

R

AL

A DIGEST
OF
RAILWAY DECISIONS.

EMBRACING
*ALL THE CASES FROM THE EARLIEST PERIOD OF RAILWAY
LITIGATION TO THE PRESENT TIME*
IN THE
UNITED STATES, ENGLAND AND CANADA.

BY
STEWART RAPALJE
AND
WILLIAM MACK.

VOLUME V.

NORTHPORT, LONG ISLAND, N. Y.:
EDWARD THOMPSON COMPANY, LAW PUBLISHERS.
1896.

A 7384

145
28803
R36

COPYRIGHT, 1896,
BY
EDWARD THOMPSON COMPANY.

All Rights Reserved.

MADE AT NORTHPORT, L. I., N. Y.
ROBERT DRUMMOND,
Printer.

J. M. DUNN,
Binder.

Act
Ad
As
—
Bo
Br
Bu
Co
—
—
—
—
Cr
Da
De
De
Du
—
—

DIGEST

OF

RAILWAY DECISIONS.

E

EMPLOYEES.

- Action for death of person assisting, see DEATH BY WRONGFUL ACT, 78.
- Admissions against interest by, see CARRIAGE OF MERCHANDISE, 745.
- Assaults by, see ASSAULT, 1-21.
- upon passengers by, see SLEEPING AND PALACE CAR COMPANIES, 19; STREET RAILWAYS, 362.
- Boycott by, against connecting road, see INTERSTATE COMMERCE, 55.
- Breach of injunction by, see INJUNCTION, 57.
- Burden of proving negligence of, see EVIDENCE, 141.
- Competency of, as experts, see WITNESSES, 179-186.
- — evidence as to customary care or negligence of, see EVIDENCE, 36.
- — of degree of care in selecting, see EVIDENCE, 57.
- — — discharge of, after accident, see EVIDENCE, 39.
- — — drunkenness of, see EVIDENCE, 40.
- Credibility of, as witnesses, see WITNESSES, 29, 30.
- Damages for dismissal of, see DAMAGES, 57.
- Declarations of, as evidence, see EVIDENCE, 202.
- Depositions of, as evidence, see FIRES, 210.
- Duty to, distinguished from duty to passengers, see CARRIAGE OF PASSENGERS, 7.
- — fence, for protection of, see FENCES, 72.
- — protect passengers from wrongful acts of, see CARRIAGE OF PASSENGERS, 301-312.
- — when a question for experts, see WITNESSES, 143.
- Employed by contractors, liability of company to, see CONSTRUCTION OF RAILWAYS, 88-98.
- Engagements of agents for board of, see AGENCY, 61.
- Evidence of incompetency of, see EVIDENCE, 63.
- Exemplary damages for unauthorized acts of, see CARRIAGE OF PASSENGERS, 639.
- Expulsion of, while on way to work, see EJECTION OF PASSENGERS, 3.
- Failure to heed warning of, see CARRIAGE OF PASSENGERS, 394.
- Getting off moving train at invitation of, see CARRIAGE OF PASSENGERS, 378, 429-431.
- Indemnity against defaults by, see INDEMNITY BONDS, 5.
- Injuries caused by negligence of, see SLEEPING AND PALACE CAR COMPANIES, 18.
- Judicial notice of duties of, see EVIDENCE, 102.
- Liability for acts of incompetent, see AGENCY, 89.
- — malicious acts of, see ELEVATED RAILWAYS, 215.
- — negligence of, see STREET RAILWAYS, 339-342.
- — thefts committed by, see SLEEPING AND PALACE CAR COMPANIES, 31.
- — torts of, on ground of agency, see AGENCY, 71-105.
- of carrier for goods stolen by, see CARRIAGE OF MERCHANDISE, 524.
- — contractors to, see CONSTRUCTION OF RAILWAYS, 50.
- — mortgage trustees for negligence of, see MORTGAGES, 153.

- Liability of receivers for wages of, see RECEIVERS, 66.**
- **to passengers for negligence of, see CARRIAGE OF PASSENGERS, 129-132.**
- **passenger pushed from car by, see ELEVATED RAILWAYS, 203.**
- Lien of, see LIENS, 43-63.**
- **for board and medical services to injured, see LIENS, 5.**
- Misdirection of, to passenger leaving train, see CARRIAGE OF PASSENGERS, 242.**
- Negligent person, when presumed to be, see FIRES, 258.**
- Of construction company, liability of railway company to, see CONSTRUCTION OF RAILWAYS, 127.**
- **contractor, liability of company for acts of, see INDEPENDENT CONTRACTORS, 9.**
- **telegraph company, limiting liability as towards, see CARRIAGE OF PASSENGERS, 341.**
- Orders to, enforcement of, see CARRIAGE OF PASSENGERS, 71.**
- Overworking, prosecutions for, see CRIMINAL LAW, 38.**
- Payment of wages of, see RECEIVERS, 92.**
- Performance of duty by, presumption of, see EVIDENCE, 128.**
- Presumption arising from failure to call as witnesses, see ANIMALS, INJURIES TO, 472; EVIDENCE, 120.**
- **of competency of, see EVIDENCE, 122.**
- Priority of claims of, see INSOLVENCY, 7.**
- Proof of injury by act of, when raises presumption of negligence, see CARRIAGE OF PASSENGERS, 588.**
- Ratification of tortious acts of, by retention in service, see AGENCY, 113.**
- Reports of, as evidence, see ANIMALS, INJURIES TO, 439.**
- Riding against rules at invitation of, see CARRIAGE OF PASSENGERS, 205.**
- Right of, to presume that person on track will retire, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, 12.**
- Set-off in suits for wages, see SET-OFF, ETC., 6.**
- Statements of, admissibility to bind company, see EVIDENCE, 162.**
- Tickets for transportation of, see INTERSTATE COMMERCE, 183.**
- Wages of, when may be reached in attachment, see ATTACHMENT, ETC., 34.**
- Weight of testimony of, see EVIDENCE, 268.**
- When deemed passengers, see CARRIAGE OF PASSENGERS, 55-59.**
- **deemed trespassers, see TRESPASSERS, INJURIES TO, 19.**
- See also APPRENTICES; FELLOW-SERVANTS; RELIEF ASSOCIATIONS.**

I. EMPLOYMENT AND DISCHARGE...	2
II. WAGES.....	8
III. LIABILITY TO MASTER.....	14

I. EMPLOYMENT AND DISCHARGE.

1. Contract of employment, generally.*—The contract of a railroad engineer with a railroad company not to go into saloons or drink whiskey while in the "employ" of the company, embraces or covers the time between trips, or time from his arrival one day to his departure the next. *Kansas City, M. & B. R. Co. v. Phillips*, 98 Ala. 159, 13 So. Rep. 65.

A contract by a company to give one permanent employment on a switch engine is not void as against public policy, as binding the company to employ such person after he should prove unfit for the service required under said contract. *Jessup v. Chicago & N. W. R. Co.*, 82 Iowa 243, 48 N. W. Rep. 77.

Where the period of hiring is determinable at the will of either party, the master's statement to the servant that his compensation thereafter would be so much per month does not raise any inference of a new hiring from that day for at least one month. *Evans v. St. Louis, I. M. & S. R. Co.*, 24 Mo. App. 114.—**FOLLOWING** *Finger v. Koch & S. Brewing Co.*, 13 Mo. App. 311.

Where a contract for service is entered into with a sub-agent of a corporation, whose acts to be valid must be approved by a general agent, the employé cannot recover for service performed after he has had notice from the general agent that the contract has been disapproved. *McGovern v. Western R. Co.*, 28 How. Pr. (N. Y.) 493.

Where a company agrees to give an injured man employment when able to work, if he seeks employment under the contract as soon as he has recovered from his injuries, the fact that two years have elapsed from the making of the contract will not relieve the company from the obligation to employ him. *East Line & R. R. Co. v. Scott*, 38 Am. & Eng. R. Cas. 16, 72 Tex. 70, 10 S. W. Rep. 99, 298.

The master has the right to determine for himself whom he will employ, and therefore defendant had the right to give notice that for the future it would not employ any one

* Employment of station agent and accepting services implies a contract to compensate him, see 24 AM. & ENG. R. CAS. 99, *abstr.*

who patron which it n itself. *In Greenwood, Rep. 559.*

Plaintiff in defend make up a It was spe should be company n plaintiff wa lost while ylvania R

To a de hiring by pany as th that they plaintiff u quired by plea was chief engin contract n seal. *Mur Man. (T. I*

Plaintiff defendants per month on August cember 16. He sued for wages up t at which h nated by a the plainti engagemen poration, n *Armstrong* 1 *Man.* 344 don & B. I

2. — ment at monthly, i month, an adelphia & N. Y. S. R

The men tion is agre vant at a does not, i fix the per year. *Ev 24 Mo. A Koch & S.*

The Eng to be rega vice is ba

who patronized plaintiff. The reasons upon which it might act concerned no one but itself. *International & G. N. R. Co. v. Greenwood*, 2 *Tex. Civ. App.* 76, 21 *S. W. Rep.* 559.

Plaintiff entered into a contract to work in defendant's shops for four years, and to make up any lost time, except for sickness. It was specially provided that no wages should be paid during any time that the company might suspend work. *Held*, that plaintiff was not bound to make up any time lost while work was thus suspended. *Pennsylvania R. Co. v. Bost.*, 104 *Pa. St.* 26.

To a declaration alleging a contract of hiring by plaintiff with the defendant company as their engineer, defendants pleaded that they did not make any contract with plaintiff under their corporate seal, as required by law. *Held*, on demurrer, that the plea was bad, for as the employment of a chief engineer was a matter of necessity, the contract might lawfully be made without seal. *Murdoch v. Manitoba S. W. C. R. Co., Man. (T. Wood)* 334.

Plaintiff, a civil engineer, was engaged by defendants as provisional engineer at \$300 per month. The employment commenced on August 9, 1882; he was dismissed on December 16, 1883, and paid up to that date. He sued for wrongful dismissal and claimed wages up to February 9, the earliest period at which his service could have been terminated by a month's notice. *Held*, that as the plaintiff was an important official, his engagement was not binding upon the corporation, not being under its corporate seal. *Armstrong v. Portage, W. & N. W. R. Co.*, 1 *Man.* 344.—DISAPPROVING *Diggle v. London & B. R. Co.*, 5 *Ex.* 442.

2. — term of service.—An employment at a fixed salary a year, payable monthly, imports a hiring from month to month, and not for a year. *Tucker v. Philadelphia & R. C. & I. Co.*, 53 *Hun* 139, 25 *N. Y. S. R.* 318, 6 *N. Y. Supp.* 134.

The mere fact that the rate of compensation is agreed upon between master and servant at a certain sum per month or per year does not, in the absence of other evidence, fix the period of hiring at one month or one year. *Evans v. St. Louis, I. M. & S. R. Co.*, 24 *Mo. App.* 114.—FOLLOWING *Finger v. Koch & S. Brewing Co.*, 13 *Mo. App.* 311.

The English rule that a general hiring is to be regarded as a contract for a year's service is based on English usage, and is not

recognized by American decisions. A mere hiring at a fixed sum "per annum" is not a contract for a year, especially where the wages are paid monthly, and received without objection. *Kansas Pac. R. Co. v. Robertson*, 3 *Colo.* 142.

3. Statutory examination for color blindness.*—Until congress legislates in regard to the examination of employes of railroads engaged in interstate commerce, the states may, by statute, require all train operators, including those engaged in interstate traffic, to be examined as to their fitness for their duties—e.g., their ability to discriminate between different colors. *Nashville, C. & St. L. R. Co. v. Alabama*, 38 *Am. & Eng. R. Cas.* 1, 128 *U. S.* 96, 9 *Sup. Ct. Rep.* 28; *affirming* 83 *Ala.* 71.—QUOTED IN *Bagg v. Wilmington, C. & A. R. Co.*, 109 *N. Car.* 279.

The Ala. Act of June, 1887, which provides that examinations of railroad employes as to color blindness shall be made "at the expense of the railroad companies" is not a deprivation of property without due process of law within the meaning of the fourteenth amendment to the federal constitution. *Nashville, C. & St. L. R. Co. v. Alabama*, 38 *Am. & Eng. R. Cas.* 1, 128 *U. S.* 96, 9 *Sup. Ct. Rep.* 28; *affirming* 83 *Ala.* 71.—QUOTED IN *Louisville & N. R. Co. v. Baldwin*, 85 *Ala.* 619.

The act approved February 28th, 1887, requiring railroad engineers to be examined and licensed by a board appointed by the governor, and making it a misdemeanor, punishable by fine or hard labor for the county, one or both, for an engineer to operate an engine on any railroad without having been examined and duly licensed (Sess. Acts 1886-7, pp. 100-2), is a mere internal police regulation, and not an unauthorized interference with interstate commerce, though incidentally affecting that commerce; nor is it objectionable on constitutional grounds, either as conferring judicial powers on the board of examiners, or as depriving the citizen of any natural right without due process of law. *McDonald v. State*, 33 *Am. & Eng. R. Cas.* 420, 81 *Ala.* 279, 2 *So. Rep.* 829.—QUOTED IN *Louisville & N. R. Co. v. Baldwin*, 85 *Ala.* 619.

But the provision of section 3, that the

* Constitutionality of Alabama act requiring railroad employes to be examined at the expense of the company, see 38 *AM. & ENG. R. CAS.* 5, *abstr.*

required examinations and re-examinations shall be made "at the expense of the railroad companies," is not a legitimate exercise of the police power, nor within the limits of any other constitutional power. (CLOPTON, J., dissenting.) *Louisville & N. R. Co. v. Baldwin*, 85 Ala. 619, 5 So. Rep. 311.—QUOTING *McDonald v. State*, 81 Ala. 279; *Smith v. Alabama*, 124 U. S. 465; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96.

4. Who are deemed employes.*—

(1) *In general.*—Where a yard master has authority to employ assistants in making up or handling trains, one who assists a brakeman in making up a train, by direction of the yard master, is a servant of the company, and not a trespasser on the train. *Central Trust Co. v. Texas & St. L. R. Co.*, 32 Fed. Rep. 448.

Evidence that defendant's superintendent was at the place where plaintiff was at work about the time of the injury was properly admitted, as tending to show that plaintiff was a servant of defendant. *Tennessee C. I. & R. Co. v. Hayes*, 97 Ala. 201, 12 So. Rep. 98.

The relation of master and servant may exist between an employé and two masters; when in the common service of both he is subject to the control of the joint authority, and when in the service of one, he is subject to the authority and control of that one alone. *Dean v. East Tenn., V. & G. R. Co.*, 98 Ala. 586, 13 So. Rep. 489.

In the absence of the regular brakeman, a person acting in his place with the consent of the conductor is an employé of the company. *Sloan v. Central Iowa R. Co.*, 11 Am. & Eng. R. Cas. 145, 62 Iowa 728, 16 N. W. Rep. 331.—DISTINGUISHING *Everhart v. Terre Haute & I. R. Co.*, 4 Am. & Eng. R. Cas. 599, 78 Ind. 292; *Kelly v. Johnson*, 128 Mass. 530; *Sherman v. Hannibal & St. J. R. Co.*, 72 Mo. 62; *Snyder v. Hannibal & St. J. R. Co.*, 60 Mo. 413; *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210.

Where a railroad company furnishes its

employés with apparatus and encourages them to organize into a fire company and allows its chief machinist one hour each week in which to inspect shops, and permits the men to drill at stated intervals during the hours which they are on duty, without deducting pay for loss of time, in case of fire it is the duty of such machinist to act as the chief of the fire company, and in aiding in the extinguishing a fire he acts as an employé of the company. *Collins v. Cincinnati, N. O. & T. P. R. Co.*, (Ky.) 18 S. W. Rep. 11.

One who, by permission of the railroad company, acts as fireman of its locomotive, is a servant of the company, though he act without compensation, and merely to learn the business. *Millsaps v. Louisville, N. O. & T. R. Co.*, 69 Miss. 423, 13 So. Rep. 696.

The foreman of a bridge gang is deemed to be "on duty," although at the time of the accident he was asleep in a car provided by the railroad company for that purpose, which was placed upon a side track, if he was liable to be called upon, at any moment, to go out with his gang on duty upon the road. *St. Louis, A. & T. R. Co. v. Welch*, 38 Am. & Eng. R. Cas. 81, 72 Tex. 298, 2 L. R. A. 839, 10 S. W. Rep. 529.

Where one having no interest in the loading of a car, or in the carriage or delivery of passengers or freight, volunteers to assist in reference to such matters, and whilst thus engaged is injured, he stands in the same position as a regular employé engaged in the particular service, so far as the right of recovery for his injuries is concerned. But the case is different when the injured party was acting at the time in furtherance of his own or his master's business. *Bonner v. Bryant*, 79 Tex. 540, 15 S. W. Rep. 491.—QUOTING *Eason v. Sabine & E. T. R. Co.*, 65 Tex. 578.

A carpenter engaged in a bridge gang working only in stated hours and having his meals and sleeping in cars provided for employes, must be considered as an employé during the hours when not at labor and in the car provided for him for sleeping, etc. *International & G. N. R. Co. v. Ryan*, 82 Tex. 565, 18 S. W. Rep. 219.

A wiper employed in a railroad company's round house is in the employment of the company while passing through its yards on his way to work. *Ewald v. Chicago & N. W. R. Co.*, 33 Am. & Eng. R. Cas. 326, 70 Wis. 420, 36 N. W. Rep. 12, 591.—DISTIN-

* When relation of master and servant exists, see note, 22 AM. ST. REP. 459.

Distinction between servants and agents, see note, 2 L. R. A. 192.

Who is a volunteer as distinguished from an employé, see note, 16 L. R. A. 861.

When servant is and is not a passenger, see note, 15 AM. & ENG. R. CAS. 229. See also CARRIAGE OF PASSENGERS, 55-59.

GUISHED IN *Adams v. Iron Cliffs Co.*, 78 Mich. 271.

If the plaintiff accepted a different employment from that originally contemplated, he became the defendants' workman in that new employment, just as he had been in his former employment. *May v. Ontario & Q. R. Co.*, 26 Am. & Eng. R. Cas. 337, 10 Ont. 70.

(2) *Illustrations.*—A company employed a contractor to do certain work upon its road, and paid him therefor a stipulated price, and furnished him a construction train and an engineer to run the same. The company prohibited the running of this train at a greater rate of speed than thirteen miles per hour, and required that it should be on a side track fifteen minutes before the schedule time for each of the company's trains. Subject to these regulations, the control, management, and direction of the construction train was given wholly to the contractor. The engineer was selected by the company, and it alone had the right to discharge him, though bound to do so upon the complaint of the contractor. The company paid the engineer's wages, but charged the same to the contractor, and deducted the amount from the sum due him. A mule having been killed by the negligent running of the train, the owner sued the company, which defended on the ground that the train was not run by its servant. *Held*, that such engineer was the servant of the company. *New Orleans, B. R., V. & M. R. Co. v. Norwood*, 62 Miss. 565, 52 Am. Rep. 191.—DISAPPROVED IN *Powell v. Virginia Constr. Co.*, 88 Tenn. 692, 13 S. W. Rep. 691.

The above decision is based upon the principle that where a person hires the personal property of another who furnishes a servant to manage the same, though the hirer acquires the right to superintend and direct the conduct of the servant, the latter continues to be the servant of the owner of the property, who is responsible for any negligence of the servant in the performance of his service for the hirer, even where the hirer only is interested in such service. *New Orleans, B. R., V. & M. R. Co. v. Norwood*, 62 Miss. 565, 52 Am. Rep. 191.

A railway company contracted with an employé to take charge of a freight yard, to be paid a certain sum per ton for freight handled and for cars moved. A superintendent of the company was authorized to see that the work was properly done, and if

not, the company could remove him. The yard master thus employed had general control of the engineers and firemen employed about the yard, and they were paid by him. A person not employed by the company sued the company for a personal injury received through the negligence of trainmen employed by the yard master. *Held*, that the yard master was a servant of the company, and not an independent contractor, so as to make him liable for the injury. *Speed v. Atlantic & P. R. Co.*, 2 Am. & Eng. R. Cas. 77, 71 Mo. 303.—FOLLOWING *Annett v. Foster*, 1 Daly (N. Y.) 502.

The plaintiff was employed by the month to render service generally on a railroad, in the capacity of baggage master, conductor of passenger trains and gravel trains, at such times and places along the road as directed; and being ordered to go to F. and take charge of a gravel train, the next day, at that place, took passage on the train for F., but passed by F. to T., and next day returned by the same train towards F., to take charge of the gravel train. Before arriving at F., by the carelessness of the servants on the passenger train, he was thrown from the car and injured. *Held*, that the plaintiff was to be regarded as an employé of the railroad company; that his relation of fellow-servant to the employés operating the train entitled him only to the exercise on their part of ordinary care, and not that extraordinary care due to a common passenger. *Manville v. Cleveland & T. R. Co.*, 11 Ohio St. 417.—REVIEWING *Whaalan v. Mad River & L. E. R. Co.*, 8 Ohio St. 249.—FOLLOWED IN *Columbus & X. R. Co. v. Webb*, 12 Ohio St. 475.

5. Who are not deemed employes.

—(1) *In general.*—One who undertakes to assist an employé of a railroad company, at the request of the employé, does not thereby place himself within the protection of the company so that it is bound to anticipate and ascertain if he has placed himself in danger, unless the employé has express authority from the company to make the request, or occupies such a position toward the company and the act to be done that the authority can be fairly implied. *Kentucky C. R. Co. v. Gastineau*, 83 Ky. 119.

A section hand, employed by the day, who was not at work the night he was killed, and had not worked the preceding day, was not in the employ of the company. *Cincinnati, N. O. & T. P. R. Co. v. Conley*, (Ky.) 20 S. W. Rep. 816.

Where one takes a contract to repair a railroad bridge, men employed by him to work by the day are servants of the contractor, and not of the railroad company; and no privity of relation exists between them and the company. *Young v. New York C. R. Co.*, 30 *Barb. (N. Y.)* 229.—APPROVING *Smith v. New York & H. R. Co.*, 19 *N. Y.* 127.

If a man thus employed be injured by a passing train he may recover against the company upon showing negligence on its part, and that he was himself free from fault. *Young v. New York C. R. Co.*, 30 *Barb. (N. Y.)* 229.—APPLIED IN *Schmidt v. Steinway & H. P. R. Co.*, 55 *Hun* 496, 29 *N. Y. S. R.* 201, 8 *N. Y. Supp.* 664, 9 *N. Y. Supp.* 939.

A company does not bear the relation of master to a person or his employes who are engaged in removing, by the company's permission, upon its track, by means of grade and brakes alone, cars which had been hired to such person and placed at his disposal to be moved by himself; and the company assumes no responsibility to employes of such person for injury sustained in such service by reason of negligence of their employer or of their fellow-servants. *Hanna v. Chattanooga & N. R. Co.*, 88 *Tenn.* 310, 6 *L. R. A.* 727, 12 *S. W. Rep.* 718.—QUOTING *Nashville, C. & St. L. R. Co. v. Handman*, 13 *Lea (Tenn.)* 423.—EXPLAINED IN *Arrowsmith v. Nashville & D. R. Co.*, 57 *Fed. Rep.* 165.

The requirement in a construction contract "that the work shall be done in a thorough and workmanlike manner, to the satisfaction of the engineer" of the construction company, does not imply or authorize such control over the details or methods of doing the work as would constitute the contractors or their servants the servants of the construction company. *Powell v. Virginia Constr. Co.*, 88 *Tenn.* 692, 13 *S. W. Rep.* 691.

Nor does the provision that the contractors shall lay the tracks "as far as the chief engineer" of the company "may determine and order" make them or their employes servants of the company. *Powell v. Virginia Constr. Co.*, 88 *Tenn.* 692, 13 *S. W. Rep.* 691.

(2) *Illustrations.*—A railroad company entered into an agreement with an individual, that he should occupy a section house belonging to the company for the purpose of boarding employes of the company, the company to aid in collecting the value of the

board out of the wages of the employes. *Held*, that this did not create the relation of master and servant, but a mere tenancy at will. *Doyle v. Union Pac. R. Co.*, 147 *U. S.* 413, 13 *Sup. Ct. Rep.* 333.

Men employed by a railroad company to shovel coal from a vessel to its freight cars were on a "strike," and the company made an arrangement with its way-master to allow him so much for handling the coal, and that he should employ the men, with the agreement that he should retain, in addition to his regular wages, anything that he might save out of the sum allowed. The men were employed under this arrangement, and the way-master was allowed weekly, on his report, the amount per ton that he was entitled to, and he paid the shovelers. *Held*, that such persons were not the employes of the company. *Burke v. Norwich & W. R. Co.*, 34 *Conn.* 474.—CRITICISING *Wiggett v. Fox*, 36 *Eng. L. & Eq.* 486.

A car-load of lumber was properly loaded and shipped to the consignee, who took charge of it, but in unloading it some of it fell on plaintiff's intestate and killed him, and his personal representative sued for damages. *Held*, that the company owed no duty to the deceased, and the plaintiff was properly nonsuited. *Hulse v. New York, O. & W. R. Co.*, 71 *Hun (N. Y.)* 40.—DISTINGUISHING *Thomas v. Henges*, 131 *N. Y.* 453.

An employe of a contractor shipping wood upon the cars of the railway volunteered in the moving of cars of the railway company while the wood was being loaded for his employer upon the train. In this work he was injured. In absence of special exception—*held*, sufficient to allege the facts of his injury and that "his assistance was necessary to expedite his master's business." There being no evidence showing that plaintiff was engaged when injured in expediting his employer's business, it was error to submit the issue, and the verdict for the plaintiff is not supported by the testimony, which shows he acted as a mere volunteer. *Bonner v. Bryant*, 79 *Tex.* 540, 15 *S. W. Rep.* 491.

6. Question when of fact for the jury.—Whether or not shovelers engaged in transferring coal from a vessel at a dock into the cars of a railroad company, the apparatus used belonging to such company and controlled by its servants, and the shovelers being paid from money received by the

comp
ing, a
quest
Daley
Eng
Rep
Pla
railro
der a
who
condi
bridg
purpo
on di
the c
and c
the p
and
bridg
eviden
of the
build
that t
over h
he wa
the b
mitter
& St
Rep.
cago,
Cas. 5
7.
restra
an in
an e
out c
reput
ences
charg
liable
L. E.
157.
If a
one v
conti
of th
eithe
pleas
vice
dema
C. &
6 N.
W
visio
the s
conta
pany

company from the shipowners for unloading, are servants of such company, is a question of fact to be decided by the jury. *Daley v. Boston & A. R. Co.*, 33 Am. & Eng. R. Cas. 298, 147 Mass. 101, 6 N. Eng. Rep. 349, 16 N. E. Rep. 690.

Plaintiff, with others, was employed by a railroad company to work a pile driver under a foreman selected by the company, who was to see that it was kept in proper condition. One who was constructing a bridge across a river for himself, but for the purpose of connecting defendant's tracks on different sides of the river, arranged with the company for the use of its pile driver and employes. Under this arrangement the pile driver and the employes were sent, and while engaged in constructing the bridge, plaintiff was injured. There was evidence tending to show that at the time of the injury he was working for the bridge builder and looked to him for his pay, and that the company was exercising no control over him. *Held*, that the question of whether he was the employe of the company or of the bridge builder should have been submitted to the jury. *Shultz v. Chicago, M. & St. P. R. Co.*, 40 Wis. 589, 13 Am. Ry. Rep. 453.—REVIEWED IN *Peschel v. Chicago, M. & St. P. R. Co.*, 17 Am. & Eng. R. Cas. 545, 62 Wis. 338.

7. Discharge, generally.— Unless restrained by contract, a corporation or an individual may suspend or discharge an employe at pleasure, with or without cause, and the fact that the employe's reputation is affected by unfavorable inferences drawn from the suspension or discharge itself will not render the employer liable in damages. *Henry v. Pittsburgh & L. E. R. Co.*, 139 Pa. St. 289, 21 Atl. Rep. 157.

If a party be hired by parol for a term of one year at a fixed salary, if the employe continues in service beyond the expiration of the year, without any new agreement, either party may terminate the contract at pleasure, and payment for the time of service actually performed is all that can be demanded. *Tucker v. Philadelphia & R. C. & I. Co.*, 53 Hun 139, 25 N. Y. S. R. 318, 6 N. Y. Supp. 134.

Where a contract for service contains provisions for the regulation of the wages for the second year, or any year thereafter, but contains an express provision that the company may discharge the employe "at any

time," the reasons of the company for discharging him are immaterial, at least where no fraud is set up. *Smith v. Buffalo St. R. Co.*, 35 Hun (N. Y.) 204.

Where, after a revolt by laborers employed by a railroad company, one of the men, with the acquiescence of the superintendent, returned and resumed work—*held*, that the superintendent could not afterwards discharge him and terminate the contract, there being no recurrence of misconduct on the part of the laborer. *Monahan v. Story*, 2 E. D. Smith (N. Y.) 393.

While a railroad was in the hands of trustees, the superintendent appointed by them employed plaintiff as an agent for the purchase of lumber for three years, but at the end of the first year the road passed into the control of a new company, and before the end of the second year plaintiff was discharged. There was no evidence that the new company, upon taking charge of the road, assumed the contracts entered into by the trustees. *Held*, that plaintiff might be discharged at any time without rendering the company liable for damages, but it was under an implied contract to pay him for the time that he rendered services. *Morrison v. Ogdensburgh & L. C. R. Co.*, 52 Barb. (N. Y.) 173.

8. Wrongful discharge.— Where an employe is hired for a specified term of service, and is discharged before the end of the term, and such discharge is without just cause, he may recover for the wages already earned, or may maintain an action against his employer for a breach of the contract of hiring. *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. Rep. 802.

A servant wrongfully discharged before the expiration of his term of service cannot recover on the theory of constructive service, but his action is for damages for the wrongful discharge. *Evans v. St. Louis, I. M. & S. R. Co.*, 24 Mo. App. 114.

In an action upon a contract of employment, in which the plaintiff avers he has been wrongfully dismissed, allegation or proof of a formal dismissal is not necessary; a denial and repudiation of the obligation of the contract are sufficient. *East Tenn., V. & G. R. Co. v. Staub*, 7 Lea (Tenn.) 397.

Plaintiff was injured on defendant's road, and in settling a claim for damages against the company it agreed to employ him as a baggage master. *Held*, that he could not be discharged for incompetency until he

had a reasonable opportunity to learn the business. *Moore v. Chicago, B. & Q. R. Co.*, 22 *Am. & Eng. R. Cas.* 396, 65 *Iowa* 505, 54 *Am. Rep.* 26, 22 *N. W. Rep.* 650.

A freight agent was employed for one year, to be paid in part by a commission on freights passing over the road, but was wrongfully discharged before the expiration of the year. *Held*, that in fixing his damages it was proper to prove by witnesses, who had the management of the business just before and after the discharge, what he would probably have received from the business had he not been discharged, the witnesses being familiar with the nature and extent of the business. *New York, L. E. & W. R. Co. v. Carhart*, 1 *N. Y. S. R.* 426, 40 *Hun* 639.

A company has no just ground for discharging its servants because they ate at plaintiff's house or drank at his bar. They presumably had the right to eat and drink where they chose, so long as they violated no contract with their employer, and performed their service well; and the malicious use of such moral coercion for the purpose of injuring plaintiff was wrongful, and made the defendant liable for the damages thereby inflicted. *International & G. N. R. Co. v. Greenwood*, 2 *Tex. Civ. App.* 76, 21 *S. W. Rep.* 559.

9. Forfeiture of employe's deposit with company.—Where an employé deposits money with the company as a guaranty of his faithful carrying out his part of the contract, in order to justify its retention it must appear that the contingency arose which warranted its retention under the contract. *Chicago City R. Co. v. Blanchard*, 35 *Ill. App.* 481.

Where a contract for service provides that the wages of the employé may be retained to reimburse the company for any damages that it has sustained through the neglect or misconduct of the employé, in order to retain the wages the company must prove, when suit is brought to recover the wages, the very facts required by the agreement—i.e., that it has sustained damages by the neglect or misconduct of the employé. *Chicago City R. Co. v. Blanchard*, 35 *Ill. App.* 481.

A contract for service provided that the employé should deposit \$50 as a guarantee fund, which should be forfeited for certain misconduct, and it was left to the judgment of the superintendent of the company to

declare the forfeiture. *Held*, that such a provision should receive a rigidly strict construction; and before a forfeiture is permitted it should be shown that there was an exercise of the judgment of the superintendent, and that it was exercised in good faith and in a reasonable, not in an arbitrary, capricious manner. *Chicago City R. Co. v. Blanchard*, 35 *Ill. App.* 481.

A discharged employé sued to recover a certain sum which he had deposited with the company, and certain wages which he claimed to be unpaid. The contract for service was in writing and provided that the amount deposited and the wages of the employé might be retained to pay any damages which the company might sustain through the carelessness, neglect, or misconduct of the employé. During the service it was claimed that a man had been injured through the carelessness of the employé, and he was discharged. On applying for reinstatement he denied his carelessness, but an oral agreement was made that he was to resume work, and \$10 per month was to be applied to the payment of the damages that the company had sustained. *Held*, that this parol agreement did not take the place of the original written agreement, neither did it modify it, and that the rights of the employé, as to the deposit made with the company, and as to his wages, must be determined with reference to the written agreement. *Chicago City R. Co. v. Blanchard*, 35 *Ill. App.* 481.

II. WAGES.

10. Priority of claims for wages.*

—Under the Pa. Act of April 9, 1872, and its supplement of June 12, 1878, the claims for wages of mechanics, laborers, and others, employed in or about mines, manufactories, or other business, are preferred to claims for rent of any of said mines, manufactories, or other real estate held under lease, where the lessee or lessees are the parties employing the said mechanics, laborers, and others. *Riddlesburg C. & I. Co.'s Appeal*, 114 *Pa. St.* 58, 6 *All. Rep.* 381.

11. Assignment of claims for wages.—Labor claims for wages under the Pa. Act of April 9, 1872, and its supplement of June 12, 1878, may be sold and assigned, and the assignees are thus invested with a

* Lien or preference of servants in payment for services, see note, 1 *AM. & ENG. R. CAS.* 211.

the rights the labor claimants themselves would have had if their respective claims had not been so sold and assigned. *Riddleburg C. & I. Co.'s Appeal*, 114 Pa. St. 58, 6 Atl. Rep. 381.

Claims by boarding-house keepers for board furnished to railroad laborers and operatives, and by grocers for supplies furnished to the boarding house keepers, under an arrangement whereby the company retained from the wages of the laborers the amounts due for their board, and credited the boarding-house keepers and grocers therewith, are properly treated as claims for wages assigned to the holders, and allowed priority as such. *McIlhenny v. Binz*, 80 Tex. 1, 13 S. W. Rep. 655.

12. Action to recover wages, generally.*—A railroad employé discharged from service is entitled to immediate payment of his wages, and may maintain an action for their recovery, the evidence failing so show a general custom among railroads to defer payment, or notice to the plaintiff of a regulation or usage of his employer to do so. *Thompson v. Minneapolis & St. L. R. Co.*, 35 Minn. 428, 29 N. W. Rep. 148.

Where a servant has been wrongfully discharged he should either sue for a breach of the contract or for the amount of the contract price of his service. If he sues for breach of contract, all of the damages are recoverable in one action, and it is a bar to a further action. If he sues for the contract price, he must show, in order to recover, that he was ready and willing to perform the services; but an action for work and labor done after the discharge cannot be maintained. *Wiseman v. Panama R. Co.*, 1 Hill. (N. Y.) 300.

Where a servant enters into a general employment and agrees to give his whole time and services to his employer, he cannot recover for services performed for a third person, unless by the consent of the employer. If such services be performed, the master, not the servant, is entitled to the wages. *Reynolds v. Roosevelt*, 30 N. Y. S. 369, 8 N. Y. Supp. 749.

A railroad employé who is employed on a monthly salary, payable each month, has a right to sue the company, if not paid, at the end of each month; or he may join in

one suit a part of the time, where he has not been paid for two or more months; and where he brings two suits, each for an amount within the jurisdiction of the court, the company is not entitled to have the suits consolidated, and then dismissed, because the aggregate amount then exceeds the jurisdiction of the court. *Mohrhardt v. S. P. & T. N. R. Co.*, 2 Tex. App. (Civ. Cas.) 278.

The rules of a company forbade the re-employment of a servant who had been once discharged. Plaintiff, with knowledge of this rule, was discharged from service and went to another department and procured employment in another capacity under an assumed name, but when his identity was discovered he was again discharged. *Held*, that he was entitled to recover for the services actually performed, in the absence of anything to show that the company had been injured or damaged by his fraud. (White, J., dissenting.) *Foley v. Western N. Y. & P. R. Co.*, 46 N. Y. S. R. 680, 19 N. Y. Supp. 826.

13. Pleading—Evidence.—(1) *Pleading.*—Where the complaint alleges that the plaintiff was employed as the engineer of the defendant, and rendered services to the defendant, he can recover either on the special contract or on the common count. *Lewis v. Albemarle & R. R. Co.*, 95 N. Car. 179.

Where the declaration, when taken as a whole, shows that the suit was for services not actually rendered, but which the plaintiff was ready to render, to the defendant, under a contract of employment, but does not allege that the contract was made with or by the defendant, or that the plaintiff was wrongfully discharged, or that he objected to taking a rest when notified that he might do so, no cause of action is set forth, and there is no error in dismissing the action for that reason, on general demurrer to the declaration. *Saunders v. Atlanta & F. R. Co.*, 83 Ga. 437, 10 S. E. Rep. 266.

In an action by an employé of a railroad company to recover for wages due, the defendant cannot question the authority of its agent to execute a time check, where it has not pleaded *non est factum*. *San Antonio & A. P. R. Co. v. Wilson*, 50 Am. & Eng. R. Cas. 513, 4 Tex. App. (Civ. Cas.) 565, 19 S. W. Rep. 910.

(2) *Evidence.*—Where a person claims to have been employed for a stated time at a

* Right of a discharged employé to sue company for wages, see 28 AM. & ENG. R. CAS. 564, *abstr.*

stipulated salary per month, and sues to recover for services rendered under such employment, and the defendant denies any liability, he may offer testimony tending to show that the plaintiff was at the same time engaged in the services of another. *Phinney v. Bronson*, 43 Kan. 451, 23 Pac. Rep. 624.

Where an employé sues a company for wages, and the only defense set up is that neither the company nor its agents employed the plaintiff, it is proper to allow proof by the company that the plaintiff received payment from the agents, for the purpose of showing that he considered them as the employers, and not the company, where the manner of making the payments afforded some evidence bearing upon the question at issue. *Gilmore v. Atlantic & P. R. Co.*, 35 Barb. (N. Y.) 279.

It is not one of the ordinary duties of a station agent to accept orders for the payment of wages, and general authority to do so cannot be established by showing that he had frequently received and sent in such orders, which had been paid by the company. *Toledo, St. L. & K. C. R. Co. v. McCormick*, 40 Ill. App. 51.

The by-laws of a company provided for an executive committee of the board of directors to have charge of the business of the company. In an action by a chief engineer to recover for services, it appeared that a member of the board, who was also a member of the committee, informed him of his appointment. Held, that it was competent for plaintiff to testify that after he had received this notice he entered into a certain agreement with the member of the committee. *Barnes v. Syracuse, P. & O. R. Co.*, 12 N. Y. S. R. 354, 46 Hun 678.

A conductor was discharged and sued for a balance of wages due him. The company admitted that the wages were due, but claimed that the conductor had collected fares which he had not accounted for, and at the trial proved by several detectives that they had paid fares on the train, which it was claimed were not reported by the conductor. One of these witnesses testified that he did not buy a ticket because he got on for the purpose of paying a fare. He was asked on cross-examination if he did not do so for the purpose of reporting that he had accomplished something, to which the witness answered, "Yes, sir," which was objected to. Held, that the admission of

the question and answer was within the discretion of the trial court, and was not error. *Francis v. Rome, W. & O. R. Co.*, 36 N. Y. S. R. 745, 59 Hun 620, 12 N. Y. Supp. 939.

Where an action for compensation for services rendered has, to support it, no evidence of any promise to pay except the plaintiff's own testimony, it must be clear and explicit. His saying, "It was always held out to me that I would be paid a salary," or testimony to like effect, is not sufficient, for it gives only an opinion or conclusion of the witness. The words relied upon as constituting the promise of a salary should be given. *So held*, where plaintiff sold tickets for two railroad companies and sued one for services which, under the circumstances, might have been understood to be inconsistent with his duties to the other, or to have been covered by his salary from the other. *Pennsylvania R. Co. v. Flanagan*, 26 Am. & Eng. R. Cas. 88, 112 Pa. St. 558, 4 Atl. Rep. 364.—QUOTING *Everhart v. Searle*, 71 Pa. St. 256.

14. Defenses, generally.—Where an employé and resident of Missouri performs labor in this state for a railway company, a corporation of another state, but also doing business in this state, and the wages of such employé are exempt in this as well as in the other state—held, in an action by the employé to recover such wages in this state, that the fact that the corporation has been garnished in such other state by a creditor of such employé before the bringing of this action and service of summons obtained upon the employé only by publication, is no defense. (*Horton, C.J.*, dissenting.) *Missouri Pac. R. Co. v. Sharitt*, 44 Am. & Eng. R. Cas. 657, 43 Kan. 375, 387, 23 Pac. Rep. 430.—DISTINGUISHING *Burlington & M. R. R. Co. v. Thompson*, 31 Kan. 180; *East Tenn., V. & G. R. Co. v. Kennedy*, 83 Ala. 462. RECONCILING *Moore v. Chicago, R. I. & P. R. Co.*, 43 Iowa 385; *Baltimore & O. R. Co. v. May*, 25 Ohio St. 347.

A discharged employé, after the lapse of two months, brought suit to recover two months' wages, and took judgment by default. After the lapse of two months more he brought another suit to recover for two months' wages. Held, that permitting the judgment to be taken by default in the first suit did not prevent the company from showing in the second suit that the agreement for service had been vacated by mu-

tual consent before bringing the first suit. *Van Alstyne v. Indianapolis, P. & C. R. Co.*, 21 *How. Pr. (N. Y.)* 175, 34 *Barb.* 28.

A discharged street-car conductor sued to recover wages, and the company set up as a defense a violation of certain rules to the effect that plaintiff should not receive fares from passengers, and requiring him to register every person getting on, and if such rules were violated \$15 should be deducted from his wages as liquidated damages, and that a report of detectives of a violation of the rules should be conclusive. *Held*, that such agreement was valid and binding, and that plaintiff could not recover upon denying a report made by two detectives of a violation of the rules. *Gallagher v. Christopher & T. St. R. Co.*, 14 *Daly* 366, 13 *N. Y. S. R.* 80.—*FOLLOWING* *Birdsall v. Twenty-third St. R. Co.*, 8 *Daly* 419.

In such case a failure on the part of the company to discharge the conductor immediately upon discovering a violation of the rules was not a waiver, so as to prevent it from insisting upon the penalty. *Gallagher v. Christopher & T. St. R. Co.*, 14 *Daly* 366, 13 *N. Y. S. R.* 80.

15. Release of claim.—Where a claim for labor on the Panama railroad was adjusted at the place of performance with a clerk of the employer, on the report of his superintendent, and a payment was made to the claimant, who gave a receipt in full, without objection—*held*, in an action afterwards brought in New York to recover upon the alleged value of the work, that the claimant, in the absence of any evidence of mistake, was concluded by the settlement. *Harris v. Story*, 2 *E. D. Smith (N. Y.)* 363.

16. Set-off—Recoupment—Counterclaim.—A railroad corporation may recover damages resulting from the negligence of an employé in the performance of his contract of service, when sued by the employé to recover his wages. *Mobile & M. R. Co. v. Clanton*, 59 *Ala.* 392.

The measure of damages in such case is fixed by a legal standard; and the corporation having the right to maintain an action against the employé, it may, when sued by him to recover wages, set off by plea such damages, and if the facts justified it, recover a judgment for the excess. *Mobile & M. R. Co. v. Clanton*, 59 *Ala.* 392. *Scott v. Mexican Nat. R. Co.*, 4 *Tex. App. (Civ. Cas.)* 496, 18 *S. W. Rep.* 137.

Where an employé sues a railroad company for wages and the company files, as a set-off, a claim for damages growing out of the negligence of the plaintiff in running a train, if it exceeds the jurisdiction of the court, the excess of jurisdiction may be waived so as to bring the claim within the jurisdiction. *Scott v. Mexican Nat. R. Co.*, 4 *Tex. App. (Civ. Cas.)* 496, 18 *S. W. Rep.* 137.

A locomotive engineer is not bound, at all hazards, to comprehend fully all the results of changes in the running time of trains made by a new time-table, and is not necessarily guilty of negligence in running his trains contrary to the rules of such time-table on the first trip after it takes effect. *Nelson v. Chicago, M. & St. P. R. Co.*, 22 *Am. & Eng. R. Cas.* 391, 60 *Wis.* 320, 19 *N. W. Rep.* 52.

The length of time given to such engineer to examine the new time-table, his recent services and protracted labors upon the road, his state of health, and the fact that he has applied to be relieved from duty on such trip, the previous manner of running trains and his understanding of the changes, are all pertinent to the issue of negligence, where the company undertakes to set up a claim for damages it has suffered against the wages due the engineer. *Nelson v. Chicago, M. & St. P. R. Co.*, 22 *Am. & Eng. R. Cas.* 391, 60 *Wis.* 320, 19 *N. W. Rep.* 52.

In an action by an employé against his employer for wages due, the latter cannot recoup unliquidated damages arising from an act of the employé outside of the line of his duty. *So held*, where the driver of a switch engine started with an engine on a foggy morning, without flag or signal light, in violation of the rules of the company, and collided with another engine, by which the company suffered considerable loss. *Nashville & C. R. Co. v. Chunley*, 6 *Heisk. (Tenn.)* 325.

In an action against a railroad company by a station agent for salary, the company admitted the amount of compensation claimed, but claimed to offset it by a claim for missing funds collected and not paid over by plaintiff. Plaintiff admitted that the money had been collected by him, but claimed that it had been appropriated by the telegraph operator, who sometimes, at his request, acted as agent in his absence. There was a conflict of evidence as to which of the two did in fact appropriate the funds. *Held*, that the evidence was not

sufficient to support a verdict for the plaintiff. *St. Louis, I. M. & S. R. Co. v. Smith*, 48 Ark. 317, 3 S. W. Rep. 364.

17. Obtaining other employment after discharge.—If an employé is wrongfully discharged it is his duty to seek other employment if it can be had. If he succeeds, the amount of the benefits which he obtains from the new employment should be deducted from the amount of the wages that he was entitled to under the first employment, which would otherwise be the measure of damages. This rule applies where the employé enters into new business on his own account; hence it is proper to admit evidence of the value of the employé's services when employed on his own account. *Huntington v. Ogdensburgh & L. C. R. Co.*, 33 How. Pr. (N. Y.) 416.—DISTINGUISHED IN *Toplitz v. Ullman*, 20 N. Y. Supp. 50.

Where a discharged employé sues for damages, and it appears that he has had other employment after he was discharged, but less profitable, defendant is entitled to a credit of the amount actually earned, and not the amount that the services were actually worth. *Toplitz v. Ullman*, 20 N. Y. Supp. 50.—DISTINGUISHING *Huntington v. Ogdensburgh & L. C. R. Co.*, 33 How. Pr. 416.

A railroad company brought an action against a discharged employé for money had and received. The employé pleaded a set-off, basing it upon the ground of injuries by reason of the wrongful discharge. The measure of damages to which the employé was entitled by reason of his unlawful discharge was fixed by the contract of employment, and under it was a stipulated salary for one year, less the actual amount paid him, and less the amount of money belonging to the company which he had actually received and not accounted for. *Held*, that it was competent for the company, in reduction of such damages, to offer in evidence that the employé actually earned, or might by diligence have earned, wages in other employment or vocation subsequent to his dismissal. *Cumberland & P. R. Co. v. Slack*, 45 Md. 161.

18. Amount recoverable, generally.—Where a statute provides that if the wages of an employé are not paid on the day of his discharge, the wages shall continue at the same rate until paid, the amount allowed in addition to the wages

earned is exemplary damages and not a penalty, and a justice of the peace has jurisdiction of an action for the recovery of such additional amount, although he is forbidden to take jurisdiction of actions for the recovery of statutory penalties. (Bunn, C. J., dissenting.) *Leep v. St. Louis, I. M. & S. R. Co.*, 57 Am. & Eng. R. Cas. 1, 58 Ark. 407, 25 S. W. Rep. 75.

In an action by a track superintendent for breach of a contract of hiring, the true rule as to the amount of recovery is the wages agreed to be paid by the contract; and the burden of showing what the plaintiff did earn or could earn by reasonable diligence in other employment is thrown upon the defendant. *Kelley v. Louisville & N. R. Co.*, 49 Ill. App. 304.

The act of March 3, 1885 (Elliott's Ind. Supp., §§ 1596, 1598), which provides that every company, corporation, or organization in the absence of any written contract to the contrary shall be required to make full settlement with and full payment in money to its employés engaged in manual or mechanical labor done for the company at least once in every calendar month, and failing to do so shall be liable to a penalty of one dollar for each succeeding day, with reasonable attorney's fees in case of suit, etc., applies to a suit brought against a railroad company for work and labor. *Terre Haute & I. R. Co. v. Baker*, 4 Ind. App. 66, 30 N. E. Rep. 431.

Under Elliott's Supp., § 1602, providing for a penalty of one dollar for each day that wages shall be withheld from an employé after ten days from demand made, recovery can be had only of the penalty accrued at the time of the commencement of the suit. *Terre Haute & I. R. Co. v. Baker*, 122 Ind. 433, 24 N. E. Rep. 83.

The value of the services of a clerk of a corporation who attends the meeting of the board of directors, waits upon their deliberations, reduces the results of their action to proper form, under the responsibility attaching to his office of clerk, is not to be determined by the value of the mere clerical service of writing or copying of so many pages or folios; and when the compensation or salary of such clerk or officer is not fixed by contract, or by law, he may recover such sum as he may by competent evidence prove his services to be worth. *Missouri River R. Co. v. Richards*, 8 Kan. 101.

When one enters into a contract of ser-

vice for another for a fixed salary or compensation, he, *prima facie*, agrees to give the latter his entire time, and the rendition of service by the employé, as a notary public in the employer's business, does not make the latter liable for the statutory fees therefor, in the absence of an agreement or understanding to that effect, or a course of conduct between the parties showing such fees were not to be included in the employé's salary. *Leach v. Hannibal & St. J. R. Co.*, 86 Mo. 27.

Where an employé is wrongfully discharged and is unable to obtain other employment, his damages are the amount of the promised wages for all services which he offered to perform, and which the defendant refused to receive. *Huntington v. Ogdensburgh & L. C. R. Co.*, 33 How. Pr. (N. Y.) 416.

An employé cannot confer jurisdiction upon a court where he sues a company to recover wages in an amount less than that required to give the court jurisdiction, by claiming in addition \$200 for damages for "the company maliciously and oppressively refusing to pay" him, where there was nothing to show a greater right to damages than in any other failure to pay money. In such case the measure of damage is the amount of wages due with interest. *Texas & P. R. Co. v. Crawford*, 2 Tex. App. (Civ. Cas.) 663.

A statute rendering railroad companies liable to pay their employés twenty per cent. on the amount due them as wages, in addition to such amount, where such companies refuse to pay their indebtedness to their employés within fifteen days of demand, is special legislation, and, therefore, unconstitutional and void. *San Antonio & A. P. R. Co. v. Wilson*, 50 Am. & Eng. R. Cas. 513, 4 Tex. App. (Civ. Cas.) 565, 19 S. W. Rep. 910.

Arkansas Act, March 25, 1889, requires corporations, and persons engaged in the operation or construction of railroads and railroad bridges, and contractors and sub-contractors engaged in the construction of any such road or bridge, to pay their employés on the day of discharge the unpaid wages then earned by them at the contract rate, without abatement or deduction. *Held*: (1) that the act means that the unpaid wages earned at the contract rate at the time of discharge shall be paid without discount on account of the payment thereof

before the time they were payable according to the terms of the contract of employment; (2) that so far as the act affects natural persons it is unconstitutional in impairing their right to contract, but as to corporations it is a valid enactment under the reserved power to alter and repeal laws relating to the formation and organization of corporations, and the act is divisible, so that the unconstitutional part may be eliminated and the valid part may stand; (3) that the act being general and uniform in its operation upon all persons coming within the class to which it applies, it is not invalid as special legislation. *Leach v. St. Louis, I. M. & S. R. Co.*, 57 Am. & Eng. R. Cas. 1, 58 Ark. 407, 25 S. W. Rep. 75.

19. Extra wages.—An employé who contracts to work, with knowledge of and reference to the invariable rule and custom of the master that no particular number of hours shall constitute a day's work, cannot recover for extra time under the ten-hour law (Mich. Laws 1885, Act No. 137), especially where he has signed a receipt for wages, which was read to him, expressly covering all extra time. *Bartlett v. Street R. Co.*, 82 Mich. 658, 46 N. W. Rep. 1034.

Where an employé applies for an increase of wages and is told that it cannot be granted, and that he must continue at the former wages or quit the service, by continuing in the service he is prevented from claiming extra pay. *McGovern v. Western R. Co.*, 28 How. Pr. (N. Y.) 493.

Where the servant voluntarily performs extra services, and gives the master no notice of any intention to claim compensation for same, but settles with him statedly under his original contract, the law will imply no contract and give no compensation for said extra services. *East Tenn. V. & G. R. Co. v. McKnight*, 15 Lea (Tenn.) 336.

The chief officer of the department of the railroad service to which the plaintiff belonged having, by an official circular, prescribed the plaintiff's duties, amongst which were the following—"He will compile the monthly rate-sheets and see that all business of this branch is properly conducted," and the plaintiff having, after the promulgation of this order, compiled the monthly rate-sheets for several years, during which he received his regular compensation as an employé of the company, such compensation is to be taken as covering his services in compiling the rate-sheet, as well as all

other services laid down in the circular. *Smith v. Central R. & B. Co.*, 88 Ga. 266, 14 S. E. Rep. 567.

20. Forfeiture of wages.*—A provision in a contract for service to the effect that the wages of the employé shall be forfeited for neglect or misconduct which brings damage to the company, should be strictly construed as against the company. *Chicago City R. Co. v. Blanchard*, 35 Ill. App. 481.

Where a railroad employé, after being discharged, sues for wages, claiming to have been hired by the month, which is admitted by the company, but the defense is set up that he was dismissed for cause, it is error to instruct the jury that they may find for plaintiff if they believe from the evidence that he was hired by the month. *Evans v. St. Louis, I. M. & S. R. Co.*, 16 Mo. App. 522.—RECONCILED IN *White v. St. Louis & S. F. R. Co.*, 20 Mo. App. 564.

21. Recovery of wages deposited with company.—A car conductor who, in leaving a part of his wages with the secretary of a corporation as a deposit, believes that he is depositing the same with the corporation, being partly induced to this belief by the action of the secretary in making a memorandum of the deposit in writing, at the time, on the books of the corporation, and by other circumstances, may recover from the corporation the money so deposited. *Carroll v. People's R. Co.*, 14 Mo. App. 490.

The conductor's receipt on the books of the company for the full amount of his wages for each month will not estop him from recovering of the corporation the money so deposited with it. *Carroll v. People's R. Co.*, 14 Mo. App. 490.

III. LIABILITY TO MASTER.

22. For injuries to master's property.—If two or more servants, though acting independently of each other, are at the same time guilty of a wrong which contributes to the injury of the master, all or either of them are liable to the master to the full extent of the injury the same as other wrong-doers. *Texas & P. R. Co. v. Hurless*, 1 Tex. App. (Civ. Cas.) 306.

A servant is liable to his master for in-

juries to his master's property caused by his negligence, and there is no law which requires that the negligence shall be wilful in order to create the liability. *Texas & P. R. Co. v. Hurless*, 1 Tex. App. (Civ. Cas.) 306.

23. Liability of sureties.—Where one railroad company which had leased another took a bond with sureties from one of its employés, and subsequently the two railroads were consolidated under the act of May 16, 1861, and, under a new name, the same business was continued—held, that the sureties were liable for the employé's defalcation after the merger of the two companies. *Pennsylvania & N. W. R. Co. v. Harkins*, 50 Am. & Eng. R. Cas. 587, 149 Pa. St. 121, 24 Atl. Rep. 175.

In such case the suit against the sureties having been brought in the name of the new company, after trial on the merits, it is immaterial whether the suit was properly so brought or not; if the suit should have been in the name of the original obligee to the use of the new company, the defect could be cured by amendment. *Pennsylvania & N. W. R. Co. v. Harkins*, 50 Am. & Eng. R. Cas. 587, 149 Pa. St. 121, 24 Atl. Rep. 175.

EMPLOYEES, INJURIES TO.

At culverts, or by reason of their absence, see CULVERTS, 20.

By collisions, see COLLISIONS, 29-37.

— defects in bridges, see BRIDGES, ETC., 52.

— derailment, see DERAILMENT, 8.

Burden of proof in actions for, see EVIDENCE, 154; PLEADING, 123.

Contributory negligence as a defense, see COLLISIONS, 35, 36; DEATH BY WRONGFUL ACT, 211-220.

— negligence, when for jury, see DEATH BY WRONGFUL ACT, 207.

Excessive damages for killing employe, see DEATH BY WRONGFUL ACT, 436.

Instructions in actions for, see TRIAL, 126, 151.

— as to contributory negligence of employe killed, see DEATH BY WRONGFUL ACT, 316.

Liability of company for injuries to employes while road was in hands of receiver, see RECEIVERS, 181.

— — — to, when riding on a pass, see PASSES, 16.

— — — lessee road for, see LEASES, ETC., 62.

— — — railway company for injury to servant

* When company not bound to pay for services rendered, see 38 AM. & ENG. R. CAS. 24, *abstr.*

- of express company, see EXPRESS COMPANIES, 13.
- Liability of receivers for, see RECEIVERS, 72.
- road exercising running powers for, see LEASES, ETC., 110.
- Nominal damages only, when recoverable, see DEATH BY WRONGFUL ACT, 425.
- Nonsuit in actions for, see TRIAL, 67, 77.
- On elevated railways, see ELEVATED RAILWAYS, 221, 222.
- street railways, see STREET RAILWAYS, 517, 518.
- Sunday, see SUNDAY, 7.
- Pleading in actions for causing death of employees, see DEATH BY WRONGFUL ACT, 137.
- Power of station agent to contract for board of injured employee, see STATION AGENTS, 7.
- Questions for jury in actions for, see TRIAL, 109.
- Release of injured employee, see RELEASE, 20, 67.
- Variance on trial for, see PLEADING, 142.

I. COMPANY'S DUTY TOWARDS ITS

EMPLOYEES	16
1. In General	16
2. Duty to Make and Enforce Rules	27
3. Duty to Warn and Instruct	34
4. Duty to Provide Safe Place in Which to Work	39
5. Duty to Provide Safe Track and Roadbed	43
a. In General	43
b. Bridges; Culverts; Trestles; Tunnels	48
c. Blocking Frogs, Guard-rails, and Switches	54
d. Sidetracks; Switches	57
e. Fences	60
f. Obstructions upon or near Track	61
6. Machinery, Appliances, Cars, etc.	67
a. In General	67
b. Brakes	83
c. Couplings, Buffers, Deadwoods, etc.	85
d. Cars; Hand-cars	90
e. Engines	95
7. Company's Knowledge of Defects and Dangers	98
8. Inspection and Repair of Track, Machinery, etc.	104
9. Management of Trains, Engines, and Cars	113

10. Contracts Limiting Company's Liability for Negligence
 125 |

II. ASSUMPTION OF RISKS OF EMPLOYMENT

1. In General	126
a. Risks Incident to Employment	126
b. Patent Defects, Obvious Dangers, and Known Risks	141
c. Latent Defects, Dangers not Obvious, and Unknown Risks	149
2. Working after Knowledge of Danger or Notice of Defects	151
a. In General	151
b. After Promise to Remedy or Repair	164
3. Where Employee has Equal Facility for Knowledge	167
4. Extra Risks and Hazards	169
a. In General	169
b. Voluntarily Assumed	169
c. Working under Orders or Outside of Scope of Employment	174
5. Risks Assumed by Repairers and Construction Hands	179
6. Negligence of Co-employees	181

III. CONTRIBUTORY NEGLIGENCE OF EMPLOYEE

1. In General	184
2. Negligence in the Operation of Trains, or in the Use of Appliances, Machinery, etc.	203
3. Coupling and Uncoupling Cars	222
a. In General	222
b. While Infringing Rules or Orders	230
4. Obedience or Disobedience of Rules and Orders	234
a. In General	234
b. Particular Rules and Orders	240

IV. INJURIES TO INFANT EMPLOYEES

V. INJURIES TO EMPLOYEES OF ONE COMPANY BY NEGLIGENCE OF ANOTHER

VI. REMEDIES; PROCEDURE	260
1. In General	260

2. Pleading; Defenses.....	261
a. Complaint; Declaration; Petition...	261
b. Answer; Plea.....	274
c. Defenses.....	274
3. Evidence.....	276
a. Admissibility.....	276
b. Burden of Proof.....	283
c. Sufficiency.....	286
d. Presumptions.....	298
4. Instructions.....	300
5. Questions of Law and Fact..	308
a. In General.....	308
b. Questions Relating to the Company's Negligence.....	309
c. Questions Relating to Assumption of Risk and Contributory Negligence..	324
6. Amount of Recovery; Damages.....	337
a. In General.....	337
b. Excessive Damages.	340

VII. ENGLISH AND CANADIAN STATUTES..... 344

I. COMPANY'S DUTY TOWARDS ITS EMPLOYEES.

1. In General.*

1. Interpretation and effect of statutes.† — (1) *Alabama*. — The statute giving an action against the employer for injuries to the employé while engaged in the service (code, § 2590), has no application to the known risks and dangers of the service against which human skill and caution cannot provide, but renders him liable for injuries resulting from his own negligence, express or imputed, in the particular cases stated; nor does it relieve the employé from the duty of using ordinary care for his own protection in the service. *Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 So. Rep. 145.

(2) *Dakota*. — It is a rule of the common law that the servant only assumes the risks and dangers which ordinarily attend or are

incident to the business in which he is engaged; and that the master, in supplying the machinery, etc., which the servant must use, must use proper care in their selection and preservation, and if not he will be liable for any injury that results therefrom to the servant. *Herbert v. Northern Pac. R. Co.*, 8 Am. & Eng. R. Cas. 85, 3 Dak. 38, 13 N. W. Rep. 349.

The above rule is not changed by Dak. Code Civ. Pro., § 1130, providing that "an employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé." *Herbert v. Northern Pac. R. Co.*, 8 Am. & Eng. R. Cas. 85, 2 Dak. 38, 13 N. W. Rep. 349.

(3) *Massachusetts*. — A locomotive and one or more cars, connected together and run upon a railroad, constitute a "train" within St. 1887, ch. 270, § 1, cl. 3, giving a right of action against an employer for personal injuries caused by the negligence of an employé in charge of a "locomotive engine or train upon a railroad." *Dacey v. Old Colony R. Co.*, 153 Mass. 112, 26 N. E. Rep. 437.

The conductor of a freight train may properly be found to be in charge thereof, within St. 1887, ch. 270, § 1, cl. 3, when a brakeman thereon is injured because of a defect in one of the cars, although such conductor is temporarily absent upon a duty incident to the proper management of the train, and nothing is done meanwhile contrary to his orders or expectation of what would be done. *Donahoe v. Old Colony R. Co.*, 153 Mass. 35, 26 N. E. Rep. 868.

It may not be necessary, in order to render an employer liable for an injury occurring to an employé through a defect in the ways, works, or machinery within the meaning of St. 1887, ch. 270, that they should belong to him; but it should at least appear that he has the control of them, and that they are used in his business by his authority, express or implied. *Trask v. Old Colony R. Co.*, 156 Mass. 298, 31 N. E. Rep. 6. Compare *Coffee v. New York, N. H. & H. R. Co.*, 48 Am. & Eng. R. Cas. 370, 15 Mass. 21, 28 N. E. Rep. 1128.

(4) *Mississippi*. — Where it is shown that injury was caused to an employé by the negli-

* Liability of master for injury to servants, generally, see note, 3 AM. REP. 147.

† Liability of company for injury to employé caused by neglect of duty of company, see note, 1 L. R. A. 698.

† Construction of statutes relating to injuries to employés. "Any person." See note, 41 AM. & ENG. R. CAS. 338.

gence of defendant, prior to the constitution of 1890, the law then in force governs. By it the defendant is *prima facie* not liable to the employé for injury suffered in the service for which he was employed. *Illinois C. R. Co. v. Cathey*, 70 Miss. 332, 12 So. Rep. 253.

The gist of such an action is negligence of the defendant, and that injury to the employé resulted therefrom. It is not sufficient merely to show negligence of the employer, and a possibility that the injury complained of was caused thereby. *Illinois C. R. Co. v. Cathey*, 70 Miss. 332, 12 So. Rep. 253.

(5) *Pennsylvania*.—The act of April 4, 1868 (P. L. p. 58), providing that any person, sustaining injury while lawfully engaged on or about roads, depots, etc., of a railroad, or about any car or train of which company such person is not an employé, shall have only the same right of action as he would have if he were an employé, is constitutional. The act is a police regulation, forbidding individuals from undertaking a dangerous employment except at their own risk. *Kirby v. Pennsylvania R. Co.*, 76 Pa. St. 566.

A brakeman who was injured by an engine of another company that had the right of trackage over the road in whose employ he was—held, to be within the act of April, 1868. *Mulherrin v. Delaware, L. & W. R. Co.*, 81 Pa. St. 366, 15 Am. Ry. Rep. 456.—DISTINGUISHED IN *Pennsylvania Co. v. O'Shaughnessy*, 41 Am. & Eng. R. Cas. 479, 122 Ind. 588, 23 N. E. Rep. 675; *Richter v. Pennsylvania Co.*, 104 Pa. St. 511; *Ham v. Delaware & H. Canal Co.*, 155 Pa. St. 548. FOLLOWED IN *Cummings v. Pittsburgh, C. & St. L. R. Co.*, 4 Am. & Eng. R. Cas. 524, 92 Pa. St. 82; *Stone v. Pennsylvania R. Co.*, 41 Am. & Eng. R. Cas. 522, 132 Pa. St. 206; *Gerard v. Pennsylvania R. Co.*, 12 Phila. (Pa.) 394. NOT FOLLOWED IN *Deans v. Wilmington & W. R. Co.*, 107 N. Car. 686.

And the act applies to one who was injured while unloading his own goods from cars of the company, permission to do which had been granted by the agent of the company. *Ricard v. North Pa. R. Co.*, 89 Pa. St. 193.—DISTINGUISHED IN *Richter v. Pennsylvania Co.*, 104 Pa. St. 511.

And to a lad employed by a coal dealer engaged in unloading cars standing upon a siding constructed by the dealer upon his own land, who, by reason of the neglect of

the railroad employé, to change the switch leading to the siding from the main track, received injuries from which he lost his leg. *Cummings v. Pittsburgh, C. & St. L. R. Co.*, 4 Am. & Eng. R. Cas. 524, 92 Pa. St. 82.—FOLLOWED IN *Mulherrin v. Delaware, L. & W. R. Co.*, 81 Pa. St. 376.—DISTINGUISHED IN *Richter v. Pennsylvania Co.*, 104 Pa. St. 511; *Christman v. Philadelphia & R. R. Co.*, 141 Pa. St. 604. FOLLOWED IN *Stone v. Pennsylvania R. Co.*, 41 Am. & Eng. R. Cas. 522, 132 Pa. St. 206.

And to a teamster not in the employ of the company, who was hauling iron to a car in the yards of the company, and was obliged to cross a street upon which the tracks were laid, and which was practically a part of the yard of the company, and was injured by a moving passenger car which hit and overturned his wagon. *Baltimore & O. R. Co. v. Colven*, 32 Am. & Eng. R. Cas. 160, 118 Pa. St. 230, 10 Cent. Rep. 583, 12 Atl. Rep. 337, 20 W. N. C. 531.—DISTINGUISHED IN *Christman v. Philadelphia & R. R. Co.*, 141 Pa. St. 604. FOLLOWED IN *Stone v. Pennsylvania R. Co.*, 41 Am. & Eng. R. Cas. 522, 132 Pa. St. 206.

And to a laborer employed by contractors in the widening of the roadbed of a railroad company, killed by the negligence of the company's employés operating a train. *Pleming v. Pennsylvania R. Co.*, 134 Pa. St. 477, 19 Atl. Rep. 740.

And to a person employed by the individual owner of cars run on a railroad, under a contract with the railroad company, when in charge of the cars. *Miller v. Cornwall R. Co.*, 154 Pa. St. 473, 26 Atl. Rep. 779.

The act applies to persons lawfully engaged on or about a railroad, in a business directly connected with the railroad; but it does not apply to one who, in the attempted exercise of a lawful right to cross a railroad, suffers injury while attempting to remove cars which obstructed his passage. *Richter v. Pennsylvania Co.*, 104 Pa. St. 511.—DISTINGUISHING *Mulherrin v. Delaware, L. & W. R. Co.*, 81 Pa. St. 376; *Ricard v. North Pa. R. Co.*, 89 Pa. St. 193; *Cummings v. Pittsburgh, C. & St. L. R. Co.*, 92 Pa. St. 82.—DISTINGUISHED IN *Stone v. Pennsylvania R. Co.*, 41 Am. & Eng. R. Cas. 522, 132 Pa. St. 206. FOLLOWED IN *Christman v. Philadelphia & R. R. Co.*, 141 Pa. St. 604. REVIEWED IN *Spisak v. Baltimore & O. R. Co.*, 152 Pa. St. 281.

Nor to a newsboy engaged in selling news-

papers, and permitted to pass in and out of traction cars for that purpose, but not engaged or in any way employed by the company. *Philadelphia Traction Co. v. Orbann*, 34 *Am. & Eng. R. Cas.* 432, 119 *Pa. St.* 37, 11 *Cent. Rep.* 628, 12 *All. Rep.* 816, 21 *W. N. C.* 76.

A civil engineer, employed in the construction of a railroad, is a workman within the meaning of the act of January 21, 1843, as to the liability of railroad companies to "contractors, laborers, and workmen." *Leuffer v. Pennsylvania & D. R. Co.*, 11 *Phila. (Pa.)* 548.

(6) *Tennessee*.—The directions of section 1166 of the code, for the prevention of accidents on railroads, do not apply to the running of engines and cars about the depots and yards of railroad companies, and in relation to the hands and employes of the companies, who are moving about or across the tracks in the performance of their several duties. *Haley v. Mobile & O. R. Co.*, 8 *Am. & Eng. R. Cas.* 541, 7 *Baxt. (Tenn.)* 239.

2. Duty to provide for employee's safety.*—The duty which a corporation owes to its servants is the same as any other master owes, the only difference being that an individual can discharge the duty in person, while a corporation can do so only by its officers or agents. *Texas Mex. R. Co. v. Whitmore*, 11 *Am. & Eng. R. Cas.* 195, 58 *Tex.* 276.

The employer impliedly engages to make the service of the employed a reasonably safe one. *Stewart v. Philadelphia, W. & B. R. Co.*, (*Del.*) 17 *All. Rep.* 639.

It is the duty of the employer not to expose the employé to perils not within those commonly known to be incident to the service he is expected to perform. *Missouri Furnace Co. v. Abend*, 107 *Ill.* 44; *affirming* 9 *Ill. App.* 319.

A company must furnish safe materials and structures for the use of its servants. *Dillon v. Union Pac. R. Co.*, 3 *Dill. (U. S.)* 319.

The company is responsible for injuries to its employes arising from the company's personal neglect. *Faulkner v. Erie R. Co.*, 49 *Barb. (N. Y.)* 324.

It is the duty of the master not to expose his servants to perils against which they ought to have been guarded by proper dili-

gence on his part. *O'Loughlin v. New York C. & H. R. R. Co.*, 9 *N. Y. S. R.* 384, 45 *Hun* 588; *affirmed in* 113 *N. Y.* 623, *mem.*, 20 *N. E. Rep.* 876, 22 *N. Y. S. R.* 992.—*FOLLOWING Sheehan v. New York C. & H. R. R. Co.*, 91 *N. Y.* 332.

A railway company is under no legal obligation to maintain station agents at flag stations for the protection of its employes. *Hewitt v. Flint & P. M. R. Co.*, 31 *Am. & Eng. R. Cas.* 249, 67 *Mich.* 61, 11 *West. Rep.* 148, 34 *N. W. Rep.* 659.

3. Duty under special contract.*—A track master who was accustomed to hire men temporarily, employed plaintiff to go out on a stormy day with his team to scrape snow from the track. Plaintiff objected that he was unused to the work, would be the only man out, and was not familiar with the time that trains passed, and he only consented to go upon the promise of the track master that he would advise him of passing trains. The track master failed to advise him, and he was struck by a passing train. *Held*, under the circumstances, that plaintiff was not bound to keep a lookout or to listen for approaching trains, and might recover for the injury. *Bradley v. New York C. R. Co.*, 62 *N. Y.* 99, 12 *Am. Ry. Rep.* 160; *affirming* 3 *T. & C.* 288.—*FOLLOWED IN Northern Pac. R. Co. v. Amato*, 49 *Fed. Rep.* 881, 1 *U. S. App.* 113, 1 *C. C. A.* 468.

4. Duty cannot be delegated to another.—The company cannot delegate to a servant of any rank or grade the duties imposed upon it by law regarding the safety and welfare of its employes so as to exempt it from liability for negligence in that regard. *Pullman Palace Car Co. v. Laack*, 143 *Ill.* 242, 32 *N. E. Rep.* 285. *Caffer v. Louisville, E. & St. L. R. Co.*, 21 *Am. & Eng. R. Cas.* 525, 103 *Ind.* 305, 2 *N. E. Rep.* 749. *Lindvall v. Woods*, 39 *Am. & Eng. R. Cas.* 339, 41 *Minn.* 212, 4 *L. R. A.* 793, 42 *N. W. Rep.* 1020. *Flike v. Boston & A. R. Co.*, 53 *N. Y.* 549, 5 *Am. Ry. Rep.* 392. *Wooden v. Western N. Y. & P. R. Co.*, 43 *N. Y. S. R.* 218, 16 *N. Y. Supp.* 840. *Fuller v. Jewett*, 1 *Am. & Eng. R. Cas.* 109, 80 *N. Y.* 46. *Miller v. Southern Pac. R. Co.*, 48 *Am. & Eng. R. Cas.* 294, 20 *Oreg.* 285, 26 *Pac. Rep.* 70. *Knahla v. Oregon S. L. & U. N. R. Co.*, 21 *Oreg.* 136, 27 *Pac. Rep.* 91. *Brabbitts v. Chicago & N. W. R. Co.*, 38 *Wis.* 289.

* Duty of employer to secure safety of employé, see note, 12 *L. R. A.* 343.

* See also *post*, 179-181.

Pike v. Chicago & A. R. Co., 41 *Fed. Rep.* 95. *Stockmeyer v. Reed*, 55 *Fed. Rep.* 259. *Madden v. Chesapeake & O. R. Co.*, 28 *W. Va.* 610, 57 *Am. Rep.* 695.

The company's own duty to its servants is always to be performed. *Chicago, B. & Q. R. Co. v. Avery*, 17 *Am. & Eng. R. Cas.* 649, 109 *Ill.* 314; *affirming* 10 *Ill. App.* 210.

The law will not permit the master to evade the duty which it has cast upon him by shifting it to another. *Pullman Palace Car Co. v. Laack*, 143 *Ill.* 242, 32 *N. E. Rep.* 285.

The company's duty to furnish safe machinery, etc., cannot be delegated to another servant so as to exempt it from liability for injuries to other servants, caused by a failure to perform this duty. *Northern Pac. R. Co. v. Charles*, 51 *Am. & Eng. R. Cas.* 198, 51 *Fed. Rep.* 562, 7 *U. S. App.* 359, 2 *C. C. A.* 380.

The duty of the master to warn his servants of dangers from new machinery cannot be delegated to another, even though a fellow-servant, and absolve the master from liability resulting in consequence of the failure to communicate to the servants the increased hazard. *Pullman Palace Car Co. v. Laack*, 143 *Ill.* 242, 32 *N. E. Rep.* 285.

5. Duty subsequent to the injury or death of employee.—A conductor on a freight train had his leg crushed in a collision. As soon as practicable he was placed on a tender and carried to the next station, attended by a friend and another conductor, and as soon as he arrived there the railroad agent was called and his limb was bound up temporarily, and he was taken to a hotel. A physician was called, who regularly dressed the limb. The limb had bled freely, but after a while the man's pulse strengthened and the physician pronounced him in a fair way to recover, and he was placed, attended by his friend, in a baggage car, to be taken some fourteen miles further to his home, but when he arrived there he was dying from hemorrhage. There was a rule of the company that an employé had no right to claim compensation from the company when sick or disabled. *Held*, that the duty and responsibility of the company to take care of the injured man ceased when he was attended to and placed in the hotel at the station, and in his transportation from there to his home he occupied the position of a stranger as to the company, and it was not bound to carry him gratuitously, nor to procure a physician nor any one to

accompany him. Whether the company would have been so liable had it undertaken to provide an attendant, *quære*. *Baltimore & O. R. Co. v. State*, 41 *Md.* 268, 6 *Am. Ky. Rep.* 276.—**DISTINGUISHING** *Northern C. R. Co. v. State*, 29 *Md.* 420.

A brakeman, seen on the train after leaving a station, was missed at the next stopping point, but supposed to be on the engine. When it was learned that he was not there, the conductor telegraphed inquiries to the station where the absent brakeman was first missed and to headquarters, and inquiries were made along the line on the return trip. *Held*, that it was not the duty of the railroad company to institute search for the brakeman's body along the line of its track. *Adkins v. Atlanta & C. A. L. R. Co.*, 31 *Am. & Eng. R. Cas.* 281, 27 *So. Car.* 71, 2 *S. E. Rep.* 849.—**DISTINGUISHING** *Northern C. R. Co. v. State*, 29 *Md.* 420.

6. Degree of care demanded, generally.—The company must do everything that can reasonably be done for the safety of its employés. *Gulf, C. & S. F. R. Co. v. Wells*, (Tex.) 16 *S. W. Rep.* 1025.

The rule as to the general duty of the master to exercise care to prevent the exposure of his servant to unnecessary and unreasonable risks, stated. *Bennett v. Syndicate Ins. Co.*, 39 *Minn.* 254, 39 *N. W. Rep.* 488.—**FOLLOWING** *Cook v. St. Paul, M. & M. R. Co.*, 34 *Minn.* 45.

7. Reasonable care.—The duty of railroad companies is to use all reasonable care not to expose employés to risks beyond those incident to the employment, and for injuries to employés resulting from a breach of this duty, or from other negligence, those companies are liable in damages. *Richmond & D. R. Co. v. Williams*, 39 *Am. & Eng. R. Cas.* 326, 86 *Va.* 165, 9 *S. E. Rep.* 990. *Pullman Palace Car Co. v. Laack*, 143 *Ill.* 242, 32 *N. E. Rep.* 285.—**APPLYING** *Pennsylvania Co. v. Lynch*, 90 *Ill.* 333; *Chicago & A. R. Co. v. Platt*, 89 *Ill.* 141; *Columbus, C. & I. C. R. Co. v. Troesch*, 68 *Ill.* 545; *Calumet I. & S. Co. v. Martin*, 115 *Ill.* 358; *Hough v. Texas & P. R. Co.*, 100 *U. S.* 213.—*Harrison v. Central R. Co.*, 31 *N. J. L.* 293.

Where an employé is where his general duty requires him to be, the master is bound

* Degree of care which master is bound to exercise for safety of servants, see note, 36 *AM. DEC.* 284.

to have knowledge of such fact, and this knowledge imposes upon the master the general obligation to exercise reasonable care to prevent his exposure to extraordinary peril. *Pennsylvania Co. v. O'Shaughnessy*, 41 *Am. & Eng. R. Cas.* 479, 122 *Ind.* 588, 23 *N. E. Rep.* 675.—DISTINGUISHING *Evansville & T. H. R. Co. v. Griffin*, 100 *Ind.* 231; *Mulherrin v. Delaware, L. & W. R. Co.*, 81 *Pa. St.* 366.—*Slater v. Jewett*, 5 *Am. & Eng. R. Cas.* 515, 85 *N. Y.* 61, 39 *Am. Rep.* 627.—EXPLAINED IN *Sheehan v. New York C. & H. R. R. Co.*, 12 *Am. & Eng. R. Cas.* 235, 91 *N. Y.* 332. FOLLOWED IN *Dana v. New York C. & H. R. R. Co.*, 92 *N. Y.* 639.—*Missouri Pac. R. Co. v. Watts*, 22 *Am. & Eng. R. Cas.* 277, 63 *Tex.* 549.

When a master has done all that can be reasonably required of him to prevent risks to his servants, he has done all that he owes them. *Smith v. Potter*, 2 *Am. & Eng. R. Cas.* 140, 46 *Mich.* 258, 9 *N. W. Rep.* 273.—NOT FOLLOWED IN *Tierney v. Minneapolis & St. L. R. Co.*, 21 *Am. & Eng. R. Cas.* 545, 33 *Minn.* 311, 53 *Am. Rep.* 35.—*Kelly v. Forty-second St., M. & St. N. A. R. Co.*, 33 *N. Y. S. R.* 816, 58 *Hun* 93, 11 *N. Y. Supp.* 344.

A track repairer who had been employed for eight or ten years was struck and killed by a slowly moving train, on a switch track, in the night-time, after completing his day's work and when returning to the tool house, and carrying a lantern. There was no light on the car striking him, and no warning was given of its approach; but it was usual to run cars on that track without such warnings, of which the deceased was familiar; and there was nothing to show whether the deceased looked to see whether a car was approaching or not. *Held*, not sufficient to show either negligence or the absence of contributory negligence, and that a nonsuit was properly allowed. Such employé is entitled to no greater protection, under such circumstances, than when performing his ordinary daily labors. *Crowe v. New York C. & H. R. R. Co.*, 70 *Hun* 37, 53 *N. Y. S. R.* 558, 23 *N. Y. Supp.* 1100.

8. Ordinary care.—The measure of diligence imposed by law on railroad companies in reference to employés, and on the conduct of the latter in reference to their employer companies, is ordinary diligence, or common prudence. *Central R. & B. Co. v. Lanier*, 83 *Ga.* 587, 10 *S. E. Rep.* 279.

The company must use ordinary care and

reasonable skill for the safety of its employés. *Louisville, N. A. & C. R. Co. v. Graham*, 124 *Ind.* 89, 24 *N. E. Rep.* 668. *Sexton v. Turner*, 89 *Va.* 341, 15 *S. E. Rep.* 862.

The contract which the law implies between master and servant does not make the master an insurer of the servant's safety or the safety of the place in which he is to do his work. He is bound to exercise only ordinary and reasonable care, and if he has failed, and in consequence of such failure the servant has been injured, he may recover of the master, provided he is without fault on his part and has not voluntarily and with knowledge of the danger assumed the risks or the consequences of the master's negligence. *McEnanny v. Kyle*, 8 *N. Y. S. R.* 358. *King v. Boston & W. R. Corp.*, 9 *Cush. (Mass.)* 112.—APPLIED IN *De Graff v. New York C. & H. R. R. Co.*, 76 *N. Y.* 125. DISTINGUISHED IN *Gilman v. Eastern R. Co.*, 13 *Allen (Mass.)* 433; *Elmer v. Locke*, 15 *Am. & Eng. R. Cas.* 300, 135 *Mass.* 575.

The duty which a railway corporation owes to section hands employed in taking care of its roadbed is that of ordinary care, and what constitutes such care varies with varying circumstances. *Britton v. Northern Pac. R. Co.*, 47 *Minn.* 340, 50 *N. W. Rep.* 231.

Men so employed are bound to exercise ordinary prudence while at work, and if, under given circumstances, they act as ordinarily prudent men would act, similarly situated, they cannot be declared guilty of contributory negligence if injured. *Britton v. Northern Pac. R. Co.*, 47 *Minn.* 340, 50 *N. W. Rep.* 231.

It is part of the personal duty of the master to give direction to the work he undertakes, and to prescribe a system for conducting it. This may be done by rules when necessary, or by the personal guidance of managers and foremen. In so doing the master must use ordinary care for the safety of his employés. *Schroeder v. Chicago & A. R. Co.*, 53 *Am. & Eng. R. Cas.* 436, 108 *Mo.* 322, 18 *S. W. Rep.* 1094. *Foster v. Missouri Pac. R. Co.*, 115 *Mo.* 165, 21 *S. W. Rep.* 916.

When one enters into the employ of another, the master is not liable to him for injuries resulting from an accident which he might not, by ordinary care and diligence, have prevented. The same rule applies, also, to perils and risks not incident to the

service, of which the servant has notice, unless he has been induced to accept the service by the promise of the master to remove the cause, and he has failed to do so. *Little Rock & Ft. S. R. Co. v. Duffey*, 4 *Am. & Eng. R. Cas.* 637, 35 *Ark.* 602.

9. Care such as used by prudent persons under like circumstances.—

An employer must exercise, for the safety of one serving him, such care and caution as an ordinarily prudent person would exercise under similar circumstances. *Austin & N. W. R. Co. v. Beatty*, 73 *Tex.* 592, 11 *S. W. Rep.* 858.

The test of liability is not whether the master omitted to do something which he could have done, and which would have prevented the injury, but whether he did anything which, under the circumstances, in the exercise of ordinary care and prudence he ought not to have done, or omitted any precaution which a prudent and careful man would or ought to have taken. *Leonard v. Collins*, 70 *N. Y.* 90.—QUOTED IN *Little Rock & Ft. S. R. Co. v. Duffey*, 4 *Am. & Eng. R. Cas.* 637, 35 *Ark.* 602.

When a workman is employed in a dangerous service, as in repairing a car on a railroad track, which requires him to get under it, the measure of duty his employer owes him, in running another car in on the track, is "that degree of care which very careful and prudent men exercise in their own affairs." *Louisville & N. R. Co. v. Davis*, 91 *Ala.* 487, 8 *So. Rep.* 552.

10. Distinguished from care required towards passengers.—The duty and obligation which the law exacts from railroad companies towards its employés is not as high as that towards its passengers; they being common carriers, the law imposes a very high degree of care in the carriage of passengers, and makes them almost insurers of the safety of their passengers. But in regard to employés a different rule of care is applicable from that which is held towards passengers. *Woodworth v. St. Paul, M. & M. R. Co.*, 5 *McCrary (U. S.)* 574, 18 *Fed. Rep.* 282. *East Tenn., V. & G. R. Co. v. Maloy*, 31 *Am. & Eng. R. Cas.* 352, 77 *Ga.* 237, 2 *S. E. Rep.* 941. *Norfolk & W. R. Co. v. Williams*, 89 *Va.* 165, 15 *S. E. Rep.* 522.

While extraordinary care and caution are due from the company to passengers, ordinary care only is due to the employé. (Wright, J., dissenting, and holding that,

under the statute, the same rule is applicable to both.) *Hunt v. Chicago & N. W. R. Co.*, 26 *Iowa* 363.

Where a construction hand voluntarily placed himself on a freight train to ride to his work, paying no fare, and not at the request of the owners of the road, without any contract to be carried, and with full knowledge of the condition of the road, he was not a passenger so as to recover for an injury not the result of the negligence or mismanagement of the defendants. *Moss v. Johnson*, 22 *Ill.* 633.*—DISAPPROVING *Allen v. Parish*, 3 *Ohio* 201; *Morgan v. Mason*, 20 *Ohio* 415; *Dixon v. Ranken*, 1 *Am. R. Cas.* 569. DISTINGUISHING *Gillenwater v. Madison & I. R. Co.*, 5 *Ind.* 339; *Fitzpatrick v. New Albany & S. R. Co.*, 7 *Ind.* 436; *Louisville & N. R. Co. v. Yandell*, 17 *B. Mon. (Ky.)* 587. FOLLOWING *Illinois C. R. Co. v. Cox*, 21 *Ill.* 20.—DISTINGUISHED IN *Chicago & N. W. R. Co. v. Taylor*, 69 *Ill.* 461. FOLLOWED IN *Chicago & A. R. Co. v. Keefe*, 47 *Ill.* 108.

An employé on a train by invitation to receive his wages is in the position of a passenger, and the company must exercise the same degree of care for his safety as if he were such. *Louisville & N. R. Co. v. Stacker*, 86 *Tenn.* 343, 6 *Am. St. Rep.* 840, 6 *S. W. Rep.* 737.†

11. Not an insurer of employes' safety.—Railroad companies are not insurers of the lives and limbs of their employés. *Woodworth v. St. Paul, M. & M. R. Co.*, 5 *McCrary (U. S.)* 574, 18 *Fed. Rep.* 282. *Sappenfield v. Main St. & A. P. R. Co.*, 91 *Cal.* 48, 27 *Pac. Rep.* 590.

12. Right to rely on company's performance of duty.—A servant has a right to assume that all reasonable attention will be given by his employer for his safety, and that he shall not carelessly be exposed to risks which might be avoided by ordinary care on the part of the master. *Louisville, N. A. & C. R. Co. v. Wright*, 38 *Am. & Eng. R. Cas.* 41, 115 *Ind.* 378, 13 *West. Rep.* 798, 16 *N. E. Rep.* 145, 17 *N. E. Rep.* 584.

A servant has the right to rely on the superior knowledge and judgment of his

*Liability of company for injuries to employés who are carried free to and from work, see note, 52 *AM. REP.* 280.

†Duty of company toward persons entering pay car to be paid off. Reasonable time required, see 39 *AM. & ENG. R. CAS.* 448, *abstr.*

master, and to assume that the latter will not expose him to evitable risk, and that he has taken proper precautions to guard him from danger. *Faren v. Sellers*, 39 *La. Ann.* 1011, 3 *So. Rep.* 363.

An employé has the right to assume that the master will make all needful rules for the conduct of his business as will not needlessly expose him to risks not necessarily resulting from his occupation. *Toledo, W. & W. R. Co. v. Durkin*, 76 *Ill.* 395. *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 *Miss.* 258. *Craig v. Chicago & A. R. Co.*, 54 *Mo. App.* 523. *Plank v. New York C. & H. R. R. Co.*, 1 *T. & C. (N. Y.)* 319; affirmed in 60 *N. Y.* 607, *mem.* *Wild v. Oregon S. L. & U. N. R. Co.*, 21 *Oreg.* 159, 27 *Pac. Rep.* 954.

When the master orders an employé to perform work in a certain place, the latter has a right to assume that the place has been made reasonably safe by the master through other and competent servants employed by him. *Kranz v. Long Island R. Co.*, 33 *N. Y. S. R.* 46.

Plaintiff's intestate was employed by the defendant to work in and about a building which it was erecting, the foundation walls of which were completed, except an opening of about fifteen feet, opposite which was a bank fifteen feet high, in the face of which was a large and heavy boulder. On the first day of his employment the bank gave way and the boulder fell upon the intestate, causing injuries which resulted in his death. It appeared that quantities of earth had fallen from the bank through the opening. Held, that the rule making it the duty of the master to furnish a safe place to work applied to the case; that the deceased was justified in assuming that this duty had been performed, and that the defendant was liable. *Byrne v. Brooklyn City R. Co.*, 6 *Misc.* 441, 27 *N. Y. Supp.* 126, 58 *N. Y. S. R.* 577.

13. Care required towards hired slaves.—Railroad companies are legally responsible for injuries to slaves hired to aid in conducting trains, where the injury is the result of the carelessness of their agents. *Louisville & N. R. Co. v. Yandell*, 17 *B. Mon. (Ky.)* 586.—DISTINGUISHED IN *Moss v. Johnson*, 22 *Ill.* 633; *Louisville & N. R. Co. v. Sickings*, 5 *Bush (Ky.)* 1.

Railroad companies, by their agents, are bound to exercise the same care and prudence to preserve from injury slaves hired

to aid in conducting trains as an ordinarily careful man would observe in regard to his own property. *Louisville & N. R. Co. v. Yandell*, 17 *B. Mon. (Ky.)* 586.

14. Responsibility for negligence, generally.—(1) *Rule stated.*—A master may be liable to a servant for injuries received in his service from the negligence of the master. *Hardy v. Carolina C. R. Co.*, 76 *N. Car.* 5, 14 *Am. Ky. Rep.* 309.

A railroad company is liable for injuries suffered by a servant, where, by its own negligence or malfeasance, it has enhanced the risk to which the servant was exposed beyond the natural risk of the employment, or has knowingly, and without informing the servant, used defective machinery which has caused the injury. *Wedgevood v. Chicago & N. W. R. Co.*, 41 *Wis.* 478.

A recovery for an injury received by an employé in the course of his employment is only warranted where the negligence of the defendant is shown. *Burlington & C. R. Co. v. Liehe*, 17 *Colo.* 280, 29 *Pac. Rep.* 175.

The principle of *respondent superior* does not apply as between a railroad company and its employés, and the company can only be held responsible to the employé injured without his own fault, while in the discharge of his duty, where the injury is caused by the negligence or failure of the board of directors to perform some duty devolved upon them by express contract with the employé, or which is implied from their relation of master to the employé. *Columbus & I. C. R. Co. v. Arnold*, 31 *Ind.* 174.

(2) *What amounts to negligence.*—Where an employé is induced to go out on a very cold night to shovel snow from the track, under a promise that a car shall be kept near by where he can warm himself, a failure to keep the car, by reason of which the employé's foot is frozen, renders the company liable in an action in the nature of tort. *Hyatt v. Hannibal & St. J. R. Co.*, 19 *Mo. App.* 287.

Where railroad laborers are employed under an agreement that suitable lodging is to be provided, a recovery may be had under a complaint averring that plaintiff was sent to a high mountain pass and was compelled to sleep on the cold, wet, and frozen ground, without anything under him except damp branches of pine or spruce, and without sufficient blankets or bedclothes to cover him and protect him from

the cold, whereby plaintiff was taken dangerously sick from such exposure. *Clifford v. Denver, S. P. & P. R. Co.*, 9 Colo. 333, 12 Pac. Rep. 219.

Where it was shown that the plaintiff was employed in removing earth from the foot of a bank, a large mass of which fell upon him and caused bodily harm, and it appeared that, just prior to the accident, levers had been unsuccessfully introduced to detach the mass—*held*: (1) that those in charge of the work were negligent in not using proper precaution to prevent the accident; (2) that negligence could not be imputed to plaintiff. *Deppe v. Chicago, R. I. & P. R. Co.*, 38 Iowa 592.

(3) *What does not amount to negligence.*—It is not such negligence in a section boss as to make the company liable, for him to send a section hand to signal trains, it appearing that the section hand was willing to do the work for extra pay, and that it was customary for section hands to do such signaling. *Wadlington v. Newport News & M. V. R. Co.*, (Ky.) 20 S. W. Rep. 783.

Plaintiff's intestate and others were employed as track hands, and were sent out with a hand-car in charge of a section foreman. When near a trestle they discovered a special freight train approaching a short distance away, around a curve and through a cut. The foreman gave certain directions to the men concerning their own safety and the safety of the hand-car, but it appeared that different means might have been resorted to to save them. In their efforts to save themselves, plaintiff's intestate was killed. *Held*, that the mere fact that it was afterward found that the foreman had not chosen the best means of escape, was not sufficient to charge him and the company with negligence. *Gumz v. Chicago, St. P. & M. R. Co.*, 5 Am. & Eng. R. Cas. 583, 52 Wts. 672, 10 N. W. Rep. 11.

(4) *Exposure to needless risks.*—Where a master voluntarily subjects his servant to dangers, such as in good faith he ought to provide against, he is liable for an injury occurring to the servant therefrom. *Kehler v. Schwenk*, 151 Pa. St. 505, 25 Atl. Rep. 130. —*Quoting Patterson v. Pittsburg & C. R. Co.*, 76 Pa. St. 389.

A master is liable for injuries to his servant resulting from the master's negligence in exposing the servant to risks which the latter is incapable of appreciating. *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205.

It is the duty of the master to know, as far as it is possible to know, the character of the material (in this case dynamite) which he places in the hands of his agent, and if placing it near a railroad he was exposing servants engaged in operating the road, as well as others, to a danger to which they ought not to have been exposed, he is liable for damages. *Tissue v. Baltimore & O. R. Co.*, 112 Pa. St. 91, 3 Atl. Rep. 667.

(5) *Act of stranger.*—Where the proof shows that the accident would not, in all likelihood, have happened, but for the interposition of some independent responsible third party, between the servant's negligence and the injury sustained, and it affects the result, and is the immediate cause of the injury, the plaintiff cannot recover against the original wrong-doer. *Mire v. East La. R. Co.*, 44 Am. & Eng. R. Cas. 495, 42 La. Ann. 385, 7 So. Rep. 473. *Wallis v. Morgan's L. & T. R. & S. Co.*, 38 La. Ann. 156.

A railroad company is not liable for injuries to a car inspector who is injured while examining the wheels of the cars of a train, by its being started by a signal from a person not an employé of the company. *Gadbois v. Chicago, M. & St. P. R. Co.*, 75 Iowa 530, 39 N. W. Rep. 871.

But where the company had ground for believing that a switch had been previously opened with a false key, and a train thrown off its proper track, the judge properly submitted to the jury whether the company had been guilty in failing to take the proper precautions to prevent a repetition of this act. *Coleman v. Wilmington, C. & A. R. Co.*, 25 So. Car. 446.

(6) *Unavoidable accident.*—An employer is not liable for an injury to an employé where it appears that the injury resulted from "pure accident." *Grant v. Union Pac. R. Co.*, 45 Fed. Rep. 673.

When the work and the place are not dangerous, and the materials are those in common use, there is no liability of the master to an employé injured by an accident, as for a breach of the duty of protection by previous instruction and warning. *Melchert v. Smith Brewing Co.*, 140 Pa. St. 448, 21 Atl. Rep. 755.

The servant of a railroad company who is injured by a rare and peculiar accident, such as being struck in the eye by a flake of iron knocked from a swage worked on by other servants and shown to have been in

average condition, cannot recover damages from the company for such injury, his place of labor being elsewhere than at the place where the swage was located, but his call there being to procure a bolt needed in his department. *McNally v. Savannah, F. & W. R. Co.*, 86 Ga. 262, 12 S. E. Rep. 351.—DISTINGUISHED IN *Central R. & B. Co. v. Attaway*, 90 Ga. 656.

That an employé, whilst passing in the course of his duty over a car loaded with ore, stepped upon a piece of the ore, which turned under his foot, whereby he was precipitated from the car and severely injured, is evidence of injury by accident rather than by any fault or negligence of the company. That the car was loaded by heaping up the ore at each end, leaving a depression in the middle, affords no suggestion of unusual or improper loading. *East Tenn., V. & G. R. Co. v. Suddeth*, 86 Ga. 388, 12 S. E. Rep. 682.

Two cars were loaded with short lumber in the body of each car, but with long timbers on top, passing over both cars. These long timbers rested on bolsters or cross-pieces to allow for play in passing curves. There was no proof of any defects in the cars, but it appeared that the lumber was loaded in the usual way, and had passed safely for a hundred miles, and had been once inspected; but afterward in passing a curve, where another train was passing, one of these bolsters worked out and was forced through the caboose of the passing train and injured a brakeman. *Held*, that the injury was the result of accident which could not have been anticipated, and that a nonsuit was properly allowed. *Knox v. New York, L. E. & W. R. Co.*, 23 N. Y. Supp. 198, 69 Hun 93, 52 N. Y. S. R. 730.

In an action for the alleged negligent killing of plaintiff's intestate, an engine-man in discharge of his duty, it was proved that the defendant exercised not only ordinary but extraordinary care to maintain a safe roadbed at the place of accident, the place having been twice inspected that morning and found safe; but a sudden fall of rain softened the already saturated earth, and the engine sank, turned over, and killed the intestate. *Held*, defendant was not liable, as the sudden rain, rendering the roadbed unsafe, was an unavoidable occurrence. *Binns v. Richmond & D. R. Co.*, 88 Va. 891, 14 S. E. Rep. 701.

An injury to a track-walker by a piece of

coal falling from the tender of a passing engine—*held*, to have been purely an accident for which no action will lie. *Schultz v. Chicago & N. W. R. Co.*, 28 Am. & Eng. R. Cas. 404, 67 W's. 616, 31 N. W. Rep. 321, 58 Am. Rep. 881.

A section hand at work stepped aside to avoid an approaching train. During the passage of the train he was hit in the leg by a stone and injured. *Held*, that as there was no evidence showing negligence on the part of the company, nor any explanation as to the force projecting the stone which injured plaintiff, he could not recover. *Steffen v. Chicago & N. W. R. Co.*, 46 Wis. 259, 50 N. W. Rep. 348.

15. Company's negligence as the proximate cause, generally.—In actions by employés for injuries arising from the negligence of the employer, such injuries must be the actual, natural, and proximate result of the wrong committed, the legitimate sequence of the thing amiss. *Clifford v. Denver, S. P. & P. R. Co.*, 9 Colo. 333, 12 Pac. Rep. 219.

Where the omission to ring the bell or sound a whistle at a road crossing appears not to have contributed in the slightest degree to an injury or accident on a train of cars, the company operating the same will not be liable for damages in consequence of such omission. *Toledo, W. & W. R. Co. v. Durkin*, 76 Ill. 395.

The fact that in a case of personal injury to a car repairer the repair track on which plaintiff was injured was upon a grade of sixty three feet to the mile did not render the company liable on account of negligence, if there was any, in so constructing it, when it is not shown that the grade was the proximate cause of the injury. *Foley v. Chicago, R. I. & P. R. Co.*, 64 Iowa 644, 21 N. W. Rep. 121.

Negligence of a company as to the manner of operating a gravel train will not render it liable for an injury to an employé, where the accident is not the result of the negligence complained of, or where the employé had previous knowledge of the manner of operating the train. *Carr v. North River Constr. Co.*, 17 N. Y. S. R. 945, 48 Hun 266.—QUOTING *Abel v. Delaware & H. Canal Co.*, 103 N. Y. 581, 4 N. Y. S. R. 269. REVIEWING *Ladd v. New Bedford R. Co.*, 119 Mass. 412.

A defect in machinery does not render the employer liable for an injury to an em-

ployé which is not the result of such defect. To render the employer liable the accident must result solely from the failure to supply proper machinery. *Gordon v. Reynolds Card Mfg. Co.*, 14 N. Y. S. R. 394.

Where a company is sued for alleged negligence, resulting in the death of an employé, a charge which gives the jury to understand that if the company was guilty of any negligence whatever it is liable, even though the accident would have occurred without such negligence, is error. *Hall v. Coopersdown & S. V. R. Co.*, 49 Hun 373, 19 N. Y. S. R. 646, 3 N. Y. Supp. 584.—FOLLOWING *Cone v. Delaware, L. & W. R. Co.*, 81 N. Y. 206. QUOTING *Searles v. Manhattan R. Co.*, 101 N. Y. 662.—*Fordyce v. Yarrowrough*, 1 Tex. Civ. App. 260, 21 S. W. Rep. 421.

Plaintiff was employed by defendant in loading and unloading gravel cars. While working in front of the locomotive, it was suddenly put in motion, and he went to the side of the track while the train passed, where there was a narrow space between the train and a bank of sand about eight feet high. While the train was passing, a quantity of sand fell upon him from the bank, forcing him against the moving train, so that he was run over by one of the wheels and injured. *Held*, that he could not recover unless the negligence of his co-defendants in starting the train was the proximate cause of the injury; and that whether it was or was not the proximate cause depended on whether he was obliged to go under the bank to avoid danger from the moving train, and whether, if he was, the bank was such that a dangerous fall of sand was reasonably to be apprehended; and that, in the absence of evidence on these points, the court should have ordered a verdict for defendant. *Handeun v. Burlington, C. R. & N. R. Co.*, 72 Iowa 709, 32 N. W. Rep. 4.

The proof disclosing that plaintiff, while acting as fireman on a locomotive, was injured by a fall occasioned by the derailing of the engine, tender, etc., and that the accident was caused by the car wheels coming in contact with a loose plank resting on one of the rails of the railroad track—*held*, that the plaintiff, in order to recover of the master, must show that the accident was caused by the direct and immediate act of its servants. *Mire v. East La. R. Co.*, 44

Am. & Eng. R. Cas. 495, 42 *La. Ann.* 385, 7 *So. Rep.* 473.

In an action for the death of a car-coupler there was no evidence of negligence on the part of the company, except that the car steps were defective, which was well known to deceased, and of which he had made no complaint, and that the roadbed was rough. *Held*, in the absence of direct proof that the defective steps contributed to the accident, that the court should have ordered a nonsuit. *Philadelphia & R. R. Co. v. Schertle*, 2 *Am. & Eng. R. Cas.* 158, 97 *Pa. St.* 450.—REVIEWED IN *Moore v. Missouri Pac. R. Co.*, 28 Mo. App. 622.

16. Illustrations of proximate cause.—A train left the track by reason of a defect therein, and an engineer was injured in reversing his engine. *Held*, that the defect in the track was the proximate cause of the injury. *Knapp v. Sioux City & P. R. Co.*, 18 *Am. & Eng. R. Cas.* 60, 65 *Iowa* 91, 50 *Am. Rep.* 569, n., 21 *N. W. Rep.* 198.—FOLLOWING *Scott v. Shepherd*, 2 *W. Bl.* 892.—ADHERED TO IN *Knapp v. Sioux City & P. R. Co.*, 71 *Iowa* 41, 32 *N. W. Rep.* 18.—*Knapp v. Sioux City & P. R. Co.*, 71 *Iowa* 41, 32 *N. W. Rep.* 18.

The furnishing of a defective and unsound car to the deceased by defendant—*held*, to have been an act of negligence constituting the proximate cause of the injury resulting in his death. *Parsons v. Missouri Pac. R. Co.*, 94 *Mo.* 286, 6 *S. W. Rep.* 464, 12 *West. Rep.* 618.

If a hand-car be provided with a defective handle, which breaks and lets an employé, who is working it, fall, causing him to be run over by another car which is closely following, the defective handle will be deemed the proximate cause of the injury. *Banks v. Wabash Western R. Co.*, 40 *Mo. App.* 458.

A freight train broke apart in the night; the forward part, being afterwards stopped, was run into by the detached rear cars, and the conductor, who was in the caboose, was killed by the collision. The evidence showed that the immediate cause of the breaking apart of the train was the letting off of a brake on one of the rear cars from the jar of the car in its motion, the brake being so worn that it would not remain wound up when the car was in motion. *Held*: (1) that the fact that a sudden increase of the speed of the locomotive may have contributed with the defective brake to cause the train to break apart does not

prevent the defective brake being deemed the legal and proximate cause of the result; (2) that the stopping of the forward part of the train, and the subsequent collision and injury, may be referred to the defective brake as a proximate cause, within the principle that a wrong-doer is responsible for injuries which might reasonably have been anticipated as a result of his misconduct. *Ransier v. Minneapolis & St. L. R. Co.*, 21 *Am. & Eng. R. Cas.* 601, 32 *Minn.* 331, 20 *N. W. Rep.* 332.

Plaintiff was injured while coupling an engine to a car because there was not sufficient space for his body between them. The draw-bars of the engine and of the car were unusually short, leaving a space of only about ten inches between the end of the car and of the engine when the draw-bars came together, whereas the usual space is from twenty-four to thirty inches. *Held*, sufficient to justify a verdict that defendant's negligence was one of the proximate causes of the injury. *Bennett v. Northern Pac. R. Co.*, 48 *Am. & Eng. R. Cas.* 182, 2 *N. Dak.* 112, 49 *N. W. Rep.* 408.—*APPLYING* Toledo, W. & W. R. Co. v. Fredericks, 71 *Ill.* 294; *Greenleaf v. Illinois C. R. Co.*, 29 *Iowa* 14; *Belair v. Chicago & N. W. R. Co.*, 43 *Iowa* 662; *Crutchfield v. Richmond & D. R. Co.*, 78 *N. Car.* 300; *Missouri Pac. R. Co. v. Callbreath*, 66 *Tex.* 526, 1 *S. W. Rep.* 622. *APPROVING* Northern Pac. R. Co. v. Herbert, 8 *Am. & Eng. R. Cas.* 85, 24 *Am. & Eng. R. Cas.* 407, 3 *Dak.* 38, 116 *U. S.* 642, 6 *Sup. Ct. Rep.* 590.

In suit by a brakeman for personal injuries there was evidence tending to show that he sustained his injuries by reason of the company's negligence in failing to supply a safe "foot-rest" for ascending to brakes on top of the car. There was also evidence tending to show that the injuries resulted from the engineer's negligence in causing a sudden jam of the cars as the brakeman was in the act of ascending the car by means of the defective "foot-rest." *Held*, the court charged correctly, upon these facts, that the plaintiff could not recover if the engineer's negligence was the cause of the injury, he being a fellow-servant; but that plaintiff was entitled to recover, notwithstanding the engineer's negligence, if the defective "foot-rest" was the proximate cause of the injury. *Louisville & N. R. Co. v. Kenley*, 92 *Tenn.* 207, 21 *S. W. Rep.* 326.

Defendant's rules, wherewith plaintiff, a

brakeman, was unacquainted, forbade uncoupling cars except with a stick, which, in this instance, could not be done. The conductor ordered plaintiff to uncouple cars. While he was pulling the coupling-pin with his hand he was thrown between the cars and injured, by reason of the engine being suddenly reversed at a signal from a brakeman left by the conductor to do the signaling. *Held*, plaintiff was not guilty of negligence in not using a stick, as it would have been ineffectual, nor in obeying the conductor; but the brakeman (acting in the place of the conductor) was guilty of negligence in giving the signal to reverse the engine, which was the proximate cause of the injury. *Richmond & D. R. Co. v. Rudd*, 88 *Va.* 648, 14 *S. E. Rep.* 361.—*FOLLOWING* *Richmond & D. R. Co. v. Williams*, 86 *Va.* 165. *QUOTING* *Chicago & N. W. R. Co. v. Bayfield*, 37 *Mich.* 212.

17. Illustrations of remote cause.

—Where plaintiff sues for personal injuries sustained while attempting to couple cars in the discharge of his duties as brakeman, alleging that the accident was caused by a defective link, the breaking of which caused the train to separate into two sections, and the evidence shows that, after the train had thus separated, he was walking in front of the rear section, intending to couple it with the front section, stumbled and fell, and was run over by the moving car in the rear, the defective link is not the proximate, but only the remote, cause of the injury. *Pryor v. Louisville & N. R. Co.*, 90 *Ala.* 32, 8 *So. Rep.* 55.

So where a brakeman is attempting to couple cars and fails to do so at the first attempt, and, instead of stepping out from between them as he might do, continues the attempt as the cars are moving on, and his foot is caught in the frog, whereby he is injured, although the company failed to furnish cars which coupled readily, yet its failure was not the proximate cause of the injury entitling plaintiff to recover. *Williams v. Central R. Co.*, 43 *Iowa* 396, 14 *Am. Ky. Rep.* 458.

The plaintiff, claiming to have been injured (run over) by reason of having his foot caught by a splinter in the rail while coupling cars, and complaining also that the freight on one of the cars (railroad iron) had been negligently suffered to project over the end of the car—*held*, that a recovery could not be had for the latter

cause, the plaintiff not having been injured thereby. *Doyle v. St. Paul, M. & M. R. Co.*, 41 *Am. & Eng. R. Cas.* 376, 42 *Minn. 79*, 43 *N. W. Rep.* 787.

Liability for an accident from such a cause is not established unless it is shown that the defendant had notice of the defect, or that in the exercise of reasonable care the defendant should have known it, or should have apprehended it, and that it was dangerous. *Doyle v. St. Paul, M. & M. R. Co.*, 41 *Am. & Eng. R. Cas.* 376, 42 *Minn. 79*, 43 *N. W. Rep.* 787.

Plaintiff, in uncoupling cars, caught his foot in a brake-beam. He signaled the engineer, but his signal was not at once seen. When perceived, the engine was reversed and the train stopped immediately, but too late to prevent injury to plaintiff. The engine was defective, and hard to reverse, which is plaintiff's ground of action. *Held*, that the defect in the engine was not the proximate cause of the injury, and defendant was not liable. *Bayus v. Syracuse, B. & N. Y. R. Co.*, 28 *Am. & Eng. R. Cas.* 499, 103 *N. Y. 312*, 8 *N. E. Rep.* 529, 3 *N. Y. S. R.* 96; *reversing* 34 *Hun* 153.

The conductor on a freight train failed to give the usual signal in passing a station, and the engineer leaned out to look, and struck a water crane and was killed. *Held*, that the failure of the conductor to give the signal was negligence, but it did not require the engineer to expose himself to danger; that the negligence of the conductor was not the proximate cause of the accident, and that the company was not liable. *Gould v. Chicago, B. & Q. R. Co.*, 22 *Am. & Eng. R. Cas.* 289, 66 *Iowa* 590, 24 *N. W. Rep.* 227.—QUOTED IN *McKee v. Chicago, R. I. & P. R. Co.*, 48 *Am. & Eng. R. Cas.* 154, 83 *Iowa* 616.

The fact that the conductor and engineer of a train moving slowly in a switch yard were both off the train did not constitute negligence as to a yard employé who by reason of the spreading of the rails was struck and killed by a lever used by switchmen to shift the cars from one track to another. The fireman and brakemen who were left in charge of the train being competent to manage it, and there being no negligence on their part, the company is not liable. *Louisville & N. R. Co. v. Coniff*, 90 *Ky.* 560, 14 *S. W. Rep.* 543.—REVIEWING *Cincinnati, N. O. & T. P. R. Co. v. Adams*, 11 *Ky. L. Rep.* 833.

A company let a contract for the building

of an arch culvert. What are called "centres," over which the arches were to be constructed, were to be furnished by the company. It did not furnish enough centres, and the contractor directed another employé of the company, who was the foreman of carpenters, to take down one of the centres that had already been used, and in doing so plaintiff's intestate, who was one of the carpenters employed, was killed by the arch falling on him, by reason of the mortar not having sufficiently set. *Held*, that the negligence of the company in not supplying sufficient centres was not the natural or proximate cause of the accident, and it was not liable. The accident resulted directly from negligence in removing the centre too soon. *Hofnagle v. New York C. & H. R. R. Co.*, 55 *N. Y.* 608, 6 *Am. Ry. Rep.* 233; *reversing* 1 *T. & C.* 346.

A conductor on a freight train was injured by his train colliding with a fugitive freight car on a descending yard track. It appeared that the brake on the car was defective, but the company's employés testified that they left it on the side track without any attempt to set the brake or to block the wheels. *Held*, that there could be no presumption that the brake would have been set had it been in order, and that the injury was therefore solely due to the negligence of the employés and not that of the company. *Harvey v. New York C. & H. R. R. Co.*, 32 *N. Y. S. R.* 817, 57 *Hun* 589, 10 *N. Y. Supp.* 645.

In such case it was insisted that the company was negligent because the assistant yard master was not in the yard at the time, and that the jury had a right to say that his absence contributed to the injury; but it appeared, unless there was something unusual, that the yard master or his assistant did not take part in shifting cars, and at the time there was no lack of men to perform this duty. *Held*, that the absence of the assistant could not be said to have contributed to the accident. *Harvey v. New York C. & H. R. R. Co.*, 32 *N. Y. S. R.* 817, 57 *Hun* 589, 10 *N. Y. Supp.* 645.

2. Duty to Make and Enforce Rules.

18. Generally.*—The law imposes upon a railroad company the duty to its

*Duty of company to employés to establish proper rules, see notes, 5 *AM. & ENG. R. CAS.* 525; 48 *Id.* 435; 12 *L. R. A.* 344.

employés of diligence and care, not only in furnishing proper and reasonably safe appliances and machinery, and skilful and careful co-employés, but also of making and promulgating rules which, if faithfully observed, will give reasonable protection to the employés. *Abel v. Delaware & H. Canal Co.*, 28 *Am. & Eng. R. Cas.* 497, 103 *N. Y. S. R.* 581, 9 *N. E. Rep.* 325, 4 *N. Y. S. R.* 269, 57 *Am. Rep.* 773. *Louisville & N. R. Co. v. Orr*, 91 *Ala.* 548, 8 *So. Rep.* 360. *Cooper v. Central R. Co.*, 44 *Iowa* 134.—APPLIED IN *Carr v. North River Constr. Co.*, 17 *N. Y. S. R.* 945.—*Judkins v. Maine C. R. Co.*, 80 *Me.* 417, 6 *N. Eng. Rep.* 715, 14 *Atl. Rep.* 735. *Rutledge v. Missouri Pac. R. Co.*, 110 *Mo.* 312, 19 *S. W. Rep.* 38. *Bushby v. New York, L. E. & W. R. Co.*, 107 *N. Y.* 374, 14 *N. E. Rep.* 407, 10 *Cent. Rep.* 240, 12 *N. Y. S. R.* 9; *affirming* 37 *Hun* 104.—FOLLOWING *Abel v. Delaware & H. Canal Co.*, 103 *N. Y.* 581.—*Corcoran v. Delaware, L. & W. R. Co.*, 4 *Silo. App.* 483, 38 *N. Y. S. R.* 251. *Hartwig v. Northern Pac. Lumber Co.*, 19 *Oreg.* 522, 25 *Pac. Rep.* 358. *Forey v. Syracuse, B. & N. Y. R. Co.*, 12 *N. Y. S. R.* 198, 46 *Hun* 678, *mem.*; *affirmed in* 122 *N. Y.* 667, *mem.*, 34 *N. Y. S. R.* 1015. *Wild v. Oregon S. L. & U. N. R. Co.*, 21 *Oreg.* 159, 27 *Pac. Rep.* 954. *Texas & P. R. Co. v. French*, (*Tex. Civ. App.*) 22 *S. W. Rep.* 866. *Madden v. Chesapeake & O. R. Co.*, 28 *W. Va.* 610, 57 *Am. Rep.* 695.

And the rule that the employé takes the risk of the business is subject to the qualification that the company perform this, as well as other duties, to protect the employé from unnecessary hazards while engaged in his work. *Abel v. Delaware & H. Canal Co.*, 28 *Am. & Eng. R. Cas.* 430, 128 *N. Y. S. R.* 626, 28 *N. E. Rep.* 325, 4 *N. Y. S. R.* 269; *affirming* 56 *Hun* 648, 10 *N. Y. S. R.* 56, 10 *N. Y. Supp.* 154.

And if there is a failure to establish a proper system or to make proper rules for the conduct of its business, a servant is injured, the corporation is liable, *Ford v. Lake Shore & M. S. R. Co.*, 48 *Am. & Eng. R. Cas.* 201, 124 *N. Y.* 493, 26 *N. E. Rep.* 1101, 36 *N. Y. S. R.* 494; *distinguishing* 117 *N. Y.* 638. *Reagan v. St. Louis, K. & N. W. R. Co.*, 93 *Mo.* 348, 12 *West. Rep.* 367, 6 *S. W. Rep.* 371. *Francis v. Kansas City, St. J. & C. B. R. Co.*, 53 *Am. & Eng. R. Cas.* 410, 110 *Mo.* 387, 19 *S. W. Rep.* 935. *Dana v. New York C. & H. R. R. Co.*, 92 *N. Y.* 639.—FOLLOWING *Slater v. Jewett*, 85 *N. Y.*

61, 39 *Am. Rep.* 627.—APPLIED IN *Sutherland v. Troy & B. R. Co.*, 46 *Hun* 372, 11 *N. Y. S. R.* 841; *Carr v. North River Constr. Co.*, 17 *N. Y. S. R.* 945; *Nary v. New York, O. & W. R. Co.*, 9 *N. Y. Supp.* 153.

It is feasible and proper for a railroad company to have some rules and regulations for the government of its employés in making flying switches, and in the shunting and kicking of cars, for the warning of persons liable to be injured. *Reagan v. St. Louis, K. & N. W. R. Co.*, 93 *Mo.* 348, 12 *West. Rep.* 367, 6 *S. W. Rep.* 371.

It is the duty of a railway company to establish regulations which would advise its servants moving cars at a station of the duty of care against injuring other employés at work and liable to injury from the movement of cars upon the switch tracks. It should also provide means by which employés on such tracks should be notified of the approach of moving cars. *International & G. N. R. Co. v. Hinzie*, 82 *Tex.* 623, 18 *S. W. Rep.* 681.

It is the duty of a railway company to establish regulations by which its servants moving cars upon repair tracks may be advised of the position of other employés who may be engaged at work in the repair yards, and who may be injured by the running of the cars so placed upon the tracks; and also to provide means by which those working in the yard may know of the approach of cars upon the tracks in the yard. *International & G. N. R. Co. v. Hall*, 78 *Tex.* 657, 15 *S. W. Rep.* 108.—APPROVED IN *Bonner v. Whitcomb*, 80 *Tex.* 178.

Where a car repairer was engaged in work under a car so situated that a jar from an approaching car would cause it to fall and crush him, it is the duty of the company, when apprised that its regulations are insufficient to protect him, to adopt such measures as will afford him reasonable protection against the dangers incident to the performance of his duties. *St. Louis, A. & T. R. Co. v. Triplett*, 48 *Am. & Eng. R. Cas.* 283, 54 *Ark.* 289, 15 *S. W. Rep.* 831, 16 *S. W. Rep.* 266.

The law does not require a railroad company to direct the movement of its trains by orders from the train dispatcher alone or by a system of signals only, nor does it require the company to adopt any particular form of orders or any particular system for communicating them; but it has the right to

direct the movement of its trains by train orders alone, or by train orders of any form and signals, or by signals alone, or by the time card alone, provided that the means adopted are brought to the knowledge of its employes, and they are reasonably well calculated to secure the safety of the men, if obeyed by them. *Hannibal & St. J. R. Co. v. Kanaley*, 39 Kan. 1, 17 Pac. Rep. 324.

19. Degree of care required.—In making rules for the government of its employes, a railroad corporation is only bound to use ordinary care, and to anticipate and guard against such accidents and casualties as may reasonably be foreseen by its managers exercising such ordinary care; it cannot be assumed that it can by rule guard against and prevent every injury to them. *Berrigan v. New York, L. E. & W. R. Co.*, 131 N. Y. 582, 30 N. E. Rep. 57, 42 N. Y. S. R. 858, 4 Silv. App. 35; reversing 59 Hun 627, 37 N. Y. S. R. 414, 14 N. Y. Supp. 26.

The law holds railroad companies to a high degree of care and diligence in the adoption and enforcement of all needful rules and regulations to avoid collisions of trains, and if an employe is injured by reason of a failure to adopt such rules the company is liable. *Chicago & A. R. Co. v. McDonald*, 21 Ill. App. 409.

A company cannot relieve itself from liability for an injury to an employe resulting from a failure on its part, through its agents, actually to use such care for the safety of employes as the law makes it necessary for such a master to use by making and enforcing regulations, unless the regulations be such and their enforcement so complete as to result in the actual use of due care. *Missouri Pac. R. Co. v. McElyea*, 38 Am. & Eng. R. Cas. 200, 71 Tex. 386, 9 S. W. Rep. 313, 1 L. R. A. 411.

20. Failure to adopt, when deemed negligence.—A failure to prescribe reasonable rules for the safety and protection of its employes constitutes negligence on the part of the company. *Ford v. Lake Shore & M. S. R. Co.*, 48 Am. & Eng. R. Cas. 201, 124 N. Y. 493, 26 N. E. Rep. 1101, 36 N. Y. S. R. 494. *Dana v. New York C. & H. R. R. Co.*, 92 N. Y. 639. *Reagan v. St. Louis, K. & N. W. R. Co.*, 93 Mo. 348, 12 West. Rep. 367, 6 S. W. Rep. 371. *Francis v. Kansas City, St. J. & C. B. R. Co.*, 53 Am. & Eng. R. Cas. 410, 110 Mo. 387, 19 S. W. Rep. 935. *Texas & P. R. Co.*

v. French, (Tex. Civ. App.) 22 S. W. Rep. 866.

A company is negligent where it fails to adopt a rule or a set of rules, thereby impairing the safety of its employes, and it may be negligent in adopting rules which make the employment unsafe. *Crew v. St. Louis, K. & N. W. R. Co.*, 20 Fed. Rep. 87.

A person in charge of a gravel train signaled it to back, which the engineer did, without giving notice or warning, and plaintiff's intestate who was assisting in unloading was thrown down and killed. The plaintiff offered to show negligence on the part of the company in not having adopted a proper system of warning employes before a train was started. Held, that it was error to reject such evidence. *Campbell v. New York C. & H. R. R. Co.*, 35 Hun (N. Y.) 506.

21. Failure to adopt, when not deemed negligence.—The failure of a master to adopt rules as to precautions to be observed by his employes is not proof of negligence rendering him liable to a servant unless it appears from the nature of the business in which the servant is engaged that the master, in the exercise of reasonable care, should have foreseen the necessity of such precautions. *Morgan v. Hudson River O. & I. Co.*, 133 N. Y. 666, 31 N. E. Rep. 234, 45 N. Y. S. R. 112, 4 Silv. App. 266.

Where an employe, whose duty it was to turn switches, couple cars, and give signals, was run over and injured by the backing of a train on the private grounds of the company while he was engaged in his duty—held, that the company was not guilty of negligence or liable to the servant in not providing rules whereby a watchman should have been kept on the rear end of the train that produced the injury, the proof showing there was a watch or lookout kept from the engine. *Chicago & N. W. R. Co. v. Donahue*, 75 Ill. 106.—APPLIED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758.

Plaintiff's intestate was engaged in making up trains, and while riding on the front step of a yard engine, was killed by colliding with a wagon at a highway crossing, used by the company in hauling material to its repair shops. Six tracks were laid over the crossing, five of which were used for storing cars, and the intestate was charged

with the duty of cutting them apart, so as to leave the crossing open. The negligence charged against the company was in leaving cars on these tracks, so that the intestate could not see the approaching wagon, and that the company should have established a rule requiring the cars to be run back a certain distance from the crossing. There was no expert evidence showing that such a rule was necessary and proper. *Held*, that a nonsuit was properly allowed. *Herbert v. Delaware & H. Canal Co.*, 16 N. Y. Supp. 561. —REVIEWING *Abel v. Delaware & H. Canal Co.*, 103 N. Y. 581, 9 N. E. Rep. 325.

Plaintiff, a brakeman, was on the hind end of the last car of a section of a train which was being backed down a track, and another brakeman, who was on the ground, gave a signal to the engineer to start up, and the jerk produced threw plaintiff to the ground. It seemed that the signal was given under a belief on the part of the brakeman that the rear cars had already been uncoupled. The negligence charged upon the company was its failure to adopt and promulgate a rule which would have prevented giving such a signal. *Held*, that plaintiff could not recover even if such a rule would have prevented the accident. He had assumed the risk of the existing conditions. *Cole v. Rome, W. & O. R. Co.*, 25 N. Y. Supp. 276, 72 Hun 467, 55 N. Y. S. R. 245.

22. Failure to adopt must be the proximate cause.—In an action by a switchman for injuries received while uncoupling cars, evidence that the cars moved suddenly, throwing him off and injuring him, and that the company had failed to promulgate and enforce needful rules in regard to its work, is insufficient to justify a recovery in the absence of any evidence showing a causal connection between the accident and the failure to have the rules. *Rutledge v. Missouri Pac. R. Co.*, 110 Mo. 312, 19 S. W. Rep. 38.

The rules of the company provided that in the night, at which time the accident occurred, the signal for starting trains was to be made by a peculiar motion of a lantern. This signal was not given at the time of the accident; but the engineer, hearing an oral order to "go ahead," and incorrectly supposing that the order was intended for him, started his engine, causing the death. *Held*, that there was no evidence that the absence of proper rules caused the accident. *Peas-*

lee v. Fitchburg R. Co., 152 Mass. 155, 25 N. E. Rep. 71.

Plaintiff was injured while repairing a car with a flag out, by the switching of another car against the one he was at work upon. Negligence was predicated upon an alleged failure of defendant to make and promulgate rules for the safety of its car repairers. Plaintiff testified that he was told to put up a flag, but was not informed of any rule requiring it to be done; that he never saw any such rule, never asked about any rules, and that he knew that railroad companies had rules as a general thing. Plaintiff was nonsuited, but the nonsuit was afterward set aside and a new trial granted. *Held*, error. *Corcoran v. Delaware, L. & W. R. Co.*, 47 N. Y. S. R. 147, 19 N. Y. Supp. 994.

23. Interpretation, validity, and effect of rules.—(1) *Interpretation by the court.*—Whether a rule adopted by a railroad company for the conduct of its employés is reasonable or not is a question of law for the court, and should not be submitted to the jury for decision. *Memphis & C. R. Co. v. Graham*, 53 Am. & Eng. R. Cas. 396, 94 Ala. 545, 10 So. Rep. 283.

A rule of a railroad company regulating the repairing of cars, provided that in "making repairs to cars standing on the main track or side track, employés must protect themselves by placing a blue signal in the draw-head, or on the platform or step of the car at each end of the train, to prevent the cars from being coupled to or removed while they were making repairs." *Held*, that such rule had no application to cars sent to the yard or repair shop, but only to those which were on the main or side track. *Quick v. Indianapolis & St. L. R. Co.*, 130 Ill. 334, 22 N. E. Rep. 709; *reversing* 29 Ill. App. 143.

A rule of a railroad company provided that "the speed of freight trains must not exceed fifteen miles per hour, exclusive of stops, except in cases where schedules are run faster than fifteen miles an hour." *Held*, that this meant that no more than fifteen miles should be run in an hour of actual running time; not that at no time within the hour the highest speed should exceed fifteen miles an hour. *Sutherland v. Troy & B. R. Co.*, 28 N. Y. S. R. 201, 8 N. Y. Supp. 83, 54 Hun 639; *reversed on another point* in 125 N. Y. 737, *mem.*, 35 N. Y. S. R. 853.

(2) *Construction by jury—Instructions.*—

Whether or not rules promulgated are reasonably sufficient to insure the safety of servants if observed, and whether or not a reasonably sufficient supervision was exercised to enforce the observance of the rules, are questions of fact, which must be determined by the jury from the evidence. *Van Tassell v. New York, L. E. & W. R. Co.*, 1 Misc. 299, 48 N. Y. S. R. 767, 20 N. Y. Supp. 708, reargument denied in 2 Misc. 592.

A brakeman was injured while passing a viaduct near a station. One rule of the company required the brakemen to be on top of the train when approaching a station, and another forbade brakemen from being on the top upon unusually high cars when approaching bridges or viaducts. Held, that it was proper to instruct the jury that there was no conflict between the two rules, and that they should be construed together. If the brakeman, in the seeming conflict between his duty to be on the train and his own safety, used reasonable care and judgment, then the company ought to compensate him for the injury. *Chicago & A. R. Co. v. Matthews*, 48 Ill. App. 361.

In an action to recover damages for the alleged negligent killing of F., plaintiff's intestate, who was a switchman in defendant's employ, it appeared that he was killed while at his post of duty by being struck by heavy timbers that fell from a passing open car which was improperly loaded. Defendant furnished good cars and stakes, but it had no rule, method, or system in reference to the loading of lumber or timber, the manner of loading being left to the discretion of its employes. It had adopted a general rule requiring its employes "to attend to the loading of all freight, whether loaded by station men or by shippers, to see that it is safely stored, and so that it cannot fall off the cars." Plaintiff proved that on other roads a verbal rule existed requiring that in all cases, no matter how short the distance, lumber, whenever loaded above the sides of a car, should be secured by stakes on the sides and stays over the top. Held, that the evidence justified the submission to the jury of the question as to whether defendant had made a proper and sufficient rule with respect to the loading of cars with lumber, and that a finding in the negative was sufficient to sustain a verdict against it. *Ford v. Lake Shore & M. S. R. Co.*, 48 Am. & Eng. R. Cas. 201, 124 N. Y. 493, 26 N.

E. Rep. 1101, 36 N. Y. S. R. 494; *distinguishing* 117 N. Y. 638.

Upon the trial of an action to recover damages for alleged negligence causing the death of the plaintiff's testator, a repairman in defendant's employ, who was killed while at work under a car, the negligence charged was the omission to promulgate proper rules for the protection of car repairers. The rules of other companies upon this subject were given in evidence, and the court charged in substance that the jury were to weigh the evidence and, in view of the rules adopted by different companies, determine whether the defendant had discharged its duties, but that they were not to find a rule proper or improper because some other company had adopted or rejected it. Held, no error. *Abel v. Delaware & H. Canal Co.*, 48 Am. & Eng. R. Cas. 430, 128 N. Y. 662, 40 N. Y. S. R. 626, 28 N. E. Rep. 663, 3 *Silv. App.* 569; *affirming* 56 Hun 648, 31 N. Y. S. R. 356, 10 N. Y. Supp. 154.

(3) *What rules are reasonable and valid.*—A railroad company cannot, by any rule adopted for the government of its employes, as by requiring them to inspect all machinery, etc., before using it, avoid or limit its statutory liability for negligence, or its duty to provide and maintain suitable and safe materials and appliances for the prosecution of its business; yet such rule being designed and calculated for the protection of the employes, imposes on them the duty of making an examination so far as their information and opportunities allow, consistent with their other duties and the attendant circumstances, and is to this extent reasonable and proper. *Memphis & C. R. Co. v. Graham*, 53 Am. & Eng. R. Cas. 396, 94 Ala. 545, 10 So. Rep. 283.

Such rule does not make a conductor or brakeman "a person in the service of the master or employer intrusted with the duty of seeing that the ways, works, machinery, or plant are in proper condition," as those words are used in the statute (Ala. Code, § 2590), but imposes on him the duty of examining with reasonable care the machinery, etc., which he is himself using; and he is not relieved from the performance of this duty by the fact that another conductor or brakeman, examining the car a few days before, failed to discover and report a defect. *Memphis & C. R. Co. v. Graham*, 53

Am. & Eng. R. Cas. 396, 94 *Ala.* 545, 10 *So. Rep.* 283.

A rule to send all cars used in carrying ore, after they are unladen at the point of transshipment, to the company's repair shops for inspection, and for such repairs as any of them may be found to require, is reasonable; persons employed to move trains of such unloaded cars to the shops must be held to have assumed the extra hazard of such employment, and the company is not chargeable with negligence because one or more of the cars in such a train is out of repair. *Flannagan v. Chicago & N. W. R. Co.*, 2 *Am. & Eng. R. Cas.* 150, 50 *Wis.* 462, 7 *N. W. Rep.* 337.—QUOTED IN *Kelley v. Chicago, M. & St. P. R. Co.*, 5 *Am. & Eng. R. Cas.* 469, 53 *Wis.* 74. REVIEWED IN *Scott v. Oregon R. & N. Co.*, 28 *Am. & Eng. R. Cas.* 414, 14 *Oreg.* 211.

(4) *What are invalid or ultra vires.*—Railroad companies have the right to adopt reasonable rules and regulations for the government of their employés and for their own protection, but cannot stipulate for immunity from liability for their own wrongful negligence; and a stipulation in a contract of employment, which the employé is required to sign on entering the service, that the regular compensation paid him "shall cover all risks incurred and liability to accident from any cause whatever while in the service of said company," contravenes the law itself, and is void. *Richmond & D. R. Co. v. Jones*, 92 *Ala.* 218, 9 *So. Rep.* 276.—FOLLOWING *Louisville & N. R. Co. v. Orr*, 91 *Ala.* 548.—*Openshaw v. Utah & N. R. Co.*, 6 *Utah* 132.

(5) *Effect of rules.*—An employé was engaged in repairing a yard track when a train was backed from another road onto the track that he was repairing, being cars transferred from one road to the other. There was no one on the end of the rear car, as was required by the rules of the company whose employé he was, and they were pushed down on him and he was crushed to death. *Held*, that the employé had a right to rely on the rule of his own company. While the train of defendant company was in the yard of the other company it was regulated by the rules of the latter, and it was liable for the accident. *Noonan v. New York C. & H. R. Co.*, 42 *N. Y. S. R.* 41, 62 *Hun* 618, 16 *N. Y. Supp.* 678; *affirmed in* 131 *N. Y.* 594, *mem.*, 42 *N.*

Y. S. R. 949.—REVIEWING *Murphy v. New York C. & H. R. Co.*, 118 *N. Y.* 527, 29 *N. Y. S. R.* 941.

A rule of appellants provided: "Great care must be used in coupling and uncoupling cars. Do not go between cars unless they are moving at slow and safe rate of speed, nor attempt to make any coupling unless the draw-bars and other coupling appliances are known to be in good order." This charge was asked: "If plaintiff did not use great care in making the coupling, or went between the cars when the same were not going at a safe rate of speed, or attempted to make the coupling when the draw bars or other appliances were not known to plaintiff to be in good order, he cannot recover." The charge was properly refused; the duty of the appellants being to furnish cars with reasonably safe coupling appliances, in good order, appellee has the right to assume that this duty had been performed, until he knew, or ought to have known, the contrary. It was not his duty to examine or inspect the attachments of the car, but the master's, so far as its performance was involved in the care required of him. The latter part of the charge, which requires the servant to know that the coupling appliances are in good order before going between the cars, was not the law of the case. *Fordyce v. Yarrowburgh*, 1 *Tex. Civ. App.* 260, 21 *S. W. Rep.* 421.

If one of the rules of a company, furnished to a foreman for his guidance, provides that "extra trains may pass over the road at any time, without previous notice, and the foreman must always be prepared for them"; and another rule provides "he must run the hand-cars with great caution, and he must not permit them to be used unless he accompany them"; and another rule requires him "to compare his time-piece with the clock at the nearest telegraph office, or with the conductor on the train,"—these rules, as well as the law, require him to use the opportunities thus daily afforded, or any other opportunities, to ascertain what trains are expected to run over his section of the track by previous arrangement, and when so, that he may be prepared for them as well as he can be, and thus diminish the risk of a collision of extra trains with the hand-car. *Criswell v. Pittsburgh, St. L. & C. R. Co.*, 33 *Am. & Eng. R. Cas.* 232, 30 *W. Va.* 798, 6 *S. E. Rep.* 31.—QUOTING *Hannibal & St. J. R.*

Co.
&
M.
I
fau
han
trai
wou
on
rail
age
St.
232.
N
tari
wea
van
a c
the
thes
had
of t
bore
volu
risk
the
woul
lision
he s
had
Cris
Am.
S. E.
24
men
not
or its
lishin
busin
its se
such
prose
son t
pursu
Dela
N. E.
ing 5
Supp
25
—Be
prom
ance,
the d
whic
theses
Mach
(D. C.

Co. v. Fox, 31 Kan. 586; *Hough v. Texas & P. R. Co.*, 100 U. S. 216; *Lake Shore & M. S. R. Co. v. Lavalley*, 36 Ohio St. 221.

If he neglects this duty, and without the fault of one of the laborers under him, his hand-car comes into collision with an extra train, which, had he performed his duty, would not have occurred, and the laborer on the hand-car is killed or injured, the railroad company will be liable for the damages so sustained. *Criswell v. Pittsburgh, St. L. & C. R. Co.*, 33 Am. & Eng. R. Cas. 232, 30 W. Va. 798, 6 S. E. Rep. 31.

Nor will the fact that the laborer voluntarily got upon the hand-car in very foggy weather, and no flag was sent out in advance, and no precautions taken to prevent a collision, prevent such a recovery from the railroad, though the laborer knew of these facts and rules of the company, if he had not been informed of such negligence of the foreman. Such conduct of the laborer, without such knowledge, would be a voluntary assuming on himself only the risk of a collision with an extra train which the foreman could not have ascertained would be on the track and come in collision with his hand-car, if he had used, as he should have done, the opportunity he had of obtaining information about them. *Criswell v. Pittsburgh, St. L. & C. R. Co.*, 33 Am. & Eng. R. Cas. 232, 30 W. Va. 798, 6 S. E. Rep. 31.

24. Compliance with and enforcement of rules.—A railroad company does not discharge its whole duty to the public or its servants by merely framing and publishing proper rules for the conduct of its business and the guidance and control of its servants; it is also required to exercise such a supervision over them and the prosecution of its business as to have reason to believe that it is being conducted in pursuance of such rules. *Whittaker v. Delaware & H. Canal Co.*, 126 N. Y. 544, 27 N. E. Rep. 1042, 38 N. Y. S. R. 523; *affirming* 58 Hun 606, 34 N. Y. S. R. 822, 11 N. Y. Supp. 914.

25. Notice and knowledge of rules.—Before an employé can be bound by rules promulgated by his employer for his guidance, the violation of which is alleged by the defense to have caused the accident of which he complains, it must be shown that these rules were brought to his notice. *Mackey v. Baltimore & P. R. Co.*, 8 Mackey (D. C.) 282. *Central R. & B. Co. v. Ryles*, 5 D. R. D.—3.

84 Ga. 420, 11 S. E. Rep. 499. *Atchison, T. & S. F. R. Co. v. Plunkett*, 2 Am. & Eng. R. Cas. 127, 25 Kan. 188. *Fay v. Minneapolis & St. L. R. Co.*, 11 Am. & Eng. R. Cas. 193, 30 Minn. 231, 15 N. W. Rep. 241. —DISTINGUISHED IN *Fraker v. St. Paul, M. & M. R. Co.*, 15 Am. & Eng. R. Cas. 256, 32 Minn. 54. —*International & G. N. R. Co. v. Hinzle*, 82 Tex. 623, 18 S. W. Rep. 681.

The servant of a railroad company to whom has been delivered a printed copy of its rules governing his conduct as a servant, and who can read and has had sufficient time to become acquainted with them, is bound by every reasonable one which is to govern his conduct while in the service, whether he has read or has knowledge of it or not. But he is not bound by a rule which requires him to waive rights not connected with his duty as a servant, although he know of it, unless he has expressly agreed to it; especially where it requires that the officer employing him shall have it distinctly understood and agreed to by him, and nothing is said to him about it. *Georgia Pac. R. Co. v. Dooley*, 48 Am. & Eng. R. Cas. 437, 86 Ga. 294, 12 S. E. Rep. 923.

The fact that a conductor was not furnished with a copy of the printed rules of the company, and was ignorant of their existence, did not constitute a sufficient reason for rejecting them as evidence. It was his duty to acquaint himself with those rules, which he might have done by the use of ordinary diligence. *Alexander v. Louisville & N. R. Co.*, 25 Am. & Eng. R. Cas. 458, 83 Ky. 589. —CONTRADICTED IN *Louisville & N. R. Co. v. Hawkins*, 92 Ala. 241.

The long-continued existence of a custom or rule may be shown in order to form an inferential basis that an employé was not ignorant of it. *Alcorn v. Chicago & A. R. Co.*, 53 Am. & Eng. R. Cas. 87, 108 Mo. 81, 18 S. W. Rep. 188.

The company's duty is performed when it provides beforehand and makes known to its servants rules explicit and efficient, which, if observed and followed by all concerned, will bring personal notice to every one who should receive such notice. *Slater v. Jewett*, 5 Am. & Eng. R. Cas. 515, 85 N. Y. 61, 39 Am. Rep. 627.

Whether the plaintiff (a workman in the employ of the company) knew of the rules established for the protection of the workmen, or by the exercise of ordinary care might have known them, was a question for

the determination of the jury; and to set aside the verdict in this respect the court should be able to say that plaintiff, from his service of three months in the repair yard of defendant, was bound to know what means, if any, were provided for the protection of the workmen. *International & G. N. R. Co. v. Hall*, 1 *Tex. Civ. App.* 221, 21 *S. W. Rep.* 1024.

A brakeman sued for a personal injury received while uncoupling cars, and the company introduced certain rules prohibiting the uncoupling of cars by hand, but requiring the men to use a stick or pin. The company's superintendent testified that such rules were in force at the time, but refused to testify that the rules had been sent to the head of the department in the yard where plaintiff was employed. On the other hand, plaintiff testified that he knew nothing about such rules, and they were not enforced in the yard. *Held*, that the question as to whether plaintiff knew of the rules, and was therefore bound by them, was for the jury. *Seese v. Northern Pac. R. Co.*, 39 *Fed. Rep.* 487.

In an action for causing the death of a brakeman, the negligence charged was that the front ends of the cars were so overloaded as to prevent the use of brakes. The only evidence as to whether the company had established proper rules for the inspection of cars before they were sent out, to see whether they were properly loaded, was by a witness who had charge of the station where the cars were loaded, and he testified that he considered such inspection a part of his duty, and that he had so instructed the men under him, which was corroborated by some of the men; but on the other hand there was proof that the cars in question were not inspected, and some of the employés testified that he had never instructed them as to such inspection. *Held*, that the question should have been submitted to the jury. *Byrnes v. New York, L. E. & W. R. Co.*, 71 *Hun (N. Y.)* 209.

26. Waiver of rule by conductor.

—A rule of a railroad company agreed to by the plaintiff (an employé) may be waived or abrogated for the company by the conductor making an order contrary to such rule, when it was the duty of the plaintiff to obey such order. *Mason v. Richmond & D. R. Co.*, 53 *Am. & Eng. R. Cas.* 183, 111 *N. Car.* 482, 16 *S. E. Rep.* 698. —APPLYING *Central R. Co. v. De Bray*, 71 *Ga.* 406.

3. Duty to Warn and Instruct.

27. Generally.—Generally, it is not the duty of the employer to instruct the servant in the rules applicable to the service, or warn him against danger, unless information be asked, or the employé is known to be ignorant and inexperienced regarding dangers peculiar to the service. *Missouri Pac. R. Co. v. Watts*, 22 *Am. & Eng. R. Cas.* 277, 63 *Tex.* 549. —FOLLOWED IN *Missouri Pac. R. Co. v. Callbreath*, 66 *Tex.* 526. —*Missouri Pac. R. Co. v. Callbreath*, 66 *Tex.* 526, 1 *S. W. Rep.* 622. —QUOTING *Walsh v. Peet Valve Co.*, 110 *Mass.* 23. —*Chicago, R. I. & P. R. Co. v. Clark*, 15 *Am. & Eng. R. Cas.* 261, 108 *Ill.* 113. —DISTINGUISHED IN *United States Rolling Stock Co. v. Wilder*, 25 *Am. & Eng. R. Cas.* 414, 116 *Ill.* 100.

This rule is subject to the qualification that when there are hazards incident to an occupation, unknown to the servant, which the master knows or ought to know, it is his duty to warn the servant of them, and on failure to do so he is liable for any injury the servant may sustain in consequence of such neglect; and this rule applies even where the danger or hazard is patent, if through youth, inexperience, or other cause the servant is incompetent to fully understand the nature and extent of the hazard. *Missouri Pac. R. Co. v. Callbreath*, 66 *Tex.* 526, 1 *S. W. Rep.* 622. —APPLIED IN *Bennett v. Northern Pac. R. Co.*, 2 *N. Dak.* 112. —*McDonald v. Chicago, St. P., M. & O. R. Co.*, 41 *Minn.* 439, 43 *N. W. Rep.* 380. —*Chicago & A. R. Co. v. Kerr*, 148 *Ill.* 605, 35 *N. E. Rep.* 1117.

Where a railroad runs through a pasture, and the right of way is not fenced, cattle may be expected anywhere, and the company cannot be charged with negligence in failing to inform a new employé that cattle had frequently been encountered at a particular place in the pasture, and might be expected there. *Patton v. Central Iowa R. Co.*, 73 *Iowa* 306, 35 *N. W. Rep.* 149.

Where a laborer sues a street-car company for injuries received while laying a track, by an assault by persons acting for a rival company, charging that the defendant company knew of the proposed attack and failed to notify plaintiff, a nonsuit is properly ordered where the company denies all knowledge of the contemplated attack, and there is no evidence to contradict this, ex-

cept that it had employed two policemen to protect the men, but which it showed satisfactorily was for the purpose of protecting them against an assault from other persons than the ones claimed by plaintiff. *Kelly v. Shelby R. Co.*, (Ky.) 22 S. W. Rep. 445.

Plaintiff was employed to remove the snow from the roof of a building belonging to defendant company. After completing his work, to avoid a snow heap at the foot of the ladder, he jumped to a side roof and fell through a skylight, which was so covered with snow that it could not be seen. *Held*, that he could not recover for the injuries received. *Reinig v. Broadway R. Co.*, 49 Hun 269, 17 N. Y. S. R. 622, 1 N. Y. Supp. 907.

In such case the company was under no duty to notify plaintiff of the existence of the skylight. *Reinig v. Broadway R. Co.*, 49 Hun 269, 17 N. Y. S. R. 622, 1 N. Y. Supp. 907.

28. Skilled and experienced employes.—There is no duty upon the part of a railroad company to instruct a skilled and experienced engineer in the dangers of a locomotive which he is set to operate, where the new locomotive is of the same general character as the one to which he had been accustomed. *Bellows v. Pennsylvania & N. Y. C. & R. Co.*, 157 Pa. St. 51, 27 Atl. Rep. 685.

Where an adult person is employed as a track walker, whose duties require him to cross a bridge, where it is known that he lives near the bridge and had often been over it, and knew of its construction, though without previous experience as a track walker, the company has the right to assume that he would comprehend the necessary dangers attending his duties, and would avoid danger. In such case the company is not liable for not specially directing the employé to resort to certain caps on the bridge when he was in danger from passing trains. *Gibson v. Oregon S. L. & U. N. R. Co.*, 23 Oreg. 493, 32 Pac. Rep. 295.

An employé sued for an injury received while uncoupling cars, and testified that he was twenty-two years old, had been employed for three weeks, and had known the yard tracks for three months; "that he knew all that was necessary to enable him to couple and uncouple cars." *Held*, that it was not necessary for the company to show that it had instructed or offered to

instruct him in coupling and uncoupling cars. *Cincinnati, N. O. & T. P. R. Co. v. Mealer*, 50 Fed. Rep. 725, 6 U. S. App. 86, 1 C. C. A. 633.

29. Unskilled, inexperienced, and ignorant employes.—(1) *General rules.*

—If the master know the danger incident to the employment, or ought to know it, and if the servant is ignorant, and such ignorance is known to the master, it is his duty to warn the servant and put him upon his guard against the danger. *Bonner v. Moore*, 3 Tex. Civ. App. 416, 22 S. W. Rep. 272.—FOLLOWING *Gulf, C. & S. F. R. Co. v. Wells*, 81 Tex. 686, 16 S. W. Rep. 1025.—*Brennan v. Gordon*, 118 N. Y. 489, 23 N. E. Rep. 810, 29 N. Y. S. R. 829; reversing 14 Daly 47, 3 N. Y. S. R. 604. *Gates v. State*, 128 N. Y. 221, 28 N. E. Rep. 373, 40 N. Y. S. R. 87. *Missouri Pac. R. Co. v. Watts*, 64 Tex. 568.—QUOTED IN *Missouri Pac. R. Co. v. White*, 76 Tex. 102, 13 S. W. Rep. 65.—*Missouri Pac. R. Co. v. King*, 2 Tex. Civ. App. 122, 20 S. W. Rep. 104, 23 S. W. Rep. 917. *Reynolds v. Boston & M. R. Co.*, 53 Am. & Eng. R. Cas. 177, 64 Vt. 66, 24 Atl. Rep. 134.

Where a servant is, by reason of youth and inexperience, not acquainted with the dangers incident to the work or place of his employment, the master must indemnify him against danger by properly warning and instructing him. *Emma Cotton Seed Oil Co. v. Hale*, 56 Ark. 232, 19 S. W. Rep. 600. *Goins v. Chicago, R. I. & P. R. Co.*, 37 Mo. App. 221. *St. Louis & S. E. R. Co. v. Valerius*, 56 Ind. 511, 18 Am. Ry. Rep. 116. *Louisville, N. A. & C. R. Co. v. Frawley*, 28 Am. & Eng. R. Cas. 308, 110 Ind. 18, 9 N. E. Rep. 594.

To the inexperienced servant entering upon a dangerous service the master owes the duty not only of full information, but also of protection from a known danger as far as reasonably practicable. Both duties are imperative, and if a failure to perform one of them results in injury, liability cannot be avoided by showing a faithful performance of the other. *Missouri Pac. R. Co. v. Watts*, 64 Tex. 568.

The failure of the employé to ask for information does not vary the liability. *Missouri Pac. R. Co. v. Watts*, 64 Tex. 568.

If the servant's ignorance of the danger and of the means provided by the employer to avert it caused the injury, the servant being ignorant and uninformed of the dan-

gers attending the service, then the employer's liability would be neither defeated nor lessened by the fact that the negligent acts of fellow-servants contributed to the injury. *Missouri Pac. R. Co. v. Watts*, 64 *Tex.* 568.

It is a fact tending to show gross negligence in a railway company for it to employ an inexperienced person in any hazardous and dangerous business, knowing such person to be ignorant of the business for which he is employed, unless such company make known and explain fully the hazard and danger connected with such business, and instruct such person how to avoid the danger; and youth is an evidence of inexperience, and greater strictness of the rule should be required in the employment of minors than of persons of mature years, even when employed by and with the consent of the parent or guardian. *St. Louis & S. E. R. Co. v. Valerius*, 56 *Ind.* 511, 18 *Am. Ky. Rep.* 116.

(2) *Illustrations.*—When a brakeman is placed on a freight train running on a road with which he is not familiar, and such train has to pass under a low bridge, notice must be given to him of the danger arising from the existence of such bridge. *Louisville & N. R. Co. v. Hall*, 39 *Am. & Eng. R. Cas.* 298, 87 *Ala.* 708, 4 *L. R. A.* 710, 6 *So. Rep.* 277.

Where a brakeman, who is inexperienced and who has only been accustomed to coupling engines having the draft-iron usually found upon freight engines, is ordered to couple a passenger engine having a "goose-neck" draft-iron, he does not assume the increased risk arising from coupling such engine to a freight car, and the railroad company is liable to him for injuries arising from exposing him to the unusual danger without warning. *Hungerford v. Chicago, M. & St. P. R. Co.*, 41 *Am. & Eng. R. Cas.* 269, 41 *Minn.* 444, 43 *N. W. Rep.* 324.—FOLLOWING *Russell v. Minneapolis & St. L. R. Co.*, 32 *Minn.* 230, 20 *N. W. Rep.* 147.

The defendant employed a freight brakeman, knowing that he had no previous experience. Most of the cars were equipped with single deadwoods, but many were equipped with double deadwoods, and such cars were liable to be found in any of the defendant's trains. When injured, the plaintiff had been in the employment of the defendant some five days, and had learned to

couple cars equipped with single deadwoods, but had never seen and did not know that there was such a thing as a double deadwood. Being called upon to make a coupling between two cars provided with these double deadwoods, his arm was caught and crushed between the deadwoods. *Held*: (1) that these facts tended to show negligence upon the part of the defendant in not having properly instructed the plaintiff as to this hazard; (2) that the plaintiff was not guilty of contributory negligence, as matter of law, in not observing and avoiding the danger as the cars came together. *Reynolds v. Boston & M. R. Co.*, 53 *Am. & Eng. R. Cas.* 177, 64 *Vt.* 66, 24 *Atl. Rep.* 134.*

A switchman, who had been but a short time in the company's service, was sent down the track at night to couple cars, without any warning that in doing so he would pass over cattle-guards. *Held*, that the company was guilty of negligence which would make it liable for any injury he received, and this liability was not affected by the fact that the place had been used for coupling cars for a considerable time, and that no injury had occurred before to other persons. *Fredenburg v. Northern C. R. Co.*, 114 *N. Y.* 582, 21 *N. E. Rep.* 1049, 24 *N. Y. S. R.* 550; *affirming* 41 *Hun* 640, *mem.*—FOLLOWING *Plank v. New York C. & H. R. R. Co.*, 60 *N. Y.* 607.

To require a gang of 16 men to range themselves in line along a train of moving cars, and, acting as one man, to lift from the ground and throw upon the car as it passes them a steel rail weighing from 600 to 700 pounds, and then to run fast enough along the uneven ground usually observed along the side of a railroad track, to be able to have the next rail in position to throw on the car of the moving train at the proper moment as it passes, at least without notifying a new and inexperienced man of the great hazard attending the performance of such work, is negligence *per se*. *Palmer v. Michigan C. R. Co.*, 93 *Mich.* 363, 53 *N. W. Rep.* 397.

An employé while working in shops was caught by a rapidly revolving shaft and killed. *Held*, that it was proper to charge that "a servant, knowing the fact of machinery being in motion close by the place where he is working, may be entirely igno-

* Duty of company to warn a new brakeman of the use of a patent coupler, see 28 *Am. & Eng. R. Cas.* 556, *abstr.*

rant of the risk which he would incur by falling against or coming in contact with it. In such case it is the duty of the master not only to exercise due care, but good faith, toward the servant, and to inform him of the risks he undertakes." *Pullman Palace Car Co. v. Harkins*, 55 Fed. Rep. 932.—FOLLOWING *Paulmier v. Erie R. Co.*, 34 N. J. L. 151; *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. Rep. 594.

30. With respect to patent defects or obvious dangers.—One who attempts to do work which exposes him to an obvious, known, and appreciated danger assumes the risk of injury; and however his knowledge may have been acquired, there is no obligation upon the employer to give to the workman warning of a known danger. *Dorney v. Sawyer*, 157 Mass. 418, 32 N. E. Rep. 654. *Ring v. Missouri Pac. R. Co.*, 112 Mo. 220, 20 S. W. Rep. 436. *Johnson v. Ashland Water Co.*, 77 Wis. 51, 45 N. W. Rep. 807.

When it is apparent to the eye that there is not space enough for two cars to be coupled by a man standing between them, the danger of so coupling is obvious, and therefore the company is not bound to warn the coupler. *Simms v. South Carolina R. Co.*, 31 Am. & Eng. R. Cas. 199, 26 So. Car. 490, 2 S. E. Rep. 486.

The omission of a railroad company to warn an inexperienced brakeman of the specific danger of coupling cars that are furnished with double deadwoods does not make the company liable for an injury received by him in so doing, if the risk is such as to be manifest to any person, and if, on being employed, he was warned in general terms of the danger of coupling cars of different construction, and was told not to take any chances. *Hathaway v. Michigan C. R. Co.*, 12 Am. & Eng. R. Cas. 249, 51 Mich. 253, 16 N. W. Rep. 634, 47 Am. Rep. 569.—DISTINGUISHED IN *Russell v. Minneapolis & St. L. Co.*, 32 Minn. 230. QUOTED IN *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112. REVIEWED IN *Wormell v. Maine C. R. Co.*, 31 Am. & Eng. R. Cas. 272, 79 Me. 397, 4 N. Eng. Rep. 692, 10 Atl. Rep. 49.—*Louisville & N. R. Co. v. Boland*, 53 Am. & Eng. R. Cas. 169, 96 Ala. 626, 11 So. Rep. 667.—QUOTING *Holland v. Tennessee C. I. & R. Co.*, 91 Ala. 444.—*East Tenn. V. & G. R. Co. v. Turberville*, 97 Ala. 122, 12 So. Rep. 63.—QUOTING *Louisville & N. R. Co. v. Boland*, 96 Ala. 626, 11 So. Rep. 667.

The utmost care that can be urged is

that the company should have given notice to the brakeman that cars are loaded in an unsafe manner; but this cannot be necessary when it is broad daylight and the danger is obvious. *Lothrop v. Fitchburg R. Co.*, 41 Am. & Eng. R. Cas. 327, 150 Mass. 423, 23 N. E. Rep. 227.

Plaintiff sued for an injury while working in defendant's machine shops, and charged the company with negligence in putting him to work where he did not know the danger and in not instructing him in regard to it. Plaintiff was nineteen years old, and, for aught that appeared, was of ordinary capacity, and had worked in the room for over two years. He was injured by having his hand caught between rollers, the danger of which was perfectly apparent to any one without instruction. Held, not sufficient to support the charge of negligence. *Berger v. St. Paul, M. & M. R. Co.*, 39 Minn. 78, 38 N. W. Rep. 814.—DISTINGUISHED IN *Kaillen v. Northwestern Bedding Co.*, 46 Minn. 187.

31. With respect to latent defects or unforeseen dangers.—When there are special risks, of which the servant is not, from the nature of the employment, cognizant, or which are not patent, it is the duty of the employer to notify him of them, and on failure to do so, if the servant is injured by exposure to such risks, he is entitled to recover. *United States Rolling Stock Co. v. Wilder*, 25 Am. & Eng. R. Cas. 414, 116 Ill. 100, 5 N. E. Rep. 92. *Paulmier v. Erie R. Co.*, 34 N. J. L. 151. *Wendling v. Brainbridge*, 6 N. Y. S. R. 21.

An employer is bound to instruct his servants as to all risks and dangers which are or ought to be known to him, and which he, as a prudent man, having due regard for the age and experience of each, would not be justified in assuming were sufficiently obvious to them. *Murphy v. Mairs*, 6 N. Y. S. R. 42.

A railroad company, whose roadbed is so constructed as to expose its employés to a latent danger, is liable to such of said employés as are injured thereby. If such danger is not obvious, it is the duty of such company to warn those who are to incur it of its existence. *Paulmier v. Erie R. Co.*, 34 N. J. L. 151.—FOLLOWED IN *Pullman Palace Car Co. v. Harkins*, 55 Fed. Rep. 932.

It is the duty of the employer to apprise the employé of any defects in machinery

which are beyond the reach of the observation of the latter. *McDade v. Washington & G. R. Co.*, 26 *Am. & Eng. R. Cas.* 325, 5 *Mackey (D. C.)* 144.

If the master directs his servant to perform some service to which a particular risk is attached, which is not patent and open to the observation of any person exercising reasonable care and prudence, it is his duty to inform the workman of it, and caution him against it; but if there is both a patent and a latent danger, and an injury results from the former, the failure of the master to inform the workman of the latter does not render him liable for the resultant damages. *Holland v. Tennessee C., I. & R. Co.*, 91 *Ala.* 444, 8 *So. Rep.* 524.

32. With respect to increased dangers or extrahazardous work.*—Where a servant is sent to do work outside of his regular employment, and of a dangerous character, not well understood by him, if the danger is obvious, the servant assumes the risk by undertaking to do the work; but if it is not obvious, the master must explain the dangers and must furnish suitable appliances; otherwise he will be liable for any injury that results. *Pittsburgh, C. & St. L. R. Co. v. Adams*, 23 *Am. & Eng. R. Cas.* 408, 105 *Ind.* 151, 5 *N. E. Rep.* 187.

Where the car coupler employed by a railroad company on one of its freight cars was one not commonly used, and was not reasonably safe when used with such cars, and one employed as a wiper, having no previous knowledge that such coupler was in use, nor of its dangerous character, while attempting to make a coupling with such car, was injured—*held*, that the "wiper" had a right to believe that the cars and appliances used by the company were reasonably safe, and that the company was negligent in not informing him of the danger of the service and of the methods of avoiding it. *Grannis v. Chicago, St. P. & K. C. R. Co.*, 81 *Iowa* 444, 46 *N. W. Rep.* 1067.

A day laborer, who had been employed

for other work, was directed by his foreman to thaw out dynamite, which was used in blasting, before a fire, without warning him of the danger. An explosion occurred and he was injured. *Held*, that the company had not discharged the duty that it owed the employé, and it was liable for the injury. *Lofrano v. New York & Mt. V. Water Co.*, 29 *N. Y. S. R.* 557, 8 *N. Y. Supp.* 717.

33. With respect to changes in schedule.—The company must use due diligence in giving the employé notice of changes made in the regular time-table. *Slater v. Jewett*, 5 *Am. & Eng. R. Cas.* 515, 85 *N. Y.* 61, 39 *Am. Rep.* 627.

It is not required that the master should see to it personally that notice of a change in the time-table comes to the knowledge of all those to be governed thereby. The duty of the master is performed when he provides beforehand and makes known to his servants rules explicit and efficient, which, if observed and followed by all concerned, will bring personal notice to every one entitled to it. *Slater v. Jewett*, 5 *Am. & Eng. R. Cas.* 515, 85 *N. Y.* 61, 39 *Am. Rep.* 627.—*QUOTING* *Rose v. Boston & A. R. Co.*, 58 *N. Y.* 217; *Flike v. Boston & A. R. Co.*, 53 *N. Y.* 549.

Plaintiff's intestate was the foreman of a gang of track repairers, and had thus been employed for several years, and while standing near the track was struck by a passing train and killed. It did not clearly appear just how this occurred, but it was a theory of plaintiff that the deceased withdrew from the track a sufficient distance to be safe, if the train had been running at its usual speed and with its usual cars, but that the train was running on a new schedule, very rapidly, and carrying sleeping cars which were much wider than ordinary cars, and that the oscillating motion caused by the increased speed caused the wider cars to strike him. *Held*, that this theory, if supported by the evidence, might make the company liable, but not where it appeared that the deceased knew of the approaching train in time to have got far enough from the track to have avoided danger. *Baltimore & O. R. Co. v. Whittington*, 30 *Gratt. (Va.)* 805.

34. With respect to new machinery, change of tools, etc.—If an employer introduces, without notice to his employé, new and unusual machinery, involving an unexpected or unanticipated danger,

*Duty of master to warn and instruct servant employed in dangerous work, see note, 1 *AM. ST. REP.* 548.

Liability of company for injuries to employé who has been assigned to more dangerous work. Age and experience as affecting liability, see note, 52 *AM. REP.* 737.

Duty of company to notify brakeman of increased danger in using cars constructed in an unusual manner, see 41 *AM. & ENG. R. CAS.* 273, *abstr.*

through the introduction of which the un-
warned employé, while using the care and
diligence incident to his employment, meets
with an accident, the employer should an-
swer therefor in damages. *O'Neil v. St.
Louis, I. M. & S. R. Co.*, 3 *McCrary* (U. S.)
423, 9 *Fed. Rep.* 337.—APPROVED IN *Bennett
v. Northern Pac. R. Co.*, 2 N. Dak. 112.
REVIEWED IN *Gottlieb v. New York, L. E.
& W. R. Co.*, 24 *Am. & Eng. R. Cas.* 421,
100 N. Y. 462, 5 N. E. *Rep.* 344.

If, by reason of a master's omission to
supply the usual and ordinary means to pre-
vent accident, the hazard of his servants is
increased, and a change in appliances made
is not known to his servants, or so open and
visible that they, by the exercise of ordi-
nary care, cannot see and know it, the legal
duty will rest upon the master to notify
them of the new or increased danger to
which they are thereby exposed. *Pullman
Palace Car Co. v. Laack*, 143 *Ill.* 242, 32 *N.
E. Rep.* 285.

If the cars ordinarily used by a railroad
company were such that the employés could
stand upon the top of them without danger
in passing under a bridge over the railroad,
and if the company introduced into its train
a car higher than those generally used by
it, and gave no warning to its employés of
the condition of such car, and an employé,
who was ordered to release a bell cord
which had become entangled, went on
top of the cars and was knocked from the
higher car by the bridge and killed, the jury
might infer that the company was negli-
gent, because of the increased hazard and
danger to its employés; and in a suit by
the widow of the dead employé against the
railroad, it was an error to grant a nonsuit.
Stick v. Central R. & B. Co., 79 *Ga.* 495, 5
S. Rep. 105.

A car coupler may recover for injuries he
receives in attempting to couple a car of a
peculiar and dangerous construction, which
he had never seen before, and concerning
which he had had no warning, though it
appear that he had had considerable experi-
ence in coupling cars. *Missouri Pac. R. Co.
v. Callbreath*, 66 *Tex.* 526, 1 *S. W. Rep.*
622.—QUOTED IN *Missouri Pac. R. Co. v.
White*, 76 *Tex.* 102, 13 *S. W. Rep.* 65.—
Missouri Pac. R. Co. v. White, 76 *Tex.* 102,
13 *S. W. Rep.* 65.—QUOTING *Missouri Pac.
R. Co. v. Callbreath*, 66 *Tex.* 528; *Missouri
Pac. R. Co. v. Watts*, 64 *Tex.* 568.

35. With respect to the operation

of trains.—No order with respect to a
change of position of the subject of the
work shall be executed without due warning
to the employés. *Stewart v. Philadelphia,
W. & B. R. Co.*, (Del.) 17 *Atl. Rep.* 639.

It is not negligence on the part of a rail-
road company to send out a wild train with-
out previous warning to a gang of section
men, where its rules, known to such men,
provide that the train preceding the wild
train shall carry a red signal, but that if it
is impossible for those running the wild
train to know that the train preceding carries
such signal, they must run at a slow rate of
speed around all curves. *Shepard v. Boston
& M. R. Co.*, 158 *Mass.* 174, 33 *N. E. Rep.*
508.

**36. Failure to warn or instruct
must be proximate cause.**—When a
charge is given upon the subject of the lia-
bility of the master for negligent failure to
inform the servant of the extra hazards
arising from the use of a car of more than
ordinarily dangerous construction, the jury
must also be informed that the failure of
the master to perform his duty in this re-
spect must have proximately caused the
injury. *Fordyce v. Yarrowborough*, 1 *Tex. Civ.
App.* 260, 21 *S. W. Rep.* 411.

**37. Manner of warning or notify-
ing employe.**—Bulletin boards and pla-
cards, printed or posted, are proper methods
of giving notice to railroad employés, but
not the only methods; and where a party
has been expressly notified, he cannot com-
plain that no placard or bulletin board was
posted. *Louisville & N. R. Co. v. Hall*, 48
Am. & Eng. R. Cas. 170, 91 *Ala.* 112, 8 *So.
Rep.* 371.

4. Duty to Provide Safe Place in Which to Work.

38. Generally.—The rule is well set-
tled that among the positive duties resting
upon the master to the servant is the ob-
ligation to exercise such reasonable care as
prudence and the exigencies of the situation
require, in providing the servant with safe
machinery and suitable instrumentalities,
and a reasonably safe place in which to
work. The negligence of the master in
this respect is not one of the perils or risks
assumed by the employé in his contract of
employment, and he has the right to insist
that the master shall strictly comply with
his obligations in this respect. *South*

Fla. R. Co. v. Weese, 32 *Fla.* 212, 13 *So. Rep.* 436. *Stewart v. Philadelphia, W. & B. R. Co.*, (*Del.*) 17 *Atl. Rep.* 639. *O'Neal v. Chicago & I. C. R. Co.*, 132 *Ind.* 110, 31 *N. E. Rep.* 669.—FOLLOWING *Indiana Car Co. v. Parker*, 100 *Ind.* 181; *Cincinnati, I., St. L. & C. R. Co. v. Roesch*, 126 *Ind.* 445.

And where the service required of an employé is of a peculiarly dangerous character, it is the duty of the master to make reasonable provision to protect him from the dangers to which he is exposed while engaged in the discharge of his duty. *Hannibal & St. J. R. Co. v. Fox*, 15 *Am. & Eng. R. Cas.* 325, 31 *Kan.* 586, 3 *Pac. Rep.* 320.—QUOTING *Atchison, T. & S. F. R. Co. v. Holt*, 29 *Kan.* 152; *Atchison, T. & S. F. R. Co. v. Moore*, 29 *Kan.* 633.

And no order with respect to change of position of the subject of the work shall be executed without due warning to the employé. *Stewart v. Philadelphia, W. & B. R. Co.*, (*Del.*) 17 *Atl. Rep.* 639.

Although the master is not an insurer he is bound on the same principle by the law to exercise due and proper care in this regard as he is in hiring competent servants, or in supplying reasonably safe machinery or other appliances for the use of his servants. *Anderson v. Bennett*, 38 *Am. & Eng. R. Cas.* 87, 16 *Oreg.* 515, 19 *Pac. Rep.* 765, 8 *Am. St. Rep.* 311.—QUOTING *Hutchinson v. York, N. & B. R. Co.*, 5 *Ex.* 348; *Atchison, T. & S. F. R. Co. v. Moore*, 29 *Kan.* 633.

An employer cannot relieve himself of liability because the duty to keep the place of work safe was intrusted to one who acts as a foreman, even if such foreman be regarded as a fellow-servant of the injured party. *Northwestern Fuel Co. v. Danielson*, 57 *Fed. Rep.* 915. *Trainor v. Philadelphia & R. R. Co.*, 137 *Pa. St.* 148, 20 *Atl. Rep.* 632.

But this rule merely asserts that the appliances must be kept safe only as to those who do not know their unsafe condition. *Indianapolis & St. L. R. Co. v. Watson*, 33 *Am. & Eng. R. Cas.* 334, 114 *Ind.* 20, 12 *West. Rep.* 285, 14 *N. E. Rep.* 721, 15 *N. E. Rep.* 824.

Plaintiff was employed to unload coal cars which were run on a trestle several feet high, and was injured by the falling of the platform on which he stood, which had been allowed to become insecure. *Held*, that it was the duty of the company to

keep the platform reasonably safe, and if the jury believed it was not, plaintiff might recover. *Selleck v. Langdon*, 55 *Hun* 19, 28 *N. Y. S. R.* 326, 8 *N. Y. Supp.* 573.—*REVIEWING Lewis v. Flint & P. M. R. Co.*, 54 *Mich.* 55.

39. Is a continuing duty.—The master's duty to his employés to provide safe places for them to work is a continuing one, and requires him to use ordinary care to keep them safe, and if they become unsafe through his neglect, or are made unsafe through his act, he must answer in damages to a servant who is injured thereby, who is himself free from contributory negligence. *Nall v. Louisville, N. A. & C. R. Co.*, 48 *Am. & Eng. R. Cas.* 309, 129 *Ind.* 260, 28 *N. E. Rep.* 183, 611. *Racine v. New York C. & H. R. Co.*, 70 *Hun* (N. Y.) 453. *Byrne v. Brooklyn City R. Co.*, 6 *Misc.* 441, 27 *N. Y. Supp.* 126, 58 *N. Y. S. R.* 577.

If a master furnish safe tools, utensils, and place for the use of his servants, he is not responsible if, without his fault or knowledge, it becomes unsafe by use, when the attention of a skilled mechanic is not required all the time; but this rule does not apply where the place may have been safe at the time of the employment, but afterward is made unsafe by the act of the master or his alter ego. *Stephens v. Hudson Valley Knitting Co.*, 69 *Hun* (N. Y.) 375.—QUOTING *Booth v. Boston & A. R. Co.*, 73 *N. Y.* 38.

40. Degree of care to be used.—The law imposes upon an employer the duty to use ordinary care to select and retain competent co-employés, and not to subject one employé to the negligence of incompetent fellow-workmen; also, to exercise ordinary care to furnish a reasonably safe place for the employé to do his work in, and to discover any defect in the structure upon which he is required to go in performing his work. *Lindvall v. Woods*, 44 *Fed. Rep.* 855. *Pennsylvania Co. v. Whitcomb*, 31 *Am. & Eng. R. Cas.* 149, 111 *Ind.* 212, 9 *West. Rep.* 823, 12 *N. E. Rep.* 380. *Cook v. St. Paul, M. & M. R. Co.*, 34 *Minn.* 45, 24 *N. W. Rep.* 311.—FOLLOWING *Bennett v. Syndicate Ins. Co.*, 39 *Minn.* 254, 39 *N. W. Rep.* 488.—*Dayharsh v. Hannibal & St. J. R. Co.*, 103 *Mo.* 570, 15 *S. W. Rep.* 554.

While an employé assumes the risks ordinarily incident to the services in which he is engaged, the master, on the other hand,

impliedly undertakes to use reasonable care to provide his servant with a reasonably safe place in which to work and suitable and safe instrumentalities with which to perform his duties. *Henry v. Wabash Western R. Co.*, 109 Mo. 488, 19 S. W. Rep. 239.

This duty the employer cannot delegate, and he cannot escape responsibility by delegating the duty of looking after and providing a safe place to any other person. *Louisville, N. A. & C. R. Co. v. Graham*, 124 Ind. 89, 24 N. E. Rep. 668. *Krueger v. Louisville, N. A. & C. R. Co.*, 31 Am. & Eng. R. Cas. 329, 111 Ind. 51, 9 West. Rep. 247, 11 N. E. Rep. 957.

When, therefore, the master directs the performance of work by his servant at a place which may become dangerous, and such danger may be foreseen and guarded against by the exercise of reasonable care, it is the master's duty to exercise such care and adopt such precautions as will protect the servant. *McGovern v. Central Vt. R. Co.*, 123 N. Y. 280, 25 N. E. Rep. 373, 33 N. Y. S. R. 416; *reversing* 53 Hun 635, 24 N. Y. S. R. 946, 6 N. Y. Supp. 838.

And if the employer knows of peculiar danger to the employé in a place where he is directed to work, the employer is bound to do all that a reasonably prudent man could do to protect such employé; but an employer cannot be held to be an insurer of his employé. *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. Rep. 956.

41. Right to rely on company's performance of this duty.—An employé, upon entering the service of a company, has the right to assume that the railroad and its appurtenances are so constructed as to render him safe for the performance of his duties. *Boss v. Northern Pac. R. Co.*, 2 N. Dak. 128, 49 N. W. Rep. 655.—**APPROVING** *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701, 16 Pac. Rep. 146; *Baltimore & O. R. Co. v. Rowan*, 104 Ind. 88, 3 N. E. Rep. 627; *Houston & T. R. Co. v. Oram*, 49 Tex. 342; *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197; *Chicago & I. R. Co. v. Russel*, 91 Ill. 298.—**CHICAGO & N. W. R. Co. v. Swett, 45 Ill. 197.—**APPROVED** IN *Boss v. Northern Pac. R. Co.*, 2 N. Dak. 128. **REVIEWED** IN *Whalen v. Illinois & St. L. R. & C. Co.*, 16 Ill. App. 320.**

A railroad employé only assumes the ordinary hazards and risks of the employment, and he has a right to assume that the mas-

ter will furnish a safe place to work and the proper instrumentalities in good repair. The servant does not assume extraordinary risks not incident to the business. *Johnston v. Oregon S. L. & U. N. R. Co.*, 23 Oreg. 94, 31 Pac. Rep. 283.

42. What amounts to a breach of this duty.—Constructing and maintaining a side track so near to a building in the yards of a railroad company, and under its control, as to endanger the lives of its employés while switching cars on said track, is a violation of the duty of the company to provide a safe place for its employés to work in. *Sweet v. Michigan C. R. Co.*, 48 Am. & Eng. R. Cas. 395, 87 Mich. 559, 49 N. W. Rep. 882.

Where in such a case an employé is killed by being crushed between the car upon which he was braking and the building, and the testimony fails to show that he had ever before switched a car on said side track or past the building, or that he had any reason to apprehend the existence of such special danger, it is a question for the jury, under all of the testimony, to determine whether he knew or ought to have known of such danger. *Sweet v. Michigan C. R. Co.*, 48 Am. & Eng. R. Cas. 395, 87 Mich. 559, 49 N. W. Rep. 882.—**DISTINGUISHING** *Illick v. Flint & P. M. R. Co.*, 67 Mich. 636.

An action was brought for injuries occasioned to a brakeman by stepping on a loose board on a platform beside the track. *Held*, that the jury were rightly instructed that it was incumbent on the defendant not only to employ suitable persons to keep its works in repair, but also to use reasonable diligence to see that they performed their duty. *Sweet v. Boston & A. R. Co.*, 156 Mass. 284, 31 N. E. Rep. 296.

In an action to recover damages for the death of W., plaintiff's intestate, an employé in defendant's machine shop, alleged to have been caused by its negligence, it appeared that he was ordered to clean out certain underground water-pipes. A trench had been opened for the purpose of furnishing W. a proper place and opportunity to do the work, by defendant's section man and laborers under his direction; while engaged in disconnecting the pipes, the earth caved upon W. and he was suffocated. At the close of the evidence, the complaint was dismissed. *Held*, error; that the question of defendant's negligence should have been submitted to the jury; that defendant owed

to W. the duty of providing a place reasonably safe for the work he was directed to do that those who opened the trench were performing the master's duty, and W. had a right to assume that the place had been made reasonably safe. *Kranz v. Long Isl. and R. Co.*, 123 N. Y. 1, 25 N. E. Rep. 206; reversing 49 Hun 608, 17 N. Y. S. R. 684, 1 N. Y. Supp. 751.—DISTINGUISHING *Murphy v. Boston & A. R. Co.*, 88 N. Y. 146; *Cook v. New York C. & H. R. R. Co.*, 119 N. Y. 653.—DISTINGUISHING *Deane v. Norton*, 126 N. Y. 1.

The defendant operated a coal mine and employed miners therein by the job. The plaintiff, a miner so employed, worked in a chamber of the mine, access to which was obtained by a gangway, which was ten feet high, the roof of which was supported by pillars of coal, and which was not timbered. The defendant caused the pillars to be cut away until they were smaller than customary in such mines, and in cutting them away a piece of coal was left on one of them overhanging the gangway about three feet, which was known by the foreman of the mine. The plaintiff, while his work was being measured, unaware of the defect, sat at the foot of this pillar and the overhanging piece of coal fell on him, inflicting serious injuries. *Held*, that the facts showed negligence on the part of the defendant. *Cunningham v. Union Pac. R. Co.*, 4 Utah 206, 7 Pac. Rep. 795.

A gang of men, under the direction of defendant's foreman, were engaged in pushing a car over an unfinished portion of track which, on one side, was near to a high bank—so near at one place that a person could not pass between a car and the bank. The car had been started by the other men. The plaintiff, being directed by the foreman to assist in the pushing, took hold of the car at the only available place left by the other men, which was on the side towards the bank. After the car had moved twelve or fourteen feet, he was caught in the narrow place and crushed between the car and the bank. The foreman had not warned him of the danger. The plaintiff testified that he did not know of the narrow place. He had no time for deliberation or to look ahead after being directed to push. The ground was rough and muddy, and while pushing he looked downward to see where to step. *Held*, that the jury were warranted in finding that the defendant was negligent both in

not providing a safe place for the plaintiff to work and in failing to warn him of the danger, and that the plaintiff was not guilty of contributory negligence. *Stackman v. Chicago & N. W. R. Co.*, 80 Wis. 428, 50 N. W. Rep. 404.—APPLYING *Bessex v. Chicago & N. W. R. Co.*, 45 Wis. 477.

43. — and what does not.—The rule that a company is bound to furnish a reasonably safe place for its employés to work, and to use reasonable care in keeping such place free from unnecessary peril, does not go to the length of making the employer an insurer against injury by the breaking of machinery or the explosion of boilers, while used by an employé, provided such machinery is apparently in a safe condition and the injury results from latent weakness or defect unknown to the employer and which the exercise of ordinary care and skill would not enable him to detect and guard against. When an accident happens under such circumstances it must be regarded as one of the risks incident to the employment, which, when no fault is chargeable to the employer, the employé assumes. *Racine v. New York C. & H. R. R. Co.*, 53 N. Y. S. R. 680.

Where a section hand was killed while riding down a grade on a "push car," the fact that a switch was turned upon a wrong track, thereby causing the car to run thereon against standing cars—*held*, not to show that the premises were unfit for the servant's use. *York v. Kansas City, C. & S. R. Co.*, 117 Mo. 405, 22 S. W. Rep. 1081.

A company maintained several tracks in its yard, to be used in repairing cars, some of which were only used for standing cars, and were known to be perfectly safe; but another track was used only for disabled cars, where they were continually being taken out or run in without warning to the workmen. A car repairer went under a car on this track and was killed by another car that was being run in. He knew of the manner in which the cars were moved, and knew that a rule of the company prohibited work on this track. *Held*, that the company was not liable for failing to provide a safe place to work. *Keenan v. New York, L. E. & W. R. Co.*, 21 N. Y. Supp. 445.

44. Blasting, drilling, and quarrying.—Where the roadmaster of a railroad who represents the company places an employé on a cliff for the purpose of blasting and quarrying rocks, in a position of danger which is known to him, but which is not

visible to the employé in his position, and unknown to him, the company will be liable for any personal injury which he receives thereby. *Elledge v. National City & O. R. Co.*, 100 Cal. 282, 34 Pac. Rep. 720.—FOLLOWING *Daves v. Southern Pac. Co.*, 98 Cal. 19, 35 Am. St. Rep. 133.

There can be no recovery against a railroad company for damages to an employé engaged in blasting rocks, on the ground that the company left cars standing so as to obstruct his retreat when blasts were being set off, where it appears that the employé had full knowledge of where the cars stood, and knew to what extent they would prevent his retreat. *Wilson v. Louisville & N. R. Co.*, (Ky.) 18 S. W. Rep. 638.

Plaintiff was engaged as a common laborer in constructing a railroad and worked under a foreman who directed him to set up a drilling machine and drill a hole for blasting, and an explosion occurred by his drilling into an unexploded hole. Held that the foreman in thus directing the work without taking any care, or adopting any precautionary measures to discover whether there were holes charged with powder which had failed to explode, and to guard against drills penetrating them, exposed plaintiff to a danger not contemplated by his contract of service, and rendered the contractor liable. *Anderson v. Bennett*, 38 Am. & Eng. R. Cas. 87, 16 Oreg. 515, 19 Pac. Rep. 765, 8 Am. St. Rep. 311.

5. Duty to Provide Safe Track and Roadbed.

a. In General.*

45. Statement of the rule.—A railroad company is bound to see that the road is in good order, and safe; and that the engines, etc., are perfect and properly constructed according to the present state of the art, and to have competent and prudent engineers. If the road and machinery are safe and perfect, and by accident a servant of the company is injured, in the absence of any fault or negligence on their part, they

will not be responsible for such injury; but if the injury was occasioned by an imperfection in the road and machinery, or associating him with other servants wanting in ordinary skill or care, or other culpable negligence, then the company would be liable to him for injuries. *Nashville & C. R. Co. v. Elliott*, 1 Coldw. (Tenn.) 611.—APPROVED IN East Tenn., V. & G. R. Co. v. Gurley, 17 Am. & Eng. R. Cas. 568, 12 Lea (Tenn.) 46. DISTINGUISHED IN East Tenn., V. & G. R. Co. v. Aiken, 89 Tenn. 245. FOLLOWED IN Nashville, C. & St. L. R. Co. v. Handman, 13 Lea 423. NOT FOLLOWED IN Nashville & D. R. Co. v. Jones, 9 Heisk. (Tenn.) 27. QUOTED IN Louisville & N. R. Co. v. Garrett, 8 Lea 438. REVIEWED IN Nashville & C. R. Co. v. Carroll, 6 Heisk. 347.—*Chicago & A. R. Co. v. Sullivan*, 63 Ill. 293. *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701, 16 Pac. Rep. 146.—QUOTING *Chicago & N. W. R. Co. v. Sweet*, 45 Ill. 197. REVIEWING *Illinois C. R. Co. v. Welch*, 52 Ill. 183; *Chicago & I. R. Co. v. Russell*, 91 Ill. 298; *Chicago & A. R. Co. v. Johnson*, 116 Ill. 206, 4 N. E. Rep. 381; *Clark v. St. Paul & S. C. R. Co.*, 28 Minn. 128.—*Howd v. Mississippi C. R. Co.*, 50 Miss. 178. *Mulvaney v. Brooklyn City R. Co.*, 1 Misc. 425, 49 N. Y. S. R. 637, 21 N. Y. Supp. 427. *Costello v. Philadelphia & R. R. Co.*, 2 Pa. Dist. 453. *Taylor, B. & H. R. Co. v. Taylor*, 79 Tex. 104, 14 S. W. Rep. 918. *Richmond & D. R. Co. v. Williams*, 39 Am. & Eng. R. Cas. 326, 86 Va. 165, 9 S. E. Rep. 990. *Toner v. Chicago, M. & St. P. R. Co.*, 28 Am. & Eng. R. Cas. 449, 31 Am. & Eng. R. Cas. 320, 69 Wis. 188, 31 N. W. Rep. 104, 33 N. W. Rep. 433.

The negligence need not be gross; nor will negligence be imputed to the employé where it has reference to the condition of roadbed and track. *Gulf, C. & S. F. R. Co. v. Johnson*, 1 Tex. Civ. App. 103, 20 S. W. Rep. 1123.

It is gross negligence to permit a shed to be in such dangerous proximity to the track as to endanger the safety of employés operating trains. *Illinois & St. L. R. Co. v. Whalen*, 19 Ill. App. 116.

The company is responsible in damages to an employé for an injury resulting, without his negligence, from a tank, or other appendage of the road, so negligently constructed as to subject the employé to unnecessary and extraordinary danger which he could not reasonably anticipate or know,

* Duty of company to servants as to safe track and machinery, see note, 18 AM. & ENG. R. CAS. 77.

Liability of company for injuries to employés caused by defective track and roadbed, see note, 39 AM. & ENG. R. CAS. 332; 2 Id. 56.

Brakeman not presumed to be acquainted with condition of defective track, see note, 18 AM. & ENG. R. CAS. 67.

and of which he was in fact not informed. *Houston & T. R. Co. v. Oram*, 49 Tex. 341.—DISTINGUISHING *Bartee v. Houston & T. C. R. Co.*, 36 Tex. 648.—APPROVED IN *Boss v. Northern Pac. R. Co.*, 2 N. Dak. 128. FOLLOWED IN *Texas & P. R. Co. v. Hohn*, 1 Tex. Civ. App. 36.

Though a portion of a railway track has been but recently completed and is being operated only for construction purposes, the company is still bound to use all reasonable care to put the roadbed in such condition that its employés engaged in running trains may use it with safety to themselves and to their co-employés. *Gulf, C. & S. F. R. Co. v. Redeker*, 67 Tex. 181, 2 S. W. Rep. 513.

If an employé is injured through the unfitness or defects of a track, the company cannot escape liability on the ground that the track belonged to another company. *Stetler v. Chicago & N. W. R. Co.*, 46 Wis. 497, 21 Am. Ky. Rep. 402. *Smith v. Memphis & L. R. R. Co.*, 18 Fed. Rep. 304. *Little Rock & Ft. S. R. Co. v. Cagle*, 44 Am. & Eng. R. Cas. 536, 53 Ark. 347, 14 S. W. Rep. 89. *Wisconsin C. R. Co. v. Ross*, 53 Am. & Eng. R. Cas. 73, 142 Ill. 9, 31 N. E. Rep. 412; affirming 43 Ill. App. 454.

This duty must be taken, so far as the servants of the company are concerned, with the qualification that the servant does not know of the defect, or if he does know, that he has reported it and remained on duty under the promise or reasonable belief of its speedy remedy. *East Tenn., V. & G. R. Co. v. Gurley*, 17 Am. & Eng. R. Cas. 568, 12 Lea (Tenn.) 46.—APPROVING *East Tenn., V. & G. R. Co. v. Hodges*, 2 Leg. Rep. 6.—*Thayer v. St. Louis, A. & T. H. R. Co.*, 22 Ind. 26.—FOLLOWED IN *Slattery v. Toledo & W. R. Co.*, 23 Ind. 81.—*Dale v. St. Louis, K. C. & N. R. Co.*, 63 Mo. 455, 21 Am. Ry. Rep. 217.—FOLLOWING *Gibson v. Pacific R. Co.*, 46 Mo. 167; *Devitt v. Pacific R. Co.*, 50 Mo. 305.—FOLLOWED IN *Elliott v. St. Louis & I. M. R. Co.*, 67 Mo. 272.—*Bonner v. La None*, 80 Tex. 117, 15 S. W. Rep. 803.—FOLLOWED IN *Texas & P. R. Co. v. Hohn*, 1 Tex. Civ. App. 36.

It is the duty of the company not only to furnish a reasonably well constructed and safe railway and track for the use of its employés, but it must also exercise continued supervision over the same, and keep them in good and safe repair and condition. *Riley v. West Virginia C. & P. R. Co.*, 27 W. Va. 145.—FOLLOWING *Cooper v. Pittsburgh,*

C. & St. L. R. Co., 24 W. Va. 37.—*Miller v. Southern Pac. Co.*, 48 Am. & Eng. R. Cas. 294, 20 Oreg. 285, 26 Pac. Rep. 70.

It is the duty of a switchman to operate the switch, and see that it properly adjusts the rails, so that the trains may pass with safety. The act he performs involves no duty of construction or repair, or other duty in regard to the switches of the road, if out of repair or unfit for use, whether by wear and tear or by the criminal interference of strangers, than to promptly notify the company of their condition, so that they may be repaired or their place supplied. *Miller v. Southern Pac. Co.*, 48 Am. & Eng. R. Cas. 294, 20 Oreg. 285, 26 Pac. Rep. 70.—DISTINGUISHED IN *Worth v. Chicago, M. & St. P. R. Co.*, 51 Fed. Rep. 171; *Carlson v. Oregon S. L. & U. N. R. Co.*, 21 Oreg. 450.

If an employé to whom the company has delegated this duty has previous knowledge of an obstruction on the track, it is incumbent upon him to warn those in charge of any train about to pass over the track of the danger; and a failure to do so would render the company liable in damages for an injury to the trainmen caused by the obstruction. *Wellman v. Oregon S. L. & U. N. R. Co.*, 21 Oreg. 530, 28 Pac. 1 p. 625. *Riley v. West Virginia C. & P. R. Co.*, 27 W. Va. 145.

But the rule does not oblige the company to make use of the latest improvements, nor to change the structures upon its road so as to conform to the most recent or advanced ideas upon such subjects, nor does "good railroading" require such action. *Illick v. Flint & P. M. R. Co.*, 67 Mich. 632, 12 West. Rep. 440, 35 N. W. Rep. 708.

The rule does not apply where the employé is injured when a defective car is on the way to shops for repairs, and the existence of the defect implied no negligence on the part of the company. *Chicago & N. W. R. Co. v. Ward*, 61 Ill. 130, 12 Am. Ry. Rep. 434.—DISTINGUISHING *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 198.

The duty of a railroad company to the public, to maintain, under all circumstances, a firm roadbed and safe track, does not extend universally to employés. The track requires frequent repairs and renewals, and gravel and construction trains must necessarily pass over unsafe portions of the road to transfer materials for repairs, and all that is required of the company under such circumstances is to give employés on these

trains timely notice of the insecurity, to enable them to adopt the necessary precautions to avert danger. *St. Louis, I. M. & S. R. Co. v. Megart*, 45 Ark. 318.

A company owes a duty to the public to keep its track in safe and suitable condition, and run its trains with regularity and dispatch for the carriage and transportation of passengers and freight. But an employé cannot have a right of action against the company on this obligation. *Henry v. Lake Shore & M. S. R. Co.*, 8 Am. & Eng. R. Cas. 110, 49 Mich. 495, 13 N. W. Rep. 832.

46. Degree of care demanded.—

(1) *Ordinary and reasonable care.*—A railroad company is under obligation to employés to observe all ordinary and reasonable precautions to keep its road in such condition as to make their passage reasonably safe; and if it neglect such ordinary and reasonable precaution, and the road becomes unsafe, and employés are thereby injured, then the company is liable for damage done by such negligence, if the injured employé be without fault. *Central R. Co. v. Mitchell*, 1 Am. & Eng. R. Cas. 145, 63 Ga. 173.—FOLLOWED IN *Central R. Co. v. De Bray*, 71 Ga. 406.—*St. Louis & S. F. R. Co. v. Weaver*, 28 Am. & Eng. R. Cas. 341, 35 Kan. 412, 11 Pac. Rep. 408.

And if such injury result in the death of the employé it is liable to the persons to whom the statute gives an action, for its failure to use that degree of care. The same rule applies when the road is operated by a receiver. *Texas & P. R. Co. v. Geiger*, 79 Tex. 13, 15 S. W. Rep. 214.

An instruction so stating the law is not misleading on the ground that the jury might understand therefrom that the company is required to keep its road in an absolutely safe condition. *McKee v. Chicago, R. I. & P. R. Co.*, 48 Am. & Eng. R. Cas. 154, 83 Iowa 616, 50 N. W. Rep. 209.

A railroad company, as between it and its employés, must exercise reasonable and ordinary care and diligence to make its road safe, whether it originally constructed the road or purchased it or leased the same. *St. Louis & S. F. R. Co. v. Weaver*, 28 Am. & Eng. R. Cas. 341, 35 Kan. 412, 11 Pac. Rep. 408.

It cannot escape the consequences of the negligence of the agents whom it has charged with a duty of that nature; and thus whether the injury complained of as resulting from a defective roadbed is inflicted on

a fellow-servant of the corporation or on another. *Houston & T. C. R. Co. v. Dunham*, 49 Tex. 181.—APPROVING *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49. REVIEWING *Warner v. Erie R. Co.*, 39 N. Y. 468.—FOLLOWED IN *Galveston, H. & S. A. R. Co. v. Daniels*, 1 Tex. Civ. App. 695; *Missouri Pac. R. Co. v. Bond*, 2 Tex. Civ. App. 104; *Ft. Worth & D. C. R. Co. v. Wilson*, 3 Tex. Civ. App. 583.

A conductor was injured through defects in the roadbed. The court instructed the jury that "a railroad company is bound to keep its track in such repair as to insure the safety of all persons lawfully upon it, and this extends to servants of the company." *Held*, that the instruction went too far. A company is bound to use ordinary care, which must be measured by the danger of the service and proportioned to it, but it is not bound to "insure" the safety of employés. *Colorado C. R. Co. v. Ogden*, 3 Colo. 499.

(2) *Reasonable care and diligence.*—As to its employés and servants a railway company must, as a general rule, exercise all reasonable care and diligence to place its roadbed, track, and structures in a safe condition, and keep them so. *Chicago & A. R. Co. v. Kerr*, 148 Ill. 605, 35 N. E. Rep. 1117.

A railroad company is bound to exercise reasonable care to furnish safe machinery, roadbed, track, and structures connected therewith, and a person entering its employment has a right to presume that the company has discharged its duty in this behalf. *Whalen v. Illinois & St. L. & C. Co.*, 16 Ill. App. 320.—QUOTING *Chicago & I. R. Co. v. Russell*, 91 Ill. 298. REVIEWING *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197; *Illinois C. R. Co. v. Welch*, 52 Ill. 183.—*Devlin v. Wabash, St. L. & P. R. Co.*, 28 Am. & Eng. R. Cas. 524, 87 Mo. 545.

What is reasonable care in furnishing employés with a safe track depends on the surroundings and the dangers to be fairly apprehended and encountered by the servant in the use of the track. *Devlin v. Wabash, St. L. & P. R. Co.*, 28 Am. & Eng. R. Cas. 524, 87 Mo. 545.

If these duties are performed with care and diligence by the directors, and one of the persons so employed is guilty of negligence, by which an injury occurs to another employé, it is not the negligence of the directors, or master, and the company is

not responsible. *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174.—DISAPPROVING *Warner v. Erie R. Co.*, 49 Barb. (N. Y.) 558.—QUESTIONED IN *Nall v. Louisville, N. A. & C. R. Co.*, 48 Am. & Eng. R. Cas. 309, 129 Ind. 260.

An instruction "that the master's duty is absolute, that he must furnish reasonably safe machinery, etc., and keep the tracks in reasonable repair," is erroneous; for he is bound only to use due and reasonable care to that end. *Peoria, D. & E. R. Co. v. Hardwick*, 48 Ill. App. 562.

A railroad company is bound to use reasonable care for the safety of its employés; but it is not the absolute duty of the company, without regard to the degree of care used by it to effect the purpose, to make all necessary guards against danger, caused by ordinary storms, and to guard against landslides, washouts, and obstructions which might endanger the lives of employés. *Gates v. Southern Minn. R. Co.*, 2 Am. & Eng. R. Cas. 237, 28 Minn. 110, 9 N. W. Rep. 579.

(3) *Utmost care and vigilance*.—A company owes to its employés the duty of using the utmost care and vigilance consistent with the practical operation of its road in keeping its tracks in safe condition. *Chicago & A. R. Co. v. Kerr*, 48 Ill. App. 231.—QUOTING *Toledo, P. & W. R. Co. v. Conroy*, 68 Ill. 560.

In an action by a fireman to recover for a personal injury resulting from a defect in the railroad track, it is error to instruct the jury, "as a matter of law, that a railway company owes the duty to its employés to do all that human care, vigilance, and foresight can do, consistently with the practical operation of its road, in providing a safe road, roadbed, tracks, ties, and rails, and to keep the same in repair," as it requires too strict a rule, and a higher degree of care than that required by the law. *Chicago & A. R. Co. v. Kerr*, 148 Ill. 605, 35 N. E. Rep. 1117.

47. Must employ skilful constructors.—It is the duty of a company constructing a railroad to employ a competent, skilled person to see to it that its road is reasonably safe for the transportation of its workmen—not necessarily as safe as a road fully completed and equipped for the carriage of passengers, but as safe as the circumstances of the case will reasonably allow. *Colorado Midland R. Co. v. O'Brien*,

48 Am. & Eng. R. Cas. 235, 16 Colo. 219, 27 Pac. Rep. 701.

48. Illustration generally.—Plaintiff's intestate, with others, was engaged in removing a wreck, when a derrick swung around and upset a car and killed him. It appeared that recent rains had softened the ground and that one of the rails was several inches lower than the other, which was sufficient to cause the derrick to swing; that this was where the track was straight. There was also evidence tending to show that there were not enough ties under the rails. *Held*, that such a slant in the track constituted negligence, whether it was caused by the original construction or by the sinking of the earth by the rains; and the question as to whether it existed was properly submitted to the jury. *Atchison, T. & S. F. R. Co. v. Wilson*, 48 Fed. Rep. 57, 4 U. S. App. 25, 1 C. C. A. 25.

Where an employé is riding upon a gravel train back to the working camp to get a coat which he had left there, it not being the habit of the company to transport employés for this purpose, he cannot be considered as a trespasser, and the company is responsible for injuries sustained by him through defects in the track. *Rosenbaum v. St. Paul & D. R. Co.*, 34 Am. & Eng. R. Cas. 274, 38 Minn. 173, 36 N. W. Rep. 447.

Plaintiff, a brakeman on one of defendant's trains, while forcing an intoxicated passenger to get off the side step and into the car, was knocked off and injured by a train moving in an opposite direction. It appeared that the tracks were improperly laid, being too close for trains to pass safely; that the outer rail was not raised, and that the curve was made of straight instead of curved rails; that it was not safe for trains to pass each other on the curve. There were no rules that trains should not pass each other upon the curve, or, if they did, that they should slacken speed, or that all persons must keep off the steps while rounding the curve. *Held*, that these facts, unexplained, would warrant a jury in finding defendant guilty of negligence, and a motion for a nonsuit was properly denied. *Mulvaney v. Brooklyn City R. Co.*, 1 Misc. 425, 49 N. Y. S. R. 637, 21 N. Y. Supp. 427.

A brakeman on the top of a box car which was turned over on account of rotten ties on the roadbed, had his thigh broken, and back and kidneys injured, causing him to urinate with difficulty, and was confined

to bed with painful suffering for nine months. The broken limb when cured was two inches shorter than before the injury was inflicted, and he was permanently incapacitated for labor. Before the injury his wages were \$60 per month. *Held*, the employé, having no actual knowledge of the worthless and dangerous roadbed, was not charged with notice of it by reason of his employment, which did not require or permit an inspection of it. The company's failure to furnish a safe roadbed on which the brakeman was required to discharge his duties rendered it liable in damages. *Houston & T. C. R. Co. v. McNamara*, 59 Tex. 255.

A brakeman on a railway train was ordered at night by the conductor to make a coupling on a portion of the roadbed which was completed, though operated for construction purposes only. In doing so he stepped into a depression in the road track between the cross-ties at a place which had not been filled up, and fell down; as he pulled his foot out the pilot of the engine ran over him, catching and crushing his foot and leg. The only fact shown to relieve the road from liability was that it was not open for the general business of transportation. *Held*, that the road was liable for resulting damages. *Gulf, C. & S. F. R. Co. v. Redeker*, 67 Tex. 181, 2 S. W. Rep. 513.

A train of six cars was run along a coal wharf, upon a wooden structure twenty-five feet high and 300 feet long. At the end was only a log chained to the wharf. The chain gave way and let the cars pass over the end, killing the plaintiff's intestate, who was a brakeman. The defendant had ordered timbers four years before to build a dead-block, but it was not built. *Held*, negligence on the part of defendant company caused the death of plaintiff's intestate, and it is liable. *Norfolk & W. R. Co. v. Gilman*, 88 Va. 239, 13 S. E. Rep. 475.

The fact that a spur track is so constructed that cars may be drawn therefrom to the main line by an engine, or "staked off," and that the men engaged in removing the cars choose the method of "staking off," whereby injury results to an employé, does not render the railroad liable on the ground of defective construction of the track, or the omission to furnish safe and suitable appliances to its servants. *Watts v. Hart*, 7 Wash. 178, 34 Pac. Rep. 423, 771.

40. Ditches.—A portion of the evi-

dence introduced tended to show that the plaintiff's intestate, who was a yard switchman, and whose duty it was to couple cars, and who was a new man in the yard, and had but little knowledge of the same, while attempting to couple a flat car loaded with projecting bridge timbers, and a box car, properly went in between them to couple them, and stepped into a ditch made by the company, of which ditch he did not have previous knowledge, and slipped, and, in recovering himself, so raised his head that it came between the projecting timbers and the box car, and was so crushed that he immediately died. *Held*, that such evidence tended to show negligence on the part of the railroad company, and did not necessarily show negligence on the part of the plaintiff's intestate. *Brown v. Atchison, T. & S. F. R. Co.*, 15 Am. & Eng. R. Cas. 271, 31 Kan. 1, 1 Pac. Rep. 605; *former appeals* 26 Kan. 443, 29 Kan. 186.

Plaintiff's intestate was moving with a train for the purpose of coupling it to stationary cars, and stepped in an open ditch some six or eight inches wide under the track, and was killed before he could extricate himself. There was a conflict of evidence as to whether it was practicable to construct a covered ditch at the place. *Held*, that it was error to charge the jury that the defendant was guilty of negligence, if the jury believed that the ditch was more unsafe than a covered ditch would have been, though the uncovered ditch had been constructed after due inquiry, and because it was believed to be secure. *De Forest v. Jewett*, 19 Hun (N. Y.) 509.

Plaintiff, a brakeman, was injured while coupling cars at night by falling into a ditch across the track. The evidence was conflicting as to how far plaintiff knew or had been warned of the danger, and as to the condition of the track. A verdict of \$5000 being rendered for plaintiff—*held*, that it would not be disturbed. *Houston & T. C. R. Co. v. Pinto*, 15 Am. & Eng. R. Cas. 286, 60 Tex. 516.

50. Excavations.—It is not the rule that a railroad company owes no duty to its employés respecting the roadbed of its side tracks, nor is a dangerous hole in the bed of a side track necessarily a risk which they assume. *Ragon v. Toledo, A. A. & N. M. R. Co.*, 91 Mich. 379, 51 N. W. Rep. 1004.

51. Floods.—A company, in discharging its duty to its employé in the matter of

protecting its roadbed from damage by water, is required to provide against such storms and floods as can be reasonably anticipated. *Stoher v. St. Louis, I. M. & S. R. Co.*, 105 Mo. 192, 16 S. W. Rep. 591.

A company which has performed the duty of inspecting and keeping in safe condition its tracks and roadbed with that degree of diligence which the law requires of it, is not liable in damages to one of its engineers for injuries occasioned by running his engine into a washout or chasm caused by a sudden, most violent, and unprecedented rainfall, such as the oldest inhabitants of the neighborhood had never before witnessed, the calamity being directly attributable to the act of God, for which no individual or corporation is ever held responsible. *Central R. & B. Co. v. Kent*, 87 Ga. 402, 13 S. E. Rep. 502; *former appeal* 84 Ga. 351.

52. Rails.—That a railroad company is not liable to an employé injured by reason of the breaking out of a piece of the flange on one of the rails, if the accident is in no way due to the company's negligence, see *Chicago & A. R. Co. v. Dunn*, 23 Ill. App. 148.

53. Turntables.—Whatever may be the character or capacity of a turntable, if it is sufficient to do the service required without danger to those servants who are required to be present and engaged in or about it, it is sufficient. *East Tenn., V. & G. R. Co. v. Toppins*, 11 Am. & Eng. R. Cas. 222, 10 Lea (Tenn.) 58.

Plaintiff was employed to operate a turntable by means of a crank that was stationary upon and revolved with the turntable, and a track was laid in such proximity to the turntable that while an engine was on the turntable, being turned by plaintiff, it was struck by an engine passing upon the track, causing the crank to strike plaintiff by a reverse motion, inflicting the injury complained of. *Held*, that whether defendant was guilty of negligence in the construction and use of the track and turntable, and whether plaintiff was chargeable with contributory negligence, were questions properly left to the jury. *Lake Shore & M. S. R. Co. v. Fitzpatrick*, 31 Ohio St. 479.

In such case the evidence tended to show that the turntable was not well adapted to turning large engines, which increased the risk to the employé operating it. *Held*,

that if this rendered the operation dangerous, it was the duty of the company to make such changes as would render the handling of the larger engines reasonably safe; and if the company was negligent in not making such changes and the employé was injured as the result of such negligence, the liability of the company was the same as if the turntable had been originally negligently and defectively constructed. *Lake Shore & M. S. R. Co. v. Fitzpatrick*, 31 Ohio St. 479.

54. Use of defective track, when not deemed negligence.—In a suit against a railroad company for injury to an employé, where no recovery can be had for negligence of a co-employé, if defendant's use of the track alleged to have been insufficient was only occasional and for special purposes, and under special instructions to those in charge of trains as to the manner of running thereon, it is liable only in case it was negligence to use the track in that manner and for those purposes. *Stetter v. Chicago & N. W. R. Co.*, 46 Wis. 497, 21 Am. Ry. Rep. 402.

b. Bridges; Culverts; Trestles; Tunnels.

55. Bridges, generally.*—A railroad company is liable for the death of an employé caused by the falling of a bridge negligently constructed and maintained by the company as a part of its road. If the falling of the bridge was the act of God, the company is not liable unless it was guilty of gross negligence which contributed to the injury. *Rodgers v. Central Pac. R. Co.*, 67 Cal. 607.—REVIEWED IN *Coleman v. Kansas City, St. J. & C. B. R. Co.*, 36 Mo. App. 476.—*St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701, 16 Pac. Rep. 146. *Harrison v. Central R. Co.*, 31 N. J. L. 293.—LIMITING *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441.—*Taylor, B. & H. R. Co. v. Taylor*, 79 Tex. 104, 14 S. W. Rep. 918.

The Iowa statute makes railroad corporations liable for an injury to an employé, caused by the negligence of other employés, when such negligence is in any manner connected with the use and operation of the

* Liability of company for injuries to trainmen from colliding with bridge timbers and trusses, see 33 AM. & ENG. R. CAS. 382, *abstr.*

Killing a brakeman by reason of a defective bridge. What is a defective bridge, see 33 AM. & ENG. R. CAS. 385, *abstr.*

—railway. So where, owing to the negligence of an employé whose duty it was to look after a bridge and keep it in repair, the same became out of repair, and in consequence thereof plaintiff's intestate was killed, the company is liable. *Locke v. Sioux City & P. R. Co.*, 46 Iowa 109, 16 Am. Ry. Rep. 138.

In such case the negligence consists in the failure to keep the bridge in repair, and the duty devolving on the employé, which he negligently performed, is directly connected with the use and operation of the railway, within the meaning of the statute. *Locke v. Sioux City & P. R. Co.*, 46 Iowa 109, 16 Am. Ry. Rep. 138.

Railroad companies, in providing for the safety of their employés, are not required to anticipate and guard against every possible danger, but only such as are likely to occur. And while it may be anticipated that trains will have to be stopped in certain emergencies at unusual places, and that employés will be required to go upon the track at such places, yet it cannot be anticipated at what places such emergencies will arise; and the company is not required, in view thereof, to have its whole track so guarded as to prevent accidents to employés in such emergencies. Such hazards pertain to the nature of the business, and are assumed by the employé. *So held*, where defendant's train was stopped in the nighttime, at an unusual place, on a bridge in process of repair, and plaintiff's intestate, a brakeman, in passing along the track in the performance of his duty, stepped through the bridge and was killed. *Koontz v. Chicago, R. I. & P. R. Co.*, 18 Am. & Eng. R. Cas. 85, 65 Iowa 224, 54 Am. Rep. 5, 21 N. W. Rep. 577.—FOLLOWED IN *McKee v. Chicago, R. I. & P. R. Co.*, 48 Am. & Eng. R. Cas. 154, 83 Iowa 616. REVIEWED IN *Texas & P. R. Co. v. Hohn*, 1 Tex. Civ. App. 36.

A company is liable for a personal injury to an engineer caused by an unsafe bridge, while the road was in course of construction and not open for trade or travel. *Van Amburg v. Vicksburg, S. & P. R. Co.*, 37 La. Ann. 650, 55 Am. Rep. 517.

It is the duty of a railroad to cover bridges and culverts on the line of its road, within the yards and within a reasonable distance of switches, wherever brakemen would be apt to go in switching and coupling cars. *Franklin v. Winona & St. P. R.*

5 D. R. D.—4.

Co., 31 Am. & Eng. R. Cas. 211, 37 Minn. 409, 34 N. W. Rep. 898, 5 Am. St. Rep. 856.—DISTINGUISHED IN *McLaren v. Williston*, 48 Minn. 299.

A corporation having employed skillful and competent persons to supervise and inspect its roads and bridges, and having made it their duty to do so, is not liable for an injury to an employé, occasioned by the falling of one of its bridges, where the defect was such as was not apparent, and of which it had no notice. *Warner v. Erie R. Co.*, 39 N. Y. 468; *reversing 49 Barb.* 558.—DISTINGUISHING *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441. REVIEWING *Keegan v. Western R. Co.*, 8 N. Y. 175; *Ryan v. Fowler*, 24 N. Y. 410; *Wright v. New York C. R. Co.*, 25 N. Y. 562.—APPLIED IN *Moran v. New York C. & H. R. Co.*, 67 Barb. 96. APPROVED IN *Harper v. Indianapolis & St. L. R. Co.*, 47 Mo. 567. EXPLAINED IN *Tinney v. Boston & A. R. Co.*, 62 Barb. 218. NOT FOLLOWED IN *Laning v. New York C. R. Co.*, 49 N. Y. 521. QUOTED IN *Smith v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 32. RECONCILED IN *Brickner v. New York C. R. Co.*, 2 Lans. (N. Y.) 506. REVIEWED IN *Houston & T. C. R. Co. v. Dunham*, 49 Tex. 181; *Ballou v. Chicago & N. W. R. Co.*, 5 Am. & Eng. R. Cas. 480, 54 Wis. 257, 41 Am. Rep. 31.

Where a company buys a railroad already constructed, including a bridge which is obviously defective, and continues its use without attempting to make it safe, whereby an employé is injured, the company is liable, though the bridge had been used for several years before the purchase without accident. *Vosburgh v. Lake Shore & M. S. R. Co.*, 15 Am. & Eng. R. Cas. 249, 94 N. Y. 374, 46 Am. Rep. 148; *affirming 26 Hun* 671, *mem.*—DISTINGUISHING *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311.

Where a company is sued for an injury to one of its employés through the want of repair or careless construction of a bridge, it is no defense that the employé knew of the condition of the bridge and ventured on it in the discharge of his duty. *Groff v. Cincinnati & I. R. Co.*, 1 Cin. Super. Ct. 264.

A master, whether a common carrier or not, is only required to exercise ordinary and reasonable care for the protection of his servants. This rule is applicable to the duty of a railway company in constructing and maintaining bridges upon its line, in a suit for damages for death of an employé.

Galveston, H. & S. A. R. Co. v. Daniels, 1 Tex. Civ. App. 695, 20 S. W. Rep. 955.

The law imposes upon a railway company the duty to construct and maintain all necessary bridges upon its route; and if it failed to do so, it cannot escape liability because its employés, charged with such duty, were guilty of negligence, nor because it had exercised due care in selecting its employés. *Galveston, H. & S. A. R. Co. v. Daniels*, 1 Tex. Civ. App. 695, 20 S. W. Rep. 955. — DISTINGUISHING *Hendrick v. Walton*, 69 Tex. 192. FOLLOWING *Houston & T. C. R. Co. v. Dunham*, 49 Tex. 181.

56. Illustrations.—A verdict in favor of a brakeman will not be disturbed, where it appears that, while in the discharge of his duties, and without contributory negligence, he was knocked from a train while ascending a ladder on the side of a box car, by striking the stays of a bridge, caused by the track being some inches nearer to the bridge on that side than on the opposite side. *Fl. Worth & D. C. R. Co. v. Graves*, (Tex. Civ. App.) 21 S. W. Rep. 606.

The representative of an employé may recover for the drowning of his intestate, who was engaged in removing driftwood from a temporary railroad bridge, a portion of which gave way, who, after floating with other workmen for some distance on the drift, being in imminent danger, jumped off and attempted to swim to the shore, but was drowned, it appearing that the superintendent in charge of the work knew of the great danger of the bridge giving way, but took no measures to prevent it, or to provide escape for the men, although those who remained on the floating drift were rescued. *Louisville & N. R. Co. v. Shivel*, (Ky.) 18 S. W. Rep. 944.

In an action for the death of a workman while being carried on an engine, it was proved that during the night preceding the accident the ice in the river over which the bridge crossed had, in consequence of a heavy gale and high tide, been forced against the piers of the bridge, displacing some of them, by reason of which the engine broke through the bridge and the workman was killed. *Held*, that the jury were properly directed that defendants were only bound, in the construction of the bridge, to provide against dangers that could reasonably be foreseen by reasonable men in the exercise of ordinary sagacity; but if the bridge was so constructed that it was de-

stroyed by a storm such as might reasonably have been anticipated, defendants would be liable. *Carney v. Caraque R. Co.*, 29 New Brun. 425.

A railroad company was sued for killing the conductor of a freight train, caused by a bridge giving way which was being repaired. The proof showed that he was running the train at an immoderate rate of speed, and it did not appear that the accident would have happened if the train had been properly run. *Held*, that the company was not liable for failing to provide a safe track. *St. Louis, I. M. & S. R. Co. v. Morgart*, (Ark.) 8 S. W. Rep. 179.

A railroad company cannot be required to remove a bridge which is without fault in its plan or defect in its structure, while in good repair and safe for the passage of trains, simply because some engineer pronounces it not as good and convenient as some other kind. *Illick v. Flint & P. M. R. Co.*, 67 Mich. 632, 12 West. Rep. 440, 35 N. W. Rep. 708.

A railroad bridge broke down and killed a brakeman. The evidence showed that it was well built, of good, sound materials, upon a plan in common use. The evidence as to its strength and capacity was abundant. Its breaking down was in no sense due to any defect in its original construction, but to a process of natural decay, called dry rot. The day before it fell it was inspected by a bridge repairer and the division superintendent, both competent men, and tested and watched under the weight of a train, and was deemed by them entirely safe and sound. *Held*, that the company was not liable either on the ground of a defect in its construction or by reason of the employment of incompetent, unskillful, or improper persons to examine the bridge. *Faulkner v. Erie R. Co.*, 49 Barb. (N. Y.) 324.—EXPLAINED IN *Tinney v. Boston & A. R. Co.*, 62 Barb. 218.

57. Covered and overhead bridges.*

—In the construction and maintenance of a bridge across a public road it is the duty of a railroad company to erect and keep the structure at such an elevation that trains can pass under it with safety to brakemen and other employés while in the discharge

* Liability of railroad companies for injuries to trainmen caused by overhead bridges, tunnels, and roofs of freight depots, see note, 48 AM. & ENG. R. CAS. 181; 41 *Id.* 256; 13 AM. ST. REP. 93; 53 AM. REP. 699. See also BRIDGES, 25.

of their ordinary duties; and although it may be placed below the line of absolute safety when inequality of surface or other natural hindrance would render a greater elevation impracticable, or greatly incommode the public in the use of the bridge, or unduly increase the expense to the railroad company, yet an additional expense of a few hundred dollars is too insignificant to be weighed in the balance against the peril to human life. *Louisville & N. R. Co. v. Hall*, 48 Am. & Eng. R. Cas. 170, 91 Ala. 112, 8 So. Rep. 371.

In an action for the killing of a brakeman by being struck by a brace of the top of a covered bridge, the real question for the jury will be whether the bridge as constructed was safe, and not dangerous. If the bridge as constructed was of a sufficient height, so that the brakeman on the top of the car might cross over the bridge in safety, then it will make no difference whether the bridge was higher or lower than other bridges. *Cleveland, C. & St. L. R. Co. v. Walter*, 147 Ill. 60, 35 N. E. Rep. 529; affirming 45 Ill. App. 642.

Where a company has constructed and maintains a bridge over its track with knowledge that it is of insufficient height and dangerous to its employes, it is liable to a brakeman, ignorant of the danger, who is injured while passing under such bridge in the performance of his duties. *Baltimore & O. R. Co. v. Rowan*, 23 Am. & Eng. R. Cas. 390, 104 Ind. 88, 3 N. E. Rep. 627.—NOT FOLLOWING *Baylor v. Delaware, L. & W. R. Co.*, 40 N. J. L. 23, 29 Am. Rep. 208; *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47, 34 Am. Rep. 291; *Devitt v. Pacific R. Co.*, 50 Mo. 302; *Pittsburgh & C. R. Co. v. Sentmeyer*, 92 Pa. St. 276, 37 Am. Rep. 634; *Clark v. Richmond & D. R. Co.*, 78 Va. 709, 49 Am. Rep. 394; *Gibson v. Erie R. Co.*, 63 N. Y. 449, 20 Am. Rep. 552.—APPROVED IN *Boss v. Northern Pac. R. Co.*, 2 N. Dak. 128. DISTINGUISHED IN *Williamson v. Newport News & M. V. Co.*, 34 W. Va. 657. REVIEWED IN *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, 11 West. Rep. 877, 14 N. E. Rep. 391.

There is no legal obligation on the part of a company to build its bridges over public roads with an elevation so great that one of its employes standing upright on the top of a car will not be endangered; and consequently, if an employé while thus standing in the course of his business be struck by

one of such bridges he cannot recover for such injury. *Baylor v. Delaware, L. & W. R. Co.*, 40 N. J. L. 23, 17 Am. Ry. Rep. 344.—APPROVED IN *Carbine v. Bennington & R. R. Co.*, 61 Vt. 348. NOT FOLLOWED IN *Chicago, M. & St. P. R. Co. v. Carpenter*, 56 Fed. Rep. 451; *Baltimore & O. R. Co. v. Rowan*, 23 Am. & Eng. R. Cas. 390, 104 Ind. 88.

In an action by a conductor of a freight train for injuries received, it was shown that while engaged in the performance of duty on the top of a car, and while the train was passing through a bridge, he collided with overhead braces which were not sufficiently high to clear a man's head when standing erect on the top of an ordinary car. Held, that the company was liable, as it had knowledge, and the conductor not knowing, nor having reasonable opportunity to know, of the defect. *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701, 16 Pac. Rep. 146.

A brakeman cannot recover for injuries sustained on account of a low overhead bridge where the company, as lessee of another company, which was under the control of the province of Ontario, was not under any duty to have remodeled and reconstructed such bridge under the Railways Clauses Consolidation Act 1879, § 15, subsection 5, as amended by 44 Vict. c. 24 § 3, or the Act of Ontario, 44 Vict. c. 22. *McLaughlin v. Grand Trunk R. Co.*, 12 Ont. 418.

58. Whipping straps, tell-tales, etc.

—Railway companies are under an obligation to all persons who have a right to be on top of their trains in the discharge of any duty, to so construct overhead bridges, or other overhanging structures, that they will not expose such persons to any risk or peril that can easily, and without any great outlay, be avoided; and if any such structure is for any reason maintained, it is the company's duty, in the exercise of ordinary care, to give warning, either verbally or by suspended "whip lashes." *Chicago, M. & St. P. R. Co. v. Carpenter*, 56 Fed. Rep. 451.—NOT FOLLOWING *Baylor v. Delaware, L. & W. R. Co.*, 40 N. J. L. 23; *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47; *Pittsburgh & C. R. Co. v. Sentmeyer*, 92 Pa. St. 276; *Gibson v. Erie R. Co.*, 63 N. Y. 449.

A railroad corporation is liable to one of its employes for an injury occasioned to him by being struck by a bridge guard, if

the guard is out of its proper position and this is caused by the wearing out of a rope attached to the guard, and the corporation has not made suitable provision to have notice of, and to remedy, defects liable to be occasioned by its use. *Warden v. Old Colony R. Co.*, 21 *Am. & Eng. R. Cas.* 612, 137 *Mass.* 204.

New York Act of 1884, ch. 439, § 2, makes it the duty of railroad companies to erect and maintain suitable warning signals at low overhead bridges, where the safety of employes may make the same necessary. *Held*, that it is the duty of a company not only to erect but to maintain such warnings; and where a warning, commonly called "tell-tales," had been erected, their absence afterward is proof of negligence, where a brakeman is injured while on top of the train. *Wallace v. Central Vt. R. Co.*, 52 *N. Y. S. R.* 351, 138 *N. Y.* 302; *reversing* 63 *Hun* 632, *mem.*, 43 *N. Y. S. R.* 639, 18 *N. Y. Supp.* 280.

In such case the evidence showed that the train was long, and it was contended that the tell-tales had been erected too close to the bridge. *Held*, that whether they were erected at the proper place was a question for the jury. *Wallace v. Central Vt. R. Co.*, 52 *N. Y. S. R.* 351, 138 *N. Y.* 302; *reversing* 63 *Hun* 632, *mem.*, 43 *N. Y. S. R.* 639, 18 *N. Y. Supp.* 280.

As bearing upon the question of whether the tell-tales were erected at the proper place or not, it is competent to prove by witnesses the usual and ordinary distance to erect them from a bridge. *Wallace v. Central Vt. R. Co.*, 52 *N. Y. S. R.* 351, 138 *N. Y.* 302; *reversing* 63 *Hun* 632, *mem.*, 43 *N. Y. S. R.* 639, 18 *N. Y. Supp.* 280.

Plaintiff was standing with his face to the rear of the train, in a position most effectually to discharge his duty; he had been in defendant's employ for several weeks, and knew of the existence of the bridge, but was not at the time aware that he was approaching it, and had no warning of the danger. *Held*, that plaintiff was not as matter of law chargeable under the circumstances with contributory negligence because he did not take notice of the fact that he was approaching the bridge. *Wallace v. Central Vt. R. Co.*, 138 *N. Y.* 302, 52 *N. Y. S. R.* 351, 33 *N. E. Rep.* 1069; *reversing* 63 *Hun* 632, *mem.*, 43 *N. Y. S. R.* 639, 18 *N. Y. Supp.* 280.—DISTINGUISHING *McGrath v. New York C. & H. R. R. Co.*, 59 *N. Y.* 468, 63 *N. Y.* 522;

Cullen v. Delaware & H. Canal Co., 113 *N. Y.* 667; *Rodrian v. New York, N. H. & H. R. Co.*, 125 *N. Y.* 526; *Williams v. Delaware, L. & W. R. Co.*, 116 *N. Y.* 628. REFERRING TO *Kane v. Northern C. R. Co.*, 128 *U. S.* 91.

The tell-tale was placed fifty-one feet from the bridge. One of plaintiff's witnesses was asked, "What is the usual and ordinary distance to erect these tell-tales from the bridge?" This was objected to as incompetent, and the objection sustained. *Held*, error; that it was competent for plaintiff to prove that the tell-tale was placed too near the bridge to answer the purpose of the statute, and upon that point it was proper to show the custom in this respect. *Wallace v. Central Vt. R. Co.*, 138 *N. Y.* 302, 52 *N. Y. S. R.* 351, 33 *N. E. Rep.* 1069; *reversing* 63 *Hun* 632, *mem.*, 43 *N. Y. S. R.* 639, 18 *N. Y. Supp.* 280.

A failure to comply with N. Y. Act of 1884, ch. 439, § 2, requiring railroad companies to erect and maintain suitable warning signals at low overhead bridges, where the protection of employes may make it necessary, will not render a company liable for the death of a brakeman, where the evidence shows that his attention had been previously called to the bridge, with an opportunity to observe its condition and the absence of warning signals, and where there is no proof that he exercised any care or caution to avoid the accident. *Fitzgerald v. New York C. & H. R. R. Co.*, 36 *N. Y. S. R.* 755, 12 *N. Y. Supp.* 932.—QUOTING *Williams v. Delaware, L. & W. R. Co.*, 116 *N. Y.* 632, 27 *N. Y. S. R.* 760; *Ryan v. Long Island R. Co.*, 51 *Hun* 608, 22 *N. Y. S. R.* 655.—REVIEWED IN *Lynch v. New York, L. E. & W. R. Co.*, 44 *N. Y. S. R.* 663, 63 *Hun* 635, 18 *N. Y. Supp.* 417.

A brakeman was injured by a blow from a railroad tell-tale, which was sufficiently raised above ordinary freight cars, but not sufficiently raised above some of the cars used by the railroad company. *Held*, that maintaining a tell-tale of insufficient height or undue rigidity was a breach of the company's duty to provide safe appliances for its employes; that the risk of injury from such a tell-tale was not one of the ordinary risks of his employment assumed by the brakeman; and no evidence showing that the brakeman knew the condition of the tell-tale in question, that the defendant company was liable for the injury. *Darling*

v. New York, P. & B. R. Co., 17 R. I. 708, 24 Atl. Rep. 462.

In the use of appliances or instrumentalities such as "whipping straps," or ropes pendent from above, as cautionary signals to brakemen when the train is approaching a low bridge or a tunnel, the duty and liability of a railroad company are determined by utility and the usage and custom of well-regulated roads; and their use by many, or even a majority of roads, does not, *per se*, impute negligence on account of the failure to use them, since allowance must be made for a difference of judgment as to such matters. *Louisville & N. R. Co. v. Hall*, 48 Am. & Eng. R. Cas. 170, 91 Ala. 112, 8 So. Rep. 371.

59. Illustrations.—A brakeman was killed by striking an overhead bridge while sitting on the top of an unusually high car. The evidence showed that the car was three feet higher than ordinary box cars, which left a space of only four feet and seven inches between the top of the car and the bridge, with braces extending diagonally to the sides of the bridge, which came still closer to the sides of the car, and that the brakeman was killed while sitting at one side of the car. *Held*, that the company was bound to know the character of the bridge, that the brakeman would be required to be on top of the train, and the height of the car; and, in the absence of warning, it was liable. *Cleveland, C. & St. L. R. Co. v. Walter*, 45 Ill. App. 642.

In such case the company could not avoid liability by showing that it received the car from another company, and under the statute was bound to transport it. The law only requires connecting freight lines to receive from each other proper freight, and does not require one company to receive from another and haul over its road a car which might be dangerous. *Cleveland, C. & St. L. R. Co. v. Walter*, 45 Ill. App. 642.

A railroad company which constructs and maintains a bridge over its track so low that a brakeman cannot, while his train is passing thereunder, walk or stand upon the cars, or even apply the brakes, without injury, is guilty of negligence, and liable to one who, having no knowledge of the peril, is injured while in the discharge of his duty. *Louisville, N. A. & C. R. Co. v. Wright*, 38 Am. & Eng. R. Cas. 41, 115 Ind. 378, 13 West. Rep. 798, 16 N. E. Rep. 145, 17 N. E. Rep. 584.

In an action under Mass. St. of 1887, ch. 270, for causing the death of a brakeman, who was apparently killed by his head coming in contact with a bridge while riding on the top of a tall refrigerator car attached to a freight train, the declaration alleged negligence in running the car under the bridge, and also in improperly guarding the approach to the bridge. At the trial there was evidence that the speed of the train was about twenty miles an hour, which was unusual; and that the tell-tale guarding the approach to the bridge was out of order. The jury were instructed that, in order to find for the plaintiff, they must be satisfied that the defendant was negligent in not having the tell-tales, and that their absence was the cause of the accident. *Held*, that the defendant had no ground of exception. *Maher v. Boston & A. R. Co.*, 158 Mass. 36, 32 N. E. Rep. 950.

Plaintiff having been struck and injured by the roof of a bridge while acting as brakeman on top of the defendant's train, brought his action for damages. There being some evidence that he was put in such position by his employer, the railroad company; that the bridge was known to the defendant to be too low to permit a person to stand erect with safety on top of a passing car; and that plaintiff was uninformed and unwarned of this danger, the circuit judge did not err in refusing to grant a nonsuit or to direct a verdict for defendant. *Atlee v. South Carolina R. Co.*, 21 So. Car. 550, 53 Am. Rep. 699, n.—DISTINGUISHING *Davis v. Columbia & G. R. Co.*, 21 So. Car. 93.

60. Culverts.*—A railroad company is liable in an action on behalf of its fireman, killed by the washing out of a culvert, the culvert being in an improper condition resulting from the negligence and carelessness of its bridge builder and road master. *Davis v. Central Vt. R. Co.*, 55 Vt. 84, 45 Am. Rep. 590.—DISTINGUISHED IN *Miller v. Southern Pac. Co.*, 20 Oreg. 285. QUOTED IN *Calvo v. Charlotte, C. & A. R. Co.*, 28 Am. & Eng. R. Cas. 327, 23 So. Car. 526, 55 Am. Rep. 28.

61. Trestles.—A brakeman may main-

* Injuries to employes from failure to construct culvert. When question of negligence for the jury, see 53 AM. & ENG. R. CAS. 106, *abstr.*

Liability of company to employes for injuries caused by washouts. Proof as to sufficiency of culverts, see 44 AM. & ENG. R. CAS. 504, *abstr.*

tain an action for personal injuries occasioned, while in the exercise of due care, by the fall of a trestle-work supporting a portion of a spur track, which was intended for use for an indefinite period of time, if the fall is caused partly by the defective construction of the trestle-work and partly by negligence of the fellow-servants of the plaintiff. *Elmer v. Locke*, 15 Am. & Eng. R. Cas. 300, 135 Mass. 575.—DISTINGUISHING *Lovegrove v. London, B. & S. C. R. Co.*, 16 C. B. N. S. 669; *King v. Boston & W. R. Co.*, 9 Cush. (Mass.) 112; *Sammon v. New York & H. R. Co.*, 62 N. Y. 251; *Potts v. Port Carlisle D. & R. Co.*, 2 L. T. 283. QUOTING *Ladd v. New Bedford R. Co.*, 119 Mass. 412.—FOLLOWED IN *Morrissey v. Hughes*, 65 Vt. 553.

In constructing a railroad a trestle was run out some distance, varying from twenty-one to twenty-four feet high, for the purpose of dumping dirt from small cars. Plaintiff was a laborer employed in constructing the trestle, under the direction of a foreman, and while assisting in placing a bent in position, the whole structure fell and plaintiff was injured. After proving fully the manner of the construction, several civil engineers were called as witnesses, who testified that the structure was unsafe. *Held*, sufficient to show that due care had not been exercised for the safety of the employes. *Woods v. Lindvall*, 48 Fed. Rep. 62, 4 U. S. App. 49, 1 C. C. A. 37; *affirming on another point* 47 Fed. Rep. 195.

62. Tunnels.—Plaintiff, in an action brought for injuries sustained while employed by defendant as a brakeman, testified that as his train was approaching a tunnel he was warned by the "tell-tale" and sat down on the top of a box car, which was eleven feet two inches high. It appeared that the tunnel was twenty feet high at its entrance, but had a brick arch fifteen feet nine inches high, which began 200 feet in, where plaintiff claimed he was struck on the head, etc. *Held*, that the negligence of defendant was not established, it being physically impossible for plaintiff to receive a blow on the head from the arch in the manner detailed, with a space above the car of four feet and seven inches. *Hunter v. New York, O. & W. R. Co.*, 116 N. Y. 615, 27 N. Y. S. R. 729, 23 N. E. Rep. 9.—APPLIED IN *Gurley v. Missouri Pac. R. Co.*, 104 Mo. 211.

Plaintiff, a brakeman, was on top of a car

eleven feet and two inches high, and he approached a tunnel which was twenty feet high at the entrance, but it seemed some two hundred feet in that the arch dropped to fifteen feet and nine inches. The brakeman was picked up in the tunnel, after the train had passed, seriously injured. He testified that on entering the tunnel he arose to go to another brake and knew nothing thereafter. *Held*, sufficient to support a verdict in his favor. *Hunter v. New York, O. & W. R. Co.*, 32 N. Y. S. R. 713, 57 Hun 591, 10 N. Y. Supp. 795; *affirmed in* 130 N. Y. 669, *mem.*, 29 N. E. Rep. 1034, 41 N. Y. S. R. 951.

c. Blocking Frogs, Guard Rails, and Switches.*

63. Duty to block frogs, generally.—The duty of keeping the frogs in its yards filled or blocked is one that a railroad company cannot delegate to any of its employes so as to relieve itself from the obligation imposed by the statute, under which it is required to keep its yards reasonably safe in this respect, which duty is of such a character that the person or persons to whom it is intrusted stand in the place of the railroad company, and their neglect is its neglect. *Ashman v. Flint & P. M. R. Co.*, 53 Am. & Eng. R. Cas. 80, 90 Mich. 567, 51 N. W. Rep. 645.

It is the duty of a railroad company not only to employ men to perform the work of blocking its frogs, and furnish the necessary material for that purpose, but it must also see that the men so employed are not negligent in performing their work. *Ashman v. Flint & P. M. R. Co.*, 53 Am. & Eng. R. Cas. 80, 90 Mich. 567, 51 N. W. Rep. 645.

The company is not bound to block its frogs, particularly if it does not appear that in so doing it would not entail greater dangers than it would avert. *McGinnis v. Canada Southern Bridge Co.*, 8 Am. & Eng. R. Cas. 135, 49 Mich. 466, 13 N. W. Rep. 819.

Leaving a frog in its track unguarded is not such negligence on the part of a railroad company as will, at common law, ren-

* Statutory liability of railroad companies. Failure to guard frogs and tracks. Contributory negligence of employé, see 48 Am. & Eng. R. Cas. 391, *abstr.*

Defective switches and unblocked frogs; injuries to employes from, see note, 37 Am. & Eng. R. Cas. 347.

der it absolutely liable for injuries resulting therefrom, regardless of the contributory negligence of the person injured. *Holum v. Chicago, M. & St. P. R. Co.*, 80 Wis. 299, 50 N. W. Rep. 99.

If an employé of a railroad corporation is injured by having his foot caught in a frog in the track of another railroad corporation, while engaged in delivering a car to the latter upon its tracks in the regular course of business between the two corporations, it is a question for the jury, in an action against the last-named corporation for the injury, whether the defendant had assumed the duty of blocking all the frogs, and keeping them blocked, for the safety of its own employés, as required by Mass. St. of 1886, ch. 120. *Turner v. Boston & M. R. Co.*, 158 Mass. 261, 33 N. E. Rep. 520.

Decedent was employed by defendants as a switchman in the station yards. In discharging his duties his foot caught in a "frog," and while held fast he was run over and killed. The frog had been "blocked," but the blocking had worn down to some extent. At the trial of an action by the widow and child, the presiding judge, at the close of plaintiffs' case, held that there was no evidence to go to the jury. Plaintiffs' counsel declined to take a nonsuit or to permit leave to be reserved to enter a nonsuit in term. The judge then told the jury to bring in a verdict for defendants, and allowed no addresses by counsel. The jury found a verdict for plaintiffs. Upon a motion in term to set aside the verdict—*held*: (1) that neither the trial judge nor the court could enter a nonsuit against plaintiffs' desire; (2) that the verdict would not necessarily be set aside, but would be allowed to stand if the trial judge was plainly and certainly right in point of law; (3) that in the absence of evidence that the system of blocking was defective or that the blocking of this particular frog was imperfect, and there being evidence that the company employed proper and competent workmen to keep the frogs in repair, there was no case for the jury; (4) the *onus* of proving the incompetency of the workmen was on plaintiffs; (5) it was for plaintiffs to prove that the deceased was ignorant of the dangerous character of the frog and that defendants were aware of it. *Rajotte v. Canadian Pac. R. Co.*, 5 Man. 365.

64. Statutory requirements as to.—

Whether Mich. Act No. 174, Laws of 1883, p. 191 (3 How. St. § 3397 *a*), requiring railroad companies so to adjust, fill, or block the frogs, switches, and guard rails on their roads as to prevent the feet of employés from being caught therein, applies to "split switches," so called, which were not in use at the time of the passage of said act, *quare*. *Grand v. Michigan C. R. Co.*, 48 Am. & Eng. R. Cas. 383, 83 Mich. 564, 47 N. W. Rep. 837.

The failure of a railroad company to comply with the provisions of said act will render it liable to an employé who is thereby injured, in a case where the law applies, if he is not himself guilty of negligence. *Grand v. Michigan C. R. Co.*, 48 Am. & Eng. R. Cas. 383, 83 Mich. 564, 47 N. W. Rep. 837.

Said act was passed upon the urgent demand of the people that such measures be taken to avoid the constantly recurring danger to life and limb from open frogs. *Ashman v. Flint & P. M. R. Co.*, 53 Am. & Eng. R. Cas. 80, 90 Mich. 567, 51 N. W. Rep. 645.

The Ohio Act of March 23, 1888, requires railroad companies in the state "to adjust, fill, or block the frogs, switches, and guard rails on its tracks" for the purpose of preventing employés from being caught therein. *Held*, that the word "employé," within the meaning of the statute, includes all persons who, by rightful authority, are engaged in walking over such frogs or guard rails, whether paid by the company owning the track, or another; which includes a person employed by one company to take the number of its cars and inspect their seals, as a train is being made up by another company. *Atkyn v. Wabash R. Co.*, 41 Fed. Rep. 193, 23 Ohio L. J. 151.

A failure to comply with the above statute does not give an injured employé a right of action against the company because his foot is caught in a rail, where it appears that the accident would have happened if the statute had been complied with. *Atkyn v. Wabash R. Co.*, 41 Fed. Rep. 193, 23 Ohio L. J. 151.

Wis. Laws of 1889, ch. 123, requiring every railroad company to erect and maintain guards or blocks at every frog, and providing that the company shall be liable for all damages sustained by reason of its failure to do so, whether the person injured

be an agent or servant of the company or not, and notwithstanding such failure may occur through the negligence of any other agent or servant thereof, does not take away the defense of contributory negligence. *Holm v. Chicago, M. & St. P. R. Co.*, 80 Wis. 299, 50 N. W. Rep. 99.—DISTINGUISHING *Quackenbush v. Wisconsin & M. R. Co.*, 62 Wis. 411.

The plaintiff, a workman employed by the Grand Trunk R. Co., was injured while in the discharge of his duties by reason of his foot having been caught in one of the frogs of the rails, which was not packed in the manner prescribed by 44 Vict. c. 22 (O). *Held*, that the Grand Trunk railway being a Dominion railway, and within section 92, No. 10 (a) of the B. N. A., was not affected by the statute which professed only to apply to railway companies in respect of which the provincial legislature had authority to enact such provisions, and therefore that the defendants were not liable. *Monkhouse v. Grand Trunk R. Co.*, 8 Ont. App. 637.

A servant of a railway company is a "person" within the meaning of 51 Vict. c. 29, § 289 (D), and as such is entitled to recover damages if injured by the negligence of his employers in omitting to comply with the provisions of section 262, by packing frogs as therein directed. *Le May v. Canadian Pac. R. Co.*, 44 Am. & Eng. R. Cas. 627, 17 Ont. App. 293; *affirming* 18 Ont. 314.—APPROVING *Harty v. Central N. J. R. Co.*, 43 N. Y. 468; *O'Donnell v. Providence & W. R. Co.*, 6 R. I. 216. DISTINGUISHING *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478. REVIEWING *McLaughlin v. Grand Trunk R. Co.*, 12 Ont. 418; *Rosenberger v. Grand Trunk R. Co.*, 8 Ont. App. 482.

65. Failure to block, when deemed negligence.—A railroad company is guilty of actionable negligence in knowingly permitting a frog required by the statute to be filled or blocked, to remain unblocked or unfilled, or in permitting it so to remain for such a length of time as to raise a legal presumption of knowledge or neglect of duty on its part; and in either case the company is liable to an employé who, without fault on his part, catches his foot in an open frog, and is thereby injured. *Ashman v. Flint & P. M. R. Co.*, 53 Am. & Eng. R. Cas. 80, 90 Mich. 567, 51 N. W. Rep. 645.

66. — and when not.—The court cannot say that a railroad company is guilty

of negligence as to a brakeman employed in its switch yard, in maintaining unblocked standard frogs at switch intersections in such yard. *Richmond & D. R. Co. v. Risdon*, 48 Am. & Eng. R. Cas. 244, 87 Va. 335, 12 S. E. Rep. 786.

In an action by a brakeman for an injury received while coupling cars, by his foot being caught in a dangerously constructed frog at a switch, the jury found specially that the switches and frogs of the road were in the same condition during all the time plaintiff was in the employ of defendant, and that they were of the same kind as those used on the principal railroads in the country; that plaintiff had full opportunity to acquire a knowledge of the condition of all the switches and frogs on the road; that he did not use any care to ascertain the condition of the frogs and switches at the place where the injury occurred; that while walking on the track behind a moving car his foot was caught in one of the frogs; that the printed rules of the company forbid brakemen to go between the cars in motion to couple them, and forbid coupling by hand in all cases where a stick could be used; that in consideration of employment by the defendant, plaintiff agreed to obey said rules; that under the circumstances, plaintiff used proper care to avoid injury to himself. *Held*, that defendant was not liable. *Lake Shore & M. S. R. Co. v. McCormick*, 5 Am. & Eng. R. Cas. 474, 74 Ind. 440.

In an action for causing the death of a brakeman, the negligence charged against the company was a failure to block a frog, in which the brakeman caught his foot and was run over and killed. There was evidence that some of the frogs on the road were blocked, but none at the place where the accident occurred; and there was no evidence that the blocking of frogs was a general practice on railroads. The accident happened in the daytime, and the brakeman knew of the condition of the frog. *Held*, that a nonsuit should have been granted. *Spencer v. New York C. & H. R. R. Co.*, 51 N. Y. S. R. 386, 67 Hun 196, 22 N. Y. Supp. 100.—REVIEWING *Appel v. Buffalo, N. Y. & P. R. Co.*, 111 N. Y. 550, 20 N. Y. S. R. 90. *Haas v. Buffalo, N. Y. & P. R. Co.*, 40 Hun 145.

67. Blocking guard rails.—A brakeman was killed by catching his foot between a guard rail and the main track. It appeared that the guard rail was the T-rail,

which answered the purpose of the company equally well, and was the one in general use; but there was evidence that the U-rail was safer for employes. *Held*, that the company was not guilty of such negligence in using the kind of rail that it did, as to render it liable. *Smith v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 32.

Where plaintiff's arm was caught and crushed between the main rail and the guard rail, the failure of the company to block the rails should not be submitted to the jury as a ground for recovery, since the blocking is only intended to prevent feet from being caught. *Rutledge v. Missouri Pac. R. Co.*, 110 Mo. 312, 19 S. W. Rep. 38.

A switchman, while uncoupling moving cars, caught his foot in a frog, and was run over and killed. The evidence showed that some guard rails on the road were blocked, and some not. *Held*, that defendant was not liable for failure to block the frog; that the switchman assumed such risks of the employment. *McNeil v. New York, L. E. & W. R. Co.*, 54 N. Y. S. R. 201.

68. Blocking switches.—In an action for the death of a switchman, the negligence charged against the company was a failure to put the rails further apart, and a failure to block a switch. The evidence showed that the construction was reasonably safe, and the one in ordinary use. *Held*, that the company was not liable. *Chicago, B. & Q. R. Co. v. Smith*, 18 Ill. App. 119.

d. Side Tracks; Switches.

69. Side tracks, generally.*—As to employes, railroad companies are only required to construct and keep such side tracks as are in general use. *Atchison, T. & S. F. R. Co. v. Alsdurf*, 47 Ill. App. 200.

If a railroad so negligently constructs its tracks and side tracks that cars occupying the main line cannot pass cars occupying the adjacent side track without endangering the lives of the employes charged with the duty of moving such cars, its negligence is actionable. If one of its employes is, by reason thereof, killed or injured while in the discharge of his duty, and is himself with-

out fault, and using due care, such company is liable to respond in damages. It was the duty of the company to contemplate that sooner or later cars might have to pass each other at each and every point on the two tracks. It is no defense that those whose acts brought such cars into such dangerous proximity were co-employes with the one injured. *Pennsylvania Co. v. McCormack*, 53 Am. & Eng. R. Cas. 107, 131 Ind. 250, 30 N. E. Rep. 27.

It is not necessarily the legal duty of a company towards an engineer to provide side tracks with stop blocks, and its omission so to do is not actionable negligence. *Hewitt v. Flint & P. M. R. Co.*, 31 Am. & Eng. R. Cas. 249, 67 Mich. 61, 34 N. W. Rep. 659, 11 West. Rep. 148.

A railroad company is not bound to change its manner of using its side tracks, or to adopt the most approved ways or appliances in business. *Hewitt v. Flint & P. M. R. Co.*, 31 Am. & Eng. R. Cas. 249, 67 Mich. 61, 11 West. Rep. 148, 34 N. W. Rep. 659.

Employes may be chargeable with knowledge that side tracks are not always perfect; that they are sometimes constructed over ditches or gullies, and are not always ballasted with the same care that main tracks usually are; but railroad companies owe it to their employes to protect them from unnecessary and dangerous pitfalls and unusual conditions. *Ragon v. Toledo, A. A. & N. M. R. Co.*, 91 Mich. 379, 51 N. W. Rep. 1004.

70. Ballasting side tracks.—Where a brakeman sues for an injury, and charges the company with negligence in failing to properly grade and ballast a side track, so as to give a solid surface and secure footing, he is presumed to be aware of and to take the risk of such defects, and the company is not liable. *Batterson v. Chicago & G. T. R. Co.*, 53 Mich. 125, 18 N. W. Rep. 584.—FOLLOWING *Michigan C. R. Co. v. Austin*, 40 Mich. 247.—QUOTED IN *Ragon v. Toledo, A. A. & N. M. R. Co.*, 97 Mich. 265.

Railroad tracks are not ballasted for the purpose of making them safe for the employes of the company to walk thereon, but to make them firm and safe for the passage of trains; and the failure of the company to ballast a side track used for stowing cars and making up trains is not a breach of any duty it owes its employes. *Finnell v. Dela-*

* Duty of company toward its employes in the construction of side tracks, see 41 AM. & ENG. R. CAS. 380, *abstr.*

ware, L. & W. R. Co., 129 N. Y. 669, 29 N. E. Rep. 825, 3 Silv. App. 643, 42 N. Y. S. R. 354; reversing 36 N. Y. S. R. 1020.

71. Switches, generally.*—Plaintiff, a section man, was riding with others, as he was directed to do, on a train, and from the number on the car he was obliged to stand on the lower step, and while there was struck by a switch signal, which was so constructed as to rub against the side of the cars. There was evidence tending to show that the switch was constructed nearer the track than usual. *Held*, that it was error to direct a nonsuit. There was sufficient evidence of negligence to justify a submission to the jury. *Boss v. Northern Pac. R. Co.*, 5 Dak. 308, 40 N. W. Rep. 590.—APPROVED IN *Boss v. Northern Pac. R. Co.*, 2 N. Dak. 128.

Plaintiff, an engineer, was injured by the derailment of his train. The evidence showed that a switch was defective in that the spring was not strong enough to throw the point of the switch to the main rail, and there held it when the lever was in a proper position to indicate to the engineer that the rails were in proper position for the cars to pass. *Held*, that the defendant was not entitled to an instruction that if other employes might have placed the rails in proper position by the use of a maul or ax, the injury resulted from the negligence of a fellow-servant and not from a defective switch. *Texas Pac. R. Co. v. Johnson*, 42 Am. & Eng. R. Cas. 7, 76 Tex. 421, 13 S. W. Rep. 463.

Where the evidence showed that notwithstanding the derailment, the locomotive and train could have been stopped before the locomotive turned over and injured plaintiff, had the air-brakes been in order, and also that the brakes would not work because they were defective, an instruction that the plaintiff could not recover on account of any defect in the brakes is properly refused. *Texas Pac. R. Co. v. Johnson*, 42 Am. & Eng. R. Cas. 7, 76 Tex. 421, 13 S. W. Rep. 463.

A brakeman stood on the car step for the purpose of throwing open a switch, while his train was moving eight or ten miles an hour, and was struck by a switch stand which stood only nine or ten inches from

the track. A rule of the company provided that no building would be allowed nearer than six feet from the main track, and five feet from a side track. The brakeman knew of this rule, but did not know of the existence of the switch stand. *Held*, that the question of the company's negligence was properly left to the jury. *Pidcock v. Union Pac. R. Co.*, 5 Utah 612, 1 L. R. A. 131, 19 Pac. Rep. 191.—REVIEWING Chicago & I. R. Co. v. Russell, 91 Ill. 298.

In such case the danger of the switch stand was not one of the ordinary risks incident to the employment, and was not assumed by the brakeman in entering the company's service. *Pidcock v. Union Pac. R. Co.*, 5 Utah 612, 1 L. R. A. 131, 19 Pac. Rep. 191.

72. Illustrations.—A ground switch, of a form in common use, was placed in a railroad yard, in a space six feet wide between two tracks; the lock of the switch was in the middle of the space, and the handle, when lying flat, extended to within a foot of the adjacent rail, and could be safely and effectively worked by standing in the middle opposite the lock, using reasonable care. The brakeman of a train on one of the tracks, while working at the switch, standing at the end of the handle, was struck by an engine on the other track. *Held*, that there was no such proof of fault on the part of the corporation, in the construction and arrangement of the switch, as would support an action against it for the injury. *Randall v. Baltimore & O. R. Co.*, 15 Am. & Eng. R. Cas. 243, 109 U. S. 478, 3 Sup. Ct. Rep. 322.

In an action by a brakeman for personal injuries received by him in consequence of his clothes getting caught on a switch handle as he was attempting to board his train while it was in motion, after he had set the switch—*held*, that the plaintiff was not entitled to recover, where the only negligence or omission charged against the defendant was that the sill on which the machinery for throwing the switch rested, extended beyond the track embankment, and that there was under the extension no filling, so as to bring the embankment up to a level with it, and where the evidence showed that the plaintiff was familiar with the switch, and failed to show that the switch had caused any other accident during the five years of its use, or that there was anything in the nature of the structure cal-

* Duty of company to its servants in regard to switches, see note, 15 AM. & ENG. R. CAS. 248; 6 Id. 145.

culated to entangle the apparel of a person, or that a switch so constructed was dangerous. *Bivins v. Georgia Pac. R. Co.*, 96 Ala. 325, 11 So. Rep. 68.—REVIEWING *Schultz v. Chicago & N.W. R. Co.*, 67 Wis. 616.

Although a master is liable in some cases for an injury to a servant resulting from an act directed to be performed by the servant outside the scope of his employment, yet this rule cannot be extended so as to make the master an insurer that the appliances with which the servant performs such act are absolutely free from defect. In this case a verdict for a fireman, directed by an engineer to throw a switch, the lever of which flew up and threw him on the track in front of the engine, resulting in the injury complained of, there being no evidence of any particular defect in the switch—*held*, not to be warranted by the evidence. *Mary Lee C. & R. Co. v. Chambliss*, 53 Am. & Eng. R. Cas. 254, 97 Ala. 171, 11 So. Rep. 897.—REVIEWING *Pittsburgh, C. & St. L. R. Co. v. Adams*, 105 Ind. 151.

73. Target switches.—An ordinary switch which is adequate and sufficient, so far as the adjustment of tracks is concerned, is all that a company is under obligations to furnish, as regards the safety of its employes. It is not obliged to provide target switches. *Salters v. Delaware & H. Canal Co.*, 3 Hun (N. Y.) 338, 5 T. & C. 559.—REVIEWING *Piper v. New York C. & H. R. R. Co.*, 1 T. & C. 290.

74. Switches without lights.—The failure to provide switches with lights on them is not negligence on the part of the company as between it and its employes, unless it appears that it is the common and uniform practice to provide them; so that switchmen might expect them. *Grant v. Union Pac. R. Co.*, 45 Fed. Rep. 673.

The closing of a switch and removal of the lights therefrom, with notice to engineers that the switch is abandoned, and its reopening thereafter without notice to the engineers, and its use without lights, by reason of which an employe is injured, make a clear case of negligence against the company. *Town v. Michigan C. R. Co.*, 84 Mich. 214, 47 N. W. Rep. 665.

In such a case, the resumption of the use of the switch without lights is as much the proximate cause of the injury as are the unlocking and turning of the switch rails; and if they were concurrent causes the defendant is liable, notwithstanding the open-

ing or unlocking of the switch may have been caused by the intermeddling of a stranger, or by the negligence of fellow-servants of the plaintiff. *Town v. Michigan C. R. Co.*, 84 Mich. 214, 47 N. W. Rep. 665.

It was contended by the company that the negligence, if any, in not restoring the lights was that of the section master, a fellow-servant of the engineer, which fact barred a recovery. *Held*, that as the reopening of the switch and its use were by direction of the division superintendent of the company, acting as its agent, it became its duty either to notify the engineer of such reopening or to restore the lights, if not to do both, and a failure so to do would be its negligence, and not that of the section master. *Town v. Michigan C. R. Co.*, 84 Mich. 214, 47 N. W. Rep. 665.

75. Switches displaced or misplaced.—A displaced switch threw a train from the track at night and killed the engineer. Some time before the accident the engineer had requested the company to take out a patent switch and put in a common one, as he thought it was safer, which the company did before the accident. *Held*, that the company could not be charged with negligence in making the change. *Piper v. New York C. & H. R. R. Co.*, 1 T. & C. (N. Y.) 290; affirmed in 56 N. Y. 630, mem.—QUOTED IN *Coppins v. New York C. & H. R. R. Co.*, 43 Hun 26; 6 N. Y. S. R. 572. REVIEWED IN *Salters v. Delaware & H. Canal Co.*, 3 Hun 338, 5 T. & C. 559.

On the night of the accident it was shown that the switch had been properly set, and one or two trains had passed without trouble within an hour before the accident. After the accident an examination showed that the upright bar or lever was in proper place and locked; but the key and bolt, by which the lower end was attached to the horizontal bar, for moving the rails, were out of place and lying on the ground. It was not shown how this occurred, but it was shown that no employe of the company interfered with it. *Held*, that the company was not liable. *Piper v. New York C. & H. R. R. Co.*, 1 T. & C. (N. Y.) 290; affirmed in 56 N. Y. 630, mem.

In such case it was charged that the company was negligent in not keeping a switchman at the place; but it appeared that if a switchman had been there in the usual discharge of his duties, he would have set the switch just as it was and gone away until

such time as a change was required; and it further appeared that there was but a single track at the place, with a switch only used for passing trains, and that a switchman was not necessary, as it was the duty of the engineer in running his train on the switch track to see that the switch was properly adjusted. *Held*, that the failure to provide a switchman was not negligence. *Piper v. New York C. & H. R. R. Co.*, 1 *T. & C. (N. Y.)* 290; *affirmed in* 56 *N. Y.* 630, *mem.*

In an action for injury to an employé resulting from a misplaced switch, the judge did not err in charging the jury that the railroad company was guilty of negligence if it failed to supply and maintain safe and suitable machinery and appliances; for keeping a switch properly connected is "maintaining the track as a proper appliance." *Coleman v. Wilmington, C. & A. R. Co.*, 25 *So. Car.* 446.

76. Switch yards.—In an action for the killing of plaintiff's intestate while in the discharge of his duties as brakeman, it appeared that the accident occurred at defendant's switch yard; that the cross-ties in the yard lay exposed above the ground, the spaces between them being unfilled; that at the place of injury the track was rougher and more dangerous than elsewhere in the yard; that if the space between the ties had been filled, the danger of making couplings would have been reduced; and that in some other similar yards on defendant's road such spaces were filled. *Held*, that there was evidence that defendant was negligent in thus maintaining its switch yard. *St. Louis, I. M. & S. R. Co. v. Robbins*, 57 *Ark.* 377, 21 *S. W. Rep.* 886.

Evidence that deceased went upon the track where the ties were less exposed, and passed safely along until he reached the place of their greatest exposure and there fell, was sufficient, in the absence of any other apparent cause, to warrant the jury in finding that the condition of the track caused him to fall. *St. Louis, I. M. & S. R. Co. v. Robbins*, 57 *Ark.* 377, 21 *S. W. Rep.* 886.

The fact that the deceased knew that the cross-ties in the switch yard were exposed, and consequently were dangerous, will not make him chargeable with notice of the extra hazard to which he was exposed at the place where he fell. *St. Louis, I. M. &*

S. R. Co. v. Robbins, 57 *Ark.* 377, 21 *S. W. Rep.* 886.

2. Fences.

77. Duty to fence, generally.*—A railway company does not owe to its employés the duty of fencing its right of way, nor of constructing its road with any other grades or curves than it sees fit; and when one enters its employment, he assumes whatever risks there may be in consequence of the road not being fenced, or of its peculiar construction as to grades and curves. *Patton v. Central Iowa R. Co.*, 73 *Iowa* 306, 35 *N. W. Rep.* 149.—FOLLOWING *Sweeney v. Central Pac. R. Co.*, 57 *Cal.* 15; *Fleming v. St. Paul & D. R. Co.*, 27 *Minn.* 111, 6 *N. W. Rep.* 448. REVIEWING *Wells v. Burlington, C. R. & N. R. Co.*, 56 *Iowa* 524.

Where a railroad runs through a pasture, and the right of way is not fenced, cattle may be expected anywhere, and the company cannot be charged with negligence in failing to inform a new employé that cattle had frequently been encountered at a particular place in the pasture, and might be expected there. *Patton v. Central Iowa R. Co.*, 73 *Iowa* 306, 35 *N. W. Rep.* 149.

The protection of Wis. Act of 1881, ch. 193, making railroad companies liable for injuries to domestic animals "or persons" on the track, by reason of a failure to fence, extends to employés of the company. *Quackenbush v. Wisconsin & M. R. Co.*, 62 *Wis.* 411, 22 *N. W. Rep.* 519.

78. Duty to fence platforms near track.—Plaintiff had been working on the river end of a pier on which a railroad company had laid tracks and erected two platforms somewhat higher than the tracks for the purpose of loading freight. Leaving his work after dark, plaintiff was passing up one of the platforms, which was not lighted, and coming upon some obstruction, he turned toward the edge of the platform, thinking, as he said, he would find it by touching cars that he supposed to be there; there were no cars, and he fell off the platform and was injured. *Held*, that the company was not negligent, so as to make it liable for the injury, by reason of having

* Liability for injury to employés owing to failure to fence, see note, 42 *AM. & ENG. R. CAS.* 583.

failed to fence the platform, or by reason of not having it lighted. *Harden v. New York C. & H. R. R. Co.*, 17 J. & S. (N. Y.) 503.

79. Failure to fence causing collisions with cattle.—Under the N. Y. General Railroad Act of 1850, requiring railroad corporations to build and keep in repair fences on the sides of their roads, and providing that they "shall be liable for damages which shall be done * * * to any cattle, horses, sheep, or hogs thereon," an absolute duty is imposed upon said corporations to fence their tracks, not simply to protect the lives of animals, but also to protect persons upon their trains; and for violation of said statutory duty, causing injury, such a corporation is liable. *Donnegan v. Erhardt*, 42 Am. & Eng. R. Cas. 580, 119 N. Y. 468, 23 N. E. Rep. 1051, 29 N. Y. S. R. 589, 7 L. R. A. 527; reversing 16 N. Y. S. R. 579, 23 J. & S. 502, 3 N. Y. Supp. 820.—*DISAPPROVING* Langlois v. Buffalo & R. R. Co., 19 Barb. (N. Y.) 364.

In an action for injuries received by a brakeman, it appeared that the injuries were caused by a collision in the night-time between the train upon which plaintiff was an employé and a horse which plaintiff claimed came upon the track through defendant's negligence in permitting the fence along its road to get out of repair. The case was submitted to the jury, with instructions that if the horse came upon the track through a fence which defendant was bound to maintain and keep in repair, and which was negligently permitted to be out of repair, plaintiff could recover. *Held*, no error. *Donnegan v. Erhardt*, 42 Am. & Eng. R. Cas. 580, 119 N. Y. 468, 23 N. E. Rep. 1051, 29 N. Y. S. R. 589, 7 L. R. A. 527; reversing 16 N. Y. S. R. 579, 23 J. & S. 502, 3 N. Y. Supp. 820.

It seems that, independent of the statute, a jury may find that it is the duty of a railroad company to fence its track to guard against such dangers. *Donnegan v. Erhardt*, 42 Am. & Eng. R. Cas. 580, 119 N. Y. 468, 23 N. E. Rep. 1051, 29 N. Y. S. R. 589, 7 L. R. A. 527; reversing 16 N. Y. S. R. 579, 23 J. & S. 502, 3 N. Y. Supp. 820.

An employé of a railway company, injured while riding on a hand-car, owing to a collision of such car with a pig escaping from an adjoining field through the neglect of the company to maintain a sufficient fence, cannot recover against the owner of

such pig. *Child v. Hearn*, L. R. 9 Ex. 176, 43 L. J. Ex. 100, 22 W. R. 864.

f. Obstructions upon or near Track.

80. Statement of the rule.—It is a duty which railroad companies owe to their employés to keep their tracks free from obstructions, such as would endanger the lives of the latter. *Wilson v. Denver, S. P. & P. R. Co.*, 15 Am. & Eng. R. Cas. 192, 7 Colo. 101, 2 Pac. Rep. 1.—*QUOTING* Toledo, P. & W. R. Co. v. Conroy, 68 Ill. 567.

But this duty has its limitations. A company is required to use ordinary care to protect its employés in this respect, and this ordinary care must be measured by the danger of the service and proportioned to it, which imposes a high degree of diligence in keeping the road and all of its appliances clear and in proper repair; but the company neither warrants nor insures against defects. *Wilson v. Denver, S. P. & P. R. Co.*, 15 Am. & Eng. R. Cas. 192, 7 Colo. 101, 2 Pac. Rep. 1.

The mere fact that an injury occurs to an employé, by reason of an obstruction on the track, does not make the company *prima facie* liable; but where the complaint charges that the obstruction was upon the track by reason of the negligence of the company, and that the injured employé was in the discharge of his duty, and exercising care and skill at the time of the injury, a *prima facie* case is made out. *Wilson v. Denver, S. P. & P. R. Co.*, 15 Am. & Eng. R. Cas. 192, 7 Colo. 101, 2 Pac. Rep. 1.

81. Obstructions on the track, generally.—In an action for the death of an engineer, caused by his train being thrown from the track by a rock and dirt on the track, an instruction at the request of plaintiff to the effect that it was the duty of the company to keep its roadway in a reasonably safe condition; that if the engineer was killed without fault on his part, by the defective condition of defendant's roadbed, and such defects were known, or by the exercise of reasonable care or diligence on the part of the company could have been known, to the company, then the jury should find for the plaintiff, is not erroneous as making the company an insurer of the lives of its employés. *Little Rock & Ft. S. R. Co. v. Voss*, (Ark.) 18 S. W. Rep. 172.—*FOLLOWING* Little Rock & Ft. S. R. Co. v. Duffey, 35 Ark. 607.

Employés left a "push" car near the

main track, unlocked and unsecured in any way to prevent its being run onto the main track. It was run onto the track, by whom it did not appear, and an employé was injured. *Held*, that the liability of the company depended upon whether leaving the car as it was was in itself an act of negligence; and it was not an act of negligence unless the company was bound to apprehend that it might be placed upon the track, and might cause an injury, which must be determined by the jury. *Harris v. Union Pac. R. Co.*, 4 *McCrary* (U. S.) 454, 13 *Fed. Rep.* 591.

82. Ashes, ice, rubbish, snow.—

It is the duty of a railroad company to its employés to keep its track free from obstructions, such as ice, snow, and rubbish, which endanger the safety of those operating the road. *McClarney v. Chicago, M. & St. P. R. Co.*, 48 *Am. & Eng. R. Cas.* 132, 80 *Wis.* 277, 49 *N. W. Rep.* 963.

An action may be maintained against a railroad corporation by a brakeman who was injured by reason of the negligence of the corporation in permitting its road to become blocked with snow and ice, and a car to be out of repair; the plaintiff being in no fault. *Fifield v. Northern R. Co.*, 42 *N. H.* 225.—REVIEWED IN *Gibson v. Pacific R. Co.*, 46 *Mo.* 163.

Plaintiff, who was engaged in making up trains in a yard, fell over a pile of ashes on the track at night, while making a coupling, and was injured. There was evidence that it was the duty of a section foreman to keep the tracks clear, and that it was not usual to dump ashes in the yard. *Held*, sufficient evidence of negligence to justify a verdict for plaintiff. *Southerland v. Northern Pac. R. Co.*, 43 *Fed. Rep.* 646.—NOT FOLLOWING *Filbert v. Delaware & H. Canal Co.*, 121 *N. Y.* 207, 23 *N. E. Rep.* 1104.

While plaintiff was attempting to make a coupling he stumbled over a pile of cinders on the track, and in trying to avoid falling his fingers were crushed between the bumpers. There was no proof that the company had notice that the cinders were on the track, or as to how long they had been there. *Held*, not sufficient proof of negligence to make the company liable. *Welch v. New York C. & H. R. R. Co.*, 43 *N. Y. S. R.* 958, 63 *Hun* 625, 17 *N. Y. Supp.* 342.

The defendant's yard master, having been injured by the derailment of an empty box

car upon which he was riding in the yard, the testimony of witnesses who examined the track soon after the accident, that at the point where the car left the rail there was considerable ice, snow, and chaff, which came up to and between the flanges of the rail, and pretty close to the top of the rail—*held*, to warrant a verdict to the effect that the injury was caused by defendant's negligence in that respect. *McClarney v. Chicago, M. & St. P. R. Co.*, 48 *Am. & Eng. R. Cas.* 132, 80 *Wis.* 277, 49 *N. W. Rep.* 963.

It being alleged that the company was negligent in allowing the spaces between the tracks in the yard to become filled with snow and rubbish, but it not appearing that the snow piled between the tracks contributed in any way to the accident, it was error to refuse to instruct the jury that they could not find the defendant liable by reason of such piles. *McClarney v. Chicago, M. & St. P. R. Co.*, 48 *Am. & Eng. R. Cas.* 132, 80 *Wis.* 277, 49 *N. W. Rep.* 963.

83. Obstructions near the track, generally.*—

It is the duty of the railway company to its employés to exercise reasonable care to keep its track clear of obstructions, and to discover and within reasonable time remove them when dangerous to employés, however they may have come there, whether by the act of a servant or a stranger. *Texas & P. R. Co. v. Hohn*, 1 *Tex. Civ. App.* 36, 21 *S. W. Rep.* 942.

If, in consequence of its neglect of that duty, an employé is injured, the company must be liable for the injury. *Bessex v. Chicago & N. W. R. Co.*, 45 *Wis.* 477, 18 *Am. Ry. Rep.* 58.—FOLLOWING *Wedgwood v. Chicago & N. W. R. Co.*, 41 *Wis.* 478, 4 *Wis.* 44. QUOTING *Smith v. Chicago, M. & St. P. R. Co.*, 42 *Wis.* 520.—APPLIED IN *Stackman v. Chicago & N. W. R. Co.*, 80 *Wis.* 428. FOLLOWED IN *Hulehan v. Green Bay, W. & St. P. R. Co.*, 12 *Am. & Eng. R. Cas.* 208, 58 *Wis.* 319.

A fireman or brakeman on a railroad has the right to rely upon the company's furnishing him with a safe and unobstructed track, and injury resulting to him from its failure to do so is not one of the perils of the service assumed by him. *Henry v. Wabash Western R. Co.*, 109 *Mo.* 488, 19 *S. W. Rep.* 239.

* Injury to employé by obstruction near track, see note, 22 *AM. & ENG. R. CAS.* 545.

Liability of company for injuries to train operators by coming in contact with objects near the track, see note, 48 *AM. & ENG. R. CAS.* 168.

Johnston v. Oregon S. L. & U. N. R. Co., 23 *Oreg.* 94, 31 *Pac. Rep.* 283.

The carelessness of a section foreman and his knowledge of an obstruction in the path of a switchman are imputable to the company. *Hall v. Missouri Pac. R. Co.*, 8 *Am. & Eng. R. Cas.* 106, 74 *Mo.* 298.—DISTINGUISHED IN *Corbett v. St. Louis, I. M. & S. R. Co.*, 26 *Mo. App.* 621.

A movable object temporarily placed in dangerous proximity to the railroad track is not a defect in the condition of such track within the meaning of the Employers' Liability Act. *Kansas City, M. & B. R. Co. v. Burton*, 53 *Am. & Eng. R. Cas.* 115, 97 *Ala.* 240, 12 *So. Rep.* 88.—DISAPPROVING *Highland Ave. & B. R. Co. v. Walters*, 91 *Ala.* 435.

Where a railroad company is sued for the death of an engineer, caused by an obstruction on the track, where the jury have already been instructed that a company cannot be held as having warranted to its employes a safe track, but only that it should use reasonable care in constructing and repairing it, an instruction at the request of plaintiff to the effect that the engineer was "not required to inspect the roadbed, but only to notice obvious defects, and the fact that he ought to have known of the defects, if he had means of knowing them, would not preclude a recovery, unless he did know, or by the exercise of reasonable care ought to have known of them," is not error. *Little Rock & Ft. S. R. Co. v. (Ark.)* 18 *S. W. Rep.* 172.

In such an action, where the jury have already been instructed correctly as to the relative duty of both the company and its employes, it is not error to instruct the jury, at the request of plaintiff, that a master is not to be held as guaranteeing the absolute safety of the apparatus provided for his services, but is bound to observe all the care which the exigencies of the occasion reasonably require. *Little Rock & Ft. S. R. Co. v. Voss, (Ark.)* 18 *S. W. Rep.* 172.

The whole business of operating railroad trains is dangerous; and an instruction to the effect that a railroad company is liable for an injury to an engineer caused by an erection which is dangerous to persons operating trains is erroneous, unless limited to persons operating trains in the exercise of ordinary care. *Gould v. Chicago, B. & Q. R. Co.*, 22 *Am. & Eng. R. Cas.* 289, 66 *Iowa* 590, 24 *N. W. Rep.* 227.

84. Buildings and awnings.*—A plaintiff who claimed damages for personal injuries sustained while he was acting as brakeman, by being struck by the supply pipe at a water tank, which was near the road, negligence in this regard could not be imputed to the defendant, if the apparatus used to supply the engine with water was constructed in the same manner as, and no nearer to passing trains than, those constructed and in ordinary use on other roads well and prudently conducted. *Wilson v. Louisville & N. R. Co.*, 85 *Ala.* 269, 4 *So. Rep.* 701.—REVIEWING *Mobile & B. R. Co. v. Holborn*, 84 *Ala.* 133.

The supply pipe at a water tank, hanging over or near a railroad track, is a part of its ways, works, machinery, or plant, as those words are used in the statute (*Ala. Code*, § 2590); and if it hangs so near to the track that a brakeman passing under it in the discharge of his duties is struck and injured, or killed, not being guilty of contributory negligence, an action for damages lies against the company. *East Tenn., V. & G. R. Co. v. Thompson*, 94 *Ala.* 636, 10 *So. Rep.* 280.

Where a brakeman was injured by an awning projecting from a station house, and it appeared that the dangerous condition of the awning had been known for a long time to the division superintendent and division engineer—held, such negligence as to make the company liable. *Illinois C. R. Co. v. Welch*, 52 *Ill.* 183.—REVIEWED IN *North Chicago St. R. Co. v. Williams*, 140 *Ill.* 275; *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 *Kan.* 701, 16 *Pac. Rep.* 146.

A brakeman was injured while ascending a freight car, by coming in contact with an awning of a station, which projected to within eighteen inches of the top of the car. Held, that evidence was admissible that the awning of no other station on the road was so near the track as the one in question. *Nugent v. Boston, C. & M. R. Corp.*, 38 *Am. & Eng. R. Cas.* 52, 80 *Me.* 62, 12 *Atl. Rep.* 797, 5 *N. Eng. Rep.* 865.

It being shown that it was necessary in the discharge of his duties for a brakeman to ascend a ladder on the outside of a box car of a moving train, who in so ascending was struck by a beam projecting from a scaffolding erected for the repair of a water

* Injuries to employes by projecting awnings, low bridges, or roofs of buildings, see note, 23 *AM. & ENG. R. CAS.* 397.

tank, the following charge was properly refused: "If the timbers that struck plaintiff were the timbers of a temporary scaffolding erected by the employés of defendant in order to build or repair the tank, and no part of the permanent structure injured plaintiff, then the jury should find for the defendant." *Texas & P. R. Co. v. Hohn*, 1 *Tex. Civ. App.* 36, 21 *S. W. Rep.* 942.

85. Cattle chute—Coal chute.—Where a railway company erects cattle chutes in such close proximity to its track as to endanger the lives of its employés in the proper operation of its trains, it is negligence. If the chutes are constructed so as to be reasonably safe for employés operating trains in a reasonable and prudent manner, the company is not chargeable with negligence. *Allen v. Burlington, C. R. & N. R. Co.*, 5 *Am. & Eng. R. Cas.* 620, 57 *Iowa* 623, 11 *N. W. Rep.* 614.

An engineer of a train engaged in hauling coal from a mine sued his company for a personal injury, caused by his engine striking a chute which was so arranged as to be raised above the track, but lowered when trains were passing. The conductor of the train had told the person who had charge of the chute that the train would not run that far, and had signaled the engineer to stop, but on account of smoke he did not see the signal. *Held*, not sufficient evidence of negligence to support a verdict in favor of the engineer. *Slate Creek Iron Co. v. Hall*, (Ky.) 12 *S. W. Rep.* 579.

Where a brakeman sues to recover for an injury received while standing on a journal box of a car wheel of a moving train, by striking a cattle chute which was alleged to have been maintained too near the track, the evidence is insufficient to support a charge of negligence, where a number of witnesses, after repeated experiments, testify that persons larger than plaintiff standing upon journal boxes, in the precise position of plaintiff, could pass without being touched, and where plaintiff does not himself testify that there was not sufficient room between the chute and car to have permitted him to pass in safety, and where it does not appear that he exercised due care. *Allen v. Burlington, C. R. & N. R. Co.*, 64 *Iowa* 94, 19 *N. W. Rep.* 870.

An instruction, "If you find from the evidence that the coal platform by which the deceased was injured was built so near the track of the defendant's road as to un-

necessarily endanger the defendant's employés on duty at that place, then you are charged as a matter of law that the defendant was guilty of negligence, and you should find for the plaintiff unless you find that the deceased was guilty of negligence directly contributory to his injury," is erroneous. *Perigo v. Chicago, R. I. & P. R. Co.*, 55 *Iowa* 326, 7 *N. W. Rep.* 627.—**DISTINGUISHING** *Greenleaf v. Illinois C. R. Co.*, 29 *Iowa* 14.

86. Derricks—Posts.—If a railroad corporation suffers a derrick, not actually in use for the purposes of its business, to remain for an unreasonable length of time on land within its control, in such a position by the side of its track as to be in danger of being thrown down by ordinary natural causes, so as to interfere with the safe passage of its trains, the corporation is liable to a brakeman for injuries resulting from its neglect in not removing the derrick, or in not guarding against the danger of allowing it to remain, even if it was put up by other servants of the corporation, and independently of the question of their negligence. *Holden v. Fitchburg R. Co.*, 2 *Am. & Eng. R. Cas.* 94, 129 *Mass.* 268, 37 *Am. Rep.* 343.

There was evidence tending to prove that a derrick had been erected by a company on the line of its side track, which, when not properly secured while not in use, was dangerous to employés of the company by reason of the use of the derrick—to which were suspended a heavy iron hook, pulley, and chain—swinging over the track. *Held*, that it was the duty of defendant to place such machinery under the control of a competent servant or employé charged with the duty of seeing that it was properly secured when not in use, and, it not being shown in this case that the machinery in question was so placed in charge of any such servant or employé, there was evidence from which a jury might properly find negligence on the part of the defendant in causing the injury, where a brakeman of the company, while on duty, and without fault on his part, was injured by reason of the derrick, not being properly fastened, swinging over the track. *Gates v. Chicago, M. & St. P. R. Co.*, 53 *Am. & Eng. R. Cas.* 245, 2 *S. Dak.* 422, 50 *N. W. Rep.* 907.

Where a derrick had been erected by defendant on the line of its side track near a station—in July—which derrick was used by shippers, and was sometimes secured

after being used and sometimes left unfastened, from that time to the time of the accident—*held*: (1) that the defendant must be presumed to have known the manner of its use and the care used in securing it when not in use, and that a special finding that neither the defendant nor any of its servants knew it was unfastened at the time of the accident was an immaterial finding; (2) that a special inquiry, "How long had it been unfastened at the time of the accident?" which was answered, "Unknown," by the jury, was also immaterial under the facts shown in this case. *Gates v. Chicago, M. & St. P. R. Co.*, 53 *Am. & Eng. R. Cas.* 245, 2 *S. Dak.* 422, 50 *N. W. Rep.* 907.

Defendant's station agent, who lived in the station house, erected on the platform, near a side track, posts for domestic purposes solely, and plaintiff, a brakeman, while descending from a moving freight car in the discharge of his duty, collided with one of the posts and was injured. *Held*: (1) that as the posts were in no way connected with the use of the railway, plaintiff had a right to presume that there was no such obstruction there, and in the absence of knowledge on his part that the posts were there, he was not negligent in not looking out for them; (2) that the defendant was negligent in allowing the posts to be erected and maintained so near the track as to add to the danger of employes. *Kearns v. Chicago, M. & St. P. R. Co.*, 22 *Am. & Eng. R. Cas.* 287, 66 *Iowa* 599, 24 *N. W. Rep.* 231.

87. Cattle-guard fences — Signal posts.—A company is required to place its signal posts, cattle-guard fences, and other structures used in connection with the road, at a safe distance from the track, to the end that they will not be dangerous to its employes in operating the trains. *Murphy v. Wabash R. Co.*, 115 *Mo.* 111, 21 *S. W. Rep.* 862. *Johnson v. St. Paul, M. & M. R. Co.*, 41 *Am. & Eng. R. Cas.* 293, 43 *Minn.* 53, 44 *N. W. Rep.* 884.—REVIEWED IN *Murphy v. Wabash R. Co.*, 115 *Mo.* 111.

Where the company has itself placed such structures so near the track as to be dangerous to its servants in the discharge of the duties assigned to them, and an injury occurs from that cause without fault on the part of the servant injured, the liability of the company is fixed. *Murphy v. Wabash R. Co.*, 115 *Mo.* 111, 21 *S. W. Rep.* 862.

A company is not guilty of negligence in erecting the wing fences of cattle-guards, 5 *D. R. D.*—5.

where it places them within three feet ten inches of the rails, so far as its liability for the death of an employe is concerned, caused by such employe being struck by one of such fences while climbing down the side of the car to examine an apprehended defect underneath the car. Such an accident is so improbable that a railroad company, in the exercise of reasonable diligence, is not required to provide against it. *McKee v. Chicago, R. I. & P. R. Co.*, 48 *Am. & Eng. R. Cas.* 154, 83 *Iowa* 616, 50 *N. W. Rep.* 209.—FOLLOWING *Koontz v. Chicago, R. I. & P. R. Co.*, 18 *Am. & Eng. R. Cas.* 85, 65 *Iowa* 226. QUOTING *Wabash, St. L. & P. R. Co. v. Locke*, 112 *Ind.* 404.

88. Mail cranes.—Where a brakeman, while ascending the side of a freight car, was injured by striking a mail crane which was only 12 inches from the car, and which had been erected about a month, and the brakeman had only passed three times since its erection, and had received no notice of its erection, it is proper for the court to refuse to charge that the crane, as constructed, was no evidence of negligence. *Sisco v. Lehigh & H. R. R. Co.*, 75 *Hun* 582, 27 *N. Y. Supp.* 671.

Plaintiff's intestate, a fireman, was acting in the line of his duty, looking out for signals at night, and while so doing, and in the exercise of care and caution, he was struck by a "mail catcher." Two other accidents had previously occurred from the same cause, of which the company had notice. *Held*, the company was guilty of gross negligence in having omitted to place the "mail catcher" a safe distance from the track. Even if the fireman was guilty of negligence in leaning out from the side window of the locomotive while upon the lookout for signals, his negligence was slight in comparison with that of the company. *Chicago, B. & Q. R. Co. v. Gregory*, 58 *Ill.* 272, 11 *Am. Ry. Rep.* 75.—FOLLOWED IN *North Chicago St. R. Co. v. Williams*, 140 *Ill.* 275.

89. Rocks, stumps, timber, etc.—A rock in the side of a railroad cut, projecting far enough to endanger brakemen in the discharge of their duties while ascending or descending ladders on the outside of passing cars, though not far enough to touch the cars, is a defect in the roadway which renders the railroad company liable for resulting injuries. *Georgia Pac. R. Co.*

v. Davis, 92 Ala. 300, 9 So. Rep. 252.—REVIEWED IN *Murphy v. Wabash R. Co.*, 115 Mo. 111.

There was no error in charging that if "skids" or planks were placed on or near the track of defendant's road when the injury occurred, and they occasioned the injury to plaintiff while in obedience to orders and without fault or negligence on his part, the company would be liable. *Central R. Co. v. De Bray*, 71 Ga. 406.

If a railway company shall neglect to cut down a standing tree that may, on account of its nearness to the roadbed, be in danger when falling of obstructing the road, whereby injury results to an employé of the company, it becomes liable in damages, on account of its negligence, to such employé; and this though the tree was standing on the land of another. *Texas & St. L. R. Co. v. Vallie*, 60 Tex. 481.

In the absence of anything to show contributory negligence, a brakeman may recover for an injury received by falling over a timber lying in his way on a foggy morning, while running to close a switch, the timber not being there when he was last over the ground. *Southern Pac. R. Co. v. Markey*, (Tex.) 19 S. W. Rep. 392.

It is culpable negligence to allow a beam of timber to project to within a few inches of passing trains after the company has discovered its presence, or by the use of proper care ought to have done so. *Texas & P. R. Co. v. Hohn*, 1 Tex. Civ. App. 36, 21 S. W. Rep. 942.

It being the custom and duty of brakemen to ascend ladders of cars while the train was in motion, appellant was bound to foresee that a timber so close to passing trains would endanger the lives of its employes, and must accept the proximate consequence of its negligence in leaving it there. *Texas & P. R. Co. v. Hohn*, 1 Tex. Civ. App. 36, 21 S. W. Rep. 942.

A railway company must repair its track, and is not guilty of negligence if there be imperfections in the track resulting necessarily from the process of repairing. *Texas & P. R. Co. v. Hohn*, 1 Tex. Civ. App. 36, 21 S. W. Rep. 942.—*QUOTING Armour v. Hahn*, 111 U. S. 318. REVIEWING *Koontz v. Chicago, R. I. & P. R. Co.*, 65 Iowa 224.

A brakeman was told to look to see if the wheels of the train were sliding, which could only be done by leaning over with his head outside of the car. In doing so he

was struck by a stump which stood dangerously near the track, of which fact he was ignorant, but which was known to his superior, who gave the order without giving any warning. *Held*, sufficient to show a cause of action against the company. *Riley v. West Virginia C. & P. R. Co.*, 27 W. Va. 145.

In such case it was not error to reject evidence offered by the company for the purpose of showing generally that its road in its construction compared favorably with other roads. *Riley v. West Virginia C. & P. R. Co.*, 27 W. Va. 145.

If a company negligently leave loose blocks of firewood along its tracks in a yard, and an employé while attempting to make a coupling stumbles over such wood and is injured, the company is liable, where it appears that the employé had no notice of the presence of the wood. *Hulehan v. Green Bay, W. & St. P. R. Co.*, 12 Am. & Eng. R. Cas. 208, 58 Wis. 319, 17 N. W. Rep. 17.—DISTINGUISHED IN *Peschel v. Chicago, M. & St. P. R. Co.*, 17 Am. & Eng. R. Cas. 545, 62 Wis. 338.

90. Snowbanks.—The dangers from snowbanks are inseparable from the operation of railroads, when snow prevails and is removed from the track. Employes, when they enter the service, assume the risk of such dangers; and a railroad company is not chargeable with negligence in leaving the accumulations of snow which it removes from the track in proximity thereto, even though some degree of danger to employes engaged in the operation of trains is thereby created. *Brown v. Chicago, R. I. & P. R. Co.*, 64 Iowa 652, 21 N. W. Rep. 193.—FOLLOWING *Dowell v. Burlington, C. R. & N. R. Co.*, 62 Iowa 629.—*Dowell v. Burlington, C. R. & N. R. Co.*, 15 Am. & Eng. R. Cas. 153, 62 Iowa 629, 17 N. W. Rep. 901.

91. Standing cars.—In an action for injuries to an employé knocked from a car by coming in contact with another car placed dangerously near on a side track, where it does not appear that the plaintiff had anything to do with the placing of the obstructing car, he had a right to assume that the way was not dangerously obstructed. *Kansas City, M. & B. R. Co. v. Burton*, 53 Am. & Eng. R. Cas. 115, 97 Ala. 240, 12 So. Rep. 88.

Where it is "reasonably practicable" to place a freight car on a side track, beyond the line of danger to employes on trains

passing on the main track, it cannot be said that there is any such necessity for the car being left dangerously near as will relieve the act of leaving and allowing it to remain there, of its negligent character. The custom of other railroads in respect to this matter is immaterial. *Kansas City, M. & B. R. Co. v. Burton*, 53 *Am. & Eng. R. Cas.* 115, 97 *Ala.* 240, 12 *So. Rep.* 88.

That it suited the convenience of the consignee of the cargo of a car, to unload it at a certain point, for the car to be placed so that its corner was within nine or twelve inches of cars passing on the main line, is not such a justifying necessity as will relieve the master of liability to an employé injured thereby, nor will proof that cars are so placed by other well-regulated railroads justify an act positively wrongful. *Kansas City, M. & B. R. Co. v. Burton*, 97 *Ala.* 240, 12 *So. Rep.* 88.

92. Ties and sleepers.—A judgment in favor of a brakeman for a personal injury is sustained by evidence showing that he was injured without contributory negligence, while standing on a plank across the rear end of the switch engine, placed there to enable him to couple cars; that while the engine was backing, the board struck a tie lying on the track and threw him down, causing the injury; that the tie had been left by persons who had been repairing the track some two days before. *Kentucky C. R. Co. v. Kyle*, (Ky.) 18 *S. W. Rep.* 938.

A brakeman, while attempting to get on a moving engine in a freight yard, was injured by striking sleepers which more than a month before had been piled within eighteen inches of the track, which he did not know were there, or failed to remember. *Held*, that the questions of the company's negligence, and as to whether he exercised due care, were for the jury. *Babcock v. Old Colony R. Co.*, 150 *Mass.* 467, 23 *N. E. Rep.* 325.

It appeared that a section master had been daily on the spot and knew how the sleepers were piled; had received printed instructions from the company's general manager to the effect that no wood, lumber, ties, or other obstructions should be piled within six feet of the track. It appeared that the duty of the supervision of the place was shared by the section master with others. *Held*, that the question whether the section master was so far charged with the supervision of the place as to render the

company liable for his negligence was for the jury. *Babcock v. Old Colony R. Co.*, 150 *Mass.* 467, 23 *N. E. Rep.* 325.

The company requested the court to charge "that if defendant had used reasonable care in the supervision of the section men, and of the use of the yard, plaintiff could not recover for the neglect of the section men in leaving the ties by the track, or the neglect of the yard master or the section master or road master, in failing to have them removed or to report that they were there"; but the court refused, and instructed the jury that the company would be liable if its supervising agents, although intelligent and competent, neglected their duty; and that the real question was whether the company had failed to exercise such care as it ought to have exercised through its agents to prevent the sleepers from being where they were. *Held*, not error. *Babcock v. Old Colony R. Co.*, 150 *Mass.* 467, 23 *N. E. Rep.* 325.

6. Machinery, Appliances, Cars, etc.

a. In General.

93. Statement of the rule.*—The duties which a railroad corporation owes to its servants, and which it is required to perform, are to furnish suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant was employed, and to make such provisions for the safety of employés as will reasonably protect them against the dangers incident to their employment. The performance of these duties cannot be shifted by it to a servant so as to avoid responsibility for injury caused to another servant by its omission; nor is their negligent performance one of the ordinary risks of the service impliedly assumed by the employé by his contract of employment. *Daves v. Southern Pac. Co.*, 98 *Cal.* 19, 32 *Pac. Rep.* 708. *Gravelle v. Minneapolis & St. L. R. Co.*, 3 *McCrary (U. S.)* 352, 10

* Duty of company to provide safe and suitable machinery and means to prosecute work, see notes, 5 *AM. & ENG. R. CAS.* 504, 513; 59 *AM. REP.* 75; 1 *L. R. A.* 699; 2 *Id.* 520; 4 *Id.* 796. See also 48 *AM. & ENG. R. CAS.* 215, *abstr.*

Duty of employer to furnish employé with safe means and appliances, and also to employ competent co-employés, see 92 *AM. DEC.* 213.

Fed. Rep. 711. *Palmer v. Denver & R. G. R. Co.*, 3 *McCrary (U. S.)* 635, 12 *Fed. Rep.* 392. *Elledge v. National City & O. R. Co.*, 100 *Cal.* 282, 34 *Pac. Rep.* 720. *Toledo, P. & W. R. Co. v. Conroy*, 68 *Ill.* 560. *Chicago & N. W. R. Co. v. Taylor*, 69 *Ill.* 461.—DISTINGUISHING *Honner v. Illinois C. R. Co.*, 15 *Ill.* 550; *Illinois C. R. Co. v. Cox*, 21 *Ill.* 20; *Moss v. Johnson*, 22 *Ill.* 633; *Chicago & A. R. Co. v. Murphy*, 53 *Ill.* 336; *Chicago & A. R. Co. v. Keefe*, 47 *Ill.* 108.—REVIEWED IN *Cooper v. Pittsburgh, C. & St. L. R. Co.*, 24 *W. Va.* 37.—*Missouri Furnace Co. v. Abend*, 107 *Ill.* 44; affirming 9 *Ill. App.* 319. *Chicago & A. R. Co. v. Bragontier*, 119 *Ill.* 51, 7 *N. E. Rep.* 688; reversing 11 *Ill. App.* 516. *Pullman Palace Car Co. v. Laack*, 143 *Ill.* 242, 32 *N. E. Rep.* 285. *Cincinnati, I., St. L. & C. R. Co. v. Roesch*, 126 *Ind.* 445, 26 *N. E. Rep.* 171. *Brann v. Chicago, R. I. & P. R. Co.*, 53 *Iowa* 595, 6 *N. W. Rep.* 5, 21 *Am. Ry. Rep.* 184.—QUOTING *Tuttle v. Chicago, R. I. & P. R. Co.*, 48 *Iowa* 236.—QUOTED IN *Richmond & D. R. Co. v. Burnett*, 88 *Va.* 538. REVIEWED IN *Cooper v. Pittsburgh, C. & St. L. R. Co.*, 24 *W. Va.* 37.—*Solomon R. Co. v. Jones*, 15 *Am. & Eng. R. Cas.* 201, 30 *Kan.* 601, 2 *Pac. Rep.* 657. *Atchison, T. & S. F. R. Co. v. McKee*, 37 *Kan.* 592, 15 *Pac. Rep.* 484. *Lawler v. Androscoggin R. Co.*, 62 *Me.* 463. *Gutridge v. Missouri Pac. R. Co.*, 105 *Mo.* 520, 16 *S. W. Rep.* 943. *Clowers v. Wabash, St. L. & P. R. Co.*, 21 *Mo. App.* 213. *Hickman v. Missouri Pac. R. Co.*, 22 *Mo. App.* 344. *Craig v. Chicago & A. R. Co.*, 54 *Mo. App.* 523. *Plank v. New York C. & H. R. R. Co.*, 1 *T. & C. (N. Y.)* 319; affirmed in 60 *N. Y.* 607, *mem.* *Salters v. Delaware & H. Canal Co.*, 3 *Hun (N. Y.)* 338, 5 *T. & C.* 559.—REVIEWING *Ford v. Fitchburg R. Co.*, 110 *Mass.* 240.—*Williams v. Delaware, L. & W. R. Co.*, 39 *Hun (N. Y.)* 430.—APPLYING *Laning v. New York C. R. Co.*, 49 *N. Y.* 521; *Flike v. Boston & A. R. Co.*, 53 *N. Y.* 549; *Cont v. Delaware, L. & W. R. Co.*, 81 *N. Y.* 206; *Ellis v. New York, L. E. & W. R. Co.*, 95 *N. Y.* 546; *Gage v. Delaware, L. & W. R. Co.*, 14 *Hun* 446.—*O'Donnell v. Allegheny Valley R. Co.*, 59 *Pa. St.* 239.—REVIEWED IN *Mullen v. Philadelphia & S. M. Steamship Co.*, 9 *Phila. (Pa.)* 16.—*Ross v. Walker*, 139 *Pa. St.* 42, 21 *Atl. Rep.* 157. *Carter v. Oliver Oil Co.*, 34 *So. Car.* 211, 13 *S. E. Rep.* 419.—DISTINGUISHING *Davis v. Columbia & G. R. Co.*, 21 *So. Car.* 93.—

Price v. Richmond & D. R. Co., 38 *So. Car.* 199, 17 *S. E. Rep.* 732. *Texas Mex. R. Co. v. Whitmore*, 11 *Am. & Eng. R. Cas.* 195, 58 *Tex.* 276.—FOLLOWED IN *Texas & P. R. Co. v. Kirk*, 62 *Tex.* 227.—*St. Louis & S. F. R. Co. v. McClain*, 80 *Tex.* 85, 15 *S. W. Rep.* 789. *Gulf, C. & S. F. R. Co. v. Wells, (Tex.)* 16 *S. W. Rep.* 1025. *Richmond & D. R. Co. v. Norment*, 84 *Va.* 167, 4 *S. E. Rep.* 211.—QUOTING *Baltimore & O. R. Co. v. McKenzie*, 81 *Va.* 71.—QUOTED IN *Richmond & D. R. Co. v. George*, 88 *Va.* 223.—*Richmond & D. R. Co. v. Burnett*, 88 *Va.* 538, 14 *S. E. Rep.* 372.—QUOTING *Clark v. Richmond & D. R. Co.*, 78 *Va.* 709; *Baltimore & O. R. Co. v. McKenzie*, 81 *Va.* 71; *Brann v. Chicago, R. I. & P. R. Co.*, 53 *Iowa* 597.

94. Scope and extent of the rule.—

(1) *In general*.—A master must use reasonable diligence to provide his servant with reasonably safe machinery and apparatus which such servant is employed to operate. This rule is not only applicable to the machinery owned by the master, but to other machinery and apparatus owned by another person than the master, which the servant is required in the line of his duty to use, which includes cars of other roads. *Ohio & M. R. Co. v. Wangelin*, 43 *Ill. App.* 324.

A railway company is bound to furnish suitable machinery for the work intended to be performed by it. If it be defective, and, while being used for the purposes for which it was designed, an injury results to an employé which was caused by the defect, the company is liable, unless the employé knew or might have known of the defect. In such case the company could not escape liability by proof that the negligence of another employé engaged in the same common service contributed to the injury. *Texas & P. R. Co. v. Scott*, 64 *Tex.* 549.

The court correctly refused to give a charge "that if the water spout was caused to fall because the appliance that held it up needed the nuts loosened, that this would not be such a defect as would make the defendant liable." The law imposes upon the master the duty to furnish his servants with reasonably safe implements, and to use reasonable diligence and care for keeping them in repair; and if they were so out of repair as to make their use dangerous, the character of the defect was immaterial. *Texas & P. R. Co. v. Crow*, 3 *Tex. Civ. App.* 266, 22 *S. W. Rep.* 928.

(2) *Duty cannot be delegated.**—The master is liable, as for his own neglect, in failing to furnish proper and safe machinery or implements, and in failing to keep them in a safe and suitable condition for use. These duties belong to the master, and he cannot rid himself of responsibility for not performing them, by showing that he delegated the performance to another servant, who neglected to follow his instructions. *Herbert v. Northern Pac. R. Co.*, 8 *Am. & Eng. R. Cas.* 85, 3 *Dak.* 38, 13 *N. W. Rep.* 349. *Morton v. Detroit, B. C. & A. R. Co.*, 81 *Mich.* 423, 46 *N. W. Rep.* 111. — APPROVING *Northern Pac. R. Co. v. Herbert*, 116 *U. S.* 650. QUOTING *Van Dusen v. Letellier*, 78 *Mich.* 502. — *Fay v. Minneapolis & St. L. R. Co.*, 11 *Am. & Eng. R. Cas.* 193, 30 *Minn.* 231, 15 *N. W. Rep.* 241. *Bridges v. St. Louis, I. M. & S. R. Co.*, 6 *Mo. App.* 389. — APPROVING *Laning v. New York C. R. Co.*, 49 *N. Y.* 521. DISAPPROVING *Wonder v. Baltimore & O. R. Co.*, 32 *Md.* 411. — *Myles v. New York, N. H. & H. R. Co.*, 6 *N. Y. S. R.* 24, 42 *Hun* 656. — DISTINGUISHING *Powers v. New York, L. E. & W. R. Co.*, 98 *N. Y.* 274. — *Mulvey v. Rhode Island Locomotive Works*, 14 *R. I.* 204. *International & G. N. R. Co. v. Kernan*, 44 *Am. & Eng. R. Cas.* 607, 78 *Tex.* 294, 14 *S. W. Rep.* 668. *Houston & T. C. R. Co. v. Marcelles*, 12 *Am. & Eng. R. Cas.* 231, 59 *Tex.* 334.

(3) *Test of negligence the ordinary usage of the business.*—From the fact that a particular method or appliance is dangerous, it does not follow that it is negligence for an employer to use it. Some employments are essentially hazardous; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. *Titus v. Bradford, B. & K. R. Co.*, 136 *Pa. St.* 618, 20 *Atl. Rep.* 517.

As to machinery and appliances, the employer is bound to furnish such only as are of the character ordinarily used and of reasonable safety; and the former is the conclusive test of the latter. *Kehler v. Schwenk*, 144 *Pa. St.* 348, 22 *Atl. Rep.* 910. — APPLYING *Northern C. R. Co. v. Husson*, 101 *Pa. St.* 1; *Iron-Ship Building Works v. Nuttall*, 119 *Pa. St.* 149.

And where there is a failure, not only to

show that the machinery was negligently constructed, but how the injury to the plaintiff occurred, it is error to refuse peremptory instructions for the defendant. *Ford v. Anderson*, 139 *Pa. St.* 261, 21 *Atl. Rep.* 18. — DISTINGUISHING *Rummel v. Dilworth*, 131 *Pa. St.* 509.

(4) *Illustrations.**—A workman who was employed in a car factory was caught in a revolving shaft and killed. It appeared that he did not know of the danger of being so caught. *Held*, that the liability of the company did not depend on whether the deceased moved against the shaft involuntarily or was pushed against it while attempting to lift a timber into place. *Pullman Palace Car Co. v. Harkins*, 55 *Fed. Rep.* 932.

In such case it was not error in the court to say, in charging the jury, that beyond a doubt the accident would not have happened if the shaft had been boxed or guarded with boards, or stopped while the employé was working near it. *Pullman Palace Car Co. v. Harkins*, 55 *Fed. Rep.* 932.

An employer is bound to furnish to his employé safe tools, machinery, and appliances for their use. This includes a scaffolding built by the employer for his servants to work upon. If such scaffolding is not safe and substantial, by reason whereof an employé, without fault, suffers injuries, the employer is liable for the damage caused thereby if the exercise of due care on the part of the employer would have prevented the injury. (Follett, J., dissenting.) *Weiler v. Isley*, 6 *N. Y. S. R.* 595.

Where a laborer upon a railroad, engaged in driving spikes, is furnished by the section boss with an iron maul known by the section boss to be defective, and is injured in consequence of such defect, the company is liable, although the defect was patent and would have been known to the servant had he inspected the maul. *Guthrie v. Louisville & N. R. Co.*, 15 *Am. & Eng. R. Cas.* 209, 11 *Lea (Tenn.)* 372.

95. Limits and exceptions to the rule.—(1) *Generally.*—A master is not liable to his servant for an injury occasioned by a defect of machinery furnished to

* Liability of master for injury caused by fall of staging or scaffold, see note, 39 *AM. & ENG. R. CAS.* 343.

Injury to a brakeman from defective push pole. Liability of company, see 33 *AM. & ENG. R. CAS.* 357, *abstr.*

* Liability of master for the injury to servant caused by defects in machinery or appliances, when the work is intrusted to a superintendent, see note, 21 *AM. REP.* 579.

the latter to operate, unless there was negligence in providing such machinery, or, knowing of the defect, the master omitted to warn the servant of its existence. And where the defect producing the injury complained of, was the consequence of the incompetency or neglect of a fellow-servant, or where the origin of the defect did not appear, the master is not liable to his servant, it not appearing that he had been guilty of negligence either in selecting the fellow-servant or in providing the machinery in which the defect occurred. *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411.—DISAPPROVED IN *Bridges v. St. Louis, I. M. & S. R. Co.*, 6 Mo. App. 389. QUOTED IN *Smith v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 32.—*O'Connell v. Baltimore & O. R. Co.*, 20 Md. 212.—QUOTED IN *Cumberland C. & I. Co. v. Scally*, 27 Md. 589.—*Mullen v. Philadelphia & S. M. Steamship Co.*, 9 Phila. (Pa.) 16.—QUOTING *Ryan v. Cumberland Valley R. Co.*, 23 Pa. St. 384. REVIEWING *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239.

Under Ala. Code, § 2590, the employer is not liable for injuries received by a person in his employment caused by any "defect in the condition of the ways, works, machinery, or plant connected with or used in the business, unless such defect arose from" the master's negligence, or had not been discovered or remedied by reason of his negligence, or the negligence of some other person in his employment who was charged with the duty of seeing that the machinery, etc., was in proper condition. *Memphis & C. R. Co. v. Askeu*, 90 Ala. 5, 7 So. Rep. 823.

A servant suing for injuries caused by a steam hammer of the company, while he was in the company's employ, cannot recover, although the injuries were caused by the defective condition of the hammer, or by negligence of the agents of the company, or by both combined, without showing also that the company did not use reasonable care in procuring for its operations sound machinery and faithful and competent employés. *Hanrathy v. Northern C. R. Co.*, 46 Md. 280, 18 Am. Ry. Rep. 188.

It is not negligence for a railroad company to use machinery that is a necessity of its business and which all persons in its employment must be presumed to know is a necessity. *Michigan C. R. Co. v. Smith-*

son, 1 Am. & Eng. R. Cas. 101, 45 Mich. 212, 7 N. W. Rep. 791.

While railroad companies are required to provide reasonably safe appliances, and keep them in repair, and provide their employés with a reasonably safe place in which to do their work, so as not to expose them to unnecessary danger, it is not within the province of courts or juries to prescribe the manner of using their tracks, or the character of their appliances, by verdicts and judgments which disregard their right to conduct their business in the manner usual with well-managed roads, and as good railroading requires. *Ragon v. Toledo, A. A. & N. M. R. Co.*, 97 Mich. 265, 56 N. W. Rep. 612.

(2) *Appliances need only be reasonably safe.*—The duty which a railroad company owes to its passengers requires it to adopt every mechanical appliance which tends to secure their safety, which has been thoroughly tested and demonstrated to be reasonably practicable; but this duty does not extend to its employés. *Salters v. Delaware & H. Canal Co.*, 3 Hun (N. Y.) 338, 5 T. & C. 559.—EXPLAINED IN *Ellis v. New York, L. E. & W. R. Co.*, 17 Am. & Eng. R. Cas. 641, 95 N. Y. 546.

The master is not liable for accidents occurring to a servant after he has provided such appliances as are reasonably safe and adequate to do the work required. *Watts v. Hart*, 7 Wash. 178, 34 Pac. Rep. 423, 771.

When a master employs a servant to do a particular kind of work with particular kinds of instruments and machinery, the master does not agree that they are free from danger in their use, but that they are sound and fit for the purpose intended, so far as ordinary care and prudence can discover, and that he will use ordinary care and prudence in keeping them in such condition and fitness; and the servant agrees that he will use such implements and machinery with care and prudence; and if, under such conditions and circumstances, harm or injury comes to the servant in the use of such machinery, it must be ranked among the accidents the risk of which the servant must be deemed to have assumed when he entered into such service. *Lake Shore & M. S. R. Co. v. McCormick*, 5 Am. & Eng. R. Cas. 474, 74 Ind. 440.

(3) *Hidden defects.*—When an appliance or machine not obviously dangerous has been in daily use for a long time, and has

uniformly proved safe and efficient, its use may be continued without the imputation of imprudence or carelessness. *Sappenfield v. Main St. & A. P. R. Co.*, 91 Cal. 48, 27 Pac. Rep. 590.

An omission by an employer to provide against an alleged defect in a machine in ordinary use, which defect no one has been able to point out, will not warrant a finding that the employer has failed in the discharge of his duty towards his employé. *Dingley v. Star Knitting Co.*, 134 N. Y. 552, 32 N. E. Rep. 35, 48 N. Y. S. R. 336.—DISTINGUISHING *McCarragher v. Rogers*, 120 N. Y. 526.

If material of the best quality is purchased by the master, and there is nothing in its appearance to indicate inefficiency, and tools for the use of the servant are constructed therefrom by competent and skilled workmen, the master discharges his duty, and is not liable for an injury to the servant caused by a breaking of the tool in consequence of a hidden defect in the material. *Carlson v. Phoenix Bridge Co.*, 132 N. Y. 273, 30 N. E. Rep. 750, 43 N. Y. S. R. 942; affirming 35 Hun 485, 29 N. Y. S. R. 553, 8 N. Y. Supp. 634.—DISTINGUISHING *Hege-man v. Western R. Corp.*, 13 N. Y. 9.

A railroad is not responsible for the negligence of a manufacturer from whom it purchases machinery. If the defect be such as could not be discovered by the company upon application of the proper tests, it will not be liable, although the manufacturer might have discovered the defects. *East Tenn., V. & G. R. Co. v. Smith*, 15 Am. & Eng. R. Cas. 224, 9 Lea (Tenn.) 685.—FOLLOWING *Nashville & D. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27.

(4) *Illustrations.**—Where two men were employed to transfer a box weighing two hundred and fifty pounds from one railway car to another, a distance of five feet, which duty they had performed regularly for three months, the employer was not required to furnish a skid for transferring the box, although it had promised to do so upon the request of one of the servants, who had requested the skid, not because it was dangerous to move the box without it, but merely for convenience; and where the said servant was injured by reason of moving the

box in a particular way, when a more convenient and safer method would have suggested itself to a prudent and careful man, he could not recover from his employer damages for his injury. Employers are not obliged to furnish tools for the prosecution of tasks which require mere manual labor and can be performed without the use of tools. *Gowen v. Harley*, 56 Am. & Eng. R. Cas. 238, 56 Fed. Rep. 973.

An injury in the eye, received by a railroad employé, caused by a scale flying from the iron rail of the track when struck with a hammer by a co-employé who was attempting to drive an iron spike, in which hammer there was an alleged defect, is not injury "caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer," within the meaning of Ala. Code 1886, § 2590, subd. 1. *Georgia Pac. R. Co. v. Brooks*, 84 Ala. 138, 4 So. Rep. 289.

96. Company neither insurer nor guarantor.*—The master is not absolutely bound to furnish his servants with safe machinery. Such a rule would make the master an insurer, and liable for injuries, though he exercised the greatest diligence and prudence in the construction or purchase and in the care and reparation of the machinery. The master does not guarantee that the machinery furnished is perfect. The law only requires him to use due care and diligence in the selection and use of the machinery. The amount of care required is measured by the circumstances of each case, depending upon the kinds of machinery used, the risks incident to its use, and the hazard of the business in which used. *Jones v. New York C. & H. R. R. Co.*, 22 Hun (N. Y.) 284. *Washington & G. R. Co. v. McDade*, 44 Am. & Eng. R. Cas. 505, 135 U. S. 554, 10 Sup. Ct. Rep. 1044.—QUOTED IN *Davidson v. Southern Pac. Co.*, 44 Fed. Rep. 476.—*Louisville & N. R. Co. v. Allen*, 28 Am. & Eng. R. Cas. 514, 78 Ala. 494.—APPROVED IN *Georgia Pac. R. Co. v. Propst*, 83 Ala. 518, 3 So. Rep. 764. FOLLOWED IN *Alabama G. S. R. Co. v. Arnold*, 35 Am. & Eng. R. Cas. 466, 84 Ala. 159, 4 So. Rep. 359, 5 Am. St. Rep. 354.—*Holland v. Tennessee C., I. & R. Co.*, 91 Ala.

*A spike hammer is not "machinery" under Ala. Code 1886, § 2590; see 33 AM. & ENG. R. CAS. 354, *abstr.*

*As to how far master is insurer of safety of machinery and appliances furnished for use of servants, see note, 77 AM. DEC. 221.

444, 8 So. Rep. 524. *Little Rock & Ft. S. R. Co. v. Duffey*, 4 Am. & Eng. R. Cas. 637, 35 Ark. 602.—QUOTING *Leonard v. Collins*, 70 N. Y. 90.—*St. Louis, I. M. & S. R. Co. v. Gaines*, 46 Ark. 555. *Columbus, C. & I. C. R. Co. v. Troesch*, 68 Ill. 545.—REVIEWED IN *Sack v. Dolese*, 35 Ill. App. 636.—*Chicago & A. R. Co. v. Mahoney*, 4 Ill. App. 222. *Chicago & N. W. R. Co. v. Scheurman*, 4 Ill. App. 533.—QUOTING *Columbus, C. & I. C. R. Co. v. Troesch*, 68 Ill. 545.—*Illinois C. R. Co. v. Jones*, 11 Ill. App. 324. *Chicago & E. I. R. Co. v. Hagar*, 11 Ill. App. 498. *Wabash, St. L. & P. R. Co. v. Fenton*, 12 Ill. App. 417. *Chicago & A. R. Co. v. Pratt*, 14 Ill. App. 346.—FOLLOWED IN *Sack v. Dolese*, 35 Ill. App. 636.—*East St. Louis P. & P. Co. v. McElroy*, 29 Ill. App. 504. *Cincinnati, I., St. L. & C. R. Co. v. Roesch*, 126 Ind. 445, 26 N. E. Rep. 171. *Atchison, T. & S. F. R. Co. v. Wagner*, 21 Am. & Eng. R. Cas. 637, 33 Kan. 660, 7 Pac. Rep. 204. *Batterson v. Chicago & G. T. R. Co.*, 8 Am. & Eng. R. Cas. 123, 49 Mich. 184, 13 N. W. Rep. 508.—REVIEWED IN *Texas & P. R. Co. v. Geiger*, 79 Tex. 13.—*Porter v. Hannibal & St. J. R. Co.*, 2 Am. & Eng. R. Cas. 44, 71 Mo. 66, 36 Am. Rep. 454.—QUOTED IN *Siela v. Hannibal & St. J. R. Co.*, 82 Mo. 430.—*Siela v. Hannibal & St. J. R. Co.*, 82 Mo. 430.—QUOTING *Porter v. Hannibal & St. J. R. Co.*, 71 Mo. 67. REFERRING TO *Waldhier v. Hannibal & St. J. R. Co.*, 71 Mo. 514.—*Tabler v. Hannibal & St. J. R. Co.*, 31 Am. & Eng. R. Cas. 185, 93 Mo. 79, 11 West. Rep. 462, 5 S. W. Rep. 810. *Higgins v. Missouri Pac. R. Co.*, 43 Mo. App. 547. *Arnold v. Delaware & H. Canal Co.*, 6 N. Y. S. R. 368. *Hotis v. New York C. & H. R. R. Co.*, 25 N. Y. S. R. 525, 53 Hun 634, 2 Silv. Sup. Ct. 598, 6 N. Y. Supp. 605. *Pleasant v. Raleigh & A. L. R. Co.*, 95 N. Car. 195. *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541.—APPROVED IN *Davis v. Detroit & M. R. Co.*, 20 Mich. 105. QUOTED IN *Kroy v. Chicago, R. I. & P. R. Co.*, 32 Iowa 357. REVIEWED IN *Vicksburg & M. R. Co. v. Wilkins*, 47 Miss. 404.—*Angerstein v. Jones*, 139 Pa. St. 183, 21 Atl. Rep. 24. *Galveston, H. & S. A. R. Co. v. Delahunty*, 4 Am. & Eng. R. Cas. 628, 53 Tex. 206.

There is no implied warranty, generally, of the completeness or fitness of the road or rolling stock, as between a company and its employés. *Indianapolis & C. R. Co. v. Love*, 10 Ind. 554.—DISTINGUISHED IN *Davis v.*

Detroit & M. R. Co., 20 Mich. 105. REVIEWED IN *Columbus & X. R. Co. v. Webb*, 12 Ohio St. 475.

The company does not insure employés against the negligence of the manufacturer of engines and other appliances. *Nashville & D. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27, 19 Am. Ky. Rep. 261.—CRITICISING *Hegeman v. Western R. Corp.*, 16 Barb. (N. Y.) 353; *Alden v. New York C. R. Co.*, 26 N. Y. 102. QUOTING *Redhead v. Midland R. Co.*, 20 L. T. 628, 4 Am. Law Rev. 85.

It will be presumed, in the absence of anything to the contrary, that a railroad company performs its duty in such cases, and the burden of proving otherwise will rest upon the party asserting that the railroad company has not performed its duty. *Atchison, T. & S. F. R. Co. v. Wagner*, 33 Kan. 660, 7 Pac. Rep. 204. *Painton v. Northern C. R. Co.*, 5 Am. & Eng. R. Cas. 454, 83 N. Y. 7.—FOLLOWED IN *Lee v. Barrow Steamship Co.*, 6 N. Y. S. R. 285.—*Devlin v. Smith*, 89 N. Y. 470; *reversing in part* 25 Hun 206.—DISTINGUISHED IN *Vosburgh v. Lake Shore & M. S. R. Co.*, 15 Am. & Eng. R. Cas. 249, 94 N. Y. 374, 46 Am. Rep. 148.—*Doing v. New York, O. & W. R. Co.*, 73 Hun 270, 26 N. Y. Supp. 405.

If a defect existed in the road which was known to the company, but which it was impossible for them to remove immediately, and in consequence of such defect the road was unsafe but not impassable, and yet they should suffer an employé, in ignorance of the defect, to attempt to pass upon the road, and injury should thereby result to him, the company would be liable. So, on the other hand, if the employé had knowledge of the defect, and the employers had not, the latter would not be liable. And where both parties had such knowledge each takes the risk, unless the company undertake to give special directions as to the mode of operating. *Indianapolis & C. R. Co. v. Love*, 10 Ind. 554.

97. Need not furnish very best machinery, etc.*—The machinery and other

*Duty of employer to furnish "best" appliances. How far employé assumes risks of employment, see note, 54 AM. REP. 726.

Duty of company to furnish employés with best appliances. When not bound to adopt a new invention, see 41 AM. & ENG. R. CAS. 353, *abstr.*

Machinery and appliances furnished employés must be reasonably safe, see note, 13 L. R. A. 374.

105. RE-
v. Webb,
employés
manufacturer
Nashville
(n.) 27, 19
Hegeman
Y.) 353;
N. Y. 102.
Co., 20

absence of
railroad
which cases,
wise will
the rail-
its duty.
Vagner, 33
v. North-
Cas. 454.
v. Barrow
—Devlin
g in part
Vosburgh
m. & Eng.
rep. 148.—
R. Co., 73

which was
ch it was
immedi-
ch defect
passable,
employé, in
pt to pass
thereby
be liable.
employé had
employers
be liable.
ch knowl-
the connec-
tions as
napolis &

best ma-
and other

est" appli-
isks of em-

oyés with
to adopt a
CAS. 353.
employés
L. R. A.

devices furnished the employé in operating the road are not required to be the best, or of the most approved kind, or to be absolutely safe. It is sufficient if the same are reasonably safe. *Chicago, R. I. & P. R. Co. v. Lonergan*, 28 *Am. & Eng. R. Cas.* 491, 118 *Ill.* 41, 7 *N. E. Rep.* 55.—QUOTING *Lake Shore & M. S. R. Co. v. McCormick*, 74 *Ind.* 447.—DISTINGUISHED IN *Huhn v. Missouri Pac. R. Co.*, 31 *Am. & Eng. R. Cas.* 221, 92 *Mo.* 440.—*Robertson v. Cornelson*, 34 *Fed. Rep.* 716. *Chicago & A. R. Co. v. Kerr*, 148 *Ill.* 605, 35 *N. E. Rep.* 1117.—APPROVING *Pittsburg, C. & St. L. R. Co. v. Thompson*, 56 *Ill.* 138. FOLLOWING *Tuller v. Talbott*, 23 *Ill.* 357. OVERRULING *Toledo, P. & W. R. Co. v. Conroy*, 68 *Ill.* 560. QUOTING *Chicago, R. I. & P. R. Co. v. Lonergan*, 118 *Ill.* 48.—*Chicago, B. & Q. R. Co. v. Smith*, 18 *Ill. App.* 119.—QUOTING *Lake Shore & M. S. R. Co. v. McCormick*, 74 *Ind.* 440; *Ft. Wayne, J. & S. R. Co. v. Gildersleeve*, 33 *Mich.* 133; *Smith v. St. Louis, K. C. & N. R. Co.*, 69 *Mo.* 32.—*Lake Shore & M. S. R. Co. v. McCormick*, 5 *Am. & Eng. R. Cas.* 474, 74 *Ind.* 440.—QUOTED IN *Chicago, B. & Q. R. Co. v. Smith*, 18 *Ill. App.* 119; *Chicago, R. I. & P. R. Co. v. Lonergan*, 28 *Am. & Eng. R. Cas.* 491, 118 *Ill.* 41.—*Louisville & N. R. Co. v. Orr*, 8 *Am. & Eng. R. Cas.* 94, 84 *Ind.* 50. *Atchison, T. & S. F. R. Co. v. McKee*, 37 *Kan.* 592, 15 *Pac. Rep.* 484. *Derby v. Kentucky C. R. Co.*, (Ky.) 4 *S. W. Rep.* 303.—QUOTING *Baltimore & O. R. Co. v. Rowan*, 104 *Ind.* 88, 3 *N. E. Rep.* 627; *Houston & T. R. Co. v. Oram*, 49 *Tex.* 341.—*Ft. Wayne, J. & S. R. Co. v. Gildersleeve*, 33 *Mich.* 133.—QUOTED IN *Chicago, B. & Q. R. Co. v. Smith*, 18 *Ill. App.* 119. REVIEWED IN *McGinnis v. Canada Southern Bridge Co.*, 8 *Am. & Eng. R. Cas.* 135, 49 *Mich.* 466.—*Michigan C. R. Co. v. Smithson*, 1 *Am. & Eng. R. Cas.* 101, 45 *Mich.* 212, 7 *N. W. Rep.* 791.—QUOTED IN *Norfolk & W. R. Co. v. Jackson*, 85 *Va.* 489, 8 *S. E. Rep.* 370.—*Hatter v. Illinois C. R. Co.*, 69 *Miss.* 642, 13 *So. Rep.* 827. *Huhn v. Missouri Pac. R. Co.*, 31 *Am. & Eng. R. Cas.* 221, 92 *Mo.* 440, 10 *West. Rep.* 405, 4 *S. W. Rep.* 937.—DISTINGUISHING *Smith v. St. Louis, K. C. & N. R. Co.*, 69 *Mo.* 32; *Chicago, R. I. & P. R. Co. v. Lonergan*, 118 *Ill.* 41.—*Tabler v. Hannibal & St. J. R. Co.*, 31 *Am. & Eng. R. Cas.* 185, 93 *Mo.* 79, 11 *West. Rep.* 462, 5 *S. W. Rep.* 810. *Friel v. Citizens' R. Co.*, 115 *Mo.* 503, 22 *S. W. Rep.* 498. *Hickey*

v. Taaffe, 105 *N. Y.* 26; affirming 39 *Hun* 656, *mem.*, which reversed 6 *N. Y. S. R.* 426. *Van Horn v. Boston, H. T. & W. R. Co.*, 4 *N. Y. S. R.* 782, 42 *Hun* 654, *mem.*; affirmed in 113 *N. Y.* 634, *mem.*, 20 *N. E. Rep.* 878, 22 *N. Y. S. R.* 994. *Thorn v. New York City Ice Co.*, 11 *N. Y. S. R.* 845, 46 *Hun* 497. *Spencer v. New York C. & H. R. R. Co.*, 51 *N. Y. S. R.* 386, 67 *Hun* 196, 22 *N. Y. Supp.* 100.—APPLYING *Bajus v. Syracuse, B. & N. Y. R. Co.*, 103 *N. Y.* 312, 3 *N. Y. S. R.* 96; *Kern v. De Castro & D. S. R. Co.*, 125 *N. Y.* 50, 34 *N. Y. S. R.* 363.—*McNeil v. New York, L. E. & W. R. Co.*, 54 *N. Y. S. R.* 201, 71 *Hun* 24.—FOLLOWING *Appel v. Buffalo, N. Y. & P. R. Co.*, 111 *N. Y.* 550, 20 *N. Y. S. R.* 90.—*Jacobson v. Cornelius*, 24 *N. Y. S. R.* 360, 5 *N. Y. Supp.* 306. *Pittsburgh & C. R. Co. v. Sentmeyer*, 5 *Am. & Eng. R. Cas.* 508, 92 *Pa. St.* 276, 37 *Am. Rep.* 684.—NOT FOLLOWED IN *Chicago, M. & St. P. R. Co. v. Carpenter*, 56 *Fed. Rep.* 451; *Baltimore & O. R. Co. v. Rowan*, 23 *Am. & Eng. R. Cas.* 390, 104 *Ind.* 88. QUOTED IN *Scott v. Oregon R. & N. Co.*, 28 *Am. & Eng. R. Cas.* 414, 14 *Oreg.* 211.—*Payne v. Reese*, 100 *Pa. St.* 301.—QUOTED IN *Mensch v. Pennsylvania R. Co.*, 150 *Pa. St.* 598.—*Philadelphia & R. R. Co. v. Hughes*, 33 *Am. & Eng. R. Cas.* 348, 119 *Pa. St.* 301, 11 *Cent. Rep.* 822, 13 *Atl. Rep.* 286, 21 *W. N. C.* 166. *International & G. N. R. Co. v. Williams*, 82 *Tex.* 342, 18 *S. W. Rep.* 700. *Nix v. Texas Pac. R. Co.*, 82 *Tex.* 473, 18 *S. W. Rep.* 571.

The master may use any reasonably safe machine he chooses to use, but he may not use a defective machine, unless it is as safe as the complete machine would have been. *Muirhead v. Hannibal & St. J. R. Co.*, 19 *Mo. App.* 634.—FOLLOWING *Porter v. Hannibal & St. J. R. Co.*, 71 *Mo.* 72.

An employer performs his duty when he furnishes appliances of ordinary character and reasonable safety; and the former is the test of the latter. For in regard to the style of the implement, or the nature of the mode of performance of a work, "reasonably safe" means safe, according to the usages, habits, and ordinary risks of the business. *Titus v. Bradford, B. & K. R. Co.*, 136 *Pa. St.* 618, 20 *Atl. Rep.* 517.

If a company use such as are in general use, that is all that can be required. *Smith v. St. Louis, K. C. & N. R. Co.*, 69 *Mo.* 32.—DISTINGUISHING *Lewis v. St. Louis & I. M. R. Co.*, 59 *Mo.* 495; *Wonder v. Baltimore &*

O. R. Co., 32 Md. 411; Toledo, W. & W. R. Co. v. Asbury, 84 Ill. 434. QUOTING Warner v. Erie R. Co., 39 N. Y. 471.—DISTINGUISHED IN Huhn v. Missouri Pac. R. Co., 31 Am. & Eng. R. Cas. 221, 92 Mo. 440. FOLLOWED IN Cagney v. Hannibal & St. J. R. Co., 69 Mo. 416; Muirhead v. Hannibal & St. J. R. Co., 19 Mo. App. 634; Warming-ton v. Atchison, T. & S. F. R. Co., 46 Mo. App. 159. QUOTED IN Chicago, B. & Q. R. Co. v. Smith, 18 Ill. App. 119.

Or such as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances. *Burke v. Witherbee*, 98 N. Y. 562.—FOLLOWED IN Bajus v. Syracuse, B. & N. Y. R. Co., 28 Am. & Eng. R. Cas. 499, 103 N. Y. 312. REVIEWED IN Lafflin v. Buffalo & S. W. R. Co., 106 N. Y. 136.

But employés engaged in running trains must be supplied with the best known machinery and appliances, as the work is more dangerous. *Chicago, R. I. & P. R. Co. v. Becker*, 38 Ill. App. 523.

A master is not an insurer that his appliances are absolutely free from defect, and the fact that the servant, a fireman, was injured while obeying the instructions of the engineer to throw open a switch similar to those in use on well-regulated railroads, which act was not within the scope of his ordinary duties, does not change the rule that the employé, in an action for personal injuries, must show that the injury complained of was caused by some defect which arose, or had not been discovered or remedied, owing to the negligence of the master or of some person intrusted by him with superintendence. *Mary Lee C. & R. Co. v. Chambliss*, 97 Ala. 171, 11 So. Rep. 897.—DISAPPROVING *Pittsburgh, C. & St. L. R. Co. v. Adams*, 105 Ind. 151.

In an action by the driver of a horse-car for injuries received in consequence of the alleged negligence of the company in furnishing a straight pin to attach the single-tree to the draw-head of the car, which worked out of its hole while the car was in motion, instead of furnishing a safety-pin to prevent accident, it is error to instruct the jury that the obligation upon the master required him to furnish such appliances "as combine the greatest safety with practical use." *Sappenfield v. Main St. & A. P. R. Co.*, 91 Cal. 48, 27 Pac. Rep. 590.

It was not negligence to use a green, round pole as a lever for raising and level-

ing the roadbed of a railroad, although "jacks" and other instrumentalities might have been effectively employed; and therefore the defendant was entitled to the instruction "that if the jury find that the defendant company was using the ordinary lever used in such cases, and that the same, if used carefully by the laborers, was safe, and not dangerous, and the plaintiff was injured by the careless use by his fellow-servants, it is not negligence of the company, and the plaintiff cannot recover." *Young v. Virginia & N. C. Constr. Co.*, 109 N. Car. 618, 14 S. E. Rep. 58.

98. Adoption of new inventions and improvements.*—Railroad companies are bound to avail themselves of all new inventions and improvements known to them which will contribute materially to safety, whenever the utility of such improvement has been thoroughly tested and demonstrated. *Smith v. New York & H. R. Co.*, 19 N. Y. 127; affirming 6 Duer 225.—DISTINGUISHED, FOLLOWED, AND REVIEWED IN *Stodder v. New York, L. E. & W. R. Co.*, 50 Hun 221, 19 N. Y. S. R. 772, 2 N. Y. Supp. 780. FOLLOWED IN *Costello v. Syracuse, B. & N. Y. R. Co.*, 65 Barb. (N. Y.) 92. QUOTED IN *Kentucky C. R. Co. v. Thomas*, 9 Ky. 160; *Flinn v. New York C. & H. R. R. Co.*, 51 N. Y. S. R. 103.

A railroad company is not required, by its duty to its employés and servants, to adopt every new invention or appliance which may be useful in its business, and which may serve to diminish the risks to life, limb, or property incident to its service; it is sufficient to adopt such as are ordinarily used by prudently conducted roads engaged in like business and surrounded by like circumstances. *Louisville & N. R. Co. v. Allen*, 28 Am. & Eng. R. Cas. 514, 78 Ala. 494. *Georgia Pac. R. Co. v. Propst*, 83 Ala. 518, 3 So. Rep. 764.—APPROVING *Louisville & N. R. Co. v. Allen*, 78 Ala. 494.—FOLLOWED IN *Alabama G. S. R. Co. v. Arnold*, 35 Am. & Eng. R. Cas. 466, 84 Ala. 159, 4 So. Rep. 359, 5 Am. St. Rep. 354.—*Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 So. Rep. 276. *Sappenfield v. Main St. & A. P. R. Co.*, 91 Cal. 48, 27 Pac. Rep. 590.—DISTINGUISHING *Treadwell v. Whittier*, 81 Cal. 599, 15 Am. St. Rep. 82.—*Toledo, W. & W.*

* Duty of company to furnish servants with improved machinery, see note, 15 AM. & ENG. R. CAS. 238. See also 48 Id. 217, *abstr.*

although
ties might
and there-
to the in-
that the
e ordinary
the same,
was safe,
aintiff was
his fellow-
the com-
recover."
r. Co., 109

ventions
compa-
ives of all
known to
terially to
such im-
tested and
ork & H.
Duer 225.
AND RE-
k, L. E. &
S. R. 772,
N Costello
, 65 Barb.
cky C. R.
n v. New
S. R. 103.
ired, by its
, to adopt
nce which
and which
p life, limb,
vice; it is
ordinarily
s engaged
by like cir-
R. Co. v.
4, 78 Alt.
st, 83 Ala.
Louisville
94.—FOL-
v. Arnold,
Ala. 159, 4
54.—Rich-
Ala. 218, 9
n St. & A.
590.—Dis-
ter, 81 Cal.
W. & W.

nts with im-
& ENG. R.

R. Co. v. Astbury, 84 Ill. 429.—QUOTED IN *Smith v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 32.—*Burns v. Chicago, M. & St. P. R. Co.*, 28 Am. & Eng. R. Cas. 409, 69 Iowa 450, 30 N. W. Rep. 25.

If the company has reasonably safe machinery and appliances, it will not be required to discard the same and adopt or apply a new invention which is yet an experiment and but partially adopted by other companies. *Chicago, R. I. & P. R. Co. v. Lonergan*, 28 Am. & Eng. R. Cas. 491, 118 Ill. 41, 7 N. E. Rep. 55.

Neither companies nor individuals are bound, as between themselves and their servants, to discard and throw away their implements or machinery upon the discovery of every new invention which may be thought or claimed to be better than those they have in use; but if they take ordinary care and exercise ordinary prudence to keep their implements or machinery in sound repair, so that harm does not result to the servant for want of such sound condition of the implements or machinery used, then such individuals or companies will not be responsible to servants for injuries which may occur to them in the use of such implements or machinery. *Lake Shore & M. S. R. Co. v. McCormick*, 5 Am. & Eng. R. Cas. 474, 74 Ind. 440.—CRITICISING *St. Louis & S. E. R. Co. v. Valirius*, 56 Ind. 511.—*Wilson v. Louisville & N. R. Co.*, 85 Ala. 269, 4 So. Rep. 701.

An employer is not bound to make use of the newest mechanical appliances for the purpose of insuring the safety of his employes, especially if it does not appear that on the whole it would be advantageous to them. So a railway company is not bound to block its frogs, particularly if it does not appear that in doing so it would not entail greater dangers than it would avert. *McGinnis v. Canada Southern Bridge Co.*, 8 Am. & Eng. R. Cas. 135, 49 Mich. 466, 13 N. W. Rep. 819.—REVIEWING *Ft. Wayne, J. & S. R. Co. v. Gildersleeve*, 33 Mich. 133.

A master may even have in use a machine or appliance shown to be less safe than another in general use, without being liable to his servants for the consequences of the use of it. If the servant think proper to operate such machine, it is at his own risk; and all that can be required is that he shall not be deceived as to the degree of danger that he incurs. *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411.

As to appliances—particularly new inventions, or changes claimed to be improvements—all railroads are not required to conform to one standard. Allowance is, and must be, made for diversity of opinion; and their use by a majority of roads does not necessarily require all roads to adopt them. *Louisville & N. R. Co. v. Hall*, 39 Am. & Eng. R. Cas. 298, 87 Ala. 708, 4 L. R. A. 710, 6 So. Rep. 277.

A master may carry on his business with an old machine not provided with all the safeguards attached to newer machines; he may discharge a servant employed to run it who refuses to perform his stipulated service, and a threat to do so is not coercion which will make the master liable for injuries to the servant resulting from the use of the machine. *Sweeney v. Berlin & J. Envelope Co.*, 101 N. Y. 520, 5 N. E. Rep. 358.—DISTINGUISHING *Hawley v. Northern C. R. Co.*, 82 N. Y. 370.—FOLLOWED IN *Bajus v. Syracuse, B. & N. Y. R. Co.*, 28 Am. & Eng. R. Cas. 499, 103 N. Y. 312.

The burden of proof is upon the plaintiff who charges negligence for not adopting a certain device, to show, from a survey of the whole field, that the new device could be safely adopted and that it afforded the desired protection in one direction, without the introduction of new perils in another. *Chicago & A. R. Co. v. Few*, 15 Ill. App. 125.

That an instrument is new and requires a different kind of management on the part of persons using it is no reason against its introduction; and an employé using such new machinery is charged with knowledge of its visible qualities and the ordinary working or effect of such qualities. *Gulf, C. & S. F. R. Co. v. Williams*, 39 Am. & Eng. R. Cas. 292, 72 Tex. 159, 12 S. W. Rep. 172.

60. Degree of care demanded.*—

(1) *In general.*—The legal obligation imposed on railroad companies by their contracts with passengers and employes is that their machinery is suitable, sufficient, and as safe as care and skill can make it; and that they will be responsible for injuries resulting from defects therein, which might have been detected by their agents upon a careful and skilful application of the proper and approved tests. *Nashville & D. R. Co.*

*Degree of care required in railroad companies in furnishing appliances for use of employes, see 44 AM. & ENG. R. CAS. 521, *abstr.*

v. Jones, 9 Heisk. (Tenn.) 27, 19 Am. Ry. Rep. 261.—NOT FOLLOWING Nashville & C. R. Co. *v. Elliott, 1 Coldw. (Tenn.) 616.*—DISTINGUISHED IN *East Tenn., V. & G. R. Co. v. Aiken, 89 Tenn. 245.*

An instruction which tells the jury that it is the duty of a company to furnish its employés reasonably safe machinery and appliances is erroneous, as it makes the company a guarantor of the reasonable fitness and safety of its machinery in all cases, which is a higher degree of care than the law requires. The company is bound only to use a high degree of care in providing safe machinery and appliances. *Chicago, B. & Q. R. Co. v. Merckes, 36 Ill. App. 195.*—REVIEWING *Camp Point Mfg. Co. v. Ballou, 71 Ill. 417.*

(2) *Ordinary care.*—The master's duty requires of him ordinary care to supply and maintain reasonably safe and sufficient appliances necessary for the servant's work. *Alcorn v. Chicago & A. R. Co., 53 Am. & Eng. R. Cas. 87, 108 Mo. 81, 18 S. W. Rep. 188.* *Woodworth v. St. Paul, M. & M. R. Co., 5 McCrary (U. S.) 574, 18 Fed. Rep. 282.* *Wabash R. Co. v. McDaniels, 11 Am. & Eng. R. Cas. 158, 107 U. S. 454, 2 Sup. Ct. Rep. 932.* *Consolidated Coal Co. v. Bonner, 43 Ill. App. 17.* *Indiana Car Co. v. Parker, 100 Ind. 181.*—FOLLOWED IN *O'Neal v. Chicago & I. Coal R. Co., 132 Ind. 110.*—*Bohn v. Chicago, R. I. & P. R. Co., 106 Mo. 429, 17 S. W. Rep. 580.* *Gorham v. Kansas City & S. R. Co., 113 Mo. 408, 20 S. W. Rep. 1060.* *Hanley v. Grand Trunk R. Co., 62 N. H. 274.* *Faulkner v. Erie R. Co., 49 Barb. (N. Y.) 324.* *Missouri Pac. R. Co. v. Lyde, 11 Am. & Eng. R. Cas. 188, 57 Tex. 505.* *International & G. N. R. Co. v. Bell, 75 Tex. 50, 12 S. W. Rep. 321.* *Gulf, C. & S. F. R. Co. v. Johnson, 83 Tex. 628, 19 S. W. Rep. 151.* *Baltimore & O. R. Co. v. McKenzie, 24 Am. & Eng. R. Cas. 395, 81 Va. 71.*—QUOTED IN *Richmond & D. R. Co. v. Norment, 84 Va. 167, 4 S. E. Rep. 211;* *Richmond & D. R. Co. v. Burnett, 88 Va. 538.*—*Richmond & D. R. Co. v. George, 48 Am. & Eng. R. Cas. 331, 88 Va. 223, 13 S. E. Rep. 429.*—QUOTING *Cayzer v. Taylor, 10 Gray (Mass.) 274;* *Richmond & D. R. Co. v. Norment, 84 Va. 167.*—*Norfolk & W. R. Co. v. Gilman, 88 Va. 239, 13 S. E. Rep. 475.*

A delegation of that duty to subordinates does not absolve the master from liability for its breach. *Taylor v. Missouri Pac. R.*

Co., (Mo.) 16 S. W. Rep. 206. *St. Louis, I. M. & S. R. Co. v. Harper, 44 Ark. 524.*

It is only ordinary care that is required of the master, but ordinary care requires that he should take notice of the liability of a rope to become worn and unsafe from age and use. *Indiana Car Co. v. Parker, 100 Ind. 181.*

(3) *Reasonable care.*—The company must use all reasonable care to provide and keep in repair safe, sound, and suitable instrumentalities and machinery for the use of its employés. *Richmond & D. R. Co. v. Williams, 39 Am. & Eng. R. Cas. 326, 86 Va. 165, 9 S. E. Rep. 990.* *Cooper v. Central R. Co., 44 Iowa 134.* *Conway v. Illinois C. R. Co., 50 Iowa 465.* *Holden v. Fitchburg R. Co., 2 Am. & Eng. R. Cas. 94, 129 Mass. 268, 37 Am. Rep. 343.* *Gates v. Southern Minn. R. Co., 2 Am. & Eng. R. Cas. 237, 28 Minn. 110, 9 N. W. Rep. 579.* *Gutridge v. Missouri Pac. R. Co., 94 Mo. 468, 13 West. Rep. 644, 7 S. W. Rep. 476.* *Henry v. Wabash Western R. Co., 109 Mo. 488, 19 S. W. Rep. 239.* *Powers v. New York C. & H. R. R. Co., 60 Hun 19, 38 N. Y. S. R. 558, 14 N. Y. Supp. 408;* *affirmed in 128 N. Y. 659, mem., 40 N. Y. S. R. 979.*—APPLYING *Chapman v. Erie R. Co., 55 N. Y. 579;* *Baulec v. New York & H. R. Co., 59 N. Y. 356;* *Edwards v. New York & H. R. Co., 98 N. Y. 245;* *Kelly v. New York & S. B. R. Co., 109 N. Y. 44.*—QUOTING *Wright v. New York C. R. Co., 25 N. Y. 562.*—*Carlson v. Phoenix Bridge Co., 132 N. Y. 273, 30 N. E. Rep. 750, 43 N. Y. S. R. 942;* *affirming 55 Hun 485, 29 N. Y. S. R. 553, 8 N. Y. Supp. 634.* *Disher v. New York C. & H. R. R. Co., 2 N. Y. S. R. 276, 41 Hun 637, mem.;* *affirmed in 114 N. Y. 619, mem., 21 N. E. Rep. 415, 22 N. Y. S. R. 1000.* *Bailey v. Rome, W. & O. R. Co., 19 N. Y. S. R. 656, 49 Hun 377, 3 N. Y. Supp. 585.* *Knahtla v. Oregon S. L. & U. N. R. Co., 21 Oreg. 136, 27 Pac. Rep. 91.* *Texas & P. R. Co. v. Huffman, 83 Tex. 286, 18 S. W. Rep. 741.* *Allen v. Union Pac. R. Co., 7 Utah 239, 26 Pac. Rep. 297.*

A company is bound to furnish safe and suitable machinery, so as not to expose its employés to unnecessary danger, and in the performance of this duty must use reasonable care. *Palmer v. Denver & R. G. R. Co., 3 McCrary (U. S.) 635, 12 Fed. Rep. 392.* *Clement v. Rankin Knitting Co., 20 N. Y. S. R. 196, 3 N. Y. Supp. 169.* *Indianapolis & St. L. R. Co. v. Watson, 33 Am. & Eng. R.*

Cas. 334, 114 Ind. 20, 12 West. Rep. 285, 14 N. E. Rep. 721, 15 N. E. Rep. 824. Wooden v. Western N. Y. & P. R. Co., 46 N. Y. S. R. 77. Herbert v. Northern Pac. R. Co., 8 Am. & Eng. R. Cas. 85, 3 Dak. 38, 13 N. W. Rep. 349. Gravelle v. Minnesota & St. L. R. Co., 3 McCrary U. S.) 352, 10 Fed. Rep. 711. Trainor v. Philadelphia & R. R. Co., 137 Pa. St. 148, 20 Atl. Rep. 632. Thayer v. St. Louis, A. & T. H. R. Co., 22 Ind. 26. Whalen v. Illinois & St. L. R. & C. Co., 16 Ill. App. 320. Faulkner v. Erie R. Co., 49 Barb. (N. Y.) 324. Anderson v. Bennett, 38 Am. & Eng. R. Cas. 87, 16 Oreg. 515, 8 Am. St. Rep. 311, 19 Pac. Rep. 765. Krueger v. Louisville, N. A. & C. R. Co., 31 Am. & Eng. R. Cas. 329, 111 Ind. 51, 9 West. Rep. 249, 11 N. E. Rep. 957. O'Neal v. Chicago & I. Coal R. Co., 132 Ind. 110, 31 N. E. Rep. 669. Pennsylvania Co. v. Whitcomb, 31 Am. & Eng. R. Cas. 149, 111 Ind. 212, 9 West. Rep. 823, 12 N. E. Rep. 380.

As a general rule, in the contract of hiring there is an implied undertaking upon the part of the master that he will use all reasonable care to furnish safe premises, machinery, and appliances for conducting the business safely, and that he will use all reasonable care to furnish competent and prudent co-employees; and on the part of the servant, that he will exercise reasonable care to avoid injury, and that he assumes all ordinary risks incident to the business, and all risks from the negligence of co-employees. *Pittsburgh, C. & St. L. R. Co. v. Adams, 23 Am. & Eng. R. Cas. 408, 105 Ind. 151, 5 N. E. Rep. 187.*—REVIEWED IN *Ohio & M. R. Co. v. Percy, 128 Ind. 197.*

What is reasonable care in the foregoing respect will depend much on the danger to be apprehended from the use of the appliance in the performance of the particular work in hand. *Friel v. Citizens' R. Co., 115 Mo. 503, 22 S. W. Rep. 498.*

A master cannot claim immunity for poor machinery furnished employees on the ground that he has exercised due care in selecting mechanics of competent skill in the construction of such machinery and buildings, but assumes the burden of seeing that such mechanics actually exercise reasonable care and skill in the execution of their work. *Collyer v. Pennsylvania R. Co., 49 N. J. L. 59, 6 Atl. Rep. 437.*

Defendant was engaged in general repairs of its road by resurfacing and taking up old and putting down new ties and rails.

Plaintiff was in its employment as brakeman on a gravel train engaged in drawing gravel, and was injured by a car running off the track in consequence of its bad condition. *Held*, that the rule that it is the duty of a master to use reasonable care and skill to furnish his servants safe and suitable instruments and means to perform the service in which they are engaged applied. *Mad-den v. Minneapolis & St. L. R. Co., 18 Am. & Eng. R. Cas. 63, 32 Minn. 303, 20 N. W. Rep. 317.*—DISTINGUISHED IN *Carlson v. Oregon S. L. & U. N. R. Co., 21 Oreg. 450.*

(4) *Due care—Proper care.*—It is the duty of a company to use due care to provide materials, machinery, and other means by which its employees are to perform the work for which they are employed, safe for their use, and to keep the same in repair, so as not to unnecessarily expose them to danger; and when it has done this, said employees assume the risks and dangers incident to the company's business, including those originating from the negligence of their fellow-servants. *Hewitt v. Flint & P. M. R. Co., 31 Am. & Eng. R. Cas. 249, 67 Mich. 61, 34 N. W. Rep. 659, 11 West. Rep. 148. Cullen v. National Sheet Metal Roofing Co., 12 N. Y. S. R. 508. Lee v. Barrow Steamship Co., 6 N. Y. S. R. 285; appeal dismissed in 113 N. Y. 659, mem., 21 N. E. Rep. 415, 22 N. Y. S. R. 1000.*—FOLLOWING *Painton v. Northern C. R. Co., 83 N. Y. 7.*

The measure of railway companies' liability to their servants and their passengers with regard to the track, machinery, etc., is not the same. They do not warrant to their servants the safe condition of their line and machinery. They guarantee only that due care shall be used in constructing and in keeping in repair and in operating the line, appliances, and machinery. *Little Rock & Ft. S. R. Co. v. Eubanks, 31 Am. & Eng. R. Cas. 176, 48 Ark. 460, 3 S. W. Rep. 808.*

Where the master undertakes to furnish structures to be used by the servant in the performance of his work, the master must use due care in the erection of the structures, and if there is negligence on his part, or on the part of some one representing him in that respect, he is liable for injuries sustained by the servant. *Bowen v. Chicago, B. & K. C. R. Co., 95 Mo. 268, 14 West. Rep. 744, 8 S. W. Rep. 230.*

The rule that the master must exercise proper care in furnishing safe machinery,

etc., to perform the service in which the employé is engaged, extends to all classes of business—as well to the removal of a disabled engine from the roadway to a place for repair, as to the operations of the trains on the road. The same rules apply to employés, as in other cases, in reference to the degree of care incumbent on them. *Houston & T. C. R. Co. v. O'Hare*, 64 Tex. 600.

(5) *Reasonable and ordinary care, skill, and diligence.*—As between a railroad company and its employés, the railroad company is required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employés reasonably safe machinery and instrumentalities for the operation of its railroad. *Atchison, T. & S. F. R. Co. v. Wagner*, 21 Am. & Eng. R. Cas. 637, 33 Kan. 660, 7 Pac. Rep. 204. *Burlington & C. R. Co. v. Liche*, 17 Colo. 280, 29 Pac. Rep. 175. *Chicago, B. & Q. R. Co. v. Abend*, 7 Ill. App. 130. *Kranz v. White*, 8 Ill. App. 583. *Umbach v. Lake Shore & M. S. R. Co.*, 8 Am. & Eng. R. Cas. 98, 83 Ind. 191. *Wabash & W. R. Co. v. Morgan*, 132 Ind. 430, 31 N. E. Rep. 661, 32 N. E. Rep. 85. *Hannibal & St. J. R. Co. v. Kanaley*, 39 Kan. 1, 17 Pac. Rep. 324.—QUOTING *Atchison, T. & S. F. R. Co. v. Wagner*, 33 Kan. 660.—*Union Pac. R. Co. v. Fray*, 43 Kan. 750, 23 Pac. Rep. 1039. *Chicago, K. & W. R. Co. v. Blevins*, 46 Kan. 370, 26 Pac. Rep. 687. *Towns v. Vicksburg, S. & P. R. Co.*, 37 La. Ann. 630, 55 Am. Rep. 508. *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411. *Bowen v. Chicago, B. & K. C. R. Co.*, 95 Mo. 268, 14 West. Rep. 744, 8 S. W. Rep. 230. *Dedrick v. Missouri Pac. R. Co.*, 21 Mo. App. 433.

It does not guarantee their safety from the consequences of the carelessness or neglect of its other employés engaged in the same general business of operating the road. *Shauck v. Northern C. R. Co.*, 25 Md. 462.

What is reasonable and ordinary care depends upon the nature and character of the implement and the dangers to be encountered in its use. *Covey v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 382, 86 Mo. 635.—QUOTED IN *Dedrick v. Missouri Pac. R. Co.*, 21 Mo. App. 433.—*Ballard v. Hitchcock Mfg. Co.*, 21 N. Y. S. R. 548, 51 Hun 188, 4 N. Y. Supp. 940.

A railway company having a machine shop, as between itself and employés therein is not bound to provide machinery that is

safe and sound so "far as human foresight and skill can make it," but is held to the exercise of only "ordinary care and prudence" in that regard. *East Tenn., V. & G. R. Co. v. Aiken*, 89 Tenn. 245, 14 S. W. Rep. 1082.—DISTINGUISHING *Nashville & C. R. Co. v. Elliott*, 1 Coldw. (Tenn.) 611; *Nashville & D. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27.

(6) *Care of prudent and careful men.*—The master, in providing safe and proper machinery for the use of the servant, and keeping the same in repair, is charged with only such care as prudent and careful men engaged in such work would be expected to, and do, exercise. *Goins v. Chicago, R. I. & P. R. Co.*, 37 Mo. App. 221. *Saffensfield v. Main St. & A. P. R. Co.*, 91 Cal. 48, 27 Pac. Rep. 590. *Brymer v. Southern Pac. Co.*, 90 Cal. 496, 27 Pac. Rep. 371.

Therefore, a charge which required the company "to furnish competent and qualified men to handle its trains at the yard, and to furnish means and appliances for switching trains which experienced railroad men had found were safest for that purpose," was error. *Gulf, C. & S. F. R. Co. v. Schwabbe*, 1 Tex. Civ. App. 573, 21 S. W. Rep. 706.

It was error to give in a charge as to the duty of railway companies the following: "Railways are not bound to their employés to provide the best possible appliances, but they are bound only to supply such as are in common use by well-managed railways, and which they have skillfully constructed and carefully maintain in repair. They are bound to furnish such appliances as are reasonably safe and suitable, such as a prudent man would furnish if his own life were exposed to danger that would result from unsuitable or unsafe appliances." *International & G. N. R. Co. v. Bell*, 75 Tex. 50, 12 S. W. Rep. 321.

(7) *Care proportionate to the hazard.*—It is the duty of the master to furnish and maintain implements and machinery reasonably suitable to perform the work which the servant is required to do in the discharge of his duty under his employment. The degree of care and diligence with which this should be done should be proportioned to the amount of hazard which may reasonably be anticipated as consequent upon its neglect, considering the work to be performed. *International & G. N. R. Co. v. Doyle*, 45 Tex. 190.

The reasonable and ordinary care required of a master in furnishing his servants with appliances and keeping the same in repair is always to be determined with reference to the changes to be reasonably apprehended. *Bowen v. Chicago, B. & K. C. R. Co.*, 95 Mo. 268, 14 West. Rep. 744, 8 S. W. Rep. 230.

100. Right to rely on company's performance of this duty.*—The burden of furnishing safe machinery, appliances, surroundings, etc., is upon the master; and while he is not to be held liable for defects and dangers of which the servant is fully informed, yet the servant is authorized to rely upon the acts of the master in that respect, and is under no primary obligation to investigate and test the fitness and safety of machinery, surroundings, etc. *Chicago & E. I. R. Co. v. Hines*, 132 Ill. 161, 23 N. E. Rep. 1021; *affirming* 33 Ill. App. 271. *Cincinnati, I., St. L. & C. R. Co. v. Koesch*, 126 Ind. 445, 26 N. E. Rep. 171. *Ohio & M. R. Co. v. Percy*, 128 Ind. 197, 27 N. E. Rep. 479. *Wabash & W. R. Co. v. Morgan*, 132 Ind. 430, 31 N. E. Rep. 661, 32 N. E. Rep. 85. *Evansville & R. Co. v. Doan*, 3 Ind. App. 453, 29 N. E. Rep. 940. *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701, 16 Pac. Rep. 146.—APPROVED IN *Boss v. Northern Pac. R. Co.*, 2 N. Dak. 128.—*Cumberland & P. R. Co. v. State*, 44 Md. 283, 45 Md. 229. *Ft. Wayne, J. & S. R. Co. v. Gildersleeve*, 33 Mich. 133.—CRITICISED IN *Indianapolis & St. L. R. Co. v. Watson*, 33 Am. & Eng. R. Cas. 334, 114 Ind. 20. FOLLOWED IN *Botsford v. Michigan C. R. Co.*, 33 Mich. 256. REVIEWED IN *Wormell v. Maine C. R. Co.*, 31 Am. & Eng. R. Cas. 272, 79 Me. 397.—*Dedrick v. Missouri Pac. R. Co.*, 21 Mo. App. 433. *Higgins v. Missouri Pac. R. Co.*, 43 Mo. App. 547. *Kain v. Smith*, 89 N. Y. 375; *affirming* 25 Hun 146.—DISTINGUISHED IN *Sweeney v. Berlin & J. Envelope Co.*, 101 N. Y. 520, 5 N. E. Rep. 358; *Peschel v. Chicago, M. & St. P. R. Co.*, 17 Am. & Eng. R. Cas. 545, 62 Wis. 338.—*Galveston, H. & S. A. R. Co. v. Garrett*, 73 Tex. 262, 13 S. W. Rep. 62. *Texas & P. R. Co. v. Geiger*, 79 Tex. 13, 15 S. W. Rep. 214. *Ayers v. Richmond & D. R. Co.*, 33 Am. & Eng. R. Cas. 269, 84 Va. 679, 5

S. E. Rep. 582. *Norfolk & W. R. Co. v. Nunnally*, 88 Va. 546, 14 S. E. Rep. 367.

Unless he knows to the contrary, or, being charged with the duty of examining and ascertaining their safety and suitability, he has neglected to do so. *Louisville & N. R. Co. v. Orr*, 91 Ala. 548, 8 So. Rep. 360. *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286, 6 S. W. Rep. 464, 12 West. Rep. 615. *Schwerdtfeger v. New York & B. Transp. Co.*, 10 N. Y. S. R. 56, 45 Hun 590, mem. *Carter v. Oliver Oil Co.*, 34 So. Car. 211, 13 S. E. Rep. 419.

But when the servant knows that the master has not furnished proper implements for the performance of his work, and continues in the employment using such implements, he will ordinarily be held to have assumed the risk incident to their use. *Texas & P. R. Co. v. Bradford*, 28 Am. & Eng. R. Cas. 479, 66 Tex. 732, 2 S. W. Rep. 595.

It is his knowledge and not his means of knowledge that affects his right to recover. *Muldowney v. Illinois C. R. Co.*, 36 Iowa 462.—FOLLOWED IN *Way v. Illinois C. R. Co.*, 40 Iowa 341.

There is nothing in the employment of a brakeman which takes it out of the general rule that the servant has the right to rely upon the master's implied promise to furnish him safe machinery, and that it is not the servant's duty to inspect the tools and appliances furnished him. He takes the risk of such secret defects as cannot be discovered by the use of ordinary diligence, and no more. *Texas & P. R. Co. v. O'Fiel*, 78 Tex. 486, 15 S. W. Rep. 33.

101. Liability for breach of this duty — Waiver by employee.*—Employers are bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was or ought to have been known to him, and was unknown to the employé. *Davidson v. Southern Pac. Co.*, 44 Fed. Rep. 476.—QUOTING *Washington & G. R. Co. v.*

* As to how far an employé may presume that his employer has performed his duty in supplying safe machinery, etc., see note, 4 L. R. A. 797.

* Liability of master for injury to servants from defective machinery or materials, see very full note, 77 AM. DEC. 218; also notes, 28 AM. & ENG. R. CAS. 546; 4 L. R. A. 797.

McDade, 135 U. S. 570, 10 Sup. Ct. Rep. 1044.—*Northern Pac. R. Co. v. Herbert*, 24 Am. & Eng. R. Cas. 407, 116 U. S. 642, 6 Sup. Ct. Rep. 590.—DISTINGUISHED IN *Baltimore & O. R. Co. v. Andrews*, 53 Am. & Eng. R. Cas. 523, 30 Fed. Rep. 728, 1 C. C. A. 636; *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758. FOLLOWED IN *Little Rock & M. R. Co. v. Moseley*, 56 Fed. Rep. 1009; *Woods v. Lindvall*, 48 Fed. Rep. 62, 4 U. S. App. 49, 1 C. C. A. 37; *Cincinnati, H. & D. R. Co. v. McMullen*, 38 Am. & Eng. R. Cas. 165, 117 Ind. 439, 20 N. E. Rep. 287. NOT FOLLOWED IN *Easton v. Houston & T. C. R. Co.*, 6 Fed. Rep. 893. QUOTED IN *Webb v. Denver & R. G. W. R. Co.*, 7 Utah 363. REVIEWED IN *Van Avery v. Union Pac. R. Co.*, 35 Fed. Rep. 40; *New York & N. E. R. Co. v. Hyde*, 56 Fed. Rep. 188.—*St. Louis & S. E. R. Co. v. Valtrius*, 56 Ind. 511, 18 Am. Ry. Rep. 116. *Bomar v. Louisiana N. & S. R. Co.*, 42 La. Ann. 983, 8 So. Rep. 478. *Union Pac. R. Co. v. Broderick*, 30 Neb. 735, 46 N. W. Rep. 1121. *Leigh v. Omaha St. R. Co.*, 36 Neb. 131, 54 N. W. Rep. 134. *Collyer v. Pennsylvania R. Co.*, 49 N. J. L. 59, 6 Atl. Rep. 437. *Hardy v. Carolina C. R. Co.*, 76 N. Car. 5, 14 Am. Ry. Rep. 309. *Stone v. Oregon City Mfg. Co.*, 4 Oreg. 52. *International & G. N. R. Co. v. Kernan*, 44 Am. & Eng. R. Cas. 607, 78 Tex. 294, 14 S. W. Rep. 668. *Humphreys v. Newport News & M. V. Co.*, 39 Am. & Eng. R. Cas. 363, 33 W. Va. 135, 10 S. E. Rep. 39.

And this whether the act or omission causing it was due to his personal neglect or the neglect of an agent employed by him, and whether there were one or more parties concerned as operators or employes. *Kain v. Smith*, 2 Am. & Eng. R. Cas. 545, 80 N. Y. 458; reversing 11 Hun 552.

Thus negligence on the part of a car inspector is chargeable to the company, on complaint of a brakeman injured by such neglect. *International & G. N. R. Co. v. Kernan*, 44 Am. & Eng. R. Cas. 607, 78 Tex. 294, 14 S. W. Rep. 668.

But if the employe previously knew of the defect and failed to notify the proper persons, he cannot recover. *Le Clair v. First Div. St. P. & P. R. Co.*, 20 Minn. 9 (Gil. 1).—QUOTING *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441.

If the railroad is negligent in this respect, it is charged in law with notice of the unfit-

ness of the machine, and cannot take advantage of its own wrong, and set up as a defense to an action for such injury that it did not have notice of the defect in its machine. *Warner v. Western N. C. R. Co.*, 25 Am. & Eng. R. Cas. 432, 94 N. Car. 250.

If the servant is injured by reason of defective appliances placed in his hands by the master or his agent, the master is liable in damages, unless he can clearly show (1) that he has used due care in the selection and preservation of the same; or (2) that the servant had knowledge of the defect, and failed to notify the master; or (3) that the injury resulted from contributory negligence. *Cowles v. Richmond & D. R. Co.*, 2 Am. & Eng. R. Cas. 90, 84 N. Car. 309, 37 Am. Rep. 620.—FOLLOWING *Hough v. Texas & P. R. Co.*, 100 U. S. 213; *Gibson v. Pacific R. Co.*, 46 Mo. 163.—COMMENTED ON IN *Hudson v. Charleston, C. & C. R. Co.*, 41 Am. & Eng. R. Cas. 348, 104 N. Car. 491, 10 S. E. Rep. 669. REVIEWED IN *Mason v. Richmond & D. R. Co.*, 111 N. Car. 482.

The plaintiff must establish that the machine or appliance was defective, that the master had knowledge or notice, or ought to have known it, and that the servant did not know, and had not equal means with the master of knowing. *Cowhill v. Roberts*, 71 Hun (N. Y.) 127.—APPLYING *Kennedy v. Manhattan R. Co.*, 33 Hun 457.

Statements made by an employe at the time of his employment, that he is familiar with the work, may excuse the company from explaining the dangers ordinarily incident to the work; but it does not relieve the company from the obligation to furnish reasonably safe appliances, or relieve it from liability for an injury that may result through its neglect to do so. *Steen v. St. Paul & D. R. Co.*, 37 Minn. 310, 34 N. W. Rep. 113.

Where a company sends a car repairer under a car on a side track where trains are liable to be moved, it should provide him with necessary signals or safeguards, and ordinarily a failure to do so will render the company liable if he is injured; but where the repairer is an old employe, and has full knowledge of the danger, and has been in the habit of doing such work for a long time without demanding any protection, he may be considered as having waived any claim for such injuries. *O'Rourke v. Union*

Pac. R. Co., 18 *Am. & Eng. R. Cas.* 19, 22 *Fed. Rep.* 189.

Evidence considered as justifying findings by the jury that the defendant was chargeable with neglect of duty to provide reasonably safe instrumentalities for the use of its servant, the plaintiff, and that the plaintiff was not chargeable with contributory negligence, or the voluntary assumption of the peculiar risk arising from the defendant's neglect; the apparatus being a pile-driver so defectively constructed that the wire rope for lifting the hammer would drop out of a pulley over which it should run, whereby it became ragged, catching the mitten of the plaintiff, and drawing his hand under the pulley. *Steen v. St. Paul & D. R. Co.*, 37 *Minn.* 310, 34 *N. W. Rep.* 113.

102. What constitutes a neglect of this duty.—If a railroad company omits a test of soundness that ought to be made in a boiler repaired at its shops, it will be guilty of negligence, and liable for the damages to its servants resulting from an explosion. *St. Louis, I. M. & S. R. Co. v. Harper*, 44 *Ark.* 524.

A company is liable for injuries sustained by a trackman engaged in raising the level of the track with gravel, by reason of the fact that the company had not furnished its employés in charge of the gravel train with sufficient and suitable appliances for unloading the gravel train at the time the work was undertaken, and that the implements and machinery were not of sufficient strength to bear the strain put upon them at the time and place of the accident. *Cincinnati, I., St. L. & C. R. Co. v. Roesch*, 126 *Ind.* 445, 26 *N. E. Rep.* 171.—FOLLOWED IN *O'Neal v. Chicago & I. Coal R. Co.*, 132 *Ind.* 110.

Defendant company directed some seven or eight laborers to remove a shed some sixty to seventy feet long, which was supported on posts. They were directed to saw off the posts, saw the shed in two in the middle, and then push it over against the wind. Besides the few tools used in cutting, sawing, etc., they were not provided with anything with which to push the shed over, except two pieces of unsound plank. The shed fell the wrong way and injured one of the laborers. *Held*, sufficient evidence to support a verdict finding the company guilty of negligence. *Cleveland, C., C. & St. L. R. Co. v. Brown*, 56 *Fed. Rep.* 804.

5 *D. R. D.*—6.

—FOLLOWING *Chicago, M. & St. P. R. Co. v. Ross*, 112 *U. S.* 377, 5 *Sup. Ct. Rep.* 184. REFERRING TO *Chicago & A. R. Co. v. May*, 108 *Ill.* 298; *Wabash, St. L. & P. R. Co. v. Hawk*, 121 *Ill.* 263, 12 *N. E. Rep.* 253; *Consolidated Coal Co. v. Wombacher*, 134 *Ill.* 57, 24 *N. E. Rep.* 627.

A brakeman on a moving train was killed by coming in contact with a pipe used for supplying engines with water. The pipe was constructed so as to swing over the tank when in use, to be swung back out of the way of trains when not needed, and at the time of the accident some of the appliances were out of order and the pipe had swung over the track of its own weight. *Held*, sufficient to render the company liable. *Ohio, I. & W. R. Co. v. Johnson*, 31 *Ill. App.* 183.

The appliance in question was a chain attached to a jack-screw, used for many years as the means of drawing down the springs on locomotives. It had broken before, and broke on the occasion of the plaintiff's injury, without apparent cause other than its want of strength for such purposes. *Held*, that the company was liable. *Krogstad v. Northern Pac. R. Co.*, 46 *Minn.* 18, 48 *N. W. Rep.* 409.

In an action to recover for the death of an employé through alleged defects in the machinery with which he was to work, there was sufficient evidence to have warranted the jury in finding that the accident resulted from defective machinery; and the question whether the defect was not so obvious that the employer, in the exercise of reasonable care, ought to have known of it and provided against it was fairly presented by the evidence. *Held*, that these questions should have been left to the jury, and it was error to direct a verdict for defendant. *Frank v. Otis*, 2 *N. Y. S. R.* 679.

Plaintiff, a watchman in employ of the company, under order of the regular engineer, who, from sickness, was unable for duty, took charge of a working train and ran to where some pile-driving was being done. The engine used in pile-driving was on the rear car of the train. Plaintiff, upon stopping the train at its destination, went back to the car in which were the pile-driver, boiler, and engine, when its boiler exploded, injuring plaintiff. *Held*, that plaintiff was an employé, and entitled to damages for injury received from imperfect implements furnished by the company. *East Line &*

R. R. Co. v. Scott, 71 Tex. 703, 10 S. W. Rep. 99, 298.

The relation of master and servant is not dissolved from the fact that by the ordinary work of plaintiff as watchman he was not on duty at the time or place of the explosion and injury. *Last Line & R. R. Co. v. Scott*, 71 Tex. 703, 10 S. W. Rep. 99, 298.

103. What does not constitute a neglect of this duty.—A verdict is not warranted by the evidence under the law where there is not sufficient ground for imputing to the defendant any negligence whatever in the matter of furnishing to the plaintiff an unfit instrument for the work in hand, but the evidence shows, on the contrary, that the plaintiff did not wait to have furnished to him such an instrument as the superintendent considered suitable and promised to furnish. *East Tenn., V. & G. R. Co. v. Perkins*, 88 Ga. 1, 13 S. E. Rep. 952.

Where it is usual to give persons who are sent to signal trains, both a white and a red lantern, to be used in different ways and for different purposes, a failure to furnish a red lantern will not make the company liable for the death of a signaler, where there is no evidence to show that there was on that occasion anything calling for the use of a red lantern. *Wadlington v. Newport News & M. V. R. Co.*, (Ky.) 20 S. W. Rep. 783.

It is not actionable negligence *per se* as between master and servant to omit to protect or cover dangerous machinery, but the question of negligence must depend upon the circumstances of each case, such as the nature of the employment, degree of exposure to danger, and notice thereof to the employé. *Carroll v. Williston*, 44 Minn. 287, 46 N. W. Rep. 352.

While a company is bound to furnish suitable and safe machinery and appliances for the use of an employé, having done so, it is not liable for an injury resulting from their breaking or failure, unless it is shown that the corporation has been guilty of negligence in regard thereto. *De Graff v. New York C. & H. R. R. Co.*, 76 N. Y. 125; *affirming* 3 T. & C. 255.—DISTINGUISHED IN *Brann v. Chicago, R. I. & P. R. Co.*, 53 Iowa 595. EXPLAINED IN *Ellis v. New York, L. E. & W. R. Co.*, 17 Am. & Eng. R. Cas. 641, 95 N. Y. 546. FOLLOWED IN *Sack v. Dolese*, 35 Ill. App. 636. QUOTED IN

Mahoney v. New York C. & H. R. R. Co., 46 N. Y. S. R. 738.

Plaintiff and another were required each day to remove a train box and safe, weighing 250 pounds, from one car to another on opposite tracks, which was done by running the cars with the doors opposite each other, and then by swinging the box by means of a rope through its handles from one door to the other. Some time before the accident plaintiff had asked for skids on which to slide the box, and had been promised them; but his request was based upon the ground of convenience, and not that the other method was regarded dangerous. The rope became untied on a certain occasion and plaintiff fell and was injured. *Held*, that the failure of the employer to provide skids was not sufficient negligence to render him liable. *Gowen v. Harley*, 56 Fed. Rep. 973.

The head of a chisel which plaintiff used had become somewhat battered, and he told his superior that the tools needed fixing. He told plaintiff to send them to the shop and have them fixed. He sent the chisels to the shop, but the smith sharpened the points and sent them back without repairing the heads. Plaintiff commenced to use them again and a piece of steel flew from the head of one, under a blow from a hammer, and destroyed one of his eyes. *Held*, that while it was the duty of the employer to furnish suitable tools, yet plaintiff having full knowledge of the defect, it not appearing that the employer knew of the defect at all, no recovery could be had. *Buchanan v. Rome, W. & O. R. Co.*, 10 N. Y. S. R. 326, 45 Hun 593.

The plaintiff, a brakeman, was injured by the colliding of two sections of a long train, which broke as it was about to descend a heavy grade. The train was drawn by two engines and was known as a "double-header." In an action against the company plaintiff alleged that it was guilty of negligence because it used the double-header; because two of the brakes were defective on the section of the train where plaintiff was, which prevented him from stopping it; and because the couplings were not of sufficient strength to hold the train together on heavy grades. *Held*: (1) that a master may conduct his business in his own way, and that plaintiff in taking service with a company which resorted to the use of the double-header ran the risk of his employment;

R. R. Co.,

quired each
safe, weigh-
another on
one by run-
posite each
the box by
bundles from
time before
ed for skids
d had been
t was based
ce, and not
garded dan-
ed on a cer-
ll and was
of the em-
not sufficient
Gowen v.

plaintiff used
and he told
ded fixing,
to the shop
the chisels
urpened the
out repair-
menced to use
el flew from
from a ham-
eyes. Held,
e employer
ntiff having
not appear-
the defect at
Buchanan v.
S. R. 326,

injured by
long train,
descend a
awn by two
a "double-
the company
ty of negli-
ble-header;
defective on
plaintiff was,
bing it; and
of sufficient
er on heavy
r may con-
y, and that
a company
the double-
employment;

(2) that as it was not shown that the company had notice that the two brakes were defective, or that if the brakes had acted they would have stopped the cars, there was nothing to submit to the jury in the matter of the brakes; (3) that the principle that the master may conduct his business in his own way applies to couplings just as to double-heading the trains. *Harok v. Pennsylvania R. Co., (Pa.)* 31 *Am. & Eng. R. Cas.* 268, 11 *Atl. Rep.* 459.

While a brakeman on a freight train was signaling the engineer at night, the cup of his lantern fell out and the light was extinguished; he then descended to the cab and procured another. When returning to the top of the cab he was knocked off and killed. Held, that this did not prove negligence by the company in furnishing a defective lantern. *Davis v. Columbia & G. R. Co.,* 28 *Am. & Eng. R. Cas.* 440, 21 *So. Car.* 93. —DISAPPROVED IN *Texas & P. R. Co. v. Hohn*, 1 *Tex. Civ. App.* 36. DISTINGUISHED IN *Atlee v. South Carolina R. Co.,* 21 *So. Car.* 550, 53 *Am. R. p.* 699, *n.*; *Carter v. Oliver Oil Co.,* 34 *So. Car.* 211.

b. Brakes.

104. Generally.*—It is the duty of a railroad company in employing a brakeman to provide its cars with safe and suitable brakes and appliances to be used by him. *Carpenter v. Mexican Nat. R. Co.,* 39 *Fed. Rep.* 315. *Disher v. New York C. & H. R. Co.,* 2 *N. Y. S. R.* 276, 41 *Hun* 637; affirmed in 114 *N. Y.* 619, *mem.*, 21 *N. E. Rep.* 415, 22 *N. Y. S. R.* 1000, *mem.*

A brakeman who is injured by reason of the brakes being unsafe and defective, of which defects he was ignorant, and whose condition he could not have ascertained by the exercise of ordinary care, is entitled to recover of the company, which knew of or could have discovered their condition by the exercise of reasonable diligence. *Carpenter v. Mexican Nat. R. Co.,* 39 *Fed. Rep.* 315. *Texas & P. R. Co. v. McAttee*, 61 *Tex.* 695. *Richmond & D. R. Co. v. Burnett*, 88 *Va.* 538, 14 *S. E. Rep.* 372.

A railroad company is not bound to furnish new brake-shoes, or those which have been worn away only half an inch or an

inch, but brake-shoes which are effectual for the purpose for which they are used; and its duty to an employé is not measured by the thickness of the shoe, but by its adequacy for the use to which it is put. *Smith v. New York C. & H. R. Co.,* 118 *N. Y.* 645, 23 *N. E. Rep.* 990, 30 *N. Y. S. R.* 96; reversing 45 *Hun* 588, 9 *N. Y. S. R.* 612.

Where a brakeman is injured while in the discharge of his duties through a defective brake, the company cannot avoid liability by showing that the car on which the defective brake was, belonged to another company. *Texas & P. R. Co. v. McClanahan*, 2 *Tex. Unrep. Cas.* 75. *Louisville & N. R. Co. v. Davis*, 91 *Ala.* 487, 8 *So. Rep.* 552.

105. Degree of care required.—It is the duty of a company to use all reasonable and ordinary care in providing safe and well-equipped brakes for the brakemen; and if the company, in neglect of such duty, has procured a defective and improper brake, and placed the brakeman to work the same, without an opportunity to know such defect, and he was thereby injured, a right of action would thereupon arise against the company. *Columbus & X. R. Co. v. Webb*, 12 *Ohio St.* 475.—QUOTING *Cleveland, C. & C. R. Co. v. Keary*, 3 *Ohio St.* 202. REVIEWING *Mad River & L. E. R. Co. v. Barber*, 5 *Ohio St.* 541; *Indianapolis & C. R. Co. v. Love*, 10 *Ind.* 554.—NOT FOLLOWED IN *Tierney v. Minneapolis & St. L. R. Co.,* 21 *Am. & Eng. R. Cas.* 545, 33 *Minn.* 311, 53 *Am. Rep.* 35.

106. Right to rely upon safety of brake.—A brakeman just entering service has a right to assume that brakes he is to use are in a safe condition; and in the absence of any information to the contrary, if he is injured by reason of a defect in a brake, not patent to the eye, he may recover of the company. *Northern Pac. R. Co. v. Herbert*, 24 *Am. & Eng. R. Cas.* 407, 116 *U. S.* 642, 6 *Sup. Ct. Rep.* 590.—APPROVED IN *Morton v. Detroit, B. C. & A. R. Co.,* 81 *Mich.* 423, 46 *N. W. Rep.* 111. FOLLOWED IN *Pullman Palace Car Co. v. Harkins*, 55 *Fed. Rep.* 932. QUOTED IN *Northern Pac. R. Co. v. Charles*, 31 *Am. & Eng. R. Cas.* 198, 51 *Fed. Rep.* 562, 7 *U. S. App.* 359, 2 *C. C. A.* 380; *Southern Pac. Co. v. Lafferty*, 57 *Fed. Rep.* 536; *McDade v. Washington & G. R. Co.,* 26 *Am. & Eng. R. Cas.* 325, 5 *Mackey (D. C.)* 144; *Mackey v. Baltimore & P. R. Co.,* 8 *Mackey (D. C.)* 282.

* Injury to employés caused by defective cars, brakes, etc., see 53 *AM. & ENG. R. CAS.* 206, *abstr.*

Employés of a railroad corporation have a right to expect that it will, as far as possible, provide for their protection, while moving trains, sufficient machinery in good order and condition, and that it will exercise reasonable care and caution not to use cars in its trains having defective brakes. *Mackey v. Baltimore & P. R. Co.*, 8 *Mackey* (D. C.) 282.—QUOTING *Northern Pac. R. Co. v. Herbert*, 116 U. S. 643.

107. What constitutes neglect of this duty.—Evidence showing that a brake-beam was but three inches above the rails, while the usual height was six inches, is sufficient to show a defective appliance, and to entitle an employé injured thereby to recover. *Texas Pac. R. Co. v. White*, 82 *Tex.* 543, 18 *S. W. Rep.* 478.

The reach-rod which, when properly adjusted, held a brake beam in place, had been absent for several days from the brake beam in front of the wheels of a car next to the engine. The absence of this rod was unknown to a brakeman, who was charged with coupling and uncoupling, but the jury found that it was, or ought to have been, known to the company. Its absence caused the beam to hang lower and more forward than it otherwise would have done, which could only be discovered by stooping and looking under the car. While attempting to uncouple the car, the engineer backed his engine, which crowded the brakeman against the car, and his feet were caught in the defective brake beam, and he was injured when the train started. *Held*, sufficient to render the company liable. *Louisville, N. A. & C. R. Co. v. Buck*, 38 *Am. & Eng. R. Cas.* 152, 116 *Ind.* 566, 19 *N. E. Rep.* 453, 2 *L. R. A.* 520.—FOLLOWED IN *Wabash & W. R. Co. v. Morgan*, 132 *Ind.* 430.

108. What does not constitute neglect of this duty.—Where suit is brought by an employé against a railroad company, under section 2590 of Ala. Code, to recover damages received on account of a defective brake on the car, and no evidence is adduced tending to show that plaintiff's injuries were in any way contributed to by any particular defective brake, or that the special brake at which he received his injuries was in any way out of order, the general charge for the defendant should be given. *Louisville & N. R. Co. v. Binion*, 98 *Ala.* 570, 14 *So. Rep.* 619.

There is no negligence in the construction

of a car brake which, when properly used in the ordinary manner, is safe under all conditions which will probably arise in any and every instance of such use. Hence, although it may have a defect, yet if that defect be one which does not interfere with its safe and proper use with reference to the purpose for which it was constructed, an injury to an employé's hand while accidentally in contact with the defective part of the brake, but which was very unlikely to occur, cannot be attributed to negligence on the part of the company in the construction of the machinery. *Richmond & D. R. Co. v. Dickey*, 90 *Ga.* 491, 16 *S. E. Rep.* 212.

It is not the duty of the company to provide a flat car with brakes, which it left standing upon a presumably safe side track; and if the jury find that it had no brakes at the time of the accident, this does not establish negligence, nor entitle the plaintiff to recover. *Hewitt v. Flint & P. M. R. Co.*, 31 *Am. & Eng. R. Cas.* 249, 67 *Mich.* 61, 11 *West. Rep.* 148, 34 *N. W. Rep.* 659.

While plaintiff was applying a brake on a freight train the chain broke and threw him from the car and injured him. The evidence showed that a chain of the same size, made of the best material, would bear a strain six times as great as a brakeman could apply. The brakeman had used the chain on three previous trips and it had proven efficient. There was no evidence of the cause of the break, nor that the chain was imperfect when it was put on, or that the company had not properly inspected it, or whether the defect might have been discovered; but it did appear that the company regularly had the chains examined, but did not test their strength. *Held*, that a nonsuit should have been allowed. *De Graff v. New York C. & H. R. R. Co.*, 76 *N. Y.* 125; *affirming* 3 *T. & C.* 255.—DISTINGUISHING *Webb v. Rennie*, 4 *F. & F.* 608.—QUOTED IN *Ballou v. Chicago & N. W. R. Co.*, 5 *Am. & Eng. R. Cas.* 480, 54 *Wis.* 257, 41 *Am. Rep.* 31.

Plaintiff, a brakeman, was injured by the breaking of an eye-bolt connecting the chain with the rod of a brake. It appeared that the eye-bolt was defective in not having been properly welded. There was no evidence of notice of the defect to defendant or any of its agents, nor was it shown that the defect could have been discovered by inspection; there was evidence that the maker of the bolt could have discovered the

defect by bending it while hot and in other ways, but it did not appear whether the eye-bolt was made by the company or purchased; and no want of care, the exercise of which would have discovered the defect, was shown. *Held*, that the plaintiff failed to make out a case, so far as it rested upon the imperfection referred to. *Painton v. Northern C. R. Co.*, 5 *Am. & Eng. R. Cas.* 454, 83 *N. Y.* 7.

There was evidence, however, that the eye-bolt was smaller than those used by defendant at the time of trial; that the breaking of the chains had formerly been of frequent occurrence. The eye-bolt in question and one of the larger eye-bolts adopted since the accident were produced, and submitted to the inspection of the jury. *Held*, that while the proof of negligence on the part of defendant was slight, sufficient was shown to justify the submission of the question to the jury. *Painton v. Northern C. R. Co.*, 5 *Am. & Eng. R. Cas.* 454, 83 *N. Y.* 7.

A brakeman sued for an injury, charging a defect in the manner of constructing a brake; but it appeared that the brake in question was in common use, and that plaintiff was familiar with their construction and use. *Held*, not sufficient to establish negligence in failing to furnish a properly constructed car. *Wright v. Delaware & H. Canal Co.*, 40 *Hun (N. Y.)* 343.—*APPLYING Laning v. New York C. R. Co.*, 49 *N. Y.* 521; *Gibson v. Erie R. Co.*, 63 *N. Y.* 449; *Evans v. Lake Shore & M. S. R. Co.*, 12 *Hun* 289.

A brake which had been examined and found in good order a short time before, fell when plaintiff attempted to use it, and he was thrown under the car. There was no evidence as to whether the brake-pin fell out or broke, or that proper inspection could have prevented the accident. *Held*, that in the absence of proof showing negligence on the part of the company, plaintiff could not recover. *Philadelphia & R. R. Co. v. Hughes*, 33 *Am. & Eng. R. Cas.* 348, 119 *Pa. St.* 301, 11 *Cent. Rep.* 822, 13 *Atl. Rep.* 286, 21 *W. N. C.* 166.—*NOT FOLLOWED* in *Little Rock & M. R. Co. v. Moseley*, 56 *Fed. Rep.* 1009.

c. Couplings, Buffers, Deadwoods, etc.

109. Coupling apparatus, generally—Company, when deemed negli-

gent.*—Four things are necessary to render a company liable to an employé who is injured while uncoupling cars: (1) a defective condition of the car; (2) an injury resulting therefrom; (3) notice, actual or presumptive, to the company of such defect; (4) that the party injured was in the exercise of ordinary care. *Chicago, B. & Q. R. Co. v. Montgomery*, 15 *Ill. App.* 205.

A brakeman may recover for a personal injury caused by defective couplings, if it is shown that he did not know of such defects before using the couplings. *Louisville & N. R. Co. v. Foley*, 94 *Ky.* 220, 21 *S. W. Rep.* 866.

It is proper to refuse a requested instruction that if the character of the coupling used by defendant was one in general use among railroad companies, it was not negligence upon the part of defendant to use it. Such general use was evidence tending to show ordinary care in the selection of the coupling, but not conclusive. *Martin v. California C. R. Co.*, 94 *Cal.* 326, 29 *Pac. Rep.* 645.

Where recovery is sought for the alleged negligence of defendant in coupling cars which lacked a draw-head with a switch rope, an instruction is erroneous which makes plaintiff's recovery depend upon the fact that the use of a rope made the coupling more unsafe than the use of the chain. *Tabler v. Hannibal & St. J. R. Co.*, 31 *Am. & Eng. R. Cas.* 185, 93 *Mo.* 79, 11 *West. Rep.* 462, 5 *S. W. Rep.* 810.

Where an employé was injured by reason of a radically defective car-coupling apparatus, without fault on his part—*held*, that companies are required to observe a high degree of care in providing machinery, and this was such negligence as to render a company liable. *Toledo, W. & W. R. Co. v. Fredericks*, 71 *Ill.* 294.—*APPLIED* IN *Bennett v. Northern Pac. R. Co.*, 2 *N. Dak.* 112. *DISTINGUISHED* IN *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 *Ill.* 365; *Pennsylvania Co. v. Lynch*, 90 *Ill.* 323.

Plaintiff was employed in making up trains in a yard, and sued for injuries

* Injuries to employés caused by defective coupling apparatus, see notes, 53 *AM. & ENG. R. CAS.* 181; 12 *Id.* 255; 31 *Id.* 163; 48 *Id.* 193. See also 41 *Id.* 263, *abstr.*

Injury to brakeman while coupling cars. Use of locomotive having "goose neck" draft iron. Notice to employé, see 41 *AM. & ENG. R. CAS.* 273, *abstr.*

alleged to have been caused by a defective or dangerous car which was in use. The evidence showed that the kind of cars had been abandoned by the company on account of their dangerous character, and by railroad companies generally. *Held*, sufficient to show that the company knew of the dangerous character of the car, and in the absence of warning to plaintiff, he might recover. *Crane v. Missouri Pac. R. Co.*, 87 Mo. 588.

An employé sued for an injury received by the car couplings breaking and allowing a car to run over his foot. The evidence showed that the breaking resulted from the defective character of the iron out of which the coupling was made, of which the company had prior notice. *Held*, sufficient to show negligence on the part of the company. *Bowers v. Union Pac. R. Co.*, 4 Utah 215, 7 Pac. Rep. 251.—REVIEWED IN *Cunningham v. Union Pac. R. Co.*, 4 Utah 206.

110. — and when not.—It is not negligence *per se* in a railway company to receive from other companies, and haul over its own track, cars having different styles of coupling from those in use on its own cars, and which increase the hazard of coupling. *Louisville & N. R. Co. v. Boland*, 53 Am. & Eng. R. Cas. 169, 96 Ala. 626, 11 So. Rep. 667.—APPROVING *Pittsburgh & L. E. R. Co. v. Henly*, 48 Ohio St. 608, 15 L. R. A. 384; *Michigan C. R. Co. v. Smithson*, 45 Mich. 212; *Hathaway v. Michigan C. R. Co.*, 51 Mich. 253; *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 Ill. 365.

It is not, *per se*, negligence for a railroad company to take from a connecting road a car not provided with suitable appliances for coupling (So. Car. Gen. St. § 1471, requiring companies in that state "to deliver with due diligence all cars wholly or partly loaded with freight consigned to points on connecting roads"). Nor is it, *per se*, negligence when the car is constructed on the old plan, so that the coupling must be made from above, for the company to put it on its trains without notice of the peculiarity to its brakemen. *Simms v. South Carolina R. Co.*, 31 Am. & Eng. R. Cas. 199, 26 So. Car. 490, 2 S. E. Rep. 486.

The fact that a switchman, while making a coupling of his company's car to a foreign

car, is injured by reason of the difference between the couplings of the two cars, is not sufficient to impute negligence to the company, the foreign car being in good order and sound condition, since railroad companies are required by the Mo. constitution (art. 12, § 13) to receive the cars of other companies. *Thomas v. Missouri Pac. R. Co.*, 53 Am. & Eng. R. Cas. 146, 109 Mo. 187, 18 S. W. Rep. 980.—QUOTING *Fl. Wayne, J. & S. R. Co. v. Gildersleeve*, 33 Mich. 133.

A coupling will not be considered defective where it appears that it was the best kind in use and was in good order, but, being new, was a little tighter than one which had become worn from longer use. *Chicago & A. R. Co. v. Rush*, 84 Ill. 570.

The mere failure of a railroad corporation to use on all its cars an improved coupling known as the "Potter draft-iron," and the fact that a common coupling broke, do not show, or tend to show, negligence on the part of the company in the equipment of the train; or if so, it is not available in an action to recover damages for the death of a brakeman who knew what couplings were used and made no objection. *Burns v. Chicago, M. & St. P. R. Co.*, 28 Am. & Eng. R. Cas. 409, 69 Iowa 450, 30 N. W. Rep. 25.

While it is the duty of a railroad company to furnish reasonably safe appliances, cars, and couplings for use by its employés, yet the use of a heavy switch rope for coupling cars is not necessarily, as a matter of law, negligence. *Muirhead v. Hannibal & St. J. R. Co.*, 103 Mo. 251, 15 S. W. Rep. 530.—FOLLOWING *Tabler v. Hannibal & St. J. R. Co.*, 93 Mo. 79.

It is not negligence *per se* for a railroad company to adopt a device for coupling cars, not before in use on its road, without discarding those already in use by it, although the use of the two together may be more hazardous than would the use of either alone. *Pittsburgh & L. E. R. Co. v. Henly*, 53 Am. & Eng. R. Cas. 194, 48 Ohio St. 608, 29 N. E. Rep. 575.

111. Bumpers or buffers.—The use of cars of such unequal height that the buffers are inoperative is more dangerous because the defect is less observable. In general freight trains, where the cars of many different companies are congregated under the necessities of through freight, it may be that, as there is no law compelling

* Liability to car coupler for defects in car of connecting company, see note, 31 AM. & ENG. R. CAS. 204.

an companies to use cars of the same height and construction, the company might be excusable for using cars of unequal height; but in a construction train, and where the cars all belong to the company itself, and where the above excuse is inoperative, the construction and use of such cars are certainly negligence. *Towns v. Vicksburg, S. & P. R. Co.*, 37 *La. Ann.* 630, 55 *Am. Rep.* 508.

Where the bumper or draw-bar of a car belonging to another company is lower than it ought to be, in consequence of the staple or strap in which it plays being broken on one side, the master is responsible for an accident caused by failure to discover and remedy such defect, and he has not fulfilled his duty by furnishing for the use of his employés crooked links which can be used in coupling together cars upon which the bumpers are of different heights. *Goodrich v. New York C. & H. R. R. Co.*, 41 *Am. & Eng. R. Cas.* 259, 116 *N. Y.* 398, 22 *N. E. Rep.* 397, 26 *N. Y. S. R.* 767, 5 *L. R. A.* 750; *affirming* 3 *N. Y. S. R.* 774.

When freight cars are obviously so defectively made, whether by a failure to attach bumpers at all or to make them sufficiently long to protect a person standing between the cars when in motion, or in consequence of any other fault in construction, that the slightest indiscretion on the part of an operative may endanger his life, the company is liable for any injury resulting from such defects. *Mason v. Richmond & D. R. Co.*, 53 *Am. & Eng. R. Cas.* 183, 111 *N. Car.* 482, 16 *S. E. Rep.* 698.—*QUOTING* *Gottlieb v. New York, L. E. & W. R. Co.*, 100 *N. Y.* 467. *REVIEWING* *Johnson v. Richmond & D. R. Co.*, 81 *N. Car.* 453.

As a brakeman was about to couple two cars he discovered that the bumper on one of them hung down lower than the other, and put his hand under it to raise it to the proper level, and his hand was caught and crushed. It appeared that the iron strap which supported the bumper was worn and broken, and there was no bolt in the bumper, which would move backward but would not spring forward; but plaintiff testified that he did not know this until after he was hurt. Another employé called to plaintiff to look out, that the car was not safe; but there was no evidence that it was originally unsafe, nor as to when it became broken or unsafe. *Held*, that the mere fact that the other employé knew it was unsafe,

without showing how long he had known it, would not charge the company with knowledge of its unsafe condition. *Smoot v. Mobile & M. R. Co.*, 67 *Ala.* 13.—*NOT FOLLOWED* IN *Little Rock & M. R. Co. v. Moseley*, 56 *Fed. Rep.* 1009.

In an action for causing the death of E., plaintiff's intestate, it appeared that the deceased was a brakeman upon a freight train and was in the caboose car when, seeing that a collision was imminent between it and another train following, he stepped out of the front door of the car onto the platform of the next car. The cars were furnished with buffers, but they so overlapped each other that they were useless, and in consequence, when the trains collided, E. was caught between the ends of the two cars and killed. *Held*, that a dismissal of the complaint was error; that it was a duty the defendant owed its employés to provide cars with buffers appropriately placed. *Ellis v. New York, L. E. & W. R. Co.*, 17 *Am. & Eng. R. Cas.* 641, 95 *N. Y.* 546; *reversing* 29 *Hun* 278.—*EXPLAINING* *De Graff v. New York C. & H. R. R. Co.*, 76 *N. Y.* 125; *Salts v. Delaware & H. Canal Co.*, 3 *Hun* 338.—*APPLIED* IN *Williams v. Delaware, L. & W. R. Co.*, 39 *Hun* 430. *DISTINGUISHED* IN *Morse v. New York C. & H. R. R. Co.*, 39 *Hun* 414. *QUOTED* IN *Pullitro v. Delaware, L. & W. R. Co.*, 27 *N. Y. S. R.* 63, 7 *N. Y. Supp.* 510. *REVIEWED* AND *QUOTED* IN *Donohue v. Brooklyn City R. Co.*, 38 *N. Y. S. R.* 485, 14 *N. Y. Supp.* 639.

The agreed facts showed that a brakeman was killed while between two cars attempting to couple them, and that one of them had no bumper, which permitted the cars to come so close together as to crush the brakeman. *Held*, sufficient to justify a submission to the jury as to whether the death was caused by a defective car. *Mahoney v. New York C. & H. R. R. Co.*, 39 *N. Y. S. R.* 911, 60 *Hun* 586, 15 *N. Y. Supp.* 501; *affirmed* in 131 *N. Y.* 623, *mem.*, 43 *N. Y. S. R.* 962.

A brakeman's leg was crushed while he was feeling for the bottom rung of a ladder on a car next the engine. There was no bumper on the car, and it was shown that if the bumper had been there the accident would not have happened. It also appeared that the engineer was guilty of negligence in backing the engine suddenly without a signal. *Held*, that the defective condition

of the car, and not the engineer's negligence, was the proximate cause of the injury. *Richmond & D. R. Co. v. George*, 48 *Am. & Eng. R. Cas.* 331, 88 *Va.* 223, 13 *S. E. Rep.* 439.—QUOTING *Grand Trunk R. Co. v. Cummings*, 105 *U. S.* 700.

112. Coupling-links.—A brakeman who has his hand crushed while attempting to couple in the dark two cars with draw-heads at an unequal height from the track can recover for his injuries where the company had failed to furnish suitable links for such couplings, and the conductor ordered plaintiff to take the unsuitable link with which he attempted to make the coupling. *Denver, T. & G. R. Co. v. Simpson*, 16 *Colo.* 55, 26 *Pac. Rep.* 339.—DISTINGUISHING *Wells v. Coe*, 9 *Colo.* 159.

Where the petition avers that the company failed to furnish a sufficient number of safe links, and that the accident resulted from that cause, evidence that the train was not properly supplied with suitable links for the run on which the accident occurred is admissible. *Denver, T. & G. R. Co. v. Simpson*, 16 *Colo.* 55, 26 *Pac. Rep.* 339.

Plaintiff, a brakeman, was ordered to couple certain cars on the side track, to be attached to and carried on by the train. The injury occurred from an attempt to use the links which he found in the draw-heads of said cars. Upon the question of negligence of the defendant, or contributory negligence of plaintiff, the court correctly charged as follows: "The law imposes on the defendant the duty of furnishing to its employes machinery and appliances of all kinds, including links and pins, reasonably suitable and proper to enable such employes to perform the duties required of them, and also to use reasonable diligence to keep such machinery and appliances in such reasonably proper condition after they are furnished; and if plaintiff was injured by reason of a failure of defendant in this respect, he would be entitled to recover, unless you believe from the evidence that it was a part of plaintiff's duty as brakeman to examine the link before undertaking to use it." *Houston & T. C. R. Co. v. Maddox*, (Tex.) 21 *Am. & Eng. R. Cas.* 625.

113. Coupling-pins and bolts.—In an action for the negligent killing of an employe a nonsuit is properly refused where there is some evidence that the death resulted from the use by the railroad of a coupling-pin which was too tight for re-

moval at the proper moment. *Price v. Richmond & D. R. Co.*, 38 *So. Car.* 199, 17 *S. E. Rep.* 732.

Plaintiff, who was engaged in repairing a track, went some twelve to fifteen feet away to allow a passenger train to pass, and was struck by an old coupling-pin which seemed to be thrown off by the motion of one of the car wheels. The facts tended to show that it had been lying loose on a car platform and had dropped upon the wheel, which threw it off. *Held*, that it was negligence to permit the pin to lie loose upon the platform, and the company was liable, though the precise nature of the injury might not have been foreseen and expected from the falling of the pin. *Doyle v. Chicago, St. P. & K. C. R. Co.*, 39 *Am. & Eng. R. Cas.* 314, 77 *Iowa* 607, 42 *N. W. Rep.* 555.

As prudence required that coupling-pins should be chained to prevent them from falling from trains, it was negligence to permit the pin to be upon the car without being secured in its place, and the defendant was not released from liability by the fact that the accident was so unusual and extraordinary that it could not reasonably have been expected to happen. *Doyle v. Chicago, St. P. & K. C. R. Co.*, 39 *Am. & Eng. R. Cas.* 314, 77 *Iowa* 607, 42 *N. W. Rep.* 555.

A fireman was standing upon a lap-board between the engine and tender when the coupling-pin between them broke, and they separated, causing the fireman to be thrown down and killed. The evidence showed that the pin had been bought with the engine from a reputable firm, and had been inspected by a competent person eight days before the accident, and showed no outward defects, except being slightly worn. After the accident an examination by experts showed a hidden flaw in it, and they testified that it was made of inferior iron. *Held*, not sufficient proof of negligence to justify a submission to the jury. *Powers v. New York C. & H. R. R. Co.*, 60 *Hun* 19, 38 *N. Y. S. R.* 558, 14 *N. Y. Supp.* 408; *affirmed in* 128 *N. Y.* 659, *mem.*, 40 *N. Y. S. R.* 979, *mem.*

Where the proof shows that after a freight train had proceeded eighty miles it parted, by reason of a tail bolt, which held the cars together, drawing out, and that this was not an unusual occurrence on all the well-regulated railroads, the tail bolt being such as is used on such roads, the mere fact of such

Price v.
199, 17 S.

repairing a
feet away
, and was
h seemed
of one of
l to show
car plat-
e wheel,
was negli-
ose upon
was liable,
he injury
expected
le v. Chi-
, & Eng.
W. Rep.

pling-pins
them from
nce to per-
r without
e defend-
ity by the
usual and
reasonably
Doyle v.
9 Am. &
42 N. W.

lap-board
when the
, and they
be thrown
showed that
engine from
pected by
before the
rd defects,
er the acci-
showed a
ed that it
not suffi-
tify a sub-
New York
N. Y. S. R.
d in 128 N.
mem.
er a freight
s it parted,
ld the cars
his was not
well-regu-
ng such as
act of such

separation of the train is not an evidence of a defect in the machinery of defendant. *Tuck v. Louisville & N. R. Co.*, 98 Ala. 150, 12 So. Rep. 168.

In such case, when there is an entire absence of evidence showing that the defendant had knowledge of the condition of the tail bolt at the time of the separation of the train, there is no presumption of negligence on the part of the defendant. *Tuck v. Louisville & N. R. Co.*, 98 Ala. 150, 12 So. Rep. 168.

Where the evidence shows that a freight train on which plaintiff's intestate was a brakeman separated after a journey of eighty miles, and the only evidence of the cause of the injury is, that part of the clothing of the deceased was found on the brake-beam of the car next to the one where the separation occurred, and that he had been run over by the train, these facts show that the parting of the train could not have been the proximate cause of the injury. *Tuck v. Louisville & N. R. Co.*, 98 Ala. 150, 12 So. Rep. 168.

114. Coupling-sticks and knives.—A failure to provide a brakeman of but little experience with a coupling-stick, as required by the company's rules, will not make the company liable for an injury, where it appears that ordinarily a stick was not used in coupling, and, after a month's experience, the brakeman undertook to couple without a stick. *Louisville & N. R. Co. v. Bryant*, (Ky.) 22 S. W. Rep. 606.

An allegation in an action by a servant for injury to his hand while attempting to couple cars, he being an employé of only seven hours, from alleged negligence on the part of the employer, that the receivers "carelessly and negligently failed to furnish a coupling-knife," is, in the absence of a specific exception, a sufficient allegation of negligence, although not showing the degree of negligence. *Bonner v. Moore*, 3 Tex. Civ. App. 416, 22 S. W. Rep. 272.

115. Deadwoods.—The use of cars equipped with double deadwoods is not negligence *per se*, so long as they can be coupled with safety by an employé who knows how the couplings should be made and makes it with proper care. *Reynolds v. Boston & M. R. Co.*, 53 Am. & Eng. R. Cas. 177, 64 Vt. 66, 24 Atl. Rep. 134.

116. Draw-bars.—It is not negligence *per se* on the part of a company to use an engine the draw-bar of which is too short

to permit one of its cars to be safely coupled thereto or detached therefrom. *Whitwam v. Wisconsin & M. R. Co.*, 12 Am. & Eng. R. Cas. 214, 58 Wis. 408, 17 N. W. Rep. 124.

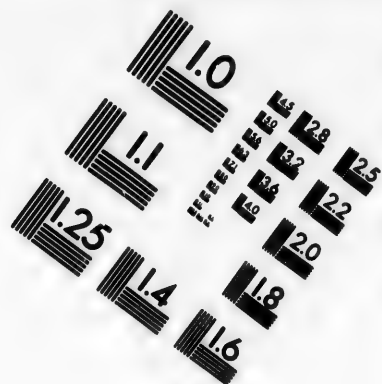
A railroad is not guilty of negligence in furnishing some of its cars with ordinary draw-bars when these must be coupled with "Muller" bars, although these two when being coupled together may be liable to slip past each other and allow the platforms to come near together. The company is required to furnish good, well-constructed machinery, adapted to the purpose of its use, of good material, and of the kind that is found to be most safe when applied to use, but not to adopt a new invention, although safe, to be applied to cars for whose use it is not suitable. *Toledo, W. & W. R. Co. v. Ashbury*, 84 Ill. 429.

Where the evidence shows that a draw-bar supplied by a railway company to be used in coupling cars was used on two occasions, working well on the first, but failing to work on the second, though twice tried in a proper manner, a jury might, in the absence of any explanation from the company, infer that the implement was defective. *Onsley v. Central R. & B. Co.*, 86 Ga. 538, 12 S. E. Rep. 938.

117. Draw-heads.—It is negligence for a company to use a car with the face of the draw-head broken, leaving a sharp, ragged edge, liable to catch the clothing of a person engaged in coupling cars; and also to drive a locomotive against a car, to which it was to be coupled, with an extraordinarily sudden impulse. *McKnight v. Chicago, M. & St. P. R. Co.*, 44 Minn. 141, 46 N. W. Rep. 294.

Plaintiff was employed as a brakeman, and while in the act of coupling cars, was injured through the alleged defective condition of a certain draft timber which held up the draw-head on one of the cars. There was evidence tending to show that the bolts that go into the deadwood were sunk into the timber and let the draw-head down four inches or more lower than it should be; that the defect was old, but the brakeman did not know of it. *Held*, sufficient evidence of negligence on the part of the company to submit the case to the jury. *Seese v. Northern Pac. R. Co.*, 39 Fed. Rep. 487.

A brakeman uncoupled and took out certain cars of the train, and while attempting to recouple the remaining cars was killed, by reason of the draw-head of one of the



Resolution test chart showing patterns of vertical and horizontal lines next to numerical values ranging from 1.0 to 4.0.

6"



**23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503**

14
13
12
11
10
9
8
7
6
5
4
3
2
1

10
9
8
7
6
5
4
3
2
1

Eng. R. Cas. 214, 58 *Wis.* 408, 17 *N. W. Rep.* 124.

A brakeman, while attempting to couple cars in the daytime, was caught between them and injured. The evidence showed that the cars were in proper repair, but were constructed with side sills which projected at each end four or five inches beyond the body of the car; that two feet was the ordinary space between bumpers, but that the two side sills were brought within fourteen inches of each other. It appeared that the company had several hundred cars in use constructed in the same way. *Held*, that the company was not chargeable with negligence for the manner of constructing the car, and that plaintiff could not recover. *Beaudin v. Central Vt. R. Co.*, 38 *N. Y. S. R.* 473, 60 *Hun* 581, *mem.*, 14 *N. Y. Supp.* 700.

120. Degree of care required.—A company is not *prima facie* liable to any of its servants for injuries resulting to them because of defects in its rolling stock or roadbed. The company is bound to that ordinary care which must be measured by the dangers of the service and proportioned to it, but it does not warrant or insure against defects. *Colorado C. R. Co. v. Ogden*, 3 *Colo.* 499.

A company is bound to furnish its employes with suitable machinery and keep it in such a condition as will not endanger their safety, or in a condition which is the least liable to cause injury; but this does not require the company to use extraordinary care and diligence, nor to obtain all the so-called improvements in machinery and appliances for the use of employes. *Greenleaf v. Illinois C. R. Co.*, 29 *Iowa* 14.—APPROVED IN *Smoot v. Mobile & M. R. Co.*, 67 *Ala.* 13.

But where it appears that a ladder on the end of a car is better calculated to insure safety than a smooth surface without the means of ascending or descending, for the purpose of coupling or uncoupling cars, then the same should be provided. *Greenleaf v. Illinois C. R. Co.*, 29 *Iowa* 14.

121. Right to assume safety of car.—A "wiper" has the right to assume that the cars used by his company are reasonably safe. *Grannis v. Chicago, St. P. & K. C. R. Co.*, 81 *Iowa* 444, 46 *N. W. Rep.* 1067.

Plaintiff, a brakeman, was injured while attempting to couple cars, by reason of being furnished with a defective or improper coupling-link. *Held*, that the duty of ascertain-

ing whether the coupling appliances were in proper condition rested in the first instance upon the company; and in the absence of evidence that the duty had devolved upon plaintiff, he had a right to assume that the company had performed this duty and that the couplings were safe. *Goodrich v. New York C. & H. R. R. Co.*, 41 *Am. & Eng. R. Cas.* 259, 116 *N. Y.* 398, 22 *N. E. Rep.* 397, 26 *N. Y. S. R.* 767, 5 *L. R. A.* 750; *affirming* 3 *N. Y. S. R.* 774.—REVIEWED IN *Costikyan v. Rome, W. & O. R. Co.*, 35 *N. Y. S. R.* 163, 12 *N. Y. Supp.* 683, 58 *Hun* 590.

122. Car steps.—Plaintiff was a brakeman on defendant's train. The engineer being a new man, the conductor traveled in the locomotive to show him the grades, etc., and put plaintiff in charge of the caboose. During the night, while performing his duties at the caboose, he was severely injured by reason of a defective step of the caboose. *Held*: (1) if the company's officers or agents knew of the defective step, or ought to have known of it, and if plaintiff did not know of it and was not chargeable with negligence in not knowing it, and was not negligent under the circumstances, he was entitled to damages; (2) there being no evidence of incompetency or negligence on the part of the engineer, it was reversible error to charge the jury that plaintiff was entitled to recover if the injury was caused by the negligence of the company in employing an incompetent engineer, and such negligence was the proximate cause of the injury. *Texas Pac. R. Co. v. Wisenor*, 66 *Tex.* 674, 2 *S. W. Rep.* 667.

123. Hand-holds.*—The usual hand-hold on the top of freight cars, used by brakemen to pull themselves over the top of cars in ascending, had been displaced from a car, and a spike driven in its place. A brakeman, in ascending, reached over the top of the car as if to secure a hold, but fell back and was killed. *Held*, not proof of sufficient negligence on the part of the company to warrant a recovery against it. *Fair v. Pennsylvania R. Co.*, (*Pa.*) 14 *Atl. Rep.* 236.

Plaintiff, a brakeman of eight or ten years' service, attempted to go on top of a box car upon which he was braking; the hand-hold

* Latent defect in hand-hold on car, when question is for jury, see 48 *AM. & ENG. R. CAS.* 220, *abstr.*

on top of the car pulled out, and he was thrown to the ground and seriously injured. The cause of the hand-hold pulling out was that the top of the car to which it had been screwed was rotten. The condition of the hold was not known to the plaintiff, was not patent, and could not have been known by the exercise of ordinary diligence, and no rule of the company required him to inspect the hand-hold before using it. He had noticed a good many roofs rotten on the road, and had worked on cars with rotten roofs, but never noticed any hand-holds loose. A verdict for \$5000 was affirmed. *Forjoe v. Culver*, 2 Tex. Civ. App. 569, 22 S. W. Rep. 237.—REVIEWING *Missouri Pac. R. Co. v. Somers*, 71 Tex. 700.

124. Ladders.—In a suit by a brakeman for a personal injury sustained in consequence of a defective ladder on a freight car, the court refused to instruct the jury, for the company, that it was the duty of plaintiff to have noticed any visible defect in the ladder, and to have reported it to the company, and if there was any visible defect in the ladder, and plaintiff failed to report it to the company, he could not recover on account of such defect. The evidence failed to show that the defect was visible, or that plaintiff ever saw the car before the day of the accident. *Held*, that there was no error in the refusal, as there was no evidence to justify giving the instruction. *Toledo, W. & W. R. Co. v. Ingraham*, 77 Ill. 309.—EXPLAINED IN *Chicago & A. R. Co. v. Platt*, 89 Ill. 141.

Where a brakeman, while obeying the order of a conductor, in uncoupling a car and attempting to climb upon the car after uncoupling it, in consequence of a defective round in the ladder fell and was run over by several cars, there being no proof that the defect in the ladder was visible, or that the brakeman ever saw the car before—*held*, that the company was liable for the injury, it being the duty of the company to furnish safe materials and structures, and the brakeman having no connection in placing the defective car upon the road. *Toledo, W. & W. R. Co. v. Ingraham*, 77 Ill. 309.—DISTINGUISHED IN *Pennsylvania Co. v. Lynch*, 90 Ill. 333.

The law only requires an employer to use due care and diligence in the selection and use of machinery. The amount of care required is measured by the circumstances of each case, depending upon the kinds of machinery used, the risks incident to its use,

and the hazard of the business in which it is used. *So held*, where a brakeman was injured by a defective ladder on the side of a freight car. *Jones v. New York C. & H. R. Co.*, 22 Hun (N. Y.) 284.

A car was taken into a train during the night, the handle of the ladder whereof had been broken off long enough for the fracture to appear weather-worn. Next morning the conductor, attempting to descend this ladder, face towards it, caught at, and would have caught, the handle, had it been in its place, but fell and was killed. *Held*, that the company was guilty of negligence in permitting the car ladder to remain out of order, which rendered it liable. (Lewis, P., and Hinton, J., dissenting.) *Richmond & D. R. Co. v. Moore*, 15 Am. & Eng. R. Cas. 239, 78 Va. 93.—REVIEWED IN *Goodman v. Richmond & D. R. Co.*, 81 Va. 576.

A conductor on a freight train sued to recover for injuries received by reason of a defective ladder on a car which he was compelled to use while in the discharge of his duties. *Held*, that so long as there was nothing in the appearance of the ladder to indicate that it was defective, he had a right to assume that it was safe. *Goodman v. Richmond & D. R. Co.*, 81 Va. 576.—QUOTING *Clark v. Richmond & D. R. Co.*, 78 Va. 718. REVIEWING *Richmond & D. R. Co. v. Moore*, 78 Va. 93.

125. Side stakes on lumber cars.*—A company furnished a platform car to be loaded with lumber, but furnished no stakes for the sides to hold the lumber in position. A shipper loaded the car, under the direction of the station agent, and furnished stakes. During the transportation one of the stakes broke and injured a brakeman who, in the discharge of his duty, was required to be on the lumber. The broken stake was of soft and decayed wood. *Held*, that stakes were necessary appliances, forming part of the car, and that the company was chargeable with negligence in failing to exercise proper care that suitable ones should be furnished. *Bushby v. New York, L. E. & W. R. Co.*, 107 N. Y. 374, 14 N. E. Rep. 407, 10 Cent. Rep. 238, 12 N. Y. S. R. 9; affirming 37 Hun 104.—APPLIED IN *Dougherty v. Rome, W. & O. R. Co.*, 45 N. Y. S. R. 154. DISTINGUISHED IN *Ford v.*

* Liability of company for injury to brakeman caused by failure of company to furnish a platform car with proper stakes, see 33 AM. & ENG. R. CAS. 355, *abstr.*

Lake Shore & M. S. R. Co., 117 N. Y. 638, 2 Silv. App. 460.

In such case it did not appear that the company had made any rules as to the inspection of cars, and that the station agent was only given general directions to see that everything was in order; and it appeared that if the conductors or brakemen saw a defect they could only report it to the station agent. *Held*, that such practice was no defense, as it merely showed that the company had chosen to delegate to shippers a duty which it should have performed itself. *Bushby v. New York, L. E. & W. R. Co.*, 107 N. Y. 374, 14 N. E. Rep. 407, 10 Cent. Rep. 238, 12 N. Y. S. R. 9; *affirming* 37 Hun 104.

A section foreman stepped some eight feet from the track to allow a freight train to pass, but was struck by a projecting piece of timber and injured. It appeared that the cars were carrying lumber, and that the loads were of ordinary size, but that the side stakes intended to hold the lumber in position had become broken, which allowed the timber to project. *Held*, that the failure of the company to provide suitable stakes to hold the lumber in position rendered it liable. *Dougherty v. Rome, W. & O. R. Co.*, 45 N. Y. S. R. 154; *affirmed* in 138 N. Y. 641, 53 N. Y. S. R. 929. —APPLYING *Bushby v. New York, L. E. & W. R. Co.*, 107 N. Y. 374, 12 N. Y. S. R. 9. DISTINGUISHING *Byrnes v. New York, L. E. & W. R. Co.*, 113 N. Y. 251, 22 N. Y. S. R. 936; *Ford v. Lake Shore & M. S. R. Co.*, 117 N. Y. 638, 27 N. Y. S. R. 246.

126. Cars of other companies—Foreign cars.*—A railway corporation, with respect to the cars of other companies which it allows to come into its yard, and which, while there, are to be moved and handled by its employes, is bound to use due diligence and care in seeing that the cars are safe to be so handled by its servants; and such railway corporation cannot divest itself of this duty to its servants for their safety and protection, by a contract with such other companies whose cars are used that the latter shall keep them in repair. The general rule is, that the employer is bound to use due diligence in providing and maintaining safe machinery and instru-

mentalities to be handled and used by his employes without regard to the ownership of the same. *Chicago, B. & Q. R. Co. v. Avery*, 17 Am. & Eng. R. Cas. 649, 109 Ill. 314; *affirming* 10 Ill. App. 210. *Bomar v. Louisiana N. & S. R. Co.*, 42 La. Ann. 983, 8 So. Rep. 478. —APPROVED IN *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112. —*Reynolds v. Boston & M. R. Co.*, 53 Am. & Eng. R. Cas. 177, 64 Vt. 66, 24 Atl. Rep. 134.

And where a brakeman receives an injury, by reason of a defect in a car and the negligence of the car inspector, the doctrine of fellow-servants does not obtain; and the rule is not changed because the car is a foreign car, belonging to a connecting line, and being transported as such. *St. Louis, A. & T. R. Co. v. Putnam*, 1 Tex. Civ. App. 142, 20 S. W. Rep. 1002.

If a railroad corporation is bound to use reasonable care in furnishing its employes with suitable cars, on which they are employed, this rule does not apply to a car received from another corporation, while in transit to its place of destination; but the only duty it owes its employes in such a case is that of providing suitable and competent inspectors. *Mackin v. Boston & A. R. Co.*, 15 Am. & Eng. R. Cas. 196, 135 Mass. 201, 46 Am. Rep. 456. —REVIEWING *Holden v. Fitchburg R. Co.*, 129 Mass. 268. —NOT FOLLOWED IN *Tierney v. Minneapolis & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 545, 33 Minn. 311, 53 Am. Rep. 35.

A railroad company is not bound to receive and haul the car of another road so defectively constructed or otherwise unsafe as manifestly to imperil the life and limb of its employes. *Texas & P. R. Co. v. Carlton*, 15 Am. & Eng. R. Cas. 350, 60 Tex. 397.

One railroad company receiving a loaded car from another, and running it upon its own road, is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all parts of the car which appear to be in good condition are so in fact. *Ballou v. Chicago & N. W. R. Co.*, 5 Am. & Eng. R. Cas. 480, 54 Wis. 257, 41 Am. Rep. 31, 11 N. W. Rep. 559. —QUOTING *Baldwin v. Chicago, R. I. & P. R. Co.*, 50 Iowa 680. —QUOTED IN *Mackey v. Baltimore & P. R. Co.*, 8 Mackey (D. C.) 282. REVIEWED IN *Gottlieb v. New York, L. E. & W. R. Co.*, 24 Am. & Eng. R. Cas. 421, 100 N. Y. 462, 3 N. E. Rep. 344.

* Liability to car coupler for defects in car of connecting company, see note, 31 AM. & ENG. R. CAS. 204.

Plaintiff was employed in making up trains in a yard, and was injured while making a coupling of a car belonging to another company, which it seemed had been out of order for several days. *Held*, that if the company permitted the car to be run into the yard in a dangerous condition for several consecutive days, so that in the exercise of a high degree of care it might have known of its condition in time to have avoided an injury, then it was liable, if the employé was without fault, whether it owned the car or not. *Chicago, B. & Q. R. Co. v. Avery*, 8 Ill. App. 133.

But on the other hand plaintiff, being engaged in a business known to be dangerous, was bound to exercise a corresponding degree of care in respect to his own personal safety to avoid the injury. *Chicago, B. & Q. R. Co. v. Avery*, 8 Ill. App. 133.

127. Hand-cars.—Plaintiff, a section man, was riding on a hand-car with others, under the control of a section boss, and was going about ten miles an hour, when they saw a rapidly moving freight train approaching through a cut on a curve, without warning. The brakes on the hand-car had been improvised by the section boss, and when applied were found entirely ineffectual to stop the car. Plaintiff, believing himself in imminent peril, jumped and was injured. *Held*, sufficient evidence of negligence to warrant a verdict for plaintiff. *Northern Pac. R. Co. v. Charless*, 51 Am. & Eng. R. Cas. 198, 51 Fed. Rep. 562, 7 U. S. App. 359, 2 C. C. A. 380.

A section hand of a railway company, while operating a hand-car, worked at the handle to a crank, which was an octagonal-shaped piece of metal, and was not furnished with a shield of wood, as is usual, within which the handle could revolve. To save his hand he used a glove, which was caught by the handle while working the car, and his thumb was torn off in consequence. *Held*, that plaintiff, to recover, should allege and prove that the use of the glove was reasonable and proper to save his hand while grasping the handle, and that the danger in other respects from the structure of the handle (of which he was ignorant) was not apparent with ordinary care and attention, and that thereby he was injured. *International & G. N. R. Co. v. Doyle*, 49 Tex. 190.

Plaintiff, who had at times been employed as a detective by the defendant railway

company, was directed by its authorized agent to come at once from P. to K. (places on the road), and on going to the station at P. for the purpose of responding to the call, found there upon the track of the company a hand-car ready for his reception, and upon which he was requested to make the journey. *Held*: (1) in the absence of any evidence tending to show the contrary, it will be presumed that the hand-car was furnished and tendered to him by an authorized agent of the company; (2) the company was bound to have its road in a reasonably safe condition for the safe transportation of plaintiff on such hand-car, and in such position thereon as he should take under the direction of the person in charge thereof. *Pool v. Chicago, M. & St. P. R. Co.*, 8 Am. & Eng. R. Cas. 360, 56 Wis. 227, 14 N. W. Rep. 46.—QUOTING *McIntyre v. New York C. R. Co.*, 37 N. Y. 287; *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135.—DISTINGUISHED IN *International & G. N. R. Co. v. Cock*, 68 Tex. 713.

Where a section hand using a hand-car is injured owing to a defect in the wood of the handle, the defect being of such character as that it could not have been discovered by inspection, knowledge possessed by the carpenter who manufactured the car handle in the shops of the company, as to the defect, is not notice to the railroad company that the car was not safe, and it is not liable for the injury. *Indiana, I. & I. R. Co. v. Snyder*, (Ind.) 53 Am. & Eng. R. Cas. 225, 32 N. E. Rep. 1129.

Where an employé sues for an injury sustained through a defective hand-car, it is error to instruct the jury that it is the duty of the company to furnish its employés with safe machinery, the duty of the company extending only to use ordinary care to avoid such defects in the machinery as might expose employés to danger. *Eddy v. Adams*, (Tex.) 18 S. W. Rep. 490.

128. "Push-car."—An employé who was required to ride on the road was directed by a boss to ride on what was known as a "push-car," which was only intended to be used for freights and pushed, and was not provided with brakes. No specific directions were given to the boss, and he directed the plaintiff to ride in the push-car, and there was evidence tending to show that the company had permitted its employés to ride in such cars. *Held*, that the question whether the company, by permit-

ing employes to use such cars for the purpose of riding therein, had so far consented to such use as to be bound for the injury, was a question for the jury. *Miller v. Union Pac. R. Co.*, 5 *McCrary* (U. S.) 300, 17 *Fed. Rep.* 67.

In determining whether the company was liable in such case, the jury should consider whether the company authorized the boss to use the push-car; and such use might be shown by proof of an established custom of the company to allow the employes to ride in such cars. *Miller v. Union Pac. R. Co.*, 5 *McCrary* (U. S.) 300, 17 *Fed. Rep.* 67.

Where a railroad company, through its foreman, directs a servant to use a "push-car" in moving ties, the law imposes upon it the duty of observing reasonable care to furnish one adequately safe for the contemplated use when operated in the usual and customary way. *York v. Kansas City, C. & S. R. Co.*, 117 *Mo.* 405, 22 *S. W. Rep.* 1081.

In an action for the death of a section hand, it appeared that he, with others, had been ordered by the foreman to take a "push-car" down a siding; that, the grade being a descending one, the men got on to ride; that a switch was open on the wrong track and that the car ran onto the switch, requiring the men to jump off to avoid injury from a collision. The "push-car" was of a kind in ordinary use, unprovided with brakes, and was not intended for the transportation of men. The deceased was not directed by the foreman to ride on the car, nor was it necessary to do so in the proper discharge of his duties. *Held*, that there was no negligence on defendant's part in ordering the use of the car. *York v. Kansas City, C. & S. R. Co.*, 117 *Mo.* 405, 22 *S. W. Rep.* 1081.

e. Engines.

129. Duty to furnish safe and suitable engines.—The law requires a company to use due care to provide such materials, machinery, and other means for engineers as are safe, and to keep them in repair and in order so as not unnecessarily to expose the engineers to danger. *Hewitt v. Flint & P. M. R. Co.*, 31 *Am. & Eng. R. Cas.* 249, 67 *Mich.* 61, 11 *West. Rep.* 148, 34 *N. W. Rep.* 659.

Gas which had accumulated in the fire-box of an engine exploded and injured an engineer. A complaint charged the com-

pany with negligence in failing to supply the engineer with proper appliances for his work. *Held*, that coal was one of the appliances within the meaning of the complaint; and therefore it was proper to admit evidence that the coal furnished was of a quality which clogged the netting on top of the smoke-stack, and caused gas to accumulate. *Davis v. New York, L. E. & W. R. Co.*, 14 *N. Y. S. R.* 1.

In such case the question was also as to whether or not the netting on the smoke-stack was suitably constructed. The evidence showed that it was as to some kinds of coal, differing from that used at the time of the accident. *Held*, that the true test was whether it was properly constructed for the kind of coal used at the time of the accident. *Davis v. New York, L. E. & W. R. Co.*, 14 *N. Y. S. R.* 1.

The original complaint charged the company generally with a failure to furnish suitable and safe appliances. An amendment was allowed, alleging that the coal furnished the engineer was of inferior quality. It was objected that the amendment introduced a new cause of action, which was barred by the statute of limitations. *Held*, that the amendment did not introduce a new cause of action; but even if it did, it was no ground for refusing the amendment. *Davis v. New York, L. E. & W. R. Co.*, 14 *N. Y. S. R.* 1.

A switchman sued for injuries received by a train starting while he was between cars attempting to make a coupling. He charged that the locomotive was defective, which caused it to start. The evidence showed that the train was standing still when he went between the cars, and plaintiff claimed that the throttle valve was defective, and would sometimes cock itself, so that the engineer could not stop the engine. But there was uncontradicted evidence that when the engine was standing still the valve was in proper position, and that the cocking which plaintiff complained of could only occur after the valve had been opened for the purpose of moving the train. There was evidence that such valves were not liable to cock when in good order, and that the engine had been thoroughly repaired throughout two months before. *Held*, not sufficient to show a defective valve, and a nonsuit or a verdict for defendant should have been directed. *Toms v. Buffalo Creek*

R. Co., 23 *N. Y. Supp.* 1112, 53 *N. Y. S. R.* 640, 70 *Hun* 84.

A company had in its yard switch engines which were provided with appliances for the protection of switchmen engaged in coupling cars, such as a foot-board on which the switchmen could stand, and other appliances. The company substituted at night an ordinary freight engine, having none of these safety appliances, and a switchman, in attempting to use it, was injured. *Held*, that the company was negligent. *Smith v. Buffalo, R. & P. R. Co.*, 55 *N. Y. S. R.* 223, 72 *Hun* 545, 25 *N. Y. Supp.* 638.

In such case the injured switchman had been but a short time in the company's service, and had never made a coupling with a freight engine. *Held*, that he was not guilty of contributory negligence in attempting to make the coupling under orders from his superior, though he knew that a freight engine had been substituted. He had a right to assume that the company had provided proper safeguards for his protection. *Smith v. Buffalo, R. & P. R. Co.*, 55 *N. Y. S. R.* 223, 72 *Hun* 545, 25 *N. Y. Supp.* 638.

130. Extent of this duty.—A railroad company which continues in use a defective and dangerous locomotive engine, after notice of its dangerous condition, is liable to one of its servants engaged in running such engine, for an injury sustained by him (without negligence on his part) in consequence of such defects. *Keegan v. Western R. Co.*, 8 *N. Y.* 175.—APPROVED IN *Elliott v. St. Louis & I. M. R. Co.*, 67 *Mo.* 272. QUOTED IN *McMillan v. Saratoga & W. R. Co.*, 20 *Barb.* (N. Y.) 449. REVIEWED IN *Mobile & O. R. Co. v. Thomas*, 42 *Ala.* 672.

A railroad corporation owes a duty, to one employed upon one of its engines, to see that the engine is fit and proper for his use in the performance of the labor he has undertaken; this duty is not discharged simply by employing fit and competent agents to supervise the engine and see that it is in fit condition; any negligence on the part of such agents in the performance of their duties in this respect is the negligence of the corporation. *Kirkpatrick v. New York C. & H. R. R. Co.*, 79 *N. Y.* 240.—FOLLOWING *Laning v. New York C. & H. R. R. Co.*, 49 *N. Y.* 521.

The company is bound to see that its engines are perfect and properly constructed

according to the present improvements in the art. *Nashville & C. R. Co. v. Elliott*, 1 *Coldw. (Tenn.)* 611.

A company cannot escape liability for an injury to an employé, caused by a defective engine, on the ground that the engineer who used the engine had failed to report its condition. *Texas & N. O. R. Co. v. Wynne*, (*Tex. Civ. App.*) 22 *S. W. Rep.* 1064.

Where a railroad company furnishes to a contractor engaged in constructing an extension of the company's railroad an engine and train, upon which a fireman already in the service of the company is, by it, ordered to work, the company is liable for personal injuries to him, caused, while obeying this order, by defects in the engine attributable to the company's negligence, although the track of the extension in progress is in possession of the contractor, and the operation and movements of the train thereon are under the latter's exclusive control. *Savannah & W. R. Co. v. Phillips*, 90 *Ga.* 829, 17 *S. E. Rep.* 82.

Where a railroad is owned by one company and controlled and operated exclusively by another, the company controlling and operating the road is liable for an injury done by a locomotive operated by its employés. *Harper v. Newport News & M. V. Co.*, 90 *Ky.* 359, 14 *S. W. Rep.* 346.

By order of the division master mechanic, a tender belonging to one engine was attached to another of different construction, its deck being three to four inches higher than that of the engine. The use of the locomotive as thus constituted was rendered dangerous, by reason of lost motion and the liability of the tender to become detached, and the engineer so notified the master mechanic. While the fireman was engaged in shoveling coal into the fire-box, the engine and tender parted and the fireman was killed. *Held*, that the company was liable. *Krueger v. Louisville, N. A. & C. R. Co.*, 31 *Am. & Eng. R. Cas.* 329, 111 *Ind.* 51, 9 *West. Rep.* 247, 11 *N. E. Rep.* 957.—QUOTING *Ford v. Fitchburg R. Co.*, 110 *Mass.* 240, 14 *Am. Rep.* 598.

131. Its limits and exceptions.—If a railroad employed an engine, which from its make and construction was unsafe, and knew thereof, or would have known thereof by the exercise of reasonable care and diligence, it would be responsible to one of its servants for injuries caused by such defect in make and construction, after it was

known, or on the railroad, the servant able with no out of the use of such would be a consider in notice, but assumption of *Thomas*, 42

Where an by the explo the boiler v and by first not been us suspicion of defect was n have been c usually empl indication of not liable.

v. Toy, 91 *M* A railroad able care in locomotive roads, is no sioned by a employed by the road w *Boston & M*

A railroad furnish to its power to ev determine h at any place accident hap not have oc gine been er *v. Syracuse, Eng. R. Cas. R. 96; rever Spencer v. N. Y. S. R.*

It is imm the engine power, or it some defect *Y. R. Co.*, 28 *N. Y.* 312, 3 *Hun* 153.

132. De The compan supplying sa gines for the *& I. C. R. Co* It is not 5 D. R

known, or ought to have been known, to the railroad, if the defect was unknown to the servant; but the railroad is not chargeable with notice of the unsafeness growing out of the make and construction, from the use of such engine for several years. This would be a circumstance for the jury to consider in determining the question of notice, but it does not raise a legal presumption of notice. *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672.

Where an engineer of a railway was killed by the explosion of a boiler, and it appeared the boiler was made of the best material, and by first-class manufacturers, and had not been used long enough to create any suspicion of its unsafe condition, and the defect was not of such character as could have been discovered by any of the tests usually employed, and there was no sign or indication of its unsafety, the company was not liable. *Indianapolis, B. & W. R. Co. v. Toy*, 91 Ill. 474.

A railroad corporation, exercising reasonable care in providing and using suitable locomotive engines and tenders on its roads, is not liable for an injury occasioned by a defect therein to a workman employed by it, while being carried over the road without paying fare. *Seaver v. Boston & M. R. Co.*, 14 Gray (Mass.) 466.

A railroad corporation is not bound to furnish to its employes engines adequate in power to every emergency; it is for it to determine how powerful the engine shall be at any place and for any purpose, and if an accident happen to an employe which would not have occurred had a more powerful engine been employed, it is not liable. *Bajus v. Syracuse, B. & N. Y. R. Co.*, 28 Am. & Eng. R. Cas. 499, 103 N. Y. 312, 3 N. Y. S. R. 96; reversing 34 Hun 153.—APPLIED IN *Spencer v. New York C. & H. R. R. Co.*, 51 N. Y. S. R. 386.

It is immaterial in such a case whether the engine was originally of moderate power, or its power has been reduced by some defect. *Bajus v. Syracuse, B. & N. Y. R. Co.*, 28 Am. & Eng. R. Cas. 499, 103 N. Y. 312, 3 N. Y. S. R. 96; reversing 34 Hun 153.

132. Degree of care required.—The company must use reasonable care in supplying safe and properly constructed engines for the use of its employes. *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174.

It is not an absolute duty of a railroad
5 D. R. D.—7.

corporation to furnish a suitable and safe engine. It is its duty to use due care and diligence to furnish such an engine. When an injury has occurred to a servant of the corporation, in consequence of a defect in an engine, and he sues the corporation for such injury, the burden is upon the plaintiff to show negligence or the want of care and diligence in the defendant corporation. The onus of proof is not shifted to the defendant by the fact that an injury has resulted from the defect. *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672.

133. Cow-catchers—Pilots—Safety chains.—It is the duty of a railway company to furnish suitable and safe machinery, and if a fireman, without fault on his part, in consequence of an unsafe and improper pilot or cow-catcher, used by the company with a knowledge of its defects, receives a personal injury, the company will be liable. *Indianapolis & St. L. R. Co. v. Estes*, 96 Ill. 470.—REVIEWED IN *Chicago, B. & Q. R. Co. v. Dickson*, 143 Ill. 368.

Although switch engines are ordinarily operated without pilots, or cow-catchers, this does not excuse or palliate the use of such an engine without a pilot in drawing a freight train of loaded cars outside of the yard, or from one yard to another distant nearly three fourths of a mile; nor does it relieve the company from the imputation of negligence, at the suit of a brakeman, who was injured by the derailment of the cars caused by running over a cow on the track. *Tennessee C., I. & R. Co. v. Kyle*, 93 Ala. 1, 8 So. Rep. 764.

An engine, which was only used as a helper on a grade, was backing down a track pushing its tender, and ran against a locomotive that was going in the opposite direction, with such force as to drive the tender on top of the engine and break it loose from the helper engine. Just before the collision the engineer on the helper reversed his engine, and after the collision it ran some distance up the track uncontrolled, and killed a brakeman on another train that it collided with. The engine was coupled to its tender with the ordinary draw-bar and link, but the company was charged with negligence in failing to secure them also by chains; but there was no evidence that an engine used for such purpose, and its tender, had ever separated before through lack of safety chains. *Held*, that the company was not liable for failing to use such chains.

Morse v. New York C. & H. R. R. Co., 39 *Hun* (N. Y.) 414; *affirmed in* 103 N. Y. 686, *mem.*, 7 N. Y. S. R. 863.—DISTINGUISHING *Ellis v. New York, L. E. & W. R. Co.*, 95 N. Y. 546.

7. Company's Knowledge of Defects and Dangers.

134. Company liable when it has knowledge.—(1) *General rules.*—A railroad company at common law is liable for injuries arising from defects in its machinery or other appliances used in the operation of its road or the transaction of its work, known to it, or which it ought to have known, and might have known by the exercise of reasonable and proper care on its part in examining and inspecting the same. *Atchison, T. & S. F. R. Co. v. Holt*, 11 *Am. & Eng. R. Cas.* 206, 29 *Kan.* 149.—QUOTED IN *Kansas City, Ft. S. & G. R. Co. v. Kier*, 38 *Am. & Eng. R. Cas.* 119, 41 *Kan.* 661, 671, 21 *Pac. Rep.* 770.—*Chicago, K. & W. R. Co. v. Blevins*, 46 *Kan.* 370, 26 *Pac. Rep.* 687. *O'Mellia v. Kansas City, St. J. & C. B. R. Co.*, 115 *Mo.* 205, 21 *S. W. Rep.* 503. *Hyatt v. Hannibal & St. J. R. Co.*, 19 *Mo. App.* 287. *Mason v. Richmond & D. R. Co.*, 53 *Am. & Eng. R. Cas.* 183, 111 *N. Car.* 482, 16 *S. E. Rep.* 698. *Houston & T. C. R. Co. v. McNamara*, 59 *Tex.* 255.—APPROVING *Hayden v. Smithville Mfg. Co.*, 29 *Conn.* 548.—*Columbia & P. S. R. Co. v. Hawthorne*, 3 *Wash. T.* 353, 19 *Pac. Rep.* 25.

And this although the negligence of a fellow-servant contributes to the accident. *Atchison, T. & S. F. R. Co. v. Holt*, 11 *Am. & Eng. R. Cas.* 206, 29 *Kan.* 149.—DISTINGUISHED IN *Miller v. Southern Pac. Co.*, 20 *Oreg.* 285.

As between a company and its employés the company is not necessarily negligent in the use of defective machinery not obviously defective, but it is negligent in such cases only where it has notice of the defects, or where it has failed to exercise reasonable and ordinary diligence in discovering them and in remedying them. *Atchison, T. & S. F. R. Co. v. Wagner*, 21 *Am. & Eng. R. Cas.* 637, 33 *Kan.* 660, 7 *Pac. Rep.* 204.—APPLIED IN *St. Louis, I. M. & S. R. Co. v. Gaines*, 46 *Ark.* 555. QUOTED IN *Hannibal & St. J. R. Co. v. Kanaley*, 39 *Kan.* 1, 17 *Pac. Rep.* 324.

(2) *Illustrations.*—An employé sued for a personal injury, and proved that he was run over and injured by reason of the engine

valves being leaky, which allowed the steam to accumulate in the cylinder, which would move the engine beyond the control of the engineer; that the defective valves were known, or should have been known, to the company. *Held*, that he should recover. *Hudson v. Charleston, C. & C. R. Co.*, 55 *Fed. Rep.* 248.

In an action by a servant for injury sustained by the falling of a pile of lumber upon him, on the ground that the defendant was negligent in not having the lumber safely piled, if, as the evidence seemed to show, the lumber was safely piled in the first instance, but it became unsafe by the subsequent removal of lumber from the pile, it was incumbent on plaintiff to prove that the defendant, through some responsible officer or agent, had actual notice of the defect, or that it had existed for so long a time that the defendant should have discovered it in the exercise of reasonable diligence. *Baldwin v. St. Louis, K. & N. R. Co.*, 68 *Iowa* 37, 25 *N. W. Rep.* 918.

In an action to recover for the death of an engineer, the company asked the court to instruct the jury "that plaintiff must show, in order to recover on account of a defective engine, that the engine was defective, and defendant knew it and deceased did not know it, and he had not equal means of knowing it with defendant"; but instead the court instructed, "If you so find the facts, and find that such injuries and death were the result of defects in the engine, as alleged; that the company operating the road knew of such defects, or might have known of them by the use of ordinary prudence; and if you find that deceased did not know of such defects, and could not have known of them by the use of ordinary care, plaintiff will be entitled to recover." *Held*, that the company had no right to complain. *Missouri Pac. R. Co. v. Henry*, 75 *Tex.* 220, 12 *S. W. Rep.* 828.

135. — or could by ordinary care and inspection have obtained knowledge.—The master's duty and liability to his servant extend not only to such unnecessary and unreasonable risks as are in fact known to him, but to such as he ought to have known in the exercise of diligence proportionate to the occasion. *Cook v. St. Paul, M. & M. R. Co.*, 34 *Minn.* 45, 24 *N. W. Rep.* 311.

Ignorance by the master of defects in the instrumentalities used by his servant in the

performance of his work is no defense when by the exercise of ordinary care and inspection the master could have discovered and remedied the defects, or avoided danger incident therefrom. *Derwin v. Herrman*, 26 J. & S. 193, 31 N. Y. S. R. 179, 9 N. Y. Supp. 72.—QUOTING *Benzing v. Steinway*, 101 N. Y. 552.

That a master might have known, by the use of ordinary care and diligence, that a tool furnished his servant for use was defective is not sufficient to make him liable for the injury resulting from its use, irrespective of any probability of harm or danger in using it. *Little Rock & Ft. S. R. Co. v. Duffey*, 4 Am. & Eng. R. Cas. 637, 35 Ark. 602.

A boiler exploded and killed a brakeman. *Held*, that even if the employés of the company did not positively know that the engine was unsafe, yet if in fact it was unsafe, and they had received such reports in regard to it as ought to have put them on their guard, and to have led by the use of proper diligence to a knowledge of the facts, the company must be held to the same liability as if their agents had had actual knowledge. *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338.

136. Company not liable without knowledge.—Where an employé seeks to recover damages for injuries resulting from insufficiency of any of the machinery or instrumentalities furnished by the company, it will not only devolve upon such employé to prove such insufficiency, but it will also devolve upon him to show either that the railroad company had notice of the defects, imperfections, or insufficiencies complained of, or that by the exercise of reasonable and ordinary care and diligence it might have obtained such notice. *Atchison, T. & S. F. R. Co. v. Wagner*, 21 Am. & Eng. R. Cas. 637, 33 Kan. 660, 7 Pac. Rep. 204. *St. Louis, I. M. & S. R. Co. v. Harper*, 44 Ark. 524. *St. Louis, I. M. & S. R. Co. v. Gaines*, 46 Ark. 555. *St. Louis, I. M. & S. R. Co. v. Rice*, 51 Ark. 467, 4 L. R. A. 173, 11 S. W. Rep. 699. *Brymer v. Southern Pac. Co.*, 90 Cal. 496, 27 Pac. Rep. 371. *Colorado C. R. Co. v. Ogden*, 3 Colo. 499. *Columbus, C. & I. C. R. Co. v. Troesch*, 68 Ill. 545. *Kranz v. White*, 8 Ill. App. 583. *Chicago & A. R. Co. v. Stites*, 20 Ill. App. 648. *Louisville, E. & St. L. Con. R. Co. v. Allen*, 47 Ill. App. 465. *Greenleaf v. Illinois C. R. Co.*, 29 Iowa 14. *Atchison, T. & S. F. R.*

Co. v. Ledbetter, 21 Am. & Eng. R. Cas. 555, 34 Kan. 326, 8 Pac. Rep. 411.—APPLIED IN *St. Louis, I. M. & S. R. Co. v. Gaines*, 46 Ark. 555.—*Elliott v. St. Louis & I. M. R. Co.*, 67 Mo. 272.—APPROVING *McMillan v. Saratoga & W. R. Co.*, 20 Barb. (N. Y.) 449; *Keegan v. Western R. Co.*, 8 N. Y. 175; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541. FOLLOWING *Gibson v. Pacific R. Co.*, 46 Mo. 166; *Dale v. St. Louis K. C. & N. R. Co.*, 63 Mo. 455; *Devitt v. Pacific R. Co.*, 50 Mo. 305. QUOTING *McDermott v. Pacific R. Co.*, 30 Mo. 116.—FOLLOWED IN *Holmes v. Hannibal & St. J. R. Co.*, 69 Mo. 536; *Schlereth v. Missouri Pac. R. Co.*, 96 Mo. 509, 10 S. W. Rep. 66.—*Covey v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 382, 86 Mo. 635. *Bailey v. Rome, W. & O. R. Co.*, 19 N. Y. S. R. 656, 49 Hun 377, 3 N. Y. Supp. 585.—QUOTING *Wright v. New York C. R. Co.*, 25 N. Y. 566.—*Humphreys v. Newport News & M. V. Co.*, 39 Am. & Eng. R. Cas. 363, 33 W. Va. 135, 10 S. E. Rep. 39. *Johnson v. Chesapeake & O. R. Co.*, 36 W. Va. 73, 14 S. E. Rep. 432.

A railroad company is not liable for an injury received by a conductor, in consequence of the insufficiency of the cars, or defects in the machinery or apparatus of the train under his charge and control, where such insufficiency or defects were unknown to both parties, and neither party was in fault. *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541.—APPROVED IN *Elliott v. St. Louis & I. M. R. Co.*, 67 Mo. 272. REVIEWED IN *Columbus & X. R. Co. v. Webb*, 12 Ohio St. 475.

The servant is not entitled to recover because the service required at a particular place was dangerous, and the master failed to inform the servant of the fact, in consequence of which he was injured, when it does not appear from the evidence that such place was, in fact, more dangerous than other places, or that the master knew that it was dangerous. *Chicago, R. I. & P. R. Co. v. Clark*, 15 Am. & Eng. R. Cas. 261, 108 Ill. 113.—RECONCILED IN *Chicago & W. I. R. Co. v. Bingenheimer*, 116 Ill. 226.

There cannot be a recovery for the plaintiff where the special findings of the jury not only do not state facts from which an inference of notice of the defect arises, but, on the contrary, state that upon inspections made at different times and places no defect was found in the brake-staff, and that such

defects as existed could not have been discovered without taking the brake-staff off the car and striking it with a hammer. *Chicago, St. L. & P. R. Co. v. Fry*, 131 Ind. 319, 28 N. E. Rep. 989.—DISTINGUISHED IN *Matchett v. Cincinnati, W. & M. R. Co.*, 132 Ind. 334.

The rule exonerating a company having no knowledge of the defects in question, applied to cases of injuries caused by defects indicated below:

Bad condition of track of another road used temporarily. *Dunlap v. Richmond & D. R. Co.*, 81 Ga. 136, 7 S. E. Rep. 283.

Defective ladder attached to freight car. *Chicago & A. R. Co. v. Platt*, 89 Ill. 141.—EXPLAINING *Toledo, W. & W. R. Co. v. Ingraham*, 77 Ill. 309.—APPLIED IN *Pullman Palace Car Co. v. Laack*, 143 Ill. 242. REVIEWED IN *Sack v. Dolese*, 35 Ill. App. 636.

Engine step in bad repair. *Miller v. Chicago & G. T. R. Co.*, 90 Mich. 230, 51 N. W. Rep. 370.

Splinter on side of rail catching employé's foot. *Doyle v. St. Paul, M. & M. R. Co.*, 41 Am. & Eng. R. Cas. 376, 42 Minn. 79, 43 N. W. Rep. 787.

Spreading of track causing derailment of train. *Gulf, C. & S. F. R. Co. v. Pettis*, 69 Tex. 689, 7 S. W. Rep. 93.

The falling of a bridge. *Toledo, P. & W. R. Co. v. Conroy*, 61 Ill. 162, 12 Am. Ry. Rep. 431. *Faulkner v. Erie R. Co.*, 49 Barb. (N. Y.) 324.

The insecure fastening of a stove in a car. *Atlanta & C. A. L. R. Co. v. Ray*, 22 Am. & Eng. R. Cas. 281, 70 Ga. 674.

Where a company is charged with negligence in the original construction of an appliance by which an employé is injured, in that it is not sufficient for the purpose for which it is intended, it is not necessary, in order to recover, to show that the company had notice of its defective condition. *Crown Coal Co. v. Hiles*, 43 Ill. App. 310. *Ohio & M. R. Co. v. Wangelin*, 43 Ill. App. 324.—QUOTING *Alexander v. Mt. Sterling*, 71 Ill. 366.

Thus a railway company will be liable to an employé for an injury occasioned by the use of a draw-head which had a patent structural defect, without proof that it had notice of the defect, but not for an injury caused by the depression of a draw-head which might have occurred during the trip and without negligence on the company's

part. *St. Louis, I. M. & S. R. Co. v. Davis*, 54 Ark. 389, 15 S. W. Rep. 895.

137. Employee's duty to notify company.—An employé must be careful to note and report any defects or want of repair in the appliances he is required to use. If the employer uses reasonable care to furnish safe and suitable appliances, he may expect the employé will promptly call attention to any defects that may appear, or any repairs that may become necessary, so far as due care on his part will discover the same; and an employé who fails in this does not exercise ordinary care for his own safety. *Petoria, D. & E. R. Co. v. Hardwick*, 48 Ill. App. 562. *Burlington & C. R. Co. v. Liche*, 17 Colo. 280, 29 Pac. Rep. 175.—APPROVING *Crutchfield v. Richmond & D. R. Co.*, 76 N. Car. 320.—*Mensch v. Pennsylvania R. Co.*, 53 A. & Eng. R. Cas. 198, 150 Pa. St. 598, 25 Atl. Rep. 31, 30 W. N. C. 548.

In an action by a brakeman for injuries received in making a coupling, an instruction which ignores the law of notice and makes the liability dependent solely upon there being a defect at the time of the injury, and such defect being the cause thereof, without reference to when the defect occurred, or that by the exercise of reasonable care it would have been discovered by the employé before the injury, is erroneous. *Chicago, C. & St. L. R. Co. v. Dixon*, 49 Ill. App. 292.

In an action for personal injuries sustained by a brakeman, defendant asked the court to instruct the jury that it was entitled to reasonable notice of the existence of the defect complained of, and an opportunity thereafter to repair the same. *Held*, that the request was rightly refused, as it entirely omitted to refer to the liability of the defendant, if the latter might, by the exercise of reasonable care, have known of the defect. *Sweat v. Boston & A. R. Co.*, 156 Mass. 284, 31 N. E. Rep. 296.

Brakemen are not required to make complaint of known defects in cars to the master of trains, and not to their conductor, under a rule of the company, in these words: "Conductors, flagmen, brakemen, and train porters to report to, and receive their instructions from, the master of trains." This rule has no application to complaints about defective appliances. *Louisville & N. R. Co. v. Kenley*, 92 Tenn. 207, 21 S. W. Rep. 326.

Notice is not necessary in case of an im-

proper co
in case o
pair. *Ch*
49 Ill. A

138.
Proof.—
shown t
character
ferred the
defect.
cise ordi
chinery,
safe; and
have bee
is on the
jured, to
thereof.
Fed. Rep
Co., 29 I

When
testing t
plements
ployé of
labor, th
acter for
been as
such em
pany wil
defect a
ages for
Co. v. S
673. *D*
Mo. App
bal & S

Where
gest to d
danger i
pany ca
means o
as to re
that lin
P. R. C
Iowa 28

Where
engines
mediate
compet
ist, and
material
notice t
of repa
absence
suffici
an inju
compan
duty up
of the

proper construction of machinery, but it is in case of defect by use or for want of repair. *Chicago, C. & St. L. R. Co. v. Dixon*, 49 Ill. App. 292.

138. What constitutes notice—

Proof.—Where a defect in an appliance is shown to be structural, and is of such a character as renders it unsafe, it may be inferred that the employer is aware of the defect. It is the employer's duty to exercise ordinary care in providing tools, machinery, and appliances that are reasonably safe; and if such appliances are shown to have been originally defective, the burden is on the company, where an employé is injured, to show that it did not have notice thereof. *Union Pac. R. Co. v. James*, 56 Fed. Rep. 1001. *Greenleaf v. Illinois C. R. Co.*, 29 Iowa 14.

When, by the use of ordinary care, in testing the strength of machinery or implements placed in the hands of an employé of a railway company with which to labor, their weakness and dangerous character for the work to be done could have been ascertained, and injury results to such employé from such defect, the company will be chargeable with notice of the defect and consequent liability in damages for the injury. *Gulf, C. & S. F. R. Co. v. Silliphant*, 70 Tex. 623, 8 S. W. Rep. 673. *Dedrick v. Missouri Pac. R. Co.*, 21 Mo. App. 433.—**QUOTING** *Covey v. Hannibal & St. J. R. Co.*, 86 Mo. 635.

Where nothing has ever occurred to suggest to a railway company that there is any danger in a certain line of conduct, the company cannot be said to have had such means of knowledge of the alleged danger as to render it negligent in continuing in that line. *Kitteringham v. Sioux City & P. R. Co.*, 18 Am. & Eng. R. Cas. 14, 62 Iowa 285, 17 N. W. Rep. 585.

Where the directors have placed the engines of the company under the immediate charge, control, and direction of a competent and trustworthy master machinist, and have furnished him with adequate materials and resources for their repair, notice to the directors that an engine is out of repair and unsafe for use is not, in the absence of notice that it is being so used, sufficient to render the company liable for an injury to a fireman employed by the company, while in the performance of his duty upon such engine under the direction of the master machinist, caused by the ex-

plosion of the boiler by reason of its defective condition, without his fault or negligence or the fault or negligence of the engineer in charge. *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174.

Proof of a single defective or imperfect operation of any of such machinery or instrumentalities resulting in injury will not of itself be sufficient evidence, nor any evidence, that the company had previous knowledge or notice of any supposed or alleged defect, imperfection, or insufficiency in such machinery or instrumentalities. *Atchison, T. & S. F. R. Co. v. Wagner*, 33 Kan. 660, 7 Pac. Rep. 204.—**DISTINGUISHED** IN *Atchison, T. & S. F. R. Co. v. Sly*, 41 Kan. 729.

139. Notice to employe when notice to company.—

Notice to servants of a railroad corporation, who were agents of the corporation to receive notice of defects in engines, would affect it with notice. *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672. *Newhart v. St. Paul City R. Co.*, 51 Minn. 42, 52 N. W. Rep. 983.

Where it is the province of a certain employé of a railroad company to supervise repairs of defects in a railway, his negligence in respect to such defects is the negligence of the company, and notice to him of such defects as are within his province to repair is notice to the company. *Colorado C. R. Co. v. Ogden*, 3 Colo. 499. *Papot v. Southwestern R. Co.*, 74 Ga. 296. *Covey v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 382, 86 Mo. 635. *Brabbitt v. Chicago & N. W. R. Co.*, 38 Wis. 289.

If either the road or machinery was defective, and that fact was known to the engineer of the train, that would be knowledge on the part of the company. *Nashville & C. R. Co. v. Elliott*, 1 Coldw. (Tenn.) 611.

A complaint by a switchman of a defect in a switch engine is properly made to the yard master, although he has no authority to supply the defect, and his only duty is to report it to the train master. *Piwart v. Chicago, R. I. & P. R. Co.*, 82 Iowa 148, 47 N. W. Rep. 1017.—**DISTINGUISHING** *Bushnel v. Chicago & N. W. R. Co.*, 69 Iowa 620.

Notice to a section master that a rock overhanging the track is dangerous, is notice to the railroad corporation. *Baltimore & O. R. Co. v. McKenzie*, 24 Am. & Eng. R. Cas. 395, 81 Va. 71.

Notice to a fellow-servant of defects in the machinery, etc., does not constitute notice to the company. *St. Louis, I. M. & S. R. Co. v. Harper*, 44 Ark. 524. *McGowan v. St. Louis & I. M. R. Co.*, 61 Mo. 528.

It is error to single out a servant upon whom none of the duties of the master, as to furnishing proper appliances and keeping the same in repair, devolve, and predicate a right to recover upon such servant's knowledge of defects, or his want of care. *Covey v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 382, 86 Mo. 635.

In an action for injuries to an assistant yard master, through defects in a car, the evidence showed that the car inspector and master mechanic had been notified of its condition. *Held*, that notice of the defect to the car inspector and master mechanic would only tend to show neglect of duty on their part, and they being fellow-servants of plaintiff, no cause of action could be based on such neglect. *Kidwell v. Houston & G. N. R. Co.*, 3 Woods (U.S.) 313.

Where a section hand using a hand-car is injured, owing to a defect in the wood of the handle, the defect being of such a character that it could not have been discovered by inspection, knowledge possessed by the carpenter who manufactured the car handle in the shops of the company, as to the defect, is not notice to the railroad company that the car was not safe, and it is not liable for the injury. *Indiana, I. & I. R. Co. v. Snyder*, (Ind.) 53 Am. & Eng. R. Cas. 225, 32 N. E. Rep. 1129.

140. Presumption of knowledge.—Where the parties occupy the relation of master and servant, it is the duty of the master to use all reasonable and ordinary care to provide safe appliances, and the law will imply and infer notice of any defect which, by the use of ordinary care, might have been known to the master. *Goff v. Toledo, St. L. & K. C. R. Co.*, 28 Ill. App. 529.

In November, 1875, a brakeman on a train was killed by coming in collision with a telegraph pole in close proximity to the track. There was the testimony of one witness that he had known of the pole being where it was since March, 1875, and of another, a brakeman, that he once came in contact with the same pole in 1872. *Held*, from the length of time of the pole standing where it did, the jury were war-

ranted in finding that the company knew of it, that they ought to have known of it, and so might be considered as having notice. *Chicago & I. R. Co. v. Russell*, 91 Ill. 298.—QUOTED IN *Whalen v. Illinois & St. L. R. & C. Co.*, 16 Ill. App. 320. REVIEWED AND FOLLOWED IN *North Chicago St. R. Co. v. Williams*, 140 Ill. 275; *Murphy v. Wabash R. Co.*, 115 Mo. 111; *Pidcock v. Union Pac. R. Co.*, 5 Utah 612, 1 L. R. A. 131, 19 Pac. Rep. 191.

In an action by a switchman to recover damages for the crushing of his hand while coupling cars, it appeared that the accident was caused by the throttle-valve of a locomotive being out of repair, which caused a sudden and unexpected start, and that the dangerous condition of the locomotive had existed some time before the accident, and was known to the engineer, who had often told the foreman of the round house (his immediate superior) of its dangerous condition. *Held*, that it was but reasonable to assume that the company, through the foreman, had notice of the unsafe condition of the engine, whether he had charge of the machinery or not, and that the company was guilty of gross negligence in allowing such engine to be used. *Chicago & E. I. R. Co. v. Rung*, 104 Ill. 641.

141. Effect of notice.—After defects in tools have been called to the attention of the company, and reasonable time has expired within which it ought to have furnished new or perfect tools, their continued use is gross negligence of the company. *Atchison, T. & S. F. R. Co. v. Sadler*, 38 Kan. 128, 16 Pac. Rep. 46.

A company fails in the performance of its duty to furnish reasonably safe appliances for the use of its employés by continuing in service, after repeated notices of the dangers of its use, a locomotive engine which emits from its cylinders unusual volumes of steam, liable to envelop and blind an employé while coupling cars. *Northern Pac. R. Co. v. Nickels*, 53 Am. & Eng. R. Cas. 388, 50 Fed. Rep. 718, 4 U. S. App. 369, 1 C. C. A. 625.

A locomotive engine was reported as unsafe, to employés having charge of the company's machinery, but they failed to ascertain its condition. *Held*, that the company could not avoid liability to an injured employé by reason of such negligence on the part of its agents. *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338.—DISTINGUISHED

IN Pennsylvania Co. v. Lynch, 90 Ill. 333. FOLLOWED IN Toledo, St. L. & K. C. R. Co. v. Bailey, 43 Ill. App. 292.

In an action under the Ala. Code of 1886, § 2590, by an employé for personal injury, although the employé, knowing of the defect or negligence which caused the injury, failed to notify the company thereof, yet if the company was aware of such defect or negligence, it cannot set up that the employé, by continuing in the work, has thereby waived his right to sue for damages for injuries received in such employment. *Mobile & B. R. Co. v. Holborn*, 84 Ala. 133, 4 So. Rep. 146.—OVERRULING *Eureka Co. v. Bass*, 81 Ala. 200.

A company is required to use all reasonable diligence to keep its track in a safe condition for its employés, and also to foresee that the accumulation of ice near the rails would render it hazardous for switchmen when coupling cars; and proof that the company had notice of the imperfect condition of an engine, which allowed water to escape and freeze on the track, and that it took no means to avert the danger by repairing the engine or removing the ice, is sufficient to charge it with negligence. *Flynn v. Wabash, St. L. & P. R. Co.*, 18 Ill. App. 235.

Where a company has had notice of defective wheels in time to have repaired them, and a train leaves the track and kills an employé, and the evidence strongly tends to show that the defective wheels were the cause, a judgment against the company will be upheld. *Illinois C. R. Co. v. Pirtle*, 47 Ill. App. 498.

Notice to the master by the employé, of defects in associates or material, does not necessarily fix the master's liability for injury to the employé. It is incumbent on the latter to show that there was no want of due and reasonable care upon his part; he is not exempt from the operation of the rule that one cannot recover for an injury which is the proximate result of his own failure to exercise ordinary care. *Colorado C. R. Co. v. Ogden*, 3 Colo. 499.—QUOTING *Clarke v. Holmes*, 7 H. & N. 937; *Patterson v. Pittsburg & C. R. Co.*, 76 Pa. St. 389.

An employé who worked in defendant's car shops was engaged in running an empty wheel by steam, which exploded and injured him. *Held*, that it was a question for the jury whether the wheel was properly

constructed or not; and it is sufficient to show negligence on the part of the company to prove that it continued to use the wheel after it had notice that it was untrue and not properly balanced. *Murtaugh v. New York C. & H. R. R. Co.*, 49 Hun (N. Y.) 456.

A section foreman on a railway informed the company of the unsafe condition of the roadbed from rotten ties, and was furnished by the company no material with which to repair it. Afterwards the road was broken up by a passing train, and the foreman soon afterwards, while passing that portion of the road in a hand-car, in performance of his duties, and in ignorance of the recent accident, while exercising due care, sustained injury by reason of the broken road. *Held*, that the company was liable to him for the injury he received. *Gulf, C. & S. F. R. Co. v. Donnelly*, 70 Tex. 371, 8 S. W. Rep. 52.

142. Rule as to latent defects.*—An employer is not liable for an injury to the servant occasioned by a hidden defect in machinery furnished for his use, unless the employer knew of, or by the exercise of reasonable care could have discovered, such defect. *Current v. Missouri Pac. R. Co.*, 86 Mo. 62.

If the defect in a car was such as to deceive human judgment, the company, as well as the plaintiff, stands excused. And whatever diligence he exercised in seeing to the apparent safety of the vehicle goes to the credit of his employer, as well as to his own credit. *Central R. & B. Co. v. Kenney*, 58 Ga. 485, 16 Am. Ry. Rep. 131.

It is error to charge that a railroad company is bound to protect its servants from injury by reason of latent or unseen defects, so far as human care and foresight can accomplish the result. *Missouri Pac. R. Co. v. Lyde*, 11 Am. & Eng. R. Cas. 188, 57 Tex. 505. *Fordyce v. Yarbrough*, 1 Tex. Civ. App. 260, 21 S. W. Rep. 421.

If a company purchases locomotives from a manufacturer of recognized standing, it is justified in assuming that in the manufacture proper care was taken, and that proper tests were made of the different parts of the machinery, and that it was delivered in a fair and reasonable condition for use; and if the company, after purchasing, has made such reasonable examination as is possible

* Liability of employer for furnishing defective machinery—latent defects, see note, 4 L. R. A. 798.

without tearing the machinery to pieces and has subjected it fully to all ordinary tests for determining the strength of completed engines, and no defect has been disclosed, it is not guilty of negligence because there was a latent defect, which subsequently causes the destruction of the engine and an injury to a person. *Richmond & D. R. Co. v. Elliott*, 149 U. S. 266, 13 Sup. Ct. Rep. 837.

Plaintiff was sent with a gang of men to repair a bridge, and was injured while pulling down an elevated water tank. Held, that he could not recover where the evidence showed that the injury was the result of an accident which could not have been foreseen by those operating the road, and if it could have been foreseen at all, it was only by plaintiff himself and the other members of the gang, who were his fellow-servants. *Easton v. Houston & T. C. R. Co.*, 39 Fed. Rep. 65.

A train was thrown down an embankment by the breaking of a switch, and the company's road master, who was riding, was injured. He charged negligence in not providing its cars with proper check-chains. Plaintiff's own evidence showed that for a long time he had been in the employ of the company, and had been of the opinion that to run trains without check-chains was not safe; that he knew that some of the company's cars were not provided with such chains, and that he did not notice, when he took the car, nor till after the accident, whether it had such chains or not. Held, that the company was not liable. *Ladd v. New Bedford R. Co.*, 119 Mass. 412, 9 Am. Ry. Rep. 273.—DISTINGUISHING AND QUESTIONING *Britton v. Great Western Cotton Co.*, L. R. 7 Ex. 130.—DISTINGUISHED IN *Chicago & T. R. Co. v. Simmons*, 11 Ill. App. 147. QUOTED IN *Elmer v. Locke*, 15 Am. & Eng. R. Cas. 300, 135 Mass. 575. REVIEWED IN *Sack v. Dolese*, 35 Ill. App. 636; *Carr v. North River Constr. Co.*, 17 N. Y. S. R. 945.

In an action under Wis. Rev. St. § 1816, for injuries to an employé, where the whole evidence shows beyond dispute that the sole cause of the injuries was the use of one bolt of insufficient length in fastening a slat of the ladder of a freight car, together with the somewhat decayed condition of the wood at the place of such bolt, and that there was no external indication of these defects, and the person injured had been

frequently in charge of the same car and in the habit of using the same ladder, there was no error in directing a nonsuit. *Bailou v. Chicago & N. W. R. Co.*, 5 Am. & Eng. R. Cas. 480, 54 Wis. 257, 41 Am. Rep. 31, 11 N. W. Rep. 559.—DISTINGUISHING *Wedgwood v. Chicago & N. W. R. Co.*, 41 Wis. 478. QUOTING *Steffen v. Chicago & N. W. R. Co.*, 46 Wis. 265; *East St. Louis P. & P. Co. v. Hightower*, 92 Ill. 139; *De Graff v. New York C. & H. R. R. Co.*, 76 N. Y. 125. REVIEWING *Smith v. Chicago, M. & St. P. R. Co.*, 42 Wis. 520; *Morrison v. Phillips & C. Constr. Co.*, 44 Wis. 405; *Warner v. Erie R. Co.*, 39 N. Y. 468.—REVIEWED IN *Hoye v. Chicago & N. W. R. Co.*, 65 Wis. 243.

8. Inspection and Repair of Track, Machinery, etc.

143. Duty to inspect and repair, generally.*—Proper inspection for the purpose of discovering defects which may arise from use is part of the duty the company owes to its employés. *Bailey v. Rome, W. & O. R. Co.*, 139 N. Y. 302, 34 N. E. Rep. 918.

The company must employ and select competent, skilful, and trusty subordinates to supervise, inspect, repair, and regulate its machinery. *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174.

It is the duty of a railway company not only to keep in its employment inspectors, but it must secure a careful inspection of its machinery. *Texas & P. R. Co. v. O'Fiel*, 78 Tex. 486, 15 S. W. Rep. 33.

The company should have its inspectors not only at its termini, but at convenient stations along its line. And where it knowingly employs and retains an incompetent inspector it will be liable for an injury resulting from his incompetency, although the person injured is the fellow-servant of such inspector. But the master is not an insurer of the servant's safety, nor does he guarantee that the tools, machinery, and instrumentalities which he furnishes may not prove defective. He only undertakes to use reasonable care to prevent such results. *St. Louis, I. M. & S. R. Co. v. Rice*, 51 Ark. 467, 4 L. R. A. 173, 11 S. W. Rep. 699.

The duty in the matter of inspection va-

*Duty of company as to inspection, see note, 15 AM. & ENG. R. CAS. 208.

ries acc
is more
more o
ployés.
Co., 25
Silv. Sh

It is
to exam
be likel
tempt t
bank b
not "eli
where t
v. Chica

A fre
the repa
parent
with suc
railroad
neer in
care as
spectior
as, in th
necessar
Co., 71 A

In an
the defe
which p
to the r
of the i
vant in
question
the mas
ter as re
the mat
furnishi
W. R.
Minn. 5

In suc
the jury
and mai
tion as t
for the c
sylvania
109 Pa.

The r
from fur
the defe
Co., 105

The d
only of
servatio
defects
the com
Co., 32 A

The g
servant

ries accordingly as the thing to be inspected is more or less liable to wear out, and is more or less perilous when worn, to employes. *Hotis v. New York C. & H. R. R. Co.*, 25 N. Y. S. R. 525, 53 Hun 634, *mem.*, 2 Silv. Sup. Ct. 598, 6 N. Y. Supp. 605.

It is the duty of the workman in charge to examine his work wherever danger would be likely to arise; and the fact that the attempt to dislodge a mass of earth from a bank by means of levers had failed would not relieve him from the duty of inspection where the attempt had been made. *Deppe v. Chicago, R. I. & P. R. Co.*, 38 Iowa 592.

A frequent inspection of the track, and the repairing of it whenever there is an apparent necessity, by the employes charged with such work, are not all the care that a railroad company owes to a locomotive engineer in that respect. There must be proper care as well as frequency in making the inspections, and such repairs must be made as, in the exercise of such care, appear to be necessary. *Knapf v. Sioux City & P. R. Co.*, 71 Iowa 41, 32 N. W. Rep. 18.

In an action for damages resulting from the defective condition of a hand-car upon which plaintiff worked, regard must be had to the risks and dangers attending the use of the instrumentalities furnished the servant in his employment, in determining the question of reasonable care on the part of the master; and the obligation of the master as respects due care extends as well to the matter of inspection and repair as to furnishing. *Anderson v. Minnesota & N. W. R. Co.*, 38 Am. & Eng. R. Cas. 206, 39 Minn. 523, 41 N. W. Rep. 104.

In such an action it is not error to charge the jury that the master is bound to keep and maintain the machinery in such condition as to be reasonably and adequately safe for the deceased to be upon and use. *Pennsylvania & N. Y. C. & R. Co. v. Mason*, 109 Pa. St. 296.

The master is not necessarily excused from further inspection if he could not see the defects. *Gutridge v. Missouri Pac. R. Co.*, 105 Mo. 520, 16 S. W. Rep. 943.

The duty of the servant is to take notice only of such defects as are open to his observation. The duty of discovering hidden defects by careful inspection devolves upon the company. *Burton v. Missouri Pac. R. Co.*, 32 Mo. App. 455.

The general rule that a master owes to his servant the duty to keep a machine or ap-

pliance used by the latter in order, and that he cannot delegate the duty so as to escape responsibility, does not apply to defects arising in its daily use, which are not of a permanent character and do not require the help of skilled mechanics to repair, but which may easily be and are usually remedied by the workmen, and to repair which proper and suitable materials are supplied. *Cregan v. Marston*, 126 N. Y. 568, 27 N. E. Rep. 952, 38 N. Y. S. R. 428; *reversing* 32 N. Y. S. R. 913, 10 N. Y. Supp. 681.—DISTINGUISHING *Daley v. Boston & A. R. Co.*, 147 Mass. 101.

It is the duty of a company to guard its employes from injuries resulting from unsound, unsafe, and defective engines, cars, and appliances by having the same continuously inspected by persons competent to perform that duty; and the negligence of such inspector in the discharge of this duty is the negligence of the company. *Cooper v. Pittsburgh, C. & St. L. R. Co.*, 24 W. Va. 37.

144. Degree of care required.—It is incumbent upon a company, in the discharge of its duty as master, not only to provide machinery and instrumentalities for its employes which are suitable and safe, but also to use reasonable diligence to keep them so. Necessarily incident to these obligations is the duty of frequent inspection, and the corporation, acting by its servants in the discharge of such duty, is liable for their negligence. *Tierney v. Minneapolis & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 545, 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. Rep. 229.—NOT FOLLOWING *Columbus & X. R. Co. v. Webb*, 12 Ohio St. 475; *Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 318; *Smoot v. Mobile & M. R. Co.*, 67 Ala. 13; *Smith v. Potter*, 46 Mich. 258; *Mackin v. Boston & A. R. Co.*, 135 Mass. 201.—FOLLOWED IN *Macy v. St. Paul & D. R. Co.*, 35 Minn. 200.—*Louisville, E. & St. L. Con. R. Co. v. Utz*, 133 Ind. 265, 32 N. E. Rep. 881. *McDonald v. Chicago, St. P., M. & O. R. Co.*, 41 Minn. 439, 43 N. W. Rep. 380. *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286, 6 S. W. Rep. 464, 12 West. Rep. 618. *Bailey v. Rome, W. & O. R. Co.*, 139 N. Y. 302, 34 N. E. Rep. 918. *Wedgwood v. Chicago & N. W. R. Co.*, 44 Wis. 44, 19 Am. Ry. Rep. 393.—DISTINGUISHED IN *Peschel v. Chicago, M. & St. P. R. Co.*, 17 Am. & Eng. R. Cas. 545, 62 Wis. 338.

The duty of the employer does not end

with simply providing safe machinery and appliances for the use of his employés, but the further duty is imposed of continuously exercising reasonable diligence and care to ascertain and know the condition of such machinery and appliances, and to keep them in a safe and proper condition. *Ohio & M. R. Co. v. Percy*, 128 Ind. 197, 27 N. E. Rep. 479.

And this duty he cannot rid himself of by casting it upon an agent. *Indiana Car Co. v. Parker*, 100 Ind. 181.

Ordinary prudence in the matter of inspection requires the master to adopt such reasonable methods and to apply such reasonable tests as are likely to discover the defects in the appliances if they exist. *Gutridge v. Missouri Pac. R. Co.*, 105 Mo. 520, 16 S. W. Rep. 943.

The law not only imposes upon the employer the duty of using reasonable care in providing safe and proper machinery, but also reasonable care in placing the same under the control of a competent servant or employé charged with the duty of properly attending to the same and seeing that it is properly used for the safety of employés, and, when not in use, properly and safely secured. And not only must the employer use reasonable care in selecting a competent servant to take charge of the machinery, but the same care must be exercised in continuing him in the service; otherwise the employer will become responsible for his care and skill. *Gates v. Chicago, M. & St. P. R. Co.*, 53 Am. & Eng. R. Cas. 245, 2 S. Dak. 422, 50 N. W. Rep. 907.

But a system of inspection which would embarrass the operation of the road cannot be required. *Smoot v. Mobile & M. R. Co.*, 67 Ala. 13. *Philadelphia & R. R. Co. v. Hughes*, 33 Am. & Eng. R. Cas. 348, 119 Pa. St. 301, 11 Cent. Rep. 822, 13 Atl. Rep. 286, 21 W. N. C. 166.

145. Failure to inspect and repair, generally.—Railroad companies are bound to use due care in seeing that their cars and other rolling stock are maintained in a reasonably safe condition; and when an employé, in the proper discharge of his duty, is injured from the failure of the company to perform this personal duty, it is liable. *King v. Ohio & M. R. Co.*, 8 Am. & Eng. R. Cas. 119, 11 Biss. (U. S.) 362, 14 Fed. Rep. 277. *Union Pac. R. Co. v. Fray*, 43 Kan. 750, 23 Pac. Rep. 1039. *Fuller v.*

Jewett, 1 Am. & Eng. R. Cas. 109, 80 N. Y. 46.—FOLLOWED IN *Goodrich v. New York C. & H. R. R. Co.*, 41 Am. & Eng. R. Cas. 259, 116 N. Y. 398, 22 N. E. Rep. 397, 26 N. Y. S. R. 767, 5 L. R. A. 750.—*Fifield v. Northern R. Co.*, 42 N. H. 225; *Houston & T. C. R. Co. v. Marcelles*, 12 Am. & Eng. R. Cas. 231, 59 Tex. 334. *Arnold v. Delaware & H. Canal Co.*, 6 N. Y. S. R. 368. *Bailey v. Rome, W. & O. R. Co.*, 19 N. Y. S. R. 656, 49 Hun 377, 3 N. Y. Supp. 585.

A railway company may make regulations requiring the most rigid and frequent inspections of its machinery, roadbed, and equipments, and the most prompt and complete repair of any ascertained defect, and may impose penalties of discharge, etc., for failure to comply; yet if the agent authorized to do what the master must do to avoid liability fails to discharge his duty, then the master is liable to an employé who suffers injury through such neglect. *Missouri Pac. R. Co. v. McElyea*, 38 Am. & Eng. R. Cas. 200, 71 Tex. 386, 9 S. W. Rep. 313, 1 L. R. A. 411. *Bailey v. Rome, W. & O. R. Co.*, 139 N. Y. 302, 34 N. E. Rep. 918.

An instruction declaring defendants exempt from liability, notwithstanding the unsafe condition of the track, if plaintiff knew, or could by the exercise of ordinary diligence have known, of the state of the track, is properly refused. It is not the business of the servant to ascertain whether the machinery and structure of the road are defective, but the duty of the company is to keep them in a safe condition, and it is responsible for injuries resulting from such defects. *Porter v. Hannibal & St. J. R. Co.*, 60 Mo. 160.

But where there is a defect in machinery or appliances under such circumstances that the employé, by the terms of his engagement, assumes the enhanced dangers, the employer is under no obligation to remedy the defect. He owes no duty to remove the danger, consequently his failure to do so will not constitute negligence. *Becker v. Baumgartner*, 5 Ind. App. 576, 32 N. E. Rep. 786.—FOLLOWING *Lake Shore & M. S. R. Co. v. Stupak*, 108 Ind. 1.

A company whose track is broken without any fault of its own is under no obligation to its employés to repair it within any specified time if it duly warns them so that they shall not be injured in consequence thereof. *Henry v. Lake Shore & M. S. R.*

Co., 8 *Am. & Eng. R. Cas.* 110, 49 *Mich.* 495, 13 *N. W. Rep.* 832.

While plaintiff was in a pit under an engine cleaning it, it moved automatically by reason of the steam escaping through a defective throttle-valve, and he was injured. The jury found that the engine was dangerous and unsafe; that the officers of the company and the persons in charge of engines had not exercised ordinary care to know the condition of the engine, though it had been unsafe for some time before the accident; and that the plaintiff was injured while in the discharge of duty, without knowledge of such defect. *Held*, that plaintiff was entitled to recover. *Atchison, T. & S. F. R. Co. v. Holt*, 11 *Am. & Eng. R. Cas.* 206, 29 *Kan.* 149.—QUOTED IN *Hannibal & St. J. R. Co. v. Fox*, 15 *Am. & Eng. R. Cas.* 325, 31 *Kan.* 586.

By a regulation governing the employés in the transfer yard of a railway company, car inspectors were required to inspect incoming cars immediately upon their arrival, and if out of repair to mark them "in bad order," indicating that they were to be sent to the "repair track." *Held*, that negligence on the part of the inspectors in failing to properly discharge this duty, by reason of which plaintiff was injured while attempting to couple a damaged car without notice of its condition, and without fault on his part, might be imputed to the company. *Tierney v. Minneapolis & St. L. R. Co.*, 21 *Am. & Eng. R. Cas.* 545, 33 *Minn.* 311, 53 *Am. Rep.* 35, 23 *N. W. Rep.* 229.

It will not be presumed under such circumstances that the plaintiff assumed the risk of such negligent inspection, unless it appears that he undertook to handle cars in the course of his employment without reference to inspection. *Tierney v. Minneapolis & St. L. R. Co.*, 21 *Am. & Eng. R. Cas.* 545, 33 *Minn.* 311, 53 *Am. Rep.* 35, 23 *N. W. Rep.* 229.

Where no inspection was made of a coupling-pin that had probably been partially broken by a collision between defendant's engine and tender with a train of cars, and a few days afterwards plaintiff's intestate, a fireman, was killed by reason of the breaking of this coupling-pin, a verdict that defendant was guilty of negligence was warranted by the evidence. *Norfolk & W. R. Co. v. Nunnally*, 88 *Va.* 546, 14 *S. E. Rep.* 367.

In an action for the death of an employé

resulting from the breaking of a defective brake-rod, the broken end of the rod itself showed a flaw or old crack extending more than half way through it. The superintendent of defendant's car depot testified that if there was a crack two thirds through the rod it would be discovered by an inspection, but that if the crack was one third through it would not be discovered. He also testified that it was the duty of the car inspectors to examine the brake-rods by looking at them and by tapping them with a hammer. *Held*, that the evidence was sufficient to sustain a finding that the proper and ordinary inspection of the car should have disclosed the defect, and hence that the defendant was negligent in not discovering and remedying it before the accident. *Cowan v. Chicago, M. & St. P. R. Co.*, 80 *Wis.* 284, 50 *N. W. Rep.* 180.—APPLYING *Ballou v. Chicago & N. W. R. Co.*, 54 *Wis.* 257.

146. — within reasonable time after notice.—A railroad company is not chargeable with negligence merely because it delays, for any length of time, to repair a broken car while it remains unused and not so situated as to create danger, nor merely because it moves such car to its shops for repairs, and does not make such repairs at the place where the car was injured. *Flanagan v. Chicago & N. W. R. Co.*, 2 *Am. & Eng. R. Cas.* 150, 50 *Wis.* 462, 7 *N. W. Rep.* 337; *former appeal* 45 *Wis.* 98.

Where there was testimony that after an accident the spring of the draw-head was found defective, and some of the castings about it were broken, and this was the only evidence tending to show latent defects, if these defects existed at the time appellee was hurt, and appellants knew, or with proper care ought to have known, of them, then their duty was to repair them; and their failure to inform appellee of these defects would neither increase nor diminish their liability. *Fordyce v. Yarborough*, 1 *Tex. Civ. App.* 260, 21 *S. W. Rep.* 421.

A train left the track and killed a fireman. The evidence showed that the track was defective, notice of which fact had been given to the foreman of the repair gang a considerable time before the accident. *Held*, that plaintiff was entitled to recover. *Gage v. Delaware, L. & W. R. Co.*, 14 *Hun (N. Y.)* 446.—APPLIED IN *Williams v. Delaware, L. & W. R. Co.*, 39 *Hun* 430.

147. Necessity of notice and rea-

reasonable opportunity for repairs.—

An employer is not guilty of negligence for not repairing defective machinery unless there has been a reasonable opportunity to remedy it after its discovery. Mere knowledge, without opportunity to act upon it, would not constitute negligence. *Seaboard Mfg. Co. v. Woodson*, 98 Ala 378, 11 So. Rep. 733.

If a car is in good order when it leaves the shop and is placed upon the track, the company is not liable for injuries to employes arising from defects from use while running, until notified of such defects, or until, in the exercise of such vigilance as the law requires, it could and would have learned of such defects. *Chicago & E. I. R. Co. v. Hagar*, 11 Ill. App. 498.

A company cannot be said to be negligent where it appears that a freight train, before starting, was inspected and pronounced to be in proper condition, but at a station on the run an employe discovered that a draw-head of one car was defective, and so informed the conductor, and at the next station, about ten miles further on, a brakeman's hand was injured by reason of such defect, while uncoupling the car, under orders from the conductor, it appearing that there was no workshop or place between the starting point and the place of injury where repairs could have been made. *Louisville & N. R. Co. v. Law*, (Ky.) 21 S. W. Rep. 648.

148. Right to rely upon performance of this duty.—A servant has a right to assume that when danger from defects has become known to the master, such measures have been taken as would prevent the recurrence of that danger; and if no knowledge on plaintiff's part is shown of the particular defect or danger which occasioned the injury, a verdict against the master will not be disturbed. *Magee v. North Pac. Coast R. Co.*, 78 Cal. 430, 20 Pac. Rep. 709, 21 Pac. Rep. 114. *Southern Pac. R. Co. v. Aylward*, 79 Tex. 675, 15 S. W. Rep. 697.

It is the duty of a company under the common law to keep its engines and other machinery in such condition as from the nature of the business and employment the employe has a right to expect that they will be kept; and where the company fails through the exercise of ordinary care to do so, it is liable for injuries arising from its negligence. *Atchison, T. & S. F. R. Co. v.*

Holt, 11 Am. & Eng. R. Cas. 206, 29 Kan. 149.

A brakeman has a right to rely upon the company to properly test and inspect such things as brakes and chains before they are placed on the car for use; and while his failure to notice visible defects would be negligence on his part, he is not required to go under the car and examine the chain link by link to see if it is in a safe condition before he uses it. *Morton v. Detroit, B. C. & A. R. Co.*, 81 Mich. 423, 46 N. W. Rep. 111.

A train was thrown from the track by running over an animal, and killed a brakeman, and the company was charged with negligence in not keeping its track properly fenced, and in not keeping its cow-catcher in proper position. *Held*, that an action against the company would not be defeated by evidence that the brakeman knew that cattle had previously been on the track, as he had a right to presume that the company had repaired it, or taken such measures as were necessary to prevent a recurrence of the danger. *Magee v. North Pac. Coast R. Co.*, 78 Cal. 430, 20 Pac. Rep. 709, 21 Pac. Rep. 114.

149. Inspection and repair of machinery and appliances.*—The obligation upon the company is to keep its machinery and all things used in the operation of its road in proper order and repair, so that its employes may not be injured by reason of defective machinery or working apparatus. *Woodworth v. St. Paul, M. & M. R. Co.*, 5 McCrary (U. S.) 574, 18 Fed. Rep. 282. *Totten v. Pennsylvania R. Co.*, 11 Fed. Rep. 564.

The negligence of the master was in not having properly tested a rope, to the possible insufficiency of which his attention had been called. *Held*, that the servant might recover, although he knew the rope had not been tested. *Dumas v. Stone*, 65 Vt. 442, 25 Atl. Rep. 1097.

150. Inspection and repair of engines.—Engines and other machinery used in operating a railroad are liable to wear out, to break, become defective and dangerous, and every railroad company employing such agencies is charged with

* Injuries to employes by defective appliances. When company liable for failing to inspect. When employe should make examination, see 44 AM. & ENG. R. CAS. 527, *abstr.*

notice of this fact, and consequently is bound to exercise a degree of watchfulness over them commensurate with the nature of the business in which they are employed and the consequences incident to neglect; therefore frequent examinations or other measures of precaution are necessary to prevent engines and machinery from becoming defective and dangerous from natural causes. *Atchison, T. & S. F. R. Co. v. Holt*, 11 Am. & Eng. R. Cas. 206, 29 Kan. 149. *Cumberland & P. R. Co. v. State*, 44 Md. 283, 45 Md. 229.—QUOTING *Clarke v. Holmes*, 7 H. & N. 943.

One employed to drive a locomotive may recover damages for personal injuries caused by a defect in the engine, arising from neglect of the company's servants to keep the engine in proper repair; nor is he debarred from recovering damages for such injuries by the fact that he was acting in intentional violation of the rules of the company, unless the accident was due, in whole or in part, to such violation; nor by the fact that such rules provided that the driver of an engine should be held responsible for the condition of his engine, must be sure that it was in good working order, and must stop, draw his fire, station his signal men, and procure assistance whenever any defect was detected in an engine that would make it, in his judgment, unsafe to proceed; nor by the fact that he knew the engine was not in good working order, if he did not know and ought not to have known that it was unsafe. *Ford v. Fitchburg R. Co.*, 110 Mass. 240.—APPROVED IN *Long v. Pacific R. Co.*, 65 Mo. 225. DISTINGUISHED IN *Miller v. Southern Pac. Co.*, 20 Oreg. 285; *Peschel v. Chicago, M. & St. P. R. Co.*, 17 Am. & Eng. R. Cas. 545, 62 Wis. 338. EXPLAINED IN *Holden v. Fitchburg R. Co.*, 129 Mass. 268. FOLLOWED IN *Sadowski v. Michigan Car Co.*, 84 Mich. 100. QUOTED IN *Northern Pac. R. Co. v. Charless*, 51 Am. & Eng. R. Cas. 198, 51 Fed. Rep. 562, 7 U. S. App. 359, 2 C. C. A. 380; *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495; *Texas Mex. R. Co. v. Whitmore*, 11 Am. & Eng. R. Cas. 195, 58 Tex. 276. REVIEWED IN *Kielley v. Belcher Silver Min. Co.*, 3 Sawy. (U. S.) 437; *Salters v. Delaware & H. Canal Co.*, 3 Hun (N. Y.) 338, 5 T. & C. 559; *Cooper v. Pittsburgh, C. & St. L. R. Co.*, 24 W. Va. 37.

Where an engineer upon a locomotive was killed by an explosion of a boiler which had

been for some time out of repair, and had been frequently reported and sent to the repair shop for repairs, defendant, who was operating the road, was not excused from liability by the facts that there was no negligence on his part in the employment of a superintendent of repairs, or in omitting to make proper regulations; that the master mechanic having charge gave proper instructions for the thorough examination and repair of the engine; and that the negligence causing the accident was that of the mechanics directed to make the repairs. *Fuller v. Jewett*, 1 Am. & Eng. R. Cas. 109, 80 N. Y. 46.—FOLLOWING *Flike v. Boston & A. R. Co.*, 53 N. Y. 549; *Booth v. Boston & A. R. Co.*, 73 N. Y. 38; *Mehan v. Syracuse, B. & N. Y. R. Corp.*, 73 N. Y. 585.—DISTINGUISHED IN *Slater v. Jewett*, 5 Am. & Eng. R. Cas. 515, 85 N. Y. 61, 39 Am. Rep. 627; *Murphy v. Boston & A. R. Co.*, 8 Am. & Eng. R. Cas. 511, 88 N. Y. 146. QUOTED IN *Umback v. Lake Shore & M. S. R. Co.*, 8 Am. & Eng. R. Cas. 98, 83 Ind. 191.

151. Inspection and repair of boilers.—The application of the steam test for boilers being shown to be neither practicable nor generally approved, on account of its danger, and the hydraulic test, as shown by the evidence, being extraordinary and rarely used, except when engines are first put in use, or fail to work well, or when they are overhauled periodically, the failure of the company to have either or both of these tests applied to the defective boiler does not authorize the imputation of negligence. *Louisville & N. R. Co. v. Allen*, 28 Am. & Eng. R. Cas. 514, 78 Ala. 494.

Nor can negligence be imputed to the company on account of the failure to apply the hydraulic test to the engine when it was last overhauled at the shops, about ten months before the explosion, when the evidence shows that the defect had only existed from two to six months. *Louisville & N. R. Co. v. Allen*, 28 Am. & Eng. R. Cas. 514, 78 Ala. 494.

A boiler exploded and injured an employé. The evidence showed that about a week before the accident an engineer discovered that the crown-sheet of the boiler looked white, and, at his suggestion, a careful examination and test were made, the boiler being subjected to a pressure of 145 pounds, its maximum capacity. At the time of the accident the engine was mov-

ing at a moderate rate of speed with only a pressure of 110 pounds. *Held*, not sufficient evidence of negligence on the part of the company to justify a submission to the jury. *Racine v. New York C. & H. R. R. Co.*, 70 *Hun* (N. Y.) 453.

An engine driver was killed by the explosion of a locomotive, in consequence of the neglect of defendants' master mechanic to keep the locomotive in repair. The duty of this master mechanic was to superintend and direct the repairs of all the locomotives on defendants' road. The directors of the defendants were not guilty of any neglect in furnishing their road in the first instance with suitable machinery and faithful and competent employés, and they were ignorant of any defect in the locomotive in question. *Held*, that the defendants were not liable. *Hard v. Vermont & C. R. Co.*, 32 *Vt.* 473.—APPROVED IN *Smoot v. Mobile & M. R. Co.*, 67 *Ala.* 13. DISTINGUISHED IN *Laning v. New York C. R. Co.*, 49 *N. Y.* 521. FOLLOWED IN *Howard v. Delaware & H. Canal Co.*, 40 *Fed. Rep.* 195; *Warner v. Erie R. Co.*, 39 *N. Y.* 468; *Davis v. Central Vt. R. Co.*, 55 *Vt.* 84, 45 *Am. Rep.* 590. LIMITED IN *Riley v. West Virginia C. & P. R. Co.*, 27 *W. Va.* 145. REVIEWED IN *Indiana Car Co. v. Parker*, 100 *Ind.* 181; *Gilman v. Eastern R. Co.*, 13 *Allen* (Mass.) 433.

152. Inspection and repair of track, etc.*—It is the duty of a company to use reasonable care and diligence to keep its tracks in a safe condition for its employés to work upon; and so far as the work of keeping its tracks in repair is left to its servants, it is its duty to exercise reasonable supervision to see that the work is properly done. *Babcock v. Old Colony R. Co.*, 150 *Mass.* 467, 23 *N. E. Rep.* 325.

It is the duty of a company to its employés and servants operating its trains to make frequent and thorough inspection of its line of road and bridges; and in case of violent storms it should make such inspection with more than ordinary promptitude and thoroughness, and in particular should examine such portions of it as are liable to injury by such storms; and where this duty by the rules of the company is devolved upon the section men, their negligence is

* What is negligence in company in not knowing of washouts and warning engineer. When for the jury, see 44 *AM. & ENG. R. CAS.* 505, *abstr.*

the negligence of the company. *St. Louis & S. F. R. Co. v. George*, 85 *Tex.* 150, 19 *S. W. Rep.* 1036.

If a company knows of the improper construction of its roadbed, and that the cross-ties and other superstructure are rotten, and if it fails to make suitable repairs, this is negligence which makes it liable for any injury that may occur on that account to any one, whether he be a servant of the company or not, notwithstanding the failure to repair was owing to the negligence of the general manager or superintendent of the road, or road master or section boss. *Krogg v. Atlanta & W. P. R. Co.*, 77 *Ga.* 202, 4 *Am. St. Rep.* 79.

153. Inspection and repair of cars.*—It is the duty of a company to have cars properly inspected; and if an employé, to whom the duty of inspection is intrusted, negligently permits a car to go out with a cracked wheel, which might easily have been detected, it will be liable to an employé who is injured by reason of the defective wheel giving way. *Union Pac. R. Co. v. Daniels*, 152 *U. S.* 684, 14 *Sup. Ct. Rep.* 756; *affirming* 6 *Utah* 357.

But before a company is chargeable with negligence in failing to inspect cars it must be shown that the defect was one which a proper inspection would have disclosed, even though, from the nature of the accident, it may be readily concluded that some defect did in fact exist. In such cases the burden of proof is upon the injured party. *Sack v. Dolese*, 35 *Ill. App.* 636.—FOLLOWING *DeGraff v. New York C. & H. R. R. Co.*, 76 *N. Y.* 125; *East St. Louis P. & P. Co. v. Hightower*, 92 *Ill.* 139; *Chicago & A. R. Co. v. Pratt*, 14 *Ill. App.* 346; *Chicago & A. R. Co. v. Stites*, 20 *Ill. App.* 648.

Where two hand-cars collide and the patent injuries to one of them are serious and such as to indicate great violence in the collision, it is the duty of the railroad corporation to make a reasonable examination and inspection of the injured car to see if there be no latent injuries. *Solomon R. Co. v. Jones*, 15 *Am. & Eng. R. Cas.* 201, 30 *Kan.* 601, 2 *Pac. Rep.* 657.

A company is liable to a brakeman for injuries received in the performance of his duties, through the negligence of the company's inspector of machinery in failing to

* Duty of company to inspect cars, see notes, 28 *AM. & ENG. R. CAS.* 549; 21 *Id.* 478.

discover and remedy a defect in a brake-staff, when the defect by the exercise of reasonable and proper diligence might have been known before the infliction of the injuries. *Missouri Pac. R. Co. v. Dwyer*, 36 Kan. 58, 12 Pac. Rep. 352.—DISTINGUISHING *Smith v. Chicago, M. & St. P. R. Co.*, 42 Wis. 520.—*Johnson v. Richmond & D. R. Co.*, 81 N. Car. 453.—REVIEWED IN *Mason v. Richmond & D. R. Co.*, 111 N. Car. 482.

154. Inspection of cars of another company.*—A railroad company is bound

to inspect the cars of another company used by its road, just as it would inspect its own cars; it owes this duty as master, and it is responsible for the consequences of such defects as could be discovered by ordinary inspection; when cars come in from another road which have defects discernible by ordinary examination, it must either remedy such defects or refuse to take them. *Mackey v. Baltimore & P. R. Co.*, 8 Mackey (D. C.) 282.—APPROVING *Gottlieb v. New York, L. E. & W. R. Co.*, 100 N. Y. 462. QUOTING *Ballou v. Chicago & N. W. R. Co.*, 54 Wis. 257.—*Sack v. Dolese*, 35 Ill. App. 636.—REVIEWING *Columbus, C. & I. C. R. Co. v. Troesch*, 68 Ill. 545; *Chicago & A. R. Co. v. Platt*, 89 Ill. 141; *Ladd v. New Bedford R. Co.*, 119 Mass. 412; *Spicer v. South Boston Iron Co.*, 138 Mass. 426.—*Missouri Pac. R. Co. v. Barber*, 44 Am. & Eng. R. Cas. 523, 44 Kan. 612, 24 Pac. Rep. 969.—QUOTING *Gutridge v. Missouri Pac. R. Co.*, 94 Mo. 468.—APPROVED IN *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112.—*Fay v. Minneapolis & St. L. R. Co.*, 11 Am. & Eng. R. Cas. 193, 30 Minn. 231, 15 N. W. Rep. 241.—APPROVED IN *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112. DISTINGUISHED IN *Chicago, St. L. & P. R. Co. v. Fry*, 131 Ind. 319. FOLLOWED IN *Macy v. St. Paul & D. R. Co.*, 35 Minn. 200.—*Mateer v. Missouri Pac. R. Co.*, (Mo.) 15 S. W. Rep. 970.—RECONCILING *Gutridge v. Missouri Pac. R. Co.*, 94 Mo. 468, 7 S. W. Rep. 476.—*Gutridge v. Missouri Pac. R. Co.*, 94 Mo. 468, 13 West. Rep. 644, 7 S. W. Rep. 476.—APPROVED IN *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112. DISTINGUISHED IN *Johnson v. Missouri Pac. R. Co.*, 96 Mo.

340, 9 S. W. Rep. 790. QUOTED IN *Missouri Pac. R. Co. v. Barber*, 44 Kan. 612.—*Gottlieb v. New York, L. E. & W. R. Co.*, 24 Am. & Eng. R. Cas. 421, 100 N. Y. 462, 3 N. E. Rep. 344; affirming 29 Hun 637.—REVIEWING *Baldwin v. Chicago, R. I. & P. R. Co.*, 50 Iowa 680; *Ballou v. Chicago & N. W. R. Co.*, 54 Wis. 257; *O'Neil v. St. Louis, I. M. & S. R. Co.*, 9 Fed. Rep. 337; *Jetter v. New York & H. R. Co.*, 2 Abb. App. Dec. (N. Y.) 458; *Jones v. New York C. & H. R. R. Co.*, 28 Hun (N. Y.) 364.—APPROVED IN *Mackey v. Baltimore & P. R. Co.*, 8 Mackey (D. C.) 282; *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112. FOLLOWED IN *Goodrich v. New York C. & H. R. R. Co.*, 41 Am. & Eng. R. Cas. 259, 116 N. Y. 398, 26 N. Y. S. R. 767.—*Goodrich v. New York C. & H. R. R. Co.*, 41 Am. & Eng. R. Cas. 259, 116 N. Y. 398, 22 N. E. Rep. 397, 26 N. Y. S. R. 767, 5 L. R. A. 750; affirming 3 N. Y. S. R. 774.—FOLLOWING *Gottlieb v. New York, L. E. & W. R. Co.*, 100 N. Y. 462; *Fuller v. Jewett*, 80 N. Y. 46.—APPROVED IN *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112.—*Bennett v. Northern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 182, 2 N. Dak. 112, 49 N. W. Rep. 408.—APPROVING *Goodrich v. New York C. & H. R. R. Co.*, 116 N. Y. 398, 22 N. E. Rep. 397; *Gottlieb v. New York, L. E. & W. R. Co.*, 24 Am. & Eng. R. Cas. 421, 100 N. Y. 462, 3 N. E. Rep. 344; *International & G. N. R. Co. v. Kernan*, 78 Tex. 294, 14 S. W. Rep. 668; *Bomar v. Louisiana N. & S. R. Co.*, 42 La. Ann. 983, 8 So. Rep. 478; *Fay v. Minneapolis & St. L. R. Co.*, 11 Am. & Eng. R. Cas. 193, 30 Minn. 231, 15 N. W. Rep. 241; *O'Neil v. St. Louis, I. M. & S. R. Co.*, 9 Fed. Rep. 337; *Missouri Pac. R. Co. v. Barber*, 44 Am. & Eng. R. Cas. 523, 44 Kan. 612; *Gutridge v. Missouri Pac. R. Co.*, 94 Mo. 468, 7 S. W. Rep. 476.—*International & G. N. R. Co. v. Kernan*, 44 Am. & Eng. R. Cas. 607, 78 Tex. 294, 14 S. W. Rep. 668.—APPROVED IN *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112.

The statutory requirement that every railroad shall impartially and diligently receive and forward the cars of other roads does not apply to cars unfit for passage, but means that no needless delays or hindrances shall be interposed, and that all precautions against the use of improper cars shall be adopted with reference to reasonable dispatch. *Smith v. Potter*, 2 Am. & Eng. R. Cas. 140, 46 Mich. 258, 9 N. W. Rep. 273.

*Duty of company to employes to inspect cars which it is using, but which belong to another company, see note, 41 AM. REP. 38.

Inspection of cars received from another company for through transportation, see note, 21 AM. & ENG. R. CAS. 561.

The rule that a railroad company must provide its employes with cars and appliances which are reasonably safe does not apply in all of its strictness where a company receives cars belonging to another company to be transported over its road. In such case it is not the duty of the company to furnish appliances and instrumentalities, but to make proper inspection and give notice of defects, if any be found; and this duty is performed by the employment of a sufficient number of competent and skilled inspectors, who are subjected to proper rules and instructions. *Cincinnati, H. & D. R. Co. v. McMullen*, 38 *Am. & Eng. R. Cas.* 165, 117 *Ind.* 439, 20 *N. E. Rep.* 287. *Mackin v. Boston & A. R. Co.*, 15 *Am. & Eng. R. Cas.* 196, 135 *Mass.* 201, 46 *Am. Rep.* 456.—APPROVED IN *Little Miami R. Co. v. Fitzpatrick*, 42 *Ohio St.* 318. NOT FOLLOWED IN *Little Rock & M. R. Co. v. Moseley*, 56 *Fed. Rep.* 1009.

Where a railroad company furnishes safe cars and a competent car inspector, it is not liable to a brakeman for injuries received while attempting to couple a properly constructed car, which has been accepted by the inspector from another company for transportation, onto another car, by reason of the projection over the end of the car so inspected of a portion of the lumber with which it is laden. *Devey v. Detroit, G. H. & M. R. Co.*, 97 *Mich.* 329, 52 *N. W. Rep.* 942, 56 *N. W. Rep.* 756.—APPROVING *Baltimore & O. R. Co. v. Baugh*, 149 *U. S.* 368, 13 *Sup. Ct. Rep.* 914. REVIEWING *Ford v. Lake Shore & M. S. R. Co.*, 117 *N. Y.* 638; *Byrnes v. New York, L. E. & W. R. Co.*, 113 *N. Y.* 251.

The rule which requires railroad companies to inspect cars received from other companies, and to see that they are in good and safe condition for their employes to handle, does not apply to companies or persons on whose sidings loaded cars are delivered for the purpose of permitting the owner of the siding to unload the freight, even though the sidings of such person or company may be extensive in number and great in length. *McMullen v. Carnegie*, 158 *Pa. St.* 518, 27 *Atl. Rep.* 1043.

A railway company that properly inspects foreign freight cars used in "through" transportation is not liable for an injury to a brakeman who, by reason of a defective hand-hold, falls under the car. *Keith v. New Haven & N. Co.*, 23 *Am. & Eng. R.*

Cas. 421, 140 *Mass.* 175, 3 *N. E. Rep.* 28.—EXPLAINED IN *Peaslee v. Fitchburg R. Co.*, 152 *Mass.* 155. NOT FOLLOWED IN *Little Rock & M. R. Co. v. Moseley*, 56 *Fed. Rep.* 1009.

A railroad company is not liable to its employes for failing to inspect cars received from another line, so as to see that they are properly loaded. *Mexican C. R. Co. v. Shean*, (Tex.) 18 *S. W. Rep.* 151.—FOLLOWING *Galveston, H. & S. A. R. Co. v. Farmer*, 73 *Tex.* 85, 11 *S. W. Rep.* 156.

Where a car with a defective brake-staff did not belong to the defendant, but to another railroad company, and was only temporarily in use by the defendant, and came to it loaded, the fact that the car had been in the possession of the defendant for nearly two weeks prior to the accident was not of itself sufficient to charge the defendant with notice of the defects. The inspection which a company is required to make of a foreign car tendered it by another company for transportation over its lines must be made with reasonable care, so as to furnish its employes with reasonably safe appliances for use in the discharge of their duties; but it cannot be held liable for hidden defects which could not be detected by such an inspection as the exigencies of traffic will permit. *Chicago, St. L. & P. R. Co. v. Fry*, 131 *Ind.* 319, 28 *N. E. Rep.* 989.—DISTINGUISHING *Fay v. Minneapolis & St. L. R. Co.*, 30 *Minn.* 231.—REFERRED TO IN *Ft. Wayne, C. & L. R. Co. v. Gruff*, 132 *Ind.* 13.

The defendants had a junction at P, at which they received from other lines a great number of trucks, which they, being bound by law to give facilities for through traffic, were compelled to forward with dispatch to their destination. The defendants, when a foreign truck came on their line, caused it to undergo such a general examination as could take place without causing an undue delay; that is to say, the tires of the wheels were tapped with a hammer, and the truck generally looked over for defects. A foreign truck loaded with coal, belonging to the B. wagon company, came on to defendants' line at P, and there underwent the usual examination, when a defect in one of the springs and a crack in the woodwork were discovered. The truck was shunted, upon the discovery of the defects, in order that it might be repaired by the wagon company to whom it belonged. The defect

in the spring, which was the only pressing defect, was repaired, and the truck was handed over to the defendants, and sent on by them to its destination. On the way an accident, by which the plaintiff was injured, happened through the existence of a crack in one of the axles of the truck. It was stated in evidence that by a minute examination of the truck the crack in the axle might have been discovered. The defect in the axle was entirely unconnected with the defects previously discovered. *Held*, that the defendants were not bound to do more in the way of examining the foreign truck on its arrival at P. than they had done, and inasmuch as the defects discovered on such examination were entirely unconnected with the defect that caused the accident, they were not responsible by reason of their failing, upon the discovery of such defects, to enter upon a more minute examination of the truck. *Richardson v. Great Eastern R. Co.*, 1 C. P. D. 342, 3 Ry. & C. T. Cas. xvii.

9. *Management of Trains, Engines, and Cars.*

155. Generally. — As between employes of a company, whose duty it is to repair its track while trains are using the same, and the company and its representatives, who are engaged in running trains over the same where the trackmen are so employed, it is the duty of the latter, as far as is practicable, to adopt such precautions as will guard its employes on the track from dangers incident to their employment. *Dick v. Indianapolis, C. & L. R. Co.*, 8 Am. & Eng. R. Cas. 101, 38 Ohio St. 389.

Where a railroad company permits its employes to habitually disregard the safeguards provided to insure the safe running of its trains, this is a neglect of duty which the company owes to its other employes, as much as permitting the use of defective machinery. *Coppins v. New York C. & H. R. Co.*, 44 Am. & Eng. R. Cas. 618, 122 N. Y. 557, 25 N. E. Rep. 915, 34 N. Y. S. R. 214; *affirming* 48 Hun 292, 17 N. Y. S. R. 916.

Plaintiff was a fireman, a part of his duty being to go on the tender to adjust the spout in taking water. The petition alleged that sufficient help was not furnished to break up the coal for the engine; that the coal on the engine in question was in large, slippery chunks, and was negligently permitted to accumulate on the end and sides

of the tender, and about the man-hole, where the plaintiff had to go. The evidence tended to show that, while the plaintiff was, in the line of his duty, upon the top of a pile of coarse, slippery coal in the tender, the engine moved without warning to the plaintiff, and that in consequence of the movement without warning he fell and was injured. *Held*, that conceding it to be the custom to move the engine immediately upon the cover being placed on the man-hole without signal, leaving the fireman to get down over the coal, and that such custom was known to the plaintiff, yet if the character, quantity, or location of the coal was such as to make the plaintiff's position unusually perilous, or if the engine moved more suddenly than usual in such cases, the custom did not apply. *Knott v. Desloge & S. C. R. Co.*, 84 Iowa 462, 51 N. W. Rep. 57.

The evidence showed that at one of the company's stations the conductor of one of its freight trains directed the rear brakeman to set out four front cars on the switch; that the latter before doing so set no brakes on the rear cars as it was his duty to do, so that when the front cars and locomotive were uncoupled the rear cars ran backward down a long grade, and struck a freight train coming from the opposite direction, killing plaintiff's husband, who was fireman on the latter train. *Held*, that the conductor of the first train was not guilty of negligence in failing to see that the brakes were set on the rear cars. *Relyea v. Kansas City, Ft. S. & G. R. Co.*, 53 Am. & Eng. R. Cas. 578, 112 Mo. 86, 20 S. W. Rep. 480. — QUOTING *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74.

Nor was the company guilty of negligence in not having more than two brakemen on the forward train, since it was a through freight train, although use could have been made of another brakeman at the station in question. *Relyea v. Kansas City, Ft. S. & G. R. Co.*, 53 Am. & Eng. R. Cas. 578, 112 Mo. 86, 20 S. W. Rep. 480.

Nor was the company guilty of negligence in running the rear train ahead of time without notice to the conductor of the forward train, when it did not appear that it was to run on the time of the forward train, and it was usual to run such train ahead of time. *Relyea v. Kansas City, Ft. S. & G. R. Co.*, 53 Am. & Eng. R. Cas. 578, 112 Mo. 86, 20 S. W. Rep. 480.

The cause of the accident was the negligence of the brakeman of the forward train in failing to secure the rear cars at the station, and not the running of the train ahead of time. *Relyea v. Kansas City, Ft. S. & G. R. Co.*, 53 *Am. & Eng. R. Cas.* 578, 112 *Mo. 86*, 20 *S. W. Rep.* 480.

Plaintiff, under direction of defendant's roadmaster, was one of a gang engaged in track work, distributing railroad ties, etc., and, while attempting to board a construction train in response to an order of the roadmaster, was hit by a heavy tie thrown from the car by the men upon it. *Held*, that there was evidence of negligent direction of the work, and that the question of plaintiff's negligence was one for the jury. *Foster v. Missouri Pac. R. Co.*, 115 *Mo. 165*, 21 *S. W. Rep.* 916.

156. Degree of care required.—Where men are rightfully at work on a trestle over which a railroad is operated, with the knowledge of the officers and persons operating the road, who know that the men are thereby placed in great danger, it is the duty of the company to operate and run its trains with care proportionate to the danger; and if it does not do so it is guilty of culpable negligence. *Inter-State Con. R. T. R. Co. v. Fox*, 39 *Am. & Eng. R. Cas.* 318, 41 *Kan. 715*, 21 *Pac. Rep.* 797.

Plaintiff, a section hand, was riding on a train going to dinner, under the directions of a foreman, and from the large number on the train he was compelled to stand on the lower step of the car, and was struck by a switch signal of which he was ignorant, and which was constructed nearer the track than usual. *Held*: (1) that he was not a trespasser, and the company owed him the duty of caring for his safety; (2) that under the evidence it was error to direct a verdict for the company. *Boss v. Northern Pac. R. Co.*, 5 *Dak. 308*, 40 *N. W. Rep.* 590.

Plaintiff's intestate was killed while cleaning cars in a yard. In the performance of her duty it was necessary to cross the track, and an agent of the company had directed her to do so whenever it was necessary. *Held*, that she was more than a mere licensee upon the track, and the company owed her the duty, in running its trains, to observe reasonable care so as to avoid injuring her. *Young v. New York C. & H. R. Co.*, 13 *Daly (N. Y.) 294*; *affirmed* (¶) 103 *N. Y. 678*, *mem.*, 7 *N. Y. S. R.* 861, *mem.*

157. Reliance upon the performance of duty, observance of rules, etc.—The general rule is that, as to persons lawfully upon the track engaged in labor, the railroad company owes a duty of active vigilance, and such persons have a right to become engrossed in their labor to such an extent that they may be oblivious to the approach of trains—relying, as they may, upon the duty imposed by law with reference to them. *Gessley v. Missouri Pac. R. Co.*, 32 *Mo. App. 413*; *Shoner v. Pennsylvania Co.*, 130 *Ind. 170*, 28 *N. E. Rep. 616*, 29 *N. E. Rep. 775*; *North Chicago Rolling Mill Co. v. Johnson*, 114 *Ill. 57*.—**DISTINGUISHING** *Pennsylvania Co. v. Stoeke*, 104 *Ill. 201*; *Pennsylvania Co. v. Hankey*, 93 *Ill. 580*.

Where a servant is injured at a crossing by a moving train, which crossing he had known for several years, the courts will presume, in the absence of a showing to the contrary, that during these years the employés of the company working at that point had been observant of the duty of reciprocal care for the safety of each other which the law imposes upon them, and obedient to the law relative to the running of trains over crossings; and the injured servant with knowledge of such facts would be justified in acting on the assumption that such careful observance of duty would continue. *Shoner v. Pennsylvania Co.*, 130 *Ind. 170*, 28 *N. E. Rep. 616*, 29 *N. E. Rep. 775*.

In an action by an engineer to recover for injuries caused by colliding with another train, it appeared that he was instructed by the train dispatcher to run ahead of time to a certain station, where he would pass another train, and after passing such station he collided with a different train, which had been instructed as to the running of plaintiff's train. *Held*, that as plaintiff had no notice of the running of the train with which he collided, he had a right to assume that he would have a clear track after passing the one train mentioned in his instructions. *McChesney v. Panama R. Co.*, 74 *Hun 150*, 26 *N. Y. Supp. 245*, 56 *N. Y. S. R.* 415.

Where a railroad employé, engaged in removing ashes, etc., from a side track in depot grounds, was injured by a train set

* Coupling cars. Reliance by employé on rule that car shall not be moved, see note, 28 *AM. & ENG. R. CAS.* 547.

off upon
right to
would b
grounds
operated
was pro
fore stan
proof th
at an u
dence t
questio
without
the plain
defenda
Schultz
638, 18

158.
Where
duty of
for the
engaged
was stat
nal sou
resting
bound tr
other th
times up
a lookou
Nave v.
Eng. R.
391.—Q
92 Ala.
Meadors

The fa
gaged i
the risk
his co-er
of the d
ing inju
souri Pa
1110.

It is n
himself
ing trai
danger g
ing a sw
it necess
he in tu
train co
Co. v. A
REVIEW
Moore, 8

Where
sonal in
"dumm
drawing
charge

off upon said track—*held*, that he had a right to act upon the belief that such train would be operated and run through the grounds as other trains had been uniformly operated and run there; and where there was proof that the bell was usually rung before starting a train at that place, and no proof that trains were run there habitually at an unlawful speed, and there was evidence tending to show that the train in question was run at an unlawful speed, and without ringing the bell at starting or giving the plaintiff other warning, the question of defendant's negligence was for the jury. *Schultz v. Chicago & N. W. R. Co.*, 44 *Wis.* 638, 18 *Am. Ry. Rep.* 146.

158. Duty to keep lookout.—

Where a flagman was charged with the duty of giving signals to north-bound trains for the protection of workmen who were engaged in laying rails north of where he was stationed, but had no authority to signal south-bound trains, there was no duty resting upon those in charge of a south-bound train to keep a lookout at this place other than the general duty resting at all times upon those operating a train to keep a lookout to avoid injuries and accidents. *Nave v. Alabama G. S. R. Co.*, 54 *Am. & Eng. R. Cas.* 151, 96 *Ala.* 264, 11 *So. Rep.* 391.—QUOTING *Georgia Pac. R. Co. v. Lee*, 92 *Ala.* 271; *Savannah & W. R. Co. v. Meadors*, 95 *Ala.* 137.

The fact that the deceased, when he engaged in the company's service, assumed the risk of injuries from the negligence of his co-employés, did not relieve the engineer of the duty of looking out for and avoiding injury to deceased. *Schlereth v. Missouri Pac. R. Co.*, 115 *Mo.* 87, 21 *S. W. Rep.* 1110.

It is negligence in an engineer to place himself in such a position on a slowly backing train that he cannot see a signal of danger given by the switch foreman on seeing a switchman fall under the cars, making it necessary to first signal the fireman, and he in turn to signal the engineer before the train could be stopped. *Louisville & N. R. Co. v. Hurst*, (Ky.) 20 *S. W. Rep.* 817.—REVIEWING *Louisville & N. R. Co. v. Moore*, 83 *Ky.* 679.

Where it is alleged in a petition for personal injuries by a fireman on a motor or "dummy" of a rapid transit company drawing two cars, that the engineer having charge of the motor or "dummy" negli-

gently failed to discharge his duty in not keeping a proper lookout for obstructions upon or near the track, it must be shown, in order to make out a case of *prima facie* actionable negligence, that the obstruction was upon or near the track for a sufficient length of time, so that the engineer, in the exercise of reasonable care, could or should have known of it, so as to have stopped the motor before reaching the obstruction. The presumption of negligence cannot be made against the master or a co-employé, without proof tending to support it. Proof of the obstruction just at the time of the collision with the motor or train, and the collision itself, are not sufficient to make a cause of actionable negligence against the rapid transit company in favor of the fireman on the motor or "dummy" with the engineer. *Telle v. Leavenworth R. T. R. Co.*, 50 *Kan.* 455, 31 *Pac. Rep.* 1076.

A train broke in two at night and a brakeman was sent forward to signal the engineer, who was running back in search of the missing cars, but the brakeman went to sleep and was injured. *Held*, that it was not the duty of the engineer to keep a sharp lookout for the brakeman under such circumstances; and the company would only be liable for injuries which might have been avoided by the exercise of proper care after the brakeman was discovered. *Newport News & M. V. Co. v. Howe*, 52 *Fed. Rep.* 362, 6 *U. S. App.* 172, 3 *C. C. A.* 121.—FOLLOWING *O'Keefe v. Chicago, R. I. & P. R. Co.*, 32 *Iowa* 467; *Yarnall v. St. Louis, K. C. & N. R. Co.*, 75 *Mo.* 575; *Denman v. St. Paul & D. R. Co.*, 26 *Minn.* 357, 4 *N. W. Rep.* 605; *Button v. Hudson River R. Co.*, 18 *N. Y.* 248. REVIEWING *Inland & S. Coasting Co. v. Tolson*, 139 *U. S.* 551, 11 *Sup. Ct. Rep.* 653.

159. Duty to give warnings and signals.*—Where a brakeman, about to make a coupling, is authorized by the custom in such cases to believe that the train would not be backed until he was ready and should so signal, it is negligence in those in charge of the train to back it without such signal. *Romick v. Chicago, R. I. & P. R. Co.*, 15 *Am. & Eng. R. Cas.* 288, 62 *Iowa* 167, 17 *N. W. Rep.* 458.

Where a mechanic from one of defendant's

* Company not liable for failing to place signals to warn trainmen of snowbanks, see 28 *AM. & ENG. R. CAS.* 554, *abstr.*

shops, acting under the orders of his superiors, was working, as commanded, upon a ladder leaning against defendant's train, it was negligence for the trainmen to move the train without signals or notice to him; or if his position was not such as to be readily observed by the trainmen, it was negligence for the foreman, under whom he was acting, not to give notice to the trainmen of his dangerous position. *Pierce v. Central Iowa R. Co.*, 73 Iowa 140, 34 N. W. Rep. 783.

Where a person enters a pay car, on the stopping of a train to which it is attached, for the purpose of receiving money due him, the railroad company is bound to afford reasonable time for the transaction of his business before starting the train, and also to give proper warning of the purpose to put the train in motion, to enable him, by the use of reasonable care, to leave the car without risk of injury to himself in the act of getting off. *New York, P. & N. R. Co. v. Coulbourn*, 69 Md. 360, 16 Atl. Rep. 208, 1 L. R. A. 541.

The failure to give signals may be considered in determining the question of due care on the part of a railway company, in behalf of a plaintiff injured in a collision with an approaching train while lawfully upon a hand-car belonging to the defendant. *Garteiser v. Galveston, H. & S. A. R. Co.*, 2 Tex. Civ. App. 230, 21 S. W. Rep. 631. *Illinois C. R. Co. v. Shultz*, 64 Ill. 172.

A railroad company is not guilty of negligence in moving cars in its yard by a switch engine, slowly and without signals, or without sending a man ahead to give notice to its employes. *Verkjetz v. Humphreys*, 53 Am. & Eng. R. Cas. 459, 145 U. S. 418, 12 Sup. Ct. Rep. 835.

Plaintiff's intestate was engaged in unloading a gravel train, and the engineer, in obedience to a signal, suddenly backed the train without notice or warning, and the intestate was thrown down and killed. *Held*, sufficient evidence of negligence to find the company guilty. *Campbell v. New York C. & H. R. R. Co.*, 35 Hun (N. Y.) 506. *Dixon v. Chicago & A. R. Co.*, 53 Am. & Eng. R. Cas. 589, 109 Mo. 413, 19 S. W. Rep. 412.

Plaintiff and others were engaged in grading a new track alongside of a main track, and their duties required them to be on or very near the main track. *Held*, that the company owed the workmen the duty of

active vigilance in giving them warning of approaching trains, whether they were the employes of the company or of a contractor. *Erickson v. St. Paul & D. R. Co.*, 41 Minn. 500, 43 N. W. Rep. 332, 5 L. R. A. 786.

Where a crew of men were working on a construction train hauling earth, and it was the custom for them, when the train was loaded, to get upon it and ride to where the earth was to be deposited, and it was also the custom before starting the train for the engineer to ring the bell as a signal that the train was about to start, the jury may find it negligence in respect to one of the men getting upon the train to start it without ringing the bell. *Moran v. Eastern R. Co.*, 48 Minn. 46, 50 N. W. Rep. 930.

A track repairer, while at work at a place where there were many tracks, was injured by a backing train, which approached without signals and without any one on the end of it to keep a lookout, as was required by a city ordinance. *Held*, that the injured party might recover. *Kelly v. Union R. & T. Co.*, 35 Am. & Eng. R. Cas. 396, 95 Mo. 279, 14 West. Rep. 721, 8 S. W. Rep. 420.

Plaintiff's intestate was a track hand and was killed by a passing train. It appeared that he had a right to be on the track at the time; that his life could have been saved by the use of ordinary care by those operating the train, and they failed to exercise such care. Those in charge of the train saw him on the track and saw that his attention was directed to other matters at the side of the track, but they failed to give any signal. *Held*, that it was not error to refuse to instruct the jury that the company was not liable. *Sullivan v. Missouri Pac. R. Co.*, 97 Mo. 113, 10 S. W. Rep. 852. — FOLLOWED IN *Pope v. Kansas City Cable R. Co.*, 43 Am. & Eng. R. Cas. 290, 99 Mo. 400, 12 S. W. Rep. 891.

160. — under statutory provisions. — The provision of the Alabama Code requiring the bell to be rung and the whistle to be blown when approaching a crossing is intended to protect persons using the crossing, and imposes no duty upon the railroad company to give such signals for the purpose of warning brakemen on the top of the train when approaching an overhead bridge. *Louisville & N. R. Co. v. Hall*, 39 Am. & Eng. R. Cas. 298, 87 Ala. 708, 4 L. R. A. 710, 6 So. Rep. 277.

The provision of Tenn. Code, § 1166, to

the effect that every railroad shall keep the engineer, fireman, or some other person upon the locomotive always on the lookout ahead, and that when any person or animal is seen on the track the whistle shall be sounded, the brakes applied, and every possible means employed to stop the train, does not apply as between a company and its employes about yards and depots. In such case the liability of the company for injuries resulting from the misconduct or negligence of its agents must be determined, not by the statute, but by common law principles. *Louisville & N. R. Co. v. Robertson*, 9 *Heisk. (Tenn.)* 276, 20 *Am. Ry. Rep.* 9.—QUOTED IN *East Tenn., V. & G. R. Co. v. Rush*, 15 *Lea (Tenn.)* 145.

161. System of signals.—A railroad company is not required to change its orders or signals for the movement of its trains because some other railroad company has adopted a different system of orders or signals; and a railroad company may even have in use a system of orders or signals shown to be less safe than that adopted by another railroad company without being liable to its employes for the consequences of the use of such orders or signals, if the orders and signals in use are reasonably well calculated to secure the safety of the employes of the company if obeyed by them. *Hannibal & St. J. R. Co. v. Kanaley*, 39 *Kan. 1*, 17 *Pac. Rep.* 324.

162. Illustrations.—Plaintiff's intestate, a trackman, was killed while operating a hand-car. The section boss had sent a signal flag by one of the trainmen to meet an approaching train. The train hands, having failed to keep a lookout, ran into the hand-car before the trackmen could get out of the way, and intestate was killed. *Held*, that the death of the intestate was caused by the negligence of those in charge of the train. *Howard v. Delaware & H. Canal Co.*, 41 *Am. & Eng. R. Cas.* 473, 40 *Fed. Rep.* 195.—FOLLOWING *Illinois C. R. Co. v. Barron*, 5 *Wall. (U. S.)* 90.

Where an employe upon a construction train consisting of an engine, two cabooses, and four or five flat cars, with the engine coupled onto the caboose, with the flat cars in the rear, all slowly backing at the rate of about four miles an hour, is directed by the conductor in charge of the train to pick up a crowbar lying crosswise near the rear end of the rear flat car, and while in the act of stooping to pick up the bar, falls off and is

killed by being run over by the cars, and the fall is caused by a sudden concussion or jerk of the cars from reversing the engine by the engineer, to stop the train on account of cattle near to the track at the rear of the train, and neither the statute, the rules of the company, nor the custom on the trains requires any preliminary signal or warning to the laborers upon the train to enable them to hold fast or otherwise secure themselves to the cars, before reversing the engine or stopping the cars under such circumstances—*held*: (1) that upon these facts the engineer was not guilty of culpable negligence in failing to ring the bell or sound the whistle, or giving other signal before reversing the engine; and (2) that the accident, if not directly contributed to by the want of care of the employe falling from the car, may be denominated entirely a fortuitous one, for which the railroad company is not liable. *Missouri Pac. R. Co. v. Haley*, 5 *Am. & Eng. R. Cas.* 594, 25 *Kan. 35*.—EXPLAINING *Berg v. Chicago, M. & St. P. R. Co.*, 50 *Wis. 419*, 7 *N. W. Rep.* 347.

Where a repair hand or workman was killed by an approaching train, the company introduced evidence to the effect that when the danger signals were given he was several feet from the track, but turned and ran on it in front of the train; but the plaintiff claimed that this was done to remove a plank which he had placed on the track over which he wheeled dirt. It appeared that the whistle or danger signal was not given until the train was very near the deceased. *Held*, that the company was negligent in not giving the signal in time to enable the workman to remove the plank in safety. *Barber v. Cincinnati, N. O. & T. P. R. Co.*, (Ky.) 21 *S. W. Rep.* 340.

It appeared that it was customary to give persons employed about a yard a warning by shouting "the cars are coming," which was shown to be understood, and more effectual than the statutory whistle or ringing of the bell. *Held*, that the company was not guilty of negligence as toward an injured employe who was thus warned, because it failed to blow a whistle or ring a bell. *Speed v. Atlantic & P. R. Co.*, 2 *Am. & Eng. R. Cas.* 77, 71 *Mo. 303*.

A brakeman was ordered by the conductor to make a coupling to a car over the end whereof lumber projected. In obeying the order the brakeman, who knew the dan-

ger, was caught between the lumber and the next car, seeing which, the conductor signaled the engineer to "jar ahead quickly," which was done, causing the brakeman to fall; and the coupling having been made, the wheels passed over and killed him. *Held*, upon demurrer to the plaintiff's evidence, that plaintiff was entitled to recover, the death being caused by the negligence of defendant's conductor in giving the signal without looking to see if the coupling had been made. *Ayers v. Richmond & D. R. Co.*, 33 *Am. & Eng. R. Cas.* 269, 84 *Va.* 679, 5 *S. E. Rep.* 582.

163. Duty to stop train.—Where an engineer signals the approach of his train, but afterward sees that men working on the track have not heard the signal, and are making no effort to leave the track, it is his duty to stop the train if he can do so in time to avoid a collision. *Erickson v. St. Paul & D. R. Co.*, 41 *Minn.* 500, 5 *L. R. A.* 786, 43 *N. W. Rep.* 332.

An engineer is not required to heed the signal to stop his train, given by a stranger, when no danger is in sight or is reasonably to be apprehended. *Blair v. Grand Rapids & I. R. Co.*, 24 *Am. & Eng. R. Cas.* 430, 60 *Mich.* 124, 26 *N. W. Rep.* 855.

Where a workman engaged in track repairing is standing away from the track and out of danger from any approaching train, no negligence can be imputed to the engineer in not stopping the train to avoid striking him. *Ring v. Missouri Pac. R. Co.*, 112 *Mo.* 220, 20 *S. W. Rep.* 436.—**DISTINGUISHING** *Stephens v. Hannibal & St. J. R. Co.*, 96 *Mo.* 207; *Moore v. Wabash, St. L. & P. R. Co.*, 85 *Mo.* 588; *Dayharsh v. Hannibal & St. J. R. Co.*, 103 *Mo.* 575.

Instructions to the effect that it is the duty of the engineer and other operatives on a train to use all means in their power to stop the train and prevent an accident "whenever" or "as soon as" the plaintiff appeared on the track, without reference to the distance in advance or the danger of collision, are erroneous when applied to a person in the employ of the company, who, in due course of his business, was traveling at the time of the accident along the track upon a velocipede in front of and in the same direction as the train, and whose duty it was to surrender the track to approaching trains. *Railway Co. v. Hicks*, 89 *Tenn.* 301, 17 *S. W. Rep.* 1036.

The court should have instructed the

jury "that when plaintiff appeared on the track, if he was then in such proximity to the train that danger to his person was probable, or if afterward the train came so near to him as to render it likely, under all the circumstances, that he might be injured if the train were not stopped, then it was the duty of the engineer and other operatives to use all the means in their power to stop the train and prevent a collision." *Railway Co. v. Hicks*, 89 *Tenn.* 301, 17 *S. W. Rep.* 1036.

A section hand was injured while riding on a hand-car by colliding with a train. *Held*, that the company was not chargeable with negligence where it appeared that those in charge of the train made every reasonable effort to stop it after they knew that they were approaching the hand-car. *Chicago, B. & Q. R. Co. v. Peterson*, 32 *Ill. App.* 139.

In descending a grade a heavily loaded freight train was in some way broken into two sections. The engineer, becoming apprised of the fact, put on additional steam and ran ahead with the front section to avoid a collision. He repeatedly gave the signal for a stop of the rear section, and when he finally checked the front section, supposing that those in charge of the rear section had stopped it, a collision occurred, resulting in the injury of the brakeman on the front section. The brakeman on the rear section was in the caboose with the conductor, and neither paid any attention to the repeated alarms. *Held*, that both the brakeman and the conductor were guilty of wilful negligence. *Newport News & M. V. Co. v. Dentzel*, 91 *Ky.* 42, 14 *S. W. Rep.* 958.

164. Live engines—Wild or extra trains.*—A brakeman was killed by two runaway engines colliding with his train. The evidence showed that three engines were run into a yard and left in charge of a single person, who examined the two runaway engines, and then passed on some seventy-five yards to look after the third one; that the night was dark, and he could not discern objects more than thirty feet distant, and while thus engaged the two engines either started themselves or were put in motion. There was some evidence that the employé had been directed to group the engines. *Held*, that the company was neg-

* Injury to section hands by extra trains, see note, 33 *AM. & ENG. R. CAS.* 30.

ligent in not taking proper precautions to prevent the engines being put in motion. *Southern Pac. Co. v. Lafferty*, 57 *Fed. Rep.* 536.—FOLLOWING *Smith v. New York, S. & W. R. Co.*, 46 N. J. L. 7. QUOTING *Northern Pac. R. Co. v. Herbert*, 116 U. S. 652, 6 Sup. Ct. Rep. 590; *Jones v. East Tenn., V. & G. R. Co.*, 128 U. S. 443, 9 Sup. Ct. Rep. 118; *Grand Trunk R. Co. v. Ives*, 144 U. S. 417, 12 Sup. Ct. Rep. 679. REVIEWING *Flike v. Boston & A. R. Co.*, 53 N. Y. 549; *Booth v. Boston & A. R. Co.*, 73 N. Y. 38.

The plaintiff, with others, was employed as a laborer in "surfacing" defendant's track. While being taken to his work by a gravel train furnished for that purpose by defendant, the plaintiff was injured by a collision with a "wild train" in charge of defendant's servants. The gravel train was on its regular time, and the "wild train" had orders to flag it. The rules of the defendant company required the person flagging to be three fourths of a mile ahead of the flagging train; but the "wild train" followed within four hundred feet of its flagman, whose signal, by reason of a curve in the road, could not be seen by the gravel train till upon it. The engine of the wild train was so disabled that it could not be quickly started or stopped. These facts being undisputed, an instruction to the jury that it was gross negligence for the wild train to be where it was when the collision occurred, was not error, as the facts, undisputed, are such as to enable the court to say, as a matter of law, that they constitute negligence. (Allyn, J., dissenting.) *Northern Pac. R. Co. v. O'Brien*, 1 *Wash.* 599, 21 *Pac. Rep.* 32.

165. Running out of schedule time.—A company or individual operating a railroad has the right, as regards employees, to vary from the regular time-table in the running of trains; all that is required are due care and diligence in giving notice of the change, and in running the train upon the changed time. *Slater v. Jewett*, 5 *Am. & Eng. R. Cas.* 515, 85 *N. Y.* 61, 39 *Am. Rep.* 627.

The plaintiff was a track repairer on a railroad, and while thus employed he was run over and had his leg broken by a train that started out of schedule time for the running of trains on that road. *Held*, that the company is liable for the wrong and injuries received by the plaintiff. *Haynes*

v. East Tenn. & G. R. Co., 3 *Coldw. (Tenn.)* 222.

A freight train, drawn by a defective engine, burdened beyond its capacity, fell behind its time nearly four hours on its way from Lexington to Louisville, and when endeavoring to ascend a grade near Lagrange at night, with no signals nor lights behind, was run upon by an extra train, which had been ordered from Midway to Lagrange by the train dispatcher of the company, whose duty it was to regulate the running of delayed and extra trains, no notice having been given to the extra train at any of the stations of the delay of the other. In the collision the engineer of the extra train was killed, without the fault of himself or any one on his train. *Held*, that the train dispatcher and the conductor of the freight train were guilty of gross negligence, and the company is liable to the personal representative of the deceased engineer in damages for the loss of his life. *Louisville, C. & L. R. Co. v. Caven*, 9 *Bush (Ky.)* 559.—QUOTED IN *Louisville & N. R. Co. v. Brooks*, 83 *Ky.* 129.

A train dispatcher sent a dispatch with the following words: "Can have until ten, 10, o'clock A. M. to make Beard's for number 2 and number 4." The conductor receiving it gave it the construction as if it read, "Can have until ten minutes after ten o'clock A. M. to make Beard's," and ran his train accordingly. A collision ensued from which he was killed. *Held*, that the railroad company was liable for the death of the conductor caused by the collision. *McLeod v. Ginther*, 8 *Am. & Eng. R. Cas.* 162, 80 *Ky.* 399.

In consequence of the starting of several trains upon defendant's road too closely together, a collision occurred occasioning the death of plaintiff's intestate, a brakeman upon one of the trains. Upon the trial the time-table was not produced, and no evidence was given as to any regulations of the company in regard to starting the trains, or by what or whose authority the trains started; nor did it appear that any agent or officer was intrusted with any general authority or discretion upon the subject. *Held*: (1) that plaintiff had failed to establish negligence on the part of defendant, as it might have prescribed proper and safe rules which were violated by a fellow-servant with the deceased, and in the absence of proof to the contrary this was to be pre-

sumed, and that, therefore, a refusal to nonsuit was error; (2) that a refusal of the court to charge that plaintiff could not recover if the deceased knew that trains were sent out with 17 or more cars and only two brakemen, and he had always gone on such trains, was not error, as it did not appear that deceased had any knowledge that the train which preceded his own on the morning in question had only two brakemen, or that the accident happened because of there being but two. *Rose v. Boston & A. R. Co.*, 58 N. Y. 217, 9 Am. Ry. Rep. 515.—DISTINGUISHING *Flike v. Boston & A. R. Co.*, 53 N. Y. 553.

166. Switching cars at sidings.—A company will be held guilty of causing the death of an employé by wilful negligence, where it appears that the deceased was employed in taking the numbers of cars on side tracks in a town, and while in the discharge of his duties, was struck by a section of a train which was switching, without any one thereon in a position to give warning of its approach. *Louisville & N. R. Co. v. Pott*, (Ky.) 17 S. W. Rep. 185.—FOLLOWING *Shelby v. Cincinnati, N. O. & T. P. R. Co.*, 85 Ky. 229, 3 S. W. Rep. 157.

A company is liable for injuries to a brakeman ordered by the conductor to carry goods from a freight car across a siding to the depot, where the conductor also directs that the train be cut in two, and a portion of it backed down against cars standing on such siding after the brakeman has started to carry the goods across it, where such backing is unnecessary and saves no time. *Richmond & D. R. Co. v. Brown*, 89 Va. 749, 17 S. E. Rep. 132.

An established custom in the management of a depot yard that, in switching cars therein, it is not the company's duty to have a brakeman or other person upon each group of cars or single car separately in motion, to give warning of its approach to men at work in the yard, but that the men in such cases must look out for themselves, would not relieve the brakeman actually in charge of a moving car, who should see that it was approaching a workman upon the track, from the duty of stopping it, or warning him of its approach; and the company is liable to such workman for an injury thus caused under Wis. St. 1875, ch. 173. *Berg v. Chicago, M. & St. P. R. Co.*, 2 Am. & Eng. R. Cas. 70, 50 Wis. 419, 7 N.

W. Rep. 347.—EXPLAINED IN *Missouri Pac. R. Co. v. Haley*, 5 Am. & Eng. R. Cas. 594, 25 Kan. 35.

167. Shunting or kicking cars.—A company is not guilty of negligence *per se* in shunting by kicking cars along its tracks in its yard, for the purpose of making up trains, pursuant to a custom of long standing, of which its employés are fully cognizant. *Schaible v. Lake Shore & M. S. R. Co.*, 97 Mich. 318, 56 N. W. Rep. 565.

The use of "kicking switches," or "running switches," in detaching and propelling cars, cannot be said to constitute negligence, as "they seem to be in general use by well-regulated railroads"; but there may be negligence in connection with their use, by failing to instruct a young and inexperienced brakeman as to the attendant danger. *Williams v. South & N. Ala. R. Co.*, 91 Ala. 635, 9 So. Rep. 77.

The tracks of two companies at the place of an accident ran within a few feet of each other. Plaintiff, a track repairer, suddenly jumped from one track to defendant's to avoid a passing train, and while waiting for the train to pass, was struck by uncoupled cars moving by their own momentum, with no one in charge, on defendant's road. *Held*, that defendant was guilty of negligence in moving the cars in such a manner; that plaintiff, under the circumstances, could not be chargeable with such contributory negligence as to bar a recovery. *Chicago, R. I. & P. R. Co. v. Dignan*, 56 Ill. 487, 4 Am. Ry. Rep. 487.—DISTINGUISHING *Chicago & N. W. R. Co. v. Sweeney*, 52 Ill. 325.

168. Sudden starts and violent jerks.—If the foreman of a hand-car on a railroad track, knowing that the men who work the handles of the lever sometimes let go the handle after pushing it down, on a down grade, having nothing else to hold on to, suddenly applies the brake and stops the car, without notice to them, and without looking to see that none of them are in a dangerous position, "the inference of negligence is clear and certain," and the court may instruct the jury that this is negligence. *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. Rep. 262.

The foreman of a hand-car on a railroad track, stopping it suddenly by the application of the brake while moving rapidly on a down grade, at a place where it was not usual to stop, and without giving notice to

the men working the lever, may be guilty of negligence, if the jury so find, without proof of any custom requiring him to give notice. *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala 412, 11 So. Rep. 262.

The different conditions attending the running of a freight train are proper to be considered by the jury in determining whether there has been negligence in coupling the cars, and they may consider the fact, if it be so, that in the coupling of loaded freight cars violent jerks and jars are likely to occur and might happen without negligence. *Fisher v. Southern Pac. R. Co.*, 89 Cal. 399, 26 Pac. Rep. 894.

A freight train was suddenly started forward and threw a brakeman, who was standing on the hind end of the rear car, down and injured him. *Held*, that the mere fact that the car was started unexpectedly would not render the company liable, unless the start was so sudden or violent as to constitute negligence. *Johnston v. Canadian Pac. R. Co.*, 50 Fed. Rep. 886.

A servant whose duty it was to clean cars, attempted to get upon a car that had arrived and was standing at rest, to clean the same, when the locomotive started suddenly, without any signal or notice, and without due care on the part of the engineer to observe whether the servant was about to go upon the car, whereby he was thrown from the car steps and severely injured. *Held*, that the facts were sufficient to justify a recovery against the company. *Chicago & W. I. R. Co. v. Bingenheimer*, 116 Ill. 226, 4 N. E. Rep. 840.—RECONCILING *Chicago, R. I. & P. R. Co. v. Clark*, 108 Ill. 113.

As plaintiff, a car cleaner, was in the act of boarding a train, it suddenly started backward without notice and he was injured. *Held*, that it was error to instruct the jury that it was negligence *per se* in the company to suddenly start the car while plaintiff was in the act of getting on it. *Chicago & W. I. R. Co. v. Bingenheimer*, 14 Ill. App. 125.

The plaintiff was employed on a construction train, and in the discharge of his duty walked to the rear of the train while in motion; when within five feet of the last car in front of the caboose, the latter was uncoupled by the conductor, and, at a signal, the engineer caused a sudden jerk, which threw the plaintiff from the car, and he was run over. *Held*, that a verdict for the plaintiff was justified by the evidence. *Jeffrey v. Keokuk & D. M. R. Co.*, 5 Am. &

Eng. R. Cas. 568, 56 Iowa 546, 9 N. W. Rep. 884.

169. Speed.—Section 1047 of the Mississippi Code of 1880 does not embrace employes among those to whom a right of action is thereby given when railroad companies run their trains at a higher rate of speed than six miles an hour through any town, city, or village. *Dowell v. Vicksburg & M. R. Co.*, 18 Am. & Eng. R. Cas. 42, 61 Miss. 519.

A railroad has the right to run its trains in excess of the usual rate of speed to make up lost time, but in doing so, those in charge of the train should use greater vigilance and care to prevent accidents to workmen on the track. *Stephens v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 538, 86 Mo. 221.

An employé of a railroad company, injured by reason of the violation of an ordinance regulating speed, but not participating therein, can maintain an action against the company for the injuries so received. *Bluedorn v. Missouri Pac. R. Co.*, 108 Mo. 439, 18 S. W. Rep. 1103.

Nor will such action be defeated because the train was in charge of co-employes of plaintiff, where the former were running the train pursuant to a time-card prepared and promulgated by the company. *Bluedorn v. Missouri Pac. R. Co.*, 108 Mo. 439, 18 S. W. Rep. 1103.

The fact that a train was run at an unlawful rate of speed within a city is no ground for imputing negligence to the railway company, as between it and its employé, where there is no evidence that the injury to the latter was caused by collision with any object. *Lockwood v. Chicago & N. W. R. Co.*, 6 Am. & Eng. R. Cas. 151, 55 Wis. 50, 12 N. W. Rep. 401.

170. Throwing out mail bags.—A railroad company is not responsible for the negligent acts of postal clerks or agents upon its trains. The evidence showed that a mail bag was thrown either from the mail car, express car, or baggage car on a train by a person within the car. The bag could not lawfully have been in any other than the mail car, and no person other than a postal clerk or agent could lawfully enter such car or throw the bag therefrom. *Held*, that in the absence of evidence to the contrary, it will be presumed that the bag was thrown from the mail car by a postal clerk or agent. *Muster v. Chicago, M. & St. P. R. Co.*, 18

Am. & Eng. R. Cas. 113, 61 *Wis.* 325, 21 *N. W. Rep.* 223, 49 *Am. Rep.* 41, *n.*—DISTINGUISHED IN *Stimson v. Milwaukee, L. S. & W. R. Co.*, 44 *Am. & Eng. R. Cas.* 381, 75 *Wis.* 381, 44 *N. W. Rep.* 748.

The mail bag was usually thrown from the train about 200 feet west of the depot, and there was no evidence that it had ever been thrown off at the depot prior to the occasion in question. *Held*, that the railroad company was not chargeable with notice that it was likely to be thrown off at the depot, and hence was not bound to guard, by notice or otherwise, against an injury to one of its employes resulting from its being thrown off there. *Muster v. Chicago, M. & St. P. R. Co.*, 18 *Am. & Eng. R. Cas.* 113, 61 *Wis.* 325, 21 *N. W. Rep.* 223, 49 *Am. Rep.* 41, *n.*—REVIEWED IN *Sargent v. St. Louis & S. F. R. Co.*, 114 *Mo.* 348.

The regulations of the post-office department do not require the speed of mailtrains to be slackened at catch stations where cranes are erected for the exchange of mails. *Muster v. Chicago, M. & St. P. R. Co.*, 18 *Am. & Eng. R. Cas.* 113, 61 *Wis.* 325, 21 *N. W. Rep.* 223, 49 *Am. Rep.* 41, *n.*

The running of a mail train at the rate of thirty or thirty-five miles per hour past a station is not, of itself, unlawful; nor can negligence be imputed to the railroad company from that fact alone, so as to make it liable for an injury resulting from the throwing of a mail bag from such train. *Muster v. Chicago, M. & St. P. R. Co.*, 18 *Am. & Eng. R. Cas.* 113, 61 *Wis.* 325, 21 *N. W. Rep.* 223, 49 *Am. Rep.* 41, *n.*

171. Injuries caused by improperly loaded cars.—Where an employé is injured by the negligent manner in which cars were loaded, it is no defense that it was customary to load cars in that manner. *Hosie v. Chicago, M. & St. P. R. Co.*, 75 *Iowa* 683, 37 *A. W. Rep.* 60. —DISTINGUISHING *Kroy v. Chicago, M. & St. P. R. Co.*, 32 *Iowa* 358; *Muldorney v. Illinois C. R. Co.*, 39 *Iowa* 616.

A company is not relieved from liability for injuries to a brakeman while coupling cars caused by the improper manner in which they were loaded by the fact that the cars had been received from another road, and that the duty to receive cars from connecting lines is imposed by statute. *Dewey v. Detroit, G. H. & M. R. Co.*, 53 *Am. & Eng. R. Cas.* 550, 90 *Mich.* 230, 16 *L. R. A.* 342, 52 *N. W. Rep.* 942, 20 *Wash. L. Rep.* 637.

172. — cars loaded with coal.—To load a tender with coal above the level of its top is not negligence *per se*, and notice to the railroad company that its employes were in the habit of so doing, without knowledge or notice that such practice was dangerous, is not sufficient to make the company liable for an accident resulting from such method of loading. *Schultz v. Chicago & N. W. R. Co.*, 28 *Am. & Eng. R. Cas.* 404, 67 *Wis.* 616, 31 *N. W. Rep.* 321, 58 *Am. Rep.* 881.

173. — cars loaded with lumber.—It is the duty of a railroad company, transporting lumber upon open cars, to adopt some system for loading, having regard for the safety of its servants, and, it seems, of those traveling over its road and of all persons who may be in the vicinity of such cars. *Ford v. Lake Shore & M. S. R. Co.*, 48 *Am. & Eng. R. Cas.* 201, 124 *N. Y.* 493, 26 *N. E. Rep.* 1101, 36 *N. Y. S. R.* 494; *distinguishing* 117 *N. Y.* 638.

It appeared that coal cars, boxed in to the height of from two to two and one half feet, but with a space of about 15 inches in depth across the brake end of each car for the use of the brakeman, were loaded with lumber, which was piled to the height of from five to six feet from the car floor, and extended before the boxes, from eight inches at the top of the box to 18 inches at the top of the lumber, and beyond the end of the car, projecting further as the height increased, until it left a space between the lumber of but 15 inches on its surface, the space reserved for the brakeman being partially covered. *Held*, that the jury were justified in finding the cars to have been improperly loaded. *Irvine v. Flint & P. M. R. Co.*, 53 *Am. & Eng. R. Cas.* 210, 89 *Mich.* 416, 50 *N. W. Rep.* 1008.

Where the declaration alleged it to be the duty of defendant to see that its cars, on which plaintiff was a brakeman, were properly loaded with lumber, so as not to imperil the lives of its employes, and the testimony tended to show that they were so loaded as to increase the hazard of braking them, and that no provision was made by the defendant for their inspection, the jury are justified in finding that there was no inspection. *Irvine v. Flint & P. M. R. Co.*, 53 *Am. & Eng. R. Cas.* 210, 89 *Mich.* 416, 50 *N. W. Rep.* 1008.

In going to set a brake a brakeman stepped on the end of a stick of timber

th coal.—
ve the level
r, and notice
ts employés
ng, without
practice was
make the
nt resulting
Schultz v.
m. & Eng.
W. Rep. 321,

h lumber,
ed company,
en cars, to
having re-
ants, and, it
s road and
e vicinity of
& *M. S. R.*
, 124 *N. Y.*
S. R. 494;

ked in to the
ne half feet,
hes in depth
for the use
with lumber,
of from five
nd extended
ches at the
e top of the
he car, pro-
reased, until
er of but 15
reserved for
ly covered.
d in finding
erly loaded.
53 *Am. &*
50 *N. W.*

it to be the
its cars, on
were prop-
not to im-
and the testi-
they were so
of braking
as made by
on, the jury
was no in-
M. R. Co.,
Mich. 416,

brakeman
of timber

which projected beyond the end of the car, and it tipped and let him fall. *Held*, that it was not negligence in the company to carry the timber without tying or binding it down, especially where the brakeman knew how it was loaded, and seems to have taken the risk of its tipping. *Miller v. New York C. & H. R. R. Co.*, 14 *N. Y. S. R.* 656. —DISTINGUISHING *Bushby v. New York, L. E. & W. R. Co.*, 37 *Hun* 104.

A railroad company accepted and undertook the transportation of a freight car loaded with lumber protruding longitudinally over its ends, which enhanced the danger of coupling this car with others. A servant of the company, while endeavoring to effect a coupling of the car, was caught between the end of the lumber and the other car, and injured. *Held*, that neither the loading of a car in the manner stated, nor its acceptance in that condition for transportation by a railroad company, is *per se* an act of negligence, but only a fact to be looked to in connection with the other facts averred and proved, in determining the question of negligence. *Louisville & N. R. Co. v. Gower*, 31 *Am. & Eng. R. Cas.* 168, 85 *Tenn.* 465, 3 *S. W. Rep.* 824. —QUOTED IN *Jacksonville, T. & K. W. R. Co. v. Galvin*, 29 *Fla.* 636. —*Lothrop v. Fitchburg R. Co.*, 41 *Am. & Eng. R. Cas.* 327, 150 *Mass.* 423, 23 *N. E. Rep.* 227.

Inasmuch as the loading of cars in the manner stated, and their coupling in course of transportation, are demanded by the necessities of commerce and are necessarily incident to the business of railroad transportation; therefore the risks and dangers ordinarily incident to the transportation of such cars are assumed by employés voluntarily undertaking the service of a railroad company, although this particular service may be extrahazardous. *Louisville & N. R. Co. v. Gower*, 31 *Am. & Eng. R. Cas.* 168, 85 *Tenn.* 465, 3 *S. W. Rep.* 824.

In an action for injuries to plaintiff, received in coupling a car loaded with timber projecting over the end thereof, the defendant asked the court to instruct the jury that "if the car which hurt the plaintiff was loaded as loads of timber had been usually and commonly loaded and carried over defendants' and other railroads, then it was not negligence in defendant to carry the timber upon which plaintiff was hurt." *Held*, that the instruction was properly refused, on the ground that if the manner of

carriage was negligent, the habit of defendant or other roads in that respect would not relieve defendant from liability. *Hamilton v. Des Moines Valley R. Co.*, 36 *Iowa* 31.

174. Injury from escaping steam, etc.—Plaintiff, a section hand, along with other employés, took a hand-car off the track to permit a train to pass, and while standing by the side of the track, the employés in charge of the engine permitted steam and water to escape from the engine and to be thrown into plaintiff's face and eyes, whereby injury occurred. *Held*, that the evidence proved a cause of action. *Atchison, T. & S. F. R. Co. v. Thul*, 32 *Kan.* 255, 49 *Am. Rep.* 484, 4 *Pac. Rep.* 352.

175. Injury while coupling moving cars.—A brakeman was directed to uncouple the engine from a train while it was in motion, and in doing so fell and was killed. *Held*, that it was not necessarily negligence to require him to uncouple while the train was in motion, where it appeared that such was a common practice. *Gorman v. Minneapolis & St. L. R. Co.*, 78 *Iowa* 509, 43 *N. W. Rep.* 303.

The absence of slight care in the management of a railroad train is gross negligence. It was the duty of the conductor of the train to see that there was no new movement of the train while the brakeman was making a coupling under his direction, and he was guilty of gross negligence in failing to see that no such movement took place. *Louisville & N. R. Co. v. Mitchell*, 87 *Ky.* 327, 8 *S. W. Rep.* 706.

176. Injury while working under standing car.—A person who is engaged in cleaning cars in a yard, and is necessarily required to stoop and be under the cars, so that he cannot observe threatened danger, has a right to depend upon others to warn him; and if they fail to do so, he may recover for the injury if he has been without fault, but he cannot so depend upon others as to relieve himself from using his eyes and ears. *Lynch v. Boston & A. R. Co.*, 159 *Mass.* 536, 34 *N. E. Rep.* 1072. —DISTINGUISHING *Davis v. New York, N. H. & H. R. Co.*, 159 *Mass.* 532; *Maher v. Boston & A. R. Co.*, 158 *Mass.* 36; *Maguire v. Fitchburg R. Co.*, 146 *Mass.* 379. NOT FOLLOWING *Lake Shore & M. S. R. Co. v. Murphy*, 50 *Ohio St.* 135, 33 *N. E. Rep.* 403.

A rule of defendant company required persons inspecting or repairing cars on repair tracks to display a red signal at the end

of the car before going under it, which was a warning for others not to back against or move such car. *Held*, that such rule, if enforced, was sufficient protection to employés, and the company was not guilty of negligence for failing to have a watchman to prevent moving against such cars, or to provide bumpers for the same purpose. *Peterson v. Chicago & N. W. R. Co.*, 31 *Am. & Eng. R. Cas.* 292, 67 *Mich.* 102, 10 *West. Rep.* 870, 34 *N. W. Rep.* 260.

177. Manning and equipment of trains.—It is clearly a company's duty, in making up and dispatching a train, to supply it with suitable machinery and sufficient help for the business and journey which it is about to undertake; and if, from want of care in these respects, an injury happens to an employé upon another train, it is liable. *Flike v. Boston & A. R. Co.*, 53 *N. Y.* 549, 5 *Am. Ry. Rep.* 392.—APPLIED IN *Williams v. Delaware, L. & W. R. Co.*, 39 *Hun (N. Y.)* 430. DISTINGUISHED IN *Rose v. Boston & A. R. Co.*, 58 *N. Y.* 217. FOLLOWED IN *Booth v. Boston & A. R. Co.*, 73 *N. Y.* 38; *Fuller v. Jewett*, 1 *Am. & Eng. R. Cas.* 109, 80 *N. Y.* 46. QUOTED IN *Northern Pac. R. Co. v. Charles*, 51 *Am. & Eng. R. Cas.* 198, 51 *Fed. Rep.* 562, 7 *U. S. App.* 359, 2 *C. C. A.* 380; *Slater v. Jewett*, 5 *Am. & Eng. R. Cas.* 515, 85 *N. Y.* 61, 39 *Am. Rep.* 627. REFERRED TO IN *Booth v. Boston & A. R. Co.*, 67 *N. Y.* 593. REVIEWED IN *Southern Pac. Co. v. Lafferty*, 57 *Fed. Rep.* 536; *Cooper v. Pittsburgh, C. & St. L. R. Co.*, 24 *W. Va.* 37. The assistant yard master being charged with the duty of inspecting cars and removing to the repair track those which were found to need repairs, is required to discharge that duty with at least such ordinary care as is involved in having them sufficiently manned to control their speed, and to prevent them from colliding with other cars; and this duty is violated if he fails to put a brakeman on the car being moved, or puts an incompetent brakeman on it. *Louisville & N. R. Co. v. Davis*, 91 *Ala.* 487, 8 *So. Rep.* 552.

It is gross negligence in the conductor of a train to permit an inexperienced fireman to be in charge of the engine while a coupling is being made by a brakeman in obedience to his order. The brakeman had no right, before proceeding to obey the order, to demand information as to who was to engineer the train, but he had the right to expect that it would be done by the proper

person, or one reasonably competent to do so. *Louisville & N. R. Co. v. Moore*, 24 *Am. & Eng. R. Cas.* 443, 83 *Ky.* 675.

It is not negligence, if a conductor requires a fireman, who is competent for that purpose, to work the engine while shifting cars at a depot, in the absence of the engine-man. In such case, whether or not there is negligence depends upon whether the fireman is competent to do such work. *Brazil v. Western N. C. R. Co.*, 93 *N. Car.* 313.

A freight train was sent out supplied with but two brakemen, when three were required, and the train broke in two, and, for want of a sufficient number of brakemen, the rear portion ran backward and collided with another train and killed a fireman. The evidence showed that at the starting point, the duty of making up trains was confided to an employé who was authorized to hire and supply trains with necessary brakemen. *Held*, that the company was liable for the act of the employé. *Flike v. Boston & A. R. Co.*, 53 *N. Y.* 549, 5 *Am. Ry. Rep.* 392.—DISTINGUISHED IN *Slater v. Jewett*, 5 *Am. & Eng. R. Cas.* 515, 85 *N. Y.* 61, 39 *Am. Rep.* 627. EXPLAINED IN *Malone v. Hathaway*, 64 *N. Y.* 5. FOLLOWED IN *Heiner v. Heuvelman*, 13 *J. & S. (N. Y.)* 88. QUOTED IN *Harrison v. Detroit, L. & N. R. Co.*, 41 *Am. & Eng. R. Cas.* 398, 79 *Mich.* 409; *Benzing v. Steinway*, 101 *N. Y.* 547, 5 *N. E. Rep.* 449; *Anderson v. Bennett*, 38 *Am. & Eng. R. Cas.* 87, 16 *Oreg.* 515. REFERRED TO IN *Hofnagle v. New York C. & H. R. R. Co.*, 55 *N. Y.* 608. REVIEWED IN *Fones v. Phillips*, 39 *Ark.* 17; *Indiana Car Co. v. Parker*, 100 *Ind.* 181; *Lewis v. St. Louis & I. M. R. Co.*, 59 *Mo.* 495.

In such case the fact that a third brakeman had been employed, but failed to appear, would not release the company from liability for sending the train out with but two brakemen. The duty of the company was not discharged until the train was actually supplied with a sufficient number of brakemen; neither could the company avoid liability by imputing negligence to the brakeman who had been engaged, but who failed to appear. *Flike v. Boston & A. R. Co.*, 53 *N. Y.* 549, 5 *Am. Ry. Rep.* 392.

The defendant provided two employés for locomotives running to an ash-pit and water-plug. *Held*, that negligence could not be imputed to it from the fact that but one of these employés was on the locomotive at the time of the accident, and that a

refusal to so charge was error. *Reichel v. New York C. & H. R. R. Co.*, 130 N. Y. 682, 3 *Silv. App.* 662, 29 N. E. *Rep.* 763, 42 N. Y. S. R. 510; reversing 29 N. Y. S. R. 999, *mem.*, 9 N. Y. *Supp.* 960.

It is the duty of a railway company to furnish the necessary and proper number of hands for the safe management of its trains; and for a delinquency in this particular the conductor of a train has a right to decline his charge, or refuse to run the train. But where he takes the charge, and runs his train for a length of time without a sufficient number of hands, he voluntarily assumes the risk, and waives the obligation of the company in this respect as to himself; and if injured by means of such delinquency on the part of the company, he is without a remedy against the company for damages. *Mad River & L. E. R. Co. v. Barber*, 5 *Ohio St.* 541.—COMMENTED ON IN *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 *Miss.* 258. REVIEWED IN *Atchison, T. & S. F. R. Co. v. Schroeder*, 47 *Kan.* 315.

178. Operating cars at night without lights, etc.—Where a switchman was killed on a dark night, by moving cars, while attempting to get to the switch, by reason of negligence in not providing the cars with proper lights and brakes, the company was held liable. *Chicago & N. W. R. Co. v. Taylor*, 69 *Ill.* 461.

10. *Contracts Limiting Company's Liability for Negligence.*

179. Such contracts generally deemed invalid.*—It is the duty of a railroad company to make rules for the protection and safety of employes; but it cannot exempt itself from liability to employes for negligence by its rules and regulations. *Crew v. St. Louis, K. & N. W. R. Co.*, 20 *Fed. Rep.* 87.

The liability of companies for injuries caused to their servants by the carelessness of other employees who are placed in authority and control over them, is founded upon considerations of public policy, and it is not competent for a railroad company to stipulate with its employes at the time, and

* Validity of contracts by employes not to sue employer in case of personal injury, see note, 58 *AM. REP.* 836.

Power of company to contract with employes against future injuries for which it is liable under Employers' Liability Act, see note, 44 *AM. REP.* 633.

as part of their contract of employment, that such liability shall not attach to it. *Lake Shore & M. S. R. Co. v. Spangler*, 44 *Ohio St.* 471. *Kunt v. Herring*, 2 *Misc.* 105, 21 N. Y. *Supp.* 244.—APPROVING *Roesner v. Hermann*, 8 *Fed. Rep.* 782; *Perry v. Little Rock & Ft. S. R. Co.*, 44 *Ark.* 383; *Kansas Pac. R. Co. v. Peavey*, 29 *Kan.* 169; *Memphis & C. R. Co. v. Jones*, 2 *Head (Tenn.)* 517; *Lake Shore & M. S. R. Co. v. Spangler*, 44 *Ohio St.* 471, 8 N. E. *Rep.* 467; *Willis v. Grand Trunk R. Co.*, 62 *Me.* 488. CRITICISING *Griffiths v. Dudley*, 9 *Q. B. D.* 357; *Western & A. R. Co. v. Bishop*, 50 *Ga.* 465; *Western & A. R. Co. v. Strong*, 52 *Ga.* 461; *Galloway v. Western & A. R. Co.*, 57 *Ga.* 512. DISTINGUISHING *Purdy v. Rome, W. & O. R. Co.*, 125 N. Y. 209, 26 N. E. *Rep.* 235.—*Louisville & N. R. Co. v. Orr*, 91 *Ala.* 548, 8 *So. Rep.* 360.—FOLLOWED IN *Richmond & D. R. Co. v. Jones*, 92 *Ala.* 218.

A stipulation in a contract of employment for service on a railroad that the compensation paid "shall cover all risks incurred, and liability to accident from any cause whatever, and if an employe is disabled by accident or other cause, the right to claim compensation for injuries will not be recognized," is in contravention of statutory provisions, opposed to public policy, and does not secure to the railroad company exemption from statutory liability. *Hissong v. Richmond & D. R. Co.*, 48 *Am. & Eng. R. Cas.* 517, n., 91 *Ala.* 514, 8 *So. Rep.* 776. *Kansas Pac. R. Co. v. Peavey*, 29 *Kan.* 169.

A contract by which a person, when he enters the employ of a railroad company, "agrees with said railway, in consideration of such employment, that he will take upon himself all risks incident to his position on the road, and will in no case hold the company liable for any injury or damage he may sustain, in his person or otherwise, by accidents or collisions on the trains or road, or which may result from defective machinery, or carelessness or misconduct of himself or any other employe and servant of the company," is not binding on him so as to relieve the company from liability for an accident caused by its failure to repair its road. *Little Rock & Ft. S. R. Co. v. Eubanks*, 31 *Am. & Eng. R. Cas.* 176, 48 *Ark.* 460, 3 *S. W. Rep.* 808.—NOT FOLLOWING *Western & A. R. Co. v. Bishop*, 50 *Ga.* 465; *Western & A. R. Co. v. Strong*, 52 *Ga.* 461;

Galloway v. Western & A. R. Co., 57 Ga. 512. QUOTING Roesner v. Hermann, 10 Biss. (U. S.) 486, 8 Fed. Rep. 782.

An agreement, in consideration of being employed, to excuse the company for negligence even when it causes death, is void. *Mason v. Richmond & D. R. Co.*, 53 Am. & Eng. R. Cas. 183, 111 N. Car. 482, 16 S. E. Rep. 698.

Upon entering service a brakeman signed a writing, recognizing a rule of the company that couplings should only be done by means of a stick, without the brakeman going between the cars, and in the writing waived any claim for damages against the company for injuries received while disobeying the rule. *Held*, that the writing was not a contract exempting the company from liability for its own negligence. *Russell v. Richmond & D. R. Co.*, 47 Fed. Rep. 204.

The duty of the plaintiff to use due care was not greater by reason of the express stipulations of his contract than it would have been without them. If making the coupling with a knife would have removed the danger, it would have been his duty to use it independently of the contract. If its use would not have removed the danger, then his mere failure to comply with his contract should not prevent his recovery. Defendants could not shield themselves from the consequences of their negligence by any form of contract. *Bonner v. Bean*, 80 Tex. 152, 15 S. W. Rep. 798.

180. Rule in Connecticut.—Among the printed rules of a company, placed in the plaintiff's hands, was this: "The regular compensation of employes covers all risk or liability to accident." Whether public policy will permit a railroad company to make such a contract with its employes, *quære*. *Darrigan v. New York & N. E. R. Co.*, 23 Am. & Eng. R. Cas. 438, 52 Conn. 285, 52 Am. Rep. 590.—QUOTED IN *Anderson v. Bennett*, 38 Am. & Eng. R. Cas. 87, 16 Oreg. 515.

181. Rule in Georgia.—An employe may contract with a railroad to take upon himself all risk incident to his business or arising from the negligence of the company, but he may not contract to exempt the company from criminal negligence. *Western & A. R. Co. v. Bishop*, 50 Ga. 465.—CRITICISED IN *Runt v. Herring*, 21 N. Y. Supp. 244. DISTINGUISHED IN *Lake Shore & M. S. R. Co. v. Spangler*, 44 Ohio St.

471. FOLLOWED IN *Western & A. R. Co. v. Strong*, 52 Ga. 461. NOT FOLLOWED IN *Little Rock & Ft. S. R. Co. v. Eubanks*, 31 Am. & Eng. R. Cas. 176, 48 Ark. 460. QUOTED IN *Cook v. Western & A. R. Co.*, 28 Am. & Eng. R. Cas. 317, 72 Ga. 48. REVIEWED IN *Annas v. Milwaukee & N. R. Co.*, 27 Am. & Eng. R. Cas. 102, 67 Wis. 46, 57 Am. Rep. 388, *n*.

It is not necessary, in order to exempt a company from liability, that the unsafe condition of a tool or implement should be known to an employe before or at the time of the making of a contract releasing the company from liability for its negligence. *Western & A. R. Co. v. Bishop*, 50 Ga. 465.

An employe of a railroad, a part of whose business was to couple cars, who by special contract had taken upon himself the risks incident to his station, cannot, if he be injured, escape the effect of his contract by showing that a particular kind of link or coupler, used by him for ten months, was a less safe instrument for the purpose than other kinds of links or couplers. *Western & A. R. Co. v. Bishop*, 50 Ga. 465.

Where an employe agrees to assume all risk incident to his employment, the fact that he was running over another railroad at the time of the injury does not release him from such agreement. If, while running over such other road, he is in the employ of the former company, so as to make it liable for the injury, his agreement remains binding. *Galloway v. Western & A. R. Co.*, 57 Ga. 512.—CRITICISED IN *Runt v. Herring*, 21 N. Y. Supp. 244.

II. ASSUMPTION OF RISKS OF EMPLOYMENT.

1. In General.*

a. Risks Incident to Employment.

182. Statement of the rule.—Where one voluntarily enters into a contract of hiring with a railroad company, he assumes all the risks and hazards ordinarily and usually incident to such employment, and will be presumed to have contracted with reference to such risks and hazards.

* Extent to which servant assumes risks of employment, see notes, 24 AM. & ENG. R. CAS. 429; 31 *Id.* 246; 48 *Id.* 253; 53 *Id.* 374; 36 AM. DEC. 281; 77 *Id.* 222; 34 AM. REP. 621; 1 I. R. A. 131; 4 *Id.* 51; 12 *Id.* 342; 13 *Id.* 375. See also 38 AM. & ENG. R. CAS. 30, *abstr.*; and consult *post*, 296-456, 704-752.

R. Co.
WED IN
ubanks.
rk. 460.
R. Co.,
8. RE-
N. R.
Wis. 46,
empt a
afe con-
ould be
he time
sing the
ligence.
Ga. 465.
of whose
special
he risks
be in-
tract by
f link or
s, was a
ose than
Western
sume all
the fact
railroad
t release
ile run-
the em-
to make
ment re-
n & A.
Runt v.
EMPLOY-
ent.
rule. —
contract
y, he as-
rdinarily
oyment,
ntracted
hazards.
risks of
R. CAS.
4; 36 AM.
21; 1 I.
375. See
and con-

O'Neil v. St. Louis, I. M. & S. R. Co., 3
McCrary (U. S.) 423, 9 Fed. Rep. 337. Gra-
ville v. Minneapolis & St. L. R. Co., 3 Mc-
Crary (U. S.) 352, 10 Fed. Rep. 711. Palmer
v. Denver & R. G. R. Co., 3 McCrary (U.
S.) 635, 12 Fed. Rep. 392. Woodworth
v. St. Paul, M. & M. R. Co., 5 McCrary
(U. S.) 574, 18 Fed. Rep. 282. Louisville &
N. R. Co. v. Orr, 91 Ala. 548, 8 So. Rep. 360.
Little Rock & Ft. S. R. Co. v. Duffey, 4 Am.
& Eng. R. Cas. 637, 35 Ark. 602. Bauer v.
St. Louis, I. M. & S. R. Co., 46 Ark. 388.
Southwestern Telep. Co. v. Woughter, 56
Ark. 206, 19 S. W. Rep. 575. Brown v.
Central Pac. R. Co., (Cal.) 12 Pac. Rep. 512.
Herbert v. Northern Pac. R. Co., 8 Am. &
Eng. R. Cas. 85, 3 Dak. 38, 13 N. W. Rep.
349. East Tenn., V. & G. R. Co. v. Perkins,
88 Ga. 1, 13 S. E. Rep. 952. Toledo, W. &
W. R. Co. v. Durkin, 76 Ill. 395. Missouri
Furnace Co. v. Abend, 107 Ill. 44; affirming
9 Ill. App. 319. Chicago, R. I. & P. R. Co.
v. Lonergan, 28 Am. & Eng. R. Cas. 491,
118 Ill. 41, 7 N. E. Rep. 55. Consolidated
Coal Co. v. Haenni, 146 Ill. 614, 35 N. E.
Rep. 162. Chicago, B. & Q. R. Co. v. Clark,
2 Ill. App. 596. Wabash, St. L. & P. R.
Co. v. Conkling, 15 Ill. App. 157. Chicago &
G. W. R. Co. v. Travis, 44 Ill. App. 466.
St. Louis, A. & T. H. R. Co. v. Corgan, 49
Ill. App. 229. Lake Shore & M. S. R. Co.
v. McCormick, 5 Am. & Eng. R. Cas. 474, 74
Ind. 440. Taylor v. Evansville & T. H. R.
Co., 41 Am. & Eng. R. Cas. 437, 121 Ind.
124, 6 L. R. A. 584, 22 N. E. Rep. 876.
Griffin v. Ohio & M. R. Co., 124 Ind. 326,
24 N. E. Rep. 888. Louisville, N. A. & C.
R. Co. v. Corps, 124 Ind. 427, 24 N. E. Rep.
1046. Louisville, E. & St. L. Con. R. Co. v.
Hanning, 53 Am. & Eng. R. Cas. 452, 131
Ind. 528, 31 N. E. Rep. 187. O'Neal v. Chi-
cago & I. Coal R. Co., 132 Ind. 110, 31 N.
E. Rep. 669. Hoosier Stone Co. v. McCain,
133 Ind. 231, 31 N. E. Rep. 956. Evansville
& R. R. Co. v. Doan, 3 Ind. App. 453, 29
N. E. Rep. 940. Atchison, T. & S. F. R.
Co. v. Wagner, 33 Kan. 660, 7 Pac. Rep. 204.
St. Louis, Ft. S. & W. R. Co. v. Irwin, 37
Kan. 701, 16 Pac. Rep. 146. Wallis v. Mor-
gan's L. & T. R. S. Co., 38 La. Ann. 156.
Dandie v. Southern Pac. R. Co., 42 La. Ann.
686, 7 So. Rep. 792. Coolbroth v. Maine C.
R. Co., 21 Am. & Eng. R. Cas. 599, 77 Me.
165. Cumberland & P. R. Co. v. State, 44
Md. 283, 45 Md. 229. Yeaton v. Boston &
J. R. Corp., 15 Am. & Eng. R. Cas. 253, 135
N. E. 418. Chicago & N. W. R. Co. v.

Bayfield, 37 Mich. 205. McGinnis v. Canada
Southern Bridge Co., 8 Am. & Eng. R. Cas.
135, 49 Mich. 466, 13 N. W. Rep. 819. Illick
v. Flint & P. M. R. Co., 67 Mich. 632, 12
West. Rep. 440, 35 N. W. Rep. 708. Irvine
v. Flint & P. M. R. Co., 53 Am. & Eng.
R. Cas. 210, 89 Mich. 416, 50 N. W. Rep.
1008. Cook v. St. Paul, M. & M. R. Co., 34
Minn. 45, 24 N. W. Rep. 311. Smith v.
Winona & St. P. R. Co., 41 Am. & Eng. R.
Cas. 289, 42 Minn. 87, 43 N. W. Rep. 968.
Bengtson v. Chicago, St. P., M. & O. R. Co.,
47 Minn. 486, 50 N. W. Rep. 531. New
Orleans, J. & G. N. R. Co. v. Hughes, 49
Miss. 258. Howd v. Mississippi C. R. Co.,
50 Miss. 178. Renfro v. Chicago, R. I. &
P. R. Co., 86 Mo. 302. Schroeder v. Chicago
& A. R. Co., 53 Am. & Eng. R. Cas. 436, 108
Mo. 322, 18 S. W. Rep. 1094. Taylor v.
Missouri Pac. R. Co., (Mo.) 16 S. W. Rep.
206. Craig v. Chicago & A. R. Co., 54 Mo.
App. 523. Henry v. Wabash Western R.
Co., 109 Mo. 488, 19 S. W. Rep. 239. Han-
ley v. Grand Trunk R. Co., 62 N. H. 274.
DeGraff v. New York C. & H. R. R. Co.,
76 N. Y. 125; affirming 3 T. & C. 255.
Disher v. New York C. & H. R. R. Co., 2
N. Y. S. R. 276, 41 Hun 637; affirmed in 114
N. Y. 619, mem., 21 N. E. Rep. 415, 22 N.
Y. S. R. 1000. Simmons v. Manhattan R.
Co., 1 N. Y. S. R. 775, 41 Hun 643. McNeil
v. New York, L. E. & W. R. Co., 71 Hun
(N. Y.) 24. Wild v. Oregon S. L. & U.
N. R. Co., 21 Oreg. 159, 27 Pac. Rep. 954.
Gibson v. Oregon S. L. & U. N. R. Co., 23
Oreg. 493, 32 Pac. Rep. 295. Galveston, H.
& S. A. R. Co. v. Lempe, 11 Am. & Eng.
R. Cas. 201, 59 Tex. 19. Dallas v. Gulf, C.
& S. F. R. Co., 21 Am. & Eng. R. Cas. 575,
61 Tex. 196. Houston & T. C. R. Co. v.
Conrad, 62 Tex. 627. Missouri Pac. R.
Co. v. Watts, 22 Am. & Eng. R. Cas. 277,
63 Tex. 549. Missouri Pac. R. Co. v. Call-
breath, 66 Tex. 526, 1 S. W. Rep. 622. Texas
& N. O. R. Co. v. Dillard, 70 Tex. 62, 8
S. W. Rep. 113. Gulf, C. & S. F. R. Co. v.
Silliphant, 70 Tex. 623, 8 S. W. Rep. 673.
Missouri Pac. R. Co. v. Crenshaw, 71 Tex.
340, 9 S. W. Rep. 262. Galveston, H. & S.
A. R. Co. v. Garrett, 73 Tex. 262, 13 S. W.
Rep. 62. Norfolk & W. R. Co. v. Cottrell,
31 Am. & Eng. R. Cas. 235, 83 Va. 512, 3 S.
E. Rep. 123. Sexton v. Turner, 89 Va. 341,
15 S. E. Rep. 862. Riley v. West Virginia
C. & P. R. Co., 27 W. Va. 145. Schultz v.
Chicago & N. W. R. Co., 44 Wis. 638, 18
Am. Ry. Rep. 146. Kelley v. Chicago, M. &

St. P. R. Co., 5 *Am. & Eng. R. Cas.* 469, 53 *Wis.* 74, 9 *N. W. Rep.* 816. *Steffen v. Chicago & N. W. R. Co.* 46 *Wis.* 259, 50 *N. W. Rep.* 348. *Priestley v. Fowler*, 3 *M. & W.* 1. *Hutchinson v. York, N. & B. R. Co.*, 5 *Ex.* 343.

Unless it is otherwise stipulated in the contract of employment. *Cumberland & P. R. Co. v. State*, 44 *Md.* 282, 45 *Md.* 229.

One who enters upon an employment, from its nature hazardous, assumes the usual and ordinary risk and perils incident to such employment. *Lake Shore & M. S. R. Co. v. Roy*, 5 *Ill. App.* 82. *Louisville, N. A. & C. R. Co. v. Frauley*, 28 *Am. & Eng. R. Cas.* 308, 110 *Ind.* 18, 9 *N. E. Rep.* 594. *Evans v. Lake Shore & M. S. R. Co.*, 12 *Hun (N. Y.)* 289. *Williams v. Delaware, L. & W. R. Co.*, 41 *Am. & Eng. R. Cas.* 254, 116 *N. Y.* 628, 22 *N. E. Rep.* 1117, 27 *N. Y. S. R.* 760; reversing 43 *Hun* 633, *mem.*, 6 *N. Y. S. R.* 872, *mem.* *Bailey v. Rome, W. & O. R. Co.*, 19 *N. Y. S. R.* 656, 49 *Hun* 377, 3 *N. Y. Supp.* 585. *Spencer v. New York C. & H. R. R. Co.*, 51 *N. Y. S. R.* 386, 67 *Hun* 196, 22 *N. Y. Supp.* 100. *Cowhill v. Roberts*, 71 *Hun (N. Y.)* 127. *Hawok v. Pennsylvania R. Co.*, 31 *Am. & Eng. R. Cas.* 268, 11 *Atl. Rep.* 459.

One engaged in the service of a company in the running of its trains is presumed to do so with a knowledge of the dangers incident to such service, and he assumes the risks of its ordinary hazards. *Chicago, R. I. & P. R. Co. v. Lonergan*, 28 *Am. & Eng. R. Cas.* 491, 118 *Ill.* 41, 7 *N. E. Rep.* 55. See also *Griffin v. Ohio & M. R. Co.*, 124 *Ind.* 326, 24 *N. E. Rep.* 888.

If a servant be an adult the presumption is that he has sufficient intelligence to comprehend the dangers incident to the service. But when the servant employed to work in a dangerous place is young or inexperienced, it is the duty of the master to point out and explain to him the necessary dangers of the employment. *Gibson v. Oregon S. L. & U. N. R. Co.*, 23 *Oreg.* 493, 32 *Pac. Rep.* 295.

183. Illustrations of the rule.—(1) *Generally.**—Plaintiff was engaged, with another, to move a train box from one car to another on the opposite track, and had assisted daily for three months, when the rope by which the box was swung from one car

to the other became unfastened, and he was injured, and he charged the company with negligence in not providing a safer way of moving it. It appeared that the officers of the company had seen it moved but a few times, and had never assisted. *Held*, that plaintiff must be regarded as having assumed the risk of moving the box. *Gowen v. Harley*, 56 *Fed. Rep.* 973.

The plaintiff having been injured by some lumber falling upon him, and there being no evidence that the doing of the work properly was dangerous, or that he did not know how to do it properly, or that he was wanting in capacity to know, and nothing being alleged in the declaration as to any defect in the car or any of the appliances, the court was correct in granting a nonsuit. *Sims v. East & W. R. Co.*, 84 *Ga.* 152, 10 *S. E. Rep.* 543.

The principle of assumption of risk applied in the case of a servant of a railroad company, employed to throw mail bags into moving trains, who was injured while so doing. *Coolbroth v. Maine C. R. Co.*, 21 *Am. & Eng. R. Cas.* 599, 77 *Me.* 165.

Plaintiff was employed to inspect cars which the company employing him would receive from defendant company, whose tracks connected, and was injured while on the premises of defendant company. *Held*, that he assumed the risks incident to his employment, whether he be regarded as the employé of his own company or the common employé of both companies. *Cruty v. Erie R. Co.*, 3 *T. & C. (N. Y.)* 244.

(2) *Risks assumed by brakeman.*—A railroad brakeman is presumed to understand the ordinary hazards of the employment, and to have assumed the same. *Atchison, T. & S. F. R. Co. v. Alsdurf*, 47 *Ill. App.* 200.

A brakeman employed to couple cars assumes the hazard of the ordinary perils which are incidental to such employment, and in a suit by such brakeman against the company to recover damages for injuries received in attempting to couple cars, on account of alleged negligence in loading a car to be coupled, and in negligently accepting a car to be coupled, when the same was in an unsafe condition, a charge of the court that excludes the right to consider such a coupling as coming within the ordinary hazards and risks of his employment is erroneous. *Jacksonville, T. & K. W. R. Co. v. Galvin*, 53 *Am. & Eng. R. Cas.* 341, 29 *Fla.* 636, 11 *So. Rep.* 231.

* When employés assume the risk of moving cars from broad-gauge to narrow-gauge tracks, see 44 *AM. & ENG. R. CAS.* 533, *abstr.*

A sudden call to supper, addressed by a conductor to a brakeman, is not such an improper or negligent command that the brakeman can recover for any injury sustained in hastily obeying it. Whoever hires out for any service takes the risks of it. *Pignone v. Chicago & G. T. R. Co.*, 52 Mich. 40, 17 N. W. Rep. 232, 50 Am. Rep. 243.

A brakeman entering service takes upon himself only those risks which are naturally and ordinarily incident to his employment, or which, from the facts before him, it is his duty to infer, and also such risks as may be announced to him as occasion requires, and which he thereafter assumes. *Hungerford v. Chicago, M. & St. P. R. Co.*, 41 Am. & Eng. R. Cas. 269, 41 Minn. 444, 43 N. W. Rep. 324.

(3) — *by engineer*.—When an engineer enters the service of a company, he assumes all the risks which are incident to the employment in the usual and ordinary way, and he cannot recover for any injury which may come to him in the usual and ordinary prosecution of the business; but he does not assume the risks arising from a failure to keep the roadbed in a safe condition. *Knapf v. Sioux City & P. R. Co.*, 71 Iowa 41, 32 N. W. Rep. 18.

(4) — *by section hand*.—A section hand assumes the risks incident to his employment, and cannot recover for injuries received by falling into an open water-way, properly constructed, while pushing a car over it. *Couch v. Charlotte, C. & A. R. Co.*, 28 Am. & Eng. R. Cas. 331, 22 So. Car. 557.—QUOTED IN *Kaminitsky v. Northeastern R. Co.*, 25 So. Car. 53.

One accepting employment as a section hand assumes all the risks ordinarily incident to the employment, and the company is not liable to him for injuries resulting from such assumed risks. But if the injuries resulted from superadded risk occasioned by the negligence of the company or its immediate representative, he could recover unless he in some way contributed to the injury by a failure to exercise such reasonable care as the occasion required. *International & G. N. R. Co. v. Hester*, 21 Am. & Eng. R. Cas. 535, 64 Tex. 401.—FOLLOWED IN *Missouri Pac. R. Co. v. Callbreath*, 66 Tex. 526; *Texas & N. O. R. Co. v. Dillard*, 70 Tex. 62, 8 S. W. Rep. 113.

(5) — *by shovelers*.—A person engaged in shoveling dirt in making repairs on the

track and bridges after unusual storms, assumes such risks as could not have been anticipated or provided against, but not when the danger by reasonable diligence and care might have been discovered and averted. *Condon v. Oregon S. L. & U. N. R. Co.*, 53 Am. & Eng. R. Cas. 356, 23 Oreg. 499, 32 Pac. Rep. 397.—FOLLOWING *Carlson v. Oregon S. L. & U. N. R. Co.*, 21 Oreg. 450, 28 Pac. Rep. 497.

Plaintiff, a shoveler, was injured while engaged in loading cars from a gravel pit, under the direction of the defendant's foreman. An embankment of earth 12 to 13 feet high had been formed by the removal of gravel under it, and was frozen. The foreman, with the knowledge of the respondent, attempted to pry the bank down. While he was doing so, plaintiff selected a place for continuing his work from which he could see the foreman, and which he considered safe though the bank should fall. As the bank began to fall, plaintiff attempted to retreat, but stumbled over a clod of earth, fell, was caught by the falling earth, and his leg broken. Held, that no negligence on the part of the defendant or its foreman had been shown, and that the accident was one of the risks of employment assumed by the plaintiff. (Palmer, J., dissenting.) *Songstad v. Burlington, C. R. & N. R. Co.*, 38 Am. & Eng. R. Cas. 211, 5 Dak. 517, 41 N. W. Rep. 755.—APPROVING *Naylor v. Chicago & N. W. R. Co.*, 53 Wis. 664, 11 N. W. Rep. 24; *Galveston, H. & S. A. R. Co. v. Lempe*, 11 Am. & Eng. R. Cas. 201, 59 Tex. 19.

(6) — *by track walker*.—A track walker accepts as a risk incident to his employment chances of being caught on a trestle by a train. *Gibson v. Oregon S. L. & U. N. R. Co.*, 23 Oreg. 493, 32 Pac. Rep. 295.

(7) — *by traveling auditor*.—The traveling auditor of a railroad company, whose duties are to travel on the company's cars from station to station on its roads and audit accounts, is a servant of the company, and assumes the ordinary risks incident to the employment. *Minty v. Union Pac. R. Co.*, 2 Idaho 437, 21 Pac. Rep. 660.

Where such servant is injured in an accident resulting in the derailment of the car on which he is riding, it will be presumed, until the contrary is shown, that the company was not in fault in providing suitable instrumentalities for the business, and had no notice of any defect or other cause of

the accident. *Minty v. Union Pac. R. Co.*, 2 Idaho 437, 21 Pac. Rep. 660.

Before the servant can recover he must show that the injury did not arise from a defect obvious to himself, or which, by the exercise of ordinary care, he might have known. *Minty v. Union Pac. R. Co.*, 2 Idaho 437, 21 Pac. Rep. 660.

184. Scope and extent of the rule.

—A railroad employé cannot recover if injured by a mere accident incident to the work in which he is employed. *Melville v. Missouri River, Ft. S. & G. R. Co.*, 48 Fed. Rep. 820. *Kelley v. Forty-second St., M. & St. N. A. R. Co.*, 33 N. Y. S. R. 816, 58 Hun 93, 11 N. Y. Supp. 344.

A brakeman assumes all risks necessarily incident to his employment; and to give him a right of action against the company for injuries sustained in its service the company must have owed him some duty, arising from contract or from the relation itself, and the failure to perform that duty must have been the proximate cause of the injury. *Little Rock & Ft. S. R. Co. v. Townsend*, 21 Am. & Eng. R. Cas. 619, 41 Ark. 382. *Mensch v. Pennsylvania R. Co.*, 53 Am. & Eng. R. Cas. 198, 150 Pa. St. 598, 25 Atl. Rep. 31, 30 W. N. C. 548.—QUOTING *Baker v. Allegheny Valley R. Co.*, 95 Pa. St. 211.

An instruction that the employé assumes such risks only as are necessarily incident to such employment is erroneous. He assumes those ordinary and usual. *Southwestern Tel. Co. v. Woughter*, 56 Ark. 206, 19 S. W. Rep. 5.

When a person enters into the service of a railroad company, he thereby undertakes to run the risk of his own negligence or unskillfulness, and that of his fellow-servants engaged in the same line of duty, or incident thereto, provided such other servants are competent to discharge the duties assigned. *Toledo, W. & W. R. Co. v. Durkin*, 76 Ill. 395.

Perils attendant upon the employé's business, upon the appliances necessarily used in conducting it, and the place where they were used, cannot be considered dangers created by the master's breach of duty, and there can be no recovery for an injury attributable to such perils; nor will an action lie where the carelessness of co-employés augments or creates the danger which results in injury. *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. Rep. 956.

Where an employé at work in a gravel

pit, while engaged in digging a bed of gravel from under a thin stratum of clay is injured by the falling of the clay, there can be no recovery from the master. *Griffin v. Ohio & M. R. Co.*, 124 Ind. 326, 24 N. E. Rep. 888.

There is no breach of duty in employing a servant subject to the ordinary risks of the employment, if the servant himself is aware of the risks and consents to encounter them. *McGinnis v. Canada Southern Bridge Co.*, 8 Am. & Eng. R. Cas. 135, 49 Mich. 466, 13 N. W. Rep. 819.

A company is not negligent in omitting to clear snow and ice from the ground alongside its track, even in the neighborhood of depot platforms; and a brakeman who is injured in consequence of slipping on such snow and ice has no remedy against the company. *Piquegno v. Chicago & G. T. R. Co.*, 52 Mich. 40, 17 N. W. Rep. 232, 50 Am. Rep. 243.

It seems, that dangers connected with a business carried on by the aid of machinery and the use of mechanical power, or the movement of large bodies, which dangers are unavoidable after the exercise by the master of proper care and precaution in guarding against them, are risks incident to an employment in the business, and are assumed by those who consent to accept employment. *McGovern v. Central Vt. R. Co.*, 123 N. Y. 280, 25 N. E. Rep. 373, 33 N. Y. S. R. 416; reversing 53 Hun 635, 24 N. Y. S. R. 946, 6 N. Y. Supp. 838.

That a company may exercise the right of adopting a new coupling device is a risk incidental to the service of one who is engaged in coupling cars; and if the sole cause of an injury to one so engaged be the concurrent use of the new and old devices, it imposes no obligation on the railroad company to compensate him therefor. *Pittsburgh & L. E. R. Co. v. Henly*, 53 Am. & Eng. R. Cas. 194, 48 Ohio St. 608, 29 N. E. Rep. 575.

Where an accident results from an unforeseen cause not discoverable in advance of its occurrence, with no visible defect in any part of the machinery, and no knowledge of any defect on the part of the men who were constantly using the machinery, or of the employer, the accident is one of the ordinary risks of the employment which the servant takes upon himself. *Bradbury v. Kingston Coal Co.*, 157 Pa. St. 231, 27 Atl. Rep. 400.—DISTINGUISHING *Philadel-*

phia & R. R. Co. v. Huber, 128 Pa. St. 63. FOLLOWING *Mensch v. Pennsylvania R. Co.*, 150 Pa. St. 598. QUOTING *Baker v. Allegheny Valley R. Co.*, 95 Pa. St. 211.

A company or its agents cannot be charged with negligence for sending a section gang out to work on its road on a foggy day. Though the state of the weather might add to the ordinary risk, still the service contracted to be performed was of such nature and importance as to embrace within its scope dark and cloudy as well as clear weather. If the injured party desired exemption from danger incident to changes in the weather, he should have contracted for it on entering the service. *International & G. N. R. Co. v. Hester*, 21 Am. & Eng. R. Cas. 535, 64 Tex. 401.

An engineer was killed by reason of a misplaced switch, and the company was charged with negligence in not painting the switch-target red instead of green, so it could have been more readily seen. The evidence showed that all of the switch-targets on the road were green, and had been for two years, during which time the engineer had been in service. *Held*, that the engineer must be presumed to have accepted the risk of the employment with the targets green. *Naylor v. New York C. & H. R. Co.*, 33 Fed. Rep. 801.

185. Limits and exceptions to the rule, generally.—The rule does not embrace risks of which, by reason of immaturity and inexperience, the employé is ignorant, as the employer knows, or by the exercise of reasonable care might have known beforehand, nor such as the latter knows that the servant, being without experience, cannot appreciate or avoid without instruction or warning. *Louisville, N. A. & C. R. Co. v. Frawley*, 28 Am. & Eng. R. Cas. 308, 110 Ind. 18, 9 N. E. Rep. 594.—QUOTING *Sullivan v. Int'l Mfg. Co.*, 113 Mass. 396. REVIEWING *Atlas Engine Works v. Randall*, 100 Ind. 293, 50 Am. Rep. 798.—FOLLOWED IN *Pullman Palace Car Co. v. Harkins*, 55 Fed. Rep. 932.—*Bauer v. St. Louis, I. M. & S. R. Co.*, 46 Ark. 388.

As to injuries resulting from other causes than the ordinary hazards of the employment, the servant stands toward the master as a stranger. *Ohio & M. R. Co. v. Hammersley*, 28 Ind. 371.—DISTINGUISHED IN *Louisville & N. R. Co. v. Filbern*, 6 Bush (Ky.) 574; *Cole v. Chicago & N. W. R. Co.*, 33 Am. & Eng. R. Cas. 274, 71 Wis. 114.—

Chicago & N. W. R. Co. v. Bayfield, 37 Mich. 205.

An employé assumes all the risks incident to the service he enters, but he does not assume a risk created by the negligent act of the master's representative in making unsafe work which he specifically orders the employé to perform. *Taylor v. Evansville & T. H. R. Co.*, 41 Am. & Eng. R. Cas. 437, 121 Ind. 124, 22 N. E. Rep. 876, 6 L. R. A. 584, 41 Alb. L. J. 173.

A servant does not assume unknown perils arising from the negligent direction of the work. They are not usual risks of the service. *Schroeder v. Chicago & A. R. Co.*, 53 Am. & Eng. R. Cas. 436, 108 Mo. 322, 18 S. W. Rep. 1094.

An employé assumes such risks as he knew existed, or might have known by ordinary care. *Galveston, H. & S. A. R. Co. v. Garrett*, 73 Tex. 262, 13 S. W. Rep. 62.

An instruction which assumes that the employé "takes all risks" is erroneous. His contract is based on an implied undertaking of the company to provide safe machinery and competent agents, and to have its roadway and structures in safe condition when he is required to go over them. *Moon v. Richmond & A. R. Co.*, 17 Am. & Eng. R. Cas. 531, 78 Va. 745.

A servant of a railroad company does not, in undertaking his business, agree to assume the risk of negligence as well as others; but, on the contrary, he assumes only such risks as are incident to the employment, or as necessarily attend the business, when conducted with ordinary care and prudence. *Chamberlain v. Milwaukee & M. R. Co.*, 11 Wis. 238; *overruled in* 18 Wis. 700.

In an action by an employé for injuries received in the course of the employment, the court, at the request of the plaintiff, instructed the jury that "the servant assumes no risks except such as existed at the beginning of the employment, and such as are incidental to the business." *Held*, that the court should have added words equivalent to "or which existed during the course of the employment, of which the employé had knowledge or was bound to have knowledge." *Sowden v. Idaho Quartz Min. Co.*, 55 Cal. 443.

186. Does not include risk from company's actual negligence.—The neglect of the company to perform duties

by law devolving upon it is not a peril which a servant assumes. *Chicago, B. & Q. R. Co. v. Avery*, 17 *Am. & Eng. R. Cas.* 649, 109 *Ill.* 314; *affirming* 10 *Ill. App.* 210. *Gulf, C. & S. F. R. Co. v. Silliphant*, 70 *Tex.* 623, 8 *S. W. Rep.* 673. *Missouri Pac. R. Co. v. Crenshaw*, 71 *Tex.* 340, 9 *S. W. Rep.* 262.

Where one enters into the service of another he assumes to run all the ordinary risks pertaining to such service; and this means only that he cannot recover for any injury that his employer, by the exercise of ordinary care and prudence, could not provide against. *Louisville, C. & L. R. Co. v. Cavens*, 9 *Bush (Ky.)* 559. *McGovern v. Central Vt. R. Co.*, 123 *N. Y.* 280, 25 *N. E. Rep.* 373, 33 *N. Y. S. R.* 416; *reversing* 53 *Hun* 635, 24 *N. Y. S. R.* 946, 6 *N. Y. Supp.* 838. *Ford v. Lake Shore & M. S. R. Co.*, 48 *Am. & Eng. R. Cas.* 201, 124 *N. Y.* 493, 26 *N. E. Rep.* 1101, 36 *N. Y. S. R.* 494; *distinguishing* 117 *N. Y.* 638.

The servant does not assume or contract to waive the liability of the master for his own negligence, whether committed in person or by an agent authorized by the master to perform a duty resting upon him. *Pullman Palace Car Co. v. Laack*, 143 *Ill.* 242, 32 *N. E. Rep.* 285.

An employé does not take upon himself the risk of being killed by a collision caused by the negligence of agents of the railroad, as a danger incident to his service. *Georgia R. & B. Co. v. Rhodes*, 56 *Ga.* 645.

Negligence of the employés of a railroad company in charge of a freight train running extra fast, in not giving the usual warning on approaching a curve in a cut, is not one of the usual and ordinary risks assumed by a section man as an incident to his employment. *Northern Pac. R. Co. v. Charless*, 51 *Am. & Eng. R. Cas.* 198, 51 *Fed. Rep.* 562, 7 *U. S. App.* 359, 2 *C. C. A.* 380.

Two engines were allowed to escape from a yard and ran uncontrolled for some distance, when they collided with a train and killed a brakeman. The collision was the result of a failure on the part of the company to take proper precautions to prevent the escape of the engines. *Held*, that the risk was not one which the brakeman had assumed as incident to the employment. *Southern Pac. Co. v. Lafferty*, 57 *Fed. Rep.* 536.

187. Risk from dangerous working place.—Where an employé enters a

trench which has been prepared for him for the purpose of taking up certain water pipes, the risk of injury by the earth caving in on him is not incident to the employment, and is therefore not assumed by him. *Kranz v. Long Island R. Co.*, 33 *N. Y. S. R.* 46.—**DISTINGUISHING** *Murphy v. Boston & A. R. Co.*, 88 *N. Y.* 152; *Cook v. New York C. & H. R. R. Co.*, 119 *N. Y.* 653, 29 *N. Y. S. R.* 994.

Plaintiff's intestate was engaged in grading a railroad alongside of a frame building in process of construction, which belonged to the company, and was killed by a brace, which had been set between the outer sills between the third and fourth floors, falling on him. There was no evidence as to how the post had been secured or fastened in position, and there was nothing to show that the intestate had any knowledge of its condition, or as to any fact which would put him on inquiry as to whether the place where he worked was safe. *Held*, that he had not assumed the risk of the falling timber, and it was error to grant a nonsuit. *Mickey v. Wood M. & R. Mach. Co.*, 70 *Hun* 456, 53 *N. Y. S. R.* 689.—**REVIEWING** *Lorey v. Hall*, 8 *N. Y. S. R.* 799.

188. Risk from defective bridges—Low bridges.—Where a brakeman enters service, the risk of striking an overhead bridge, which cannot be passed while standing on certain cars without stooping, is assumed by him, and he cannot recover for injuries received by striking the bridge, if he had knowledge of the condition of the bridge. *Baltimore & O. R. Co. v. Stricker*, 51 *Md.* 47.—**APPROVED IN** *Carbine v. Bennington & R. R. Co.*, 61 *Vt.* 348. **FOLLOWED IN** *Baltimore & P. R. Co. v. State*, 75 *Md.* 152. **NOT FOLLOWED IN** *Chicago, M. & St. P. R. Co. v. Carpenter*, 56 *Fed. Rep.* 451; *Baltimore & O. R. Co. v. Rowan*, 23 *Am. & Eng. R. Cas.* 390, 104 *Ind.* 88. **QUOTED IN** *Clark v. Richmond & D. R. Co.*, 18 *Am. & Eng. R. Cas.* 78, 78 *Va.* 709, 49 *Am. Rep.* 394.

Dangers from a low overhead bridge not known to an employé are not among the risks assumed by him where the injury occurs on a dark night. *Louisville, N. A. & C. R. Co. v. Wright*, 38 *Am. & Eng. R. Cas.* 41, 115 *Ind.* 378, 16 *N. E. Rep.* 145.

In an action for damages for negligently causing the death of plaintiff's intestate, it appeared that the deceased, a brakeman of many years' experience, had been, at the

time of his death, seven months in the employ of the defendant. Whilst riding upon a coal car which was higher than common cars, he was hit by the arch of a bridge and was killed. The evidence showed that the deceased had frequently ridden on coal cars, that he passed through the bridge daily, and that he must have known of its height and condition. *Held*, that the deceased had assumed the risk of his employment in respect to the bridge and that no recovery could be had. *Carbine v. Bennington & R. R. Co.*, 38 *Am. & Eng. R. Cas.* 45, 61 *VI. 348*, 17 *Atl. Rep.* 491.

The bridge having been built in 1862, the question is not affected by *Vt. R. L. §§ 3418, 3419*, or *No. 34, Acts of 1872*. And, *quære*, whether it could have been had the bridge been constructed since 1872. *Carbine v. Bennington & R. R. Co.*, 38 *Am. & Eng. R. Cas.* 45, 61 *VI. 348*, 17 *Atl. Rep.* 491.

189. Risk from defective track or roadbed.—(1) *In general*.—Railroad employés, regardless of their experience, do not assume risks growing out of a defective track. Therefore where an employé is injured by catching his foot in an imperfect track, the company is not entitled to an instruction that if the employé was in the habit of running cars over the track, and by the use of ordinary care could have been aware of the defect, then he will be regarded as having assumed the risk. *Philadelphia, W. & B. R. Co. v. State*, 10 *Am. & Eng. R. Cas.* 792, 58 *Mid.* 372.

Where an injury complained of resulted from a low joint in the railway track, an instruction that plaintiff, an employé of the company, assumed such risk, if he knew or might have known by the exercise of ordinary care that low joints were common to railways generally, is properly refused in the absence of proof that such low joints are common. *Fl. Worth & D. C. R. Co. v. Thompson*, 2 *Tex. Civ. App.* 170, 21 *S. W. Rep.* 137.

Where a company is not chargeable with negligence in the location and construction of cattle-guards, the danger to brakemen in having to pass over the same in switching

trains is a risk of the employment which they assume. *Henderson v. Coons*, 31 *Ill. App.* 75.

An injury to a civil engineer employed by a company in laying track on a new line of road, caused by the derailment of a train by passing over the road to the front of operations, owing to a defective roadbed, is not a risk incident to his employment, and he is entitled to recover. *Meloy v. Chicago & N. W. R. Co.*, (Iowa) 33 *Am. & Eng. R. Cas.* 358, 37 *N. W. Rep.* 335.

A company is not responsible for an injury sustained by an employé whose foot was caught in a frog, where it appears there was no negligence on the part of the defendant, and that the accident was owing to a risk incidental to the plaintiff's employment as a brakeman. *Bourgeault v. Grand Trunk R. Co.*, 5 *Mont. Super.* 249. *Appel v. Buffalo, N. Y. & P. R. Co.*, 111 *N. Y.* 550, 19 *N. E. Rep.* 93, 20 *N. Y. S. R.* 90; *reversing* 40 *Hun* 632, 2 *N. Y. S. R.* 257.—**FOLLOWING** *De Forest v. Jewett*, 88 *N. Y.* 264.—**APPLIED IN** *Finnell v. Delaware, L. & W. R. Co.*, 42 *N. Y. S. R.* 354.

(2) *Illustrations*.—A freight conductor was killed by reason of a car drifting from a side track onto the main track and colliding with his train. The company was charged with negligence in not properly constructing the side track; that it was not properly blocked and was constructed with curves dangerously sharp. *Held*, that the risks arising from such defects were assumed by the conductor on entering the service. *Twitchell v. Grand Trunk R. Co.*, 39 *Fed. Rep.* 419.—**FOLLOWING** *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 *U. S.* 189, 7 *Sup. Ct. Rep.* 1166.

During a storm, sand and gravel washed down a mountain side, and were deposited on the track, which threw a train from the track and killed an engineer. It appeared that the water came down a natural ravine and was deposited on the track by reason of there being no culvert under the track. *Held*, that the engineer must be deemed as having assumed the risk of the road being constructed through a mountainous country; but he did not assume the risk arising from a defective construction of the track, as by making no culverts for the passage of water, though the danger was increased by the road being in a mountainous country. *Union Pac. R. Co. v. O'Brien*, 49 *Fed. Rep.* 538, 4 *U. S. App.* 221, 1 *C. C. A.* 354.

*Risks assumed by employés in riding on dilapidated or newly constructed tracks, see note, 53 *AM. & ENG. R. CAS.* 144.

Injury to employé caused by sand and gravel washed on track. Assumption of risk, see 53 *AM. & ENG. R. CAS.* 362, *abstr.*

In an action to recover for the death of plaintiff's intestate, it was alleged that "defendant had constructed a switch and a frog which was so worn and defective as to render it unsafe" for use, and that by reason thereof, plaintiff's intestate, while in the performance of his duty as brakeman, was thrown from the car and killed. Plaintiff's evidence only went to show that the switch rail was a little lower than the other rail, but did not show that this could be remedied. It was shown by the defendant that it was necessary to have the switch rail lower than the main rail. *Held*, not sufficient to show that the appliance was defective, and the accident must be ascribed to the ordinary risks incident to deceased's employment. *Little Rock & Ft. S. R. Co. v. Eubanks*, 31 *Am. & Eng. R. Cas.* 176, 48 *Ark.* 460, 3 *S. W. Rep.* 808.

The injury complained of occurred on account of the unskillful, improper, and negligent manner in which defendant had constructed its railroad, whereby a construction train ran off the track. Plaintiff was employed in leveling and working on the track, and received the injury in going on the construction train to the place where he was engaged in work. *Held*, conceding that plaintiff and the engineer of the train were fellow-servants in the same general business, plaintiff did not assume the risk arising from the unskillful, improper, and negligent manner in which the defendant's road was constructed. *Trask v. California Southern R. Co.*, 11 *Am. & Eng. R. Cas.* 192, 63 *Cal.* 96.

The presence of one clinker of unusual size on the margin of a railway track where switching is to be done, and on which a brakeman accidentally steps in descending from a moving engine in the due course of his duties, will not render the company liable for a personal injury which the brakeman thus sustains. *Lee v. Central R. & B. Co.*, 86 *Ga.* 231, 12 *S. E. Rep.* 307.

A brakeman stepped into a cattle-guard and was killed; the railroad company was charged with negligence in placing the cattle-guard too near the switch. The cattle-guard was on the line of a municipal corporation, where it was required, and about eighty feet from the head of the switch, and there was nothing to show that it was more dangerous generally than if it had been further away. *Held*, that the company

was not chargeable with negligence. *Henderson v. Coons*, 31 *Ill. App.* 75.

A switchman, while standing on the foot-board of a tender that was backing on a side track, let go the hand-rail to shift his lantern from one hand to the other, and was thrown off by a jerk caused by a worn rail left there by his fellow-employees, the trackmen. He had full means of knowing the condition of the track, and the custom of the road as to using worn rails for side tracks. *Held*, that the risk was one of the ordinary risks of his employment, and that he had no ground of recovery. (Marston, J., dissenting.) *Michigan C. R. Co. v. Austin*, 40 *Mich.* 247.—FOLLOWED IN *Batterson v. Chicago & G. T. R. Co.*, 53 *Mich.* 125.

Where an accident, caused by a broken switch rail, resulted in the derailment of an engine, and the death of an engineer in charge thereof, and the evidence tended to show that the rail was too weak and light to support the engine and rolling stock used on the road—*held*, that the risk of such defects was not to be deemed to have been assumed by the deceased unless it appeared that he had notice that the rail was unsafe. *Clapp v. Minneapolis & St. L. R. Co.*, 36 *Minn.* 6, 29 *N. W. Rep.* 340.

A brakeman, while at work uncoupling cars, caught his foot between a guard rail and the main rail of the track and was killed by moving cars. The company was charged with negligence in not blocking the guard rail. The evidence showed that some of the company's guard rails were blocked and some not. *Held*, that the risk was one that the brakeman had assumed, and there could be no recovery. *McNeil v. New York, L. E. & W. R. Co.*, 71 *Hun* 24, 24 *N. Y. Supp.* 616.—FOLLOWING *Appel v. Buffalo, N. Y. & P. R. Co.*, 111 *N. Y.* 550.

190. Risk from obstructions on or near track.*—An engineer having no knowledge of the proximity of a fence to the track does not assume the risk arising therefrom, it being one resulting from the non-performance of a duty which the law devolves upon the company. *Murphy v. Wabash R. Co.*, 115 *Mo.* 111, 21 *S. W. Rep.* 862.

Employés are not presumed to assume

* Injury to switchman by being struck by a switch stand. Assumption of risk, see 38 *AM. & ENG. R. CAS.* 50, *abstr*

the risk of peril occasioned by the nearness to the track of structures like signal posts, in the absence of notice of such dangerous erection. *Johnson v. St. Paul, M. & M. R. Co.*, 41 *Am. & Eng. R. Cas.* 293, 43 *Minn.* 53, 44 *N. W. Rep.* 884. *Scanlon v. Boston & A. R. Co.*, 38 *Am. & Eng. R. Cas.* 48, 147 *Mass.* 484, 7 *N. Eng. Rep.* 141, 18 *N. E. Rep.* 209.

The fact that it was the duty of a track walker, a fellow-servant of plaintiff, to examine the condition of the track just before the passage of the train, cannot excuse the defendant of negligence in leaving a ledge of rock so that it falls from the jar of a passing train. This was not an ordinary hazard, and in the absence of evidence to show that plaintiff knew of the dangerous condition of the ledge, the court rightly refused to instruct the jury that there was contributory negligence on his part. *Bean v. Western N. C. R. Co.*, 107 *N. Car.* 731, 12 *S. E. Rep.* 600.

A brakeman cannot recover for an injury received by being caught between a moving freight car and an "oil house" used by the company, and built so near the track that cars cleared it by only a few inches. It was a risk of his employment which the brakeman is held to have assumed. *Kelly v. Baltimore & O. R. Co.*, (Pa.) 11 *Atl. Rep.* 659.

An employé on a railway train, injured by the fall of a tree across the roadbed, is not bound to show that he did not, in entering the service of the company, assume the risk of being injured in that manner. *Texas & St. L. R. Co. v. Vallie*, 60 *Tex.* 481.

A switchman, who was charged with making up trains, was injured by striking a switch stand within nine or ten inches of a train when moving on the track. *Held*, that the risk of injury arising from such cause was not one assumed by the switchman. *Pidcock v. Union Pac. R. Co.*, 5 *Utah* 612, 1 *L. R. A.* 131, 19 *Pac. Rep.* 191.—QUOTING *Hulehan v. Green Bay, W. & St. P. R. Co.*, 68 *Wis.* 520, 32 *N. W. Rep.* 529.—APPROVED IN *Boss v. Northern Pac. R. Co.*, 2 *N. Dak.* 128.

An employé does not assume the risk arising from the erection and maintenance of a switch stand and target of such height and in such position and condition that the target will sometimes come in contact with the sides of the cars of passing trains, particularly when such employé of the company

knows that the rules of the company prohibit the erection of any such switch stand within less than six feet of the track. *Boss v. Northern Pac. R. Co.*, 2 *N. Dak.* 128, 49 *N. W. Rep.* 655.—APPROVING *Pidcock v. Union Pac. R. Co.*, 5 *Utah* 612, 19 *Pac. Rep.* 191; *Scanlon v. Boston & A. R. Co.*, 147 *Mass.* 484, 18 *N. E. Rep.* 209; *Boss v. Northern Pac. R. Co.*, 5 *Dak.* 308, 40 *N. W. Rep.* 590.

191. Risk from defective machinery, appliances, etc.*—A master is not liable for injuries sustained by a servant in the use of an appliance, though different from and more dangerous than those generally employed in the service, if the use of such appliance was one of the dangers incident to the employment voluntarily assumed by the servant. *Hatter v. Illinois C. R. Co.*, 69 *Miss.* 642, 13 *So. Rep.* 827.

Danger resulting from negligence is not one of the ordinary risks of operating dangerous machinery. *Brown v. Sullivan*, 71 *Tex.* 470, 10 *S. W. Rep.* 288.

192. Risk from handling machinery.—Where a master has exercised due diligence in the selection of employées, and in providing safe machinery, and in establishing suitable regulations for the safe and proper conduct of his business, the risks incident to the use and handling of such machinery, and the management of the details of the business, must be taken to be assumed by the employées to whom such duties are committed. *Fraker v. St. Paul, M. & M. R. Co.*, 15 *Am. & Eng. R. Cas.* 256, 32 *Minn.* 54, 19 *N. W. Rep.* 349.

193. Risk from defective car or engine.—A laborer on the track is not bound to inform himself whether an engine is in good repair, or whether the engineer thereof has performed his duty in reporting a defect therein; and therefore he does not assume the risks arising from a failure of the engineer to report the engine as unsafe or defective. *Peoria, D. & E. R. Co. v. Johns*, 43 *Ill. App.* 83.

The risk of a defective foot-board is not one assumed by a switchman by virtue of his employment. *O'Mellia v. Kansas City, St. J. & C. B. R. Co.*, 115 *Mo.* 205, 21 *S. W. Rep.* 503.

A brakeman does not assume the risk of injury while making a coupling from one of

* Risk of employment; use of defective machinery and appliances, see note, 8 *AM. & ENG. R. CAS.* 139; 2 *Id.* 163.

the cars having no bumper, as it is the duty of the company to provide safe cars. *Mahoney v. New York C. & H. R. R. Co.*, 39 N. Y. S. R. 911, 60 Hun 586, 15 N. Y. Supp. 501; affirmed in 131 N. Y. 623, mem., 43 N. Y. S. R. 962.

A brakeman does not assume the risk of injury resulting from a railroad company's neglect to ascertain and repair defective brake steps. *Van Tassell v. New York C. & H. R. R. Co.*, 1 Misc. 299, 48 N. Y. Supp. 767, 20 N. Y. Supp. 708; reargument in 2 Misc. 592.

It does not constitute negligence for a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances; and the transportation or use of such cars by the company is one of the risks which an employé assumes in undertaking the employment. *Baldwin v. Chicago, R. I. & P. R. Co.*, 50 Iowa 680.—QUOTED IN *Dallou v. Chicago & N. W. R. Co.*, 5 Am. & Eng. R. Cas. 480, 54 Wis. 257, 41 Am. Rep. 31. REVIEWED IN *Gottlieb v. New York, L. E. & W. R. Co.*, 24 Am. & Eng. R. Cas. 421, 100 N. Y. 462, 3 N. E. Rep. 344.

A brakeman, injured by coupling a damaged car, cannot secure exemption from the consequences of a custom which required the car to be marked "out of order," which was done in the particular case, by showing his inability to read. *Watson v. Houston & T. C. R. Co.*, 11 Am. & Eng. R. Cas. 213, 58 Tex. 434.

194. Risk from management and operation of trains.—Great care and caution are required on the part of railroad companies, when they are moving cars in places where the general public have a right to pass, to in some manner announce their approach; but a different rule obtains in the companies' yards, where cars are being distributed and trains made up. The employés about such yards understand the situation; they know the manner of doing the business therein, that cars frequently pass without notice of their approach, and they assume the risks incident to the business as thus conducted. *Croove v. New York C. & H. R. R. Co.*, 70 Hun 37, 53 N. Y. S. R. 558, 23 N. Y. Supp. 1100.

Whether an accident occasioned by a switch being misplaced, whereby a train is run upon a side track and against cars standing there, is not within the risks as-

sumed by an engineer in entering into the employment of the company to run its engines, *quere*. *Lyon v. Detroit, L. & L. M. R. Co.*, 31 Mich. 429.

Whether a brakeman can recover against a railway company for an injury received in consequence of the conductor's managing the locomotive in the engineer's absence, *quere*. Judgment denying such liability affirmed by a divided court. *Rodman v. Michigan C. R. Co.*, 17 Am. & Eng. R. Cas. 521, 55 Mich. 57, 20 N. W. Rep. 788.

A misplaced switch caused a train to leave the track, and killed an engineer. Four months before the freight trains had been run on the tracks in the opposite direction, and in a direction which would have caused the train in question to strike the switch heel instead of the switch head, and thereby lessen the danger. *Held*, that the change to running in the opposite direction did not so increase the risk of the employment as to charge the company with negligence. *Naylor v. New York C. & H. R. R. Co.*, 33 Fed. Rep. 801.

A fireman, while cleaning the ash pan of his locomotive, was killed by another train being run against the engine. *Held*, that the risk was one that the fireman had assumed, though the train was run contrary to a rule of the company. *Wabash, St. L. & P. R. Co. v. Conkling*, 15 Ill. App. 157.

195. — flying switch—Shunting cars.—Plaintiff, a brakeman, was, in pursuance of his duties, standing on top of certain freight cars while a flying switch was being made. Sometimes the brakeman uncoupling cars gave the signal to the engineer to go ahead when the uncoupling was effected, and sometimes the brakeman was in the position of plaintiff. In the present case, the former gave the signal and plaintiff was knocked off the train by the sudden start and injured. *Held*, that he was not entitled to damages. *Youll v. Sioux City & P. R. Co.*, 21 Am. & Eng. R. Cas. 589, 66 Iowa 346, 23 N. W. Rep. 736.

It was immaterial, where a brakeman is injured in the performance of his duties where a flying switch is being made, that a rule of the company required its servants to exercise care when making flying switches, and to avoid them even if it increased the work. *Youll v. Sioux City & P. R. Co.*, 21 Am. & Eng. R. Cas. 589, 66 Iowa 346, 23 N. W. Rep. 736.

If it were conceded that a railroad com-

pany is guilty of negligence if it allows flying switches to be made, yet if an employé knows of the custom, and without objection participates and aids in making such switches, he waives the negligence of the company and assumes the risk, and cannot recover if he is injured. *Youll v. Sioux City & P. R. Co.*, 21 Am. & Eng. R. Cas. 589, 66 Iowa 346, 23 N. W. Rep. 736.

A servant cannot recover of a company for injuries sustained while shunting trucks upon the line of its road, in the absence of evidence of negligence or breach of duty on the part of the company towards him. *Memery v. Great Western R. Co.*, 14 App. Cas. 179.—DISTINGUISHING *Woodley v. Metropolitan Dist. R. Co.*, 2 Ex. D. 384.

196. — sudden jerks and movements.—A railroad brakeman assumes the risk of injury from the jerk given to a freight train by taking up the slack. *Davis v. Baltimore & O. R. Co.*, 152 Pa. St. 314, 25 Atl. Rep. 498.

Plaintiff cannot recover if the sudden movement was the ordinary result of trains entering on switches. *Rutledge v. Missouri Pac. R. Co.*, 110 Mo. 312, 19 S. W. Rep. 38.

Where a gravel or repair train is managed as usual, and the jerk complained of is only such as would be expected to occur on a train of that character in doing its work, the employés engaged on it or attached to it take the risk as incident to the service, and if injured by the jerk, cannot recover of the company. *Central R. & B. Co. v. Sims*, 80 Ga. 749, 7 S. E. Rep. 176.—DISTINGUISHING *Gainesville, J. & S. R. Co. v. Wall*, 75 Ga. 282.—DISTINGUISHED IN *Hudson v. Georgia Pac. R. Co.*, 85 Ga. 203.

197. Risk from backing train.—The danger of injury arising from the engineer backing the train upon a stationary car with force so great as to make the deadwoods meet, is a risk of employment assumed by a brakeman; but he did not assume any risk where the accident was caused by the defective bumper of the moving car, which hung lower than it ought, passing under the bumper of the stationary car, and thus permitting the deadwoods to come together. *Goodrich v. New York C. & H. R. R. Co.*, 41 Am. & Eng. R. Cas. 259, 116 N. Y. 398, 22 N. E. Rep. 397, 26 N. Y. S. R. 767, 5 L. R. A. 750; affirming 3 N. Y. S. R. 774.—DISTINGUISHED IN *Arnold v. Delaware & H. Canal Co.*, 125 N. Y. 15. FOLLOWED IN *Mahoney*

v. New York C. & H. R. R. Co., 39 N. Y. S. R. 911, 60 Hun 586, 15 N. Y. Supp. 501.

The backing of a construction train in the usual manner of its operation does not subject a track hand employed thereon to any unusual risk not assumed as a condition of his service, although he is injured by such backing. *Galveston, H. & S. A. R. Co. v. Arispe*, 48 Am. & Eng. R. Cas. 350, 81 Tex. 517, 17 S. W. Rep. 47.

A fireman who was young, but who had considerable experience and who knew how trains were operated, went under his engine to clean the ash pan, while the train was on a siding, and was injured by another engine backing against it. No one directed him to clean the pan, and the engineer was otherwise occupied and did not know that he was under the engine. The ash pan needed cleaning, but there was no pressing necessity for its being done before the engine got back to the regular yards. *Held*, that the injury was due to the fireman's own negligence, and he could not recover. *Union R. & T. Co. v. Leahy*, 9 Ill. App. 353.

A verdict is properly directed for the defendant, where the plaintiff went to sleep in a caboose car while it was standing upon an extension track used during the night to shove cars in upon, and which was struck by such car, injuring the plaintiff. *Jacobs v. Lake Shore & M. S. R. Co.*, 84 Mich. 299, 47 N. W. Rep. 669.

198. Risk from car improperly loaded.—A brakeman was killed while riding on the brake-beam of the tender, and backing to take on certain cars. When about half way to the cars, the tender struck a flat car, loaded with rails which projected over the ends, which projecting ends struck the brakeman and killed him. He did not know the car was on the track, and could not see it from his position on the tender. *Held*, that the death was due either to the negligence of co-employés or to the ordinary risks of the service, and in either event the company was not liable. *Jackson v. Missouri Pac. R. Co.*, (Mo.) 14 S. W. Rep. 54. *Jackson v. Missouri Pac. R. Co.*, 104 Mo. 448, 16 S. W. Rep. 413.—DISTINGUISHING *Smith v. Wabash, St. L. & P. R. Co.*, 92 Mo. 359. QUOTING *Northern C. R. Co. v. Husson*, 12 Am. & Eng. R. Cas. 244, 101 Pa. St. 1; *Atchison, T. & S. F. R. Co. v. Plunkett*, 25 Kan. 188.—*Louisville & N. R. Co. v. Gover*, 31 Am. & Eng. R. Cas. 168, 85 Tenn. 465, 3 S. W. Rep. 824.

Nor is the foregoing rule inapplicable because the company's train dispatcher directed the brakeman to go with a locomotive and tender on a side track on which the dangerous car stood and with which the tender collided, thereby causing the injury, it not appearing what the duties of the train dispatcher were, nor that he knew of the location of the dangerous car on the side track, or of its being laden with projecting rails. *Jackson v. Missouri Pac. R. Co.*, 104 Mo. 448, 16 S. W. Rep. 413.—QUOTED IN *Thomas v. Missouri Pac. R. Co.*, 109 Mo. 187.

In an action by a track walker for injuries caused by a piece of coal falling from a tender on which the coal was heaped up above its top, plaintiff's own testimony showed that he had seen the tender overloaded in that way before, that it was customary so to load it, and that he had seen pieces of coal on the track. *Held*, that if such method of loading was negligent, yet plaintiff, having knowledge thereof, assumed the risk of injury therefrom as one of the risks incident to his employment. *Schultz v. Chicago & N. W. R. Co.*, 28 Am. & Eng. R. Cas. 404, 67 Wis. 616, 58 Am. Rep. 881, 31 N. W. Rep. 321.

199. Risk from collisions with cattle or teams.—The liability to injury to train employes by coming in contact with animals trespassing on the road is one of the dangers incident to the operation of railroads and may be encountered inside of inclosures having cattle-guards, as well as outside. *Ward v. Bonner*, 80 Tex. 168, 15 S. W. Rep. 805.

Plaintiff, a locomotive engineer, in the employ of the defendants, received injuries from the derailment of his engine at night, caused by its coming in contact with a cow fastened in a bridge on the railway track, with her legs down between the ties. Less than three hours before that time the track over the bridge was clear of obstruction. *Held*, that the evidence did not show defendants to have been guilty of negligence; and also, that the accident was within the assumed risks of plaintiff's employment. *Manson v. Eddy*, 3 Tex. Civ. App. 148, 22 S. W. Rep. 66.

A freight conductor employed for many years in switching trains on a short section of a railroad was killed while seated on the pilot of a shifting engine by collision of the engine with a wagon at a public crossing

where no watchman was stationed by the railroad company. *Held*, that the accident was one of the risks assumed by the decedent, and that his representatives could not recover damages for his death. *Rumsey v. Delaware, L. & W. R. Co.*, 151 Pa. St. 74, 25 Atl. Rep. 37.

200. Risk from running at high rate of speed.—A brakeman in entering the service of a company only assumes such dangers as are incident to the operation of the road in a reasonably prudent and careful manner, and he does not assume the risk of dangers arising from running the trains at too great a speed. *Conners v. Burlington, C. R. & N. R. Co.*, 74 Iowa 383, 37 N. W. Rep. 966.

A civil engineer employed by a railroad company in the construction of its road only assumes the risks incidental to the operation of the trains over a new, partly completed roadbed and unballasted track, in a reasonably prudent and careful manner, and does not assume risks which are the result of running trains at an unreasonably high rate of speed over such track, especially when it appears that the company negligently failed to keep such track in proper condition. *Meloy v. Chicago & N. W. R. Co.*, 38 Am. & Eng. R. Cas. 130, 77 Iowa 743, 42 N. W. Rep. 563.—DISTINGUISHED IN *Carlson v. Oregon S. L. & U. N. R. Co.*, 21 Oreg. 450.

201. Risks from the use of snow-plows—"Bucking snow."—When an employe of a railroad undertakes the performance of any duty which requires him to engage in "bucking snow," he assumes the usual and ordinary hazards connected with such work, and if, in performing such work in the ordinary way, he is injured, he has no reason to complain. *Bryant v. Burlington, C. R. & N. R. Co.*, 21 Am. & Eng. R. Cas. 593, 66 Iowa 305, 55 Am. Rep. 275, 23 N. W. Rep. 678.—APPROVING *Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465; *Naylor v. Chicago & N. W. R. Co.*, 53 Wis. 661; *Howland v. Milwaukee, L. S. & W. R. Co.*, 54 Wis. 226.

Dangers from snowbanks are inseparable from the operation of railroads where snow prevails and is removed from the track by snowplows; and when employes enter the service they assume such risks. *Brown v. Chicago, I. I. & P. R. Co.*, 69 Iowa 161, 28 N. W. Rep. 487; *affirming* 64 Iowa 652, 21 N. W. Rep. 193.—FOLLOWING *Dowell v.*

Burlington, C. R. & N. R. Co., 62 Iowa 629.

One of the acts of negligence relied upon as a ground of recovery was the order of defendant to plaintiff's intestate to couple two engines together, tender to tender, and use them in "bucking" snow off the road, this being claimed to be a dangerous and unsafe practice. The undisputed evidence was that this was the general and common practice of the defendant and other roads in the state, well understood by all railroad engineers, including the defendant's, and one which they were frequently called upon to engage in. *Held*, that under these circumstances the dangers incident to such a practice (assuming that the company was not negligent in the matter of keeping its track and engines in proper order) must be held to have been assumed by the deceased as included in the ordinary risks of the employment in which he engaged, and therefore it was error to submit that question to the jury. *Morse v. Minneapolis & St. L. R. Co.*, 11 *Am. & Eng. R. Cas.* 168, 30 *Minn.* 465, 16 *N. W. Rep.* 358.—APPROVED IN *Bryant v. Burlington, C. R. & N. R. Co.*, 66 Iowa 305. REVIEWED IN *Doyle v. St. Paul, M. & M. R. Co.*, 41 *Am. & Eng. R. Cas.* 376, 42 *Minn.* 79, 43 *N. W. Rep.* 787.

A locomotive engineer was injured by his engine running into a snow drift in a deep cut. The evidence showed that deceased had charge of one of four engines coupled together, which had been sent out to remove snow drifts. The manner in which the train was made up, equipped, and manned showed the purpose for which it was intended. Hands employed on the train were informed that the train was intended to open the road, although there was no direct proof that deceased received this information. Deceased had been employed on the division where the accident occurred for four years. *Held*, that there was no evidence of negligence on the part of the company, and that the risks involved were intelligently assumed by the deceased. *Derr v. Lehigh Valley R. Co.*, 158 *Pa. St.* 365, 27 *Atl. Rep.* 1002.

202. Risk of danger while coupling cars.*—It is not necessarily negli-

*Risks assumed by servants in coupling cars, see note, 15 *AM. & ENG. R. CAS.* 264.

Injury to employes while coupling cars having projecting loads. Risks of employment, see 53 *AM. & ENG. R. CAS.* 351, *abstr.*

gence on the part of a railroad company to receive and use cars which have draw-heads of unequal heights, which necessarily increase the danger of coupling. *Woodworth v. St. Paul, M. & M. R. Co.*, 5 *McCrary (U. S.)* 574, 18 *Fed. Rep.* 282.

Railroad employes who are required to couple and uncouple cars are presumed to know the risk of the business and to assume it. They are presumed to know that cars of various construction and mode of coupling will pass over the road and be coupled and handled by them, and they take upon themselves the duty of ascertaining the kind of cars handled, and to use the necessary caution to avoid injury. *Henry v. Bond*, 34 *Fed. Rep.* 101. *Dysinger v. Cincinnati, S. & M. R. Co.*, 93 *Mich.* 646, 53 *N. W. Rep.* 825. *Thomas v. Missouri Pac. R. Co.*, 53 *Am. & Eng. R. Cas.* 146, 109 *Mo.* 187, 18 *S. W. Rep.* 980.—QUOTING *Toledo, W. & W. R. Co. v. Black*, 88 *Ill.* 112; *Michigan C. R. Co. v. Smithson*, 45 *Mich.* 212. *Jackson v. Missouri Pac. R. Co.*, 104 *Mo.* 448.—*Simms v. South Carolina R. Co.*, 31 *Am. & Eng. R. Cas.* 199, 26 *So. Car.* 490, 2 *S. E. Rep.* 486. *Nashville, C. & St. L. R. Co. v. Wheeler, (Tenn.)* 4 *Am. & Eng. R. Cas.* 633. *Kelly v. Abbot*, 21 *Am. & Eng. R. Cas.* 633, 63 *Wis.* 307, 23 *N. W. Rep.* 890, 53 *Am. Rep.* 292.—APPLYING *Whitwam v. Wisconsin & M. R. Co.*, 55 *Wis.* 408; *Toledo, W. & W. R. Co. v. Black*, 88 *Ill.* 112. QUOTING *Ballou v. Chicago & N. W. R. Co.*, 54 *Wis.* 257. REVIEWING *Smith v. Potter*, 46 *Mich.* 258.

The conductor of a switching crew in a railroad freight yard, who is familiar with the business, assumes the risk of injury caused by cars being loaded with timbers projecting over the ends, and cannot recover, where the business is conducted in the ordinary way, for an injury received from such cause while attempting to make a coupling. *Boyle v. New York & N. E. R. Co.*, 151 *Mass.* 102, 23 *N. E. Rep.* 827.—FOLLOWING *Lothrop v. Fitchburg R. Co.*, 150 *Mass.* 423.

A brakeman employed on a freight train cannot recover for injuries sustained in coupling his train a locomotive equipped with a coupler, not defective as one of its make, but more dangerous in the use for freight trains than those generally employed, if the use of such coupler, on certain freight engines of the company (designed for passenger service on occasion)

was not unusual when he entered the employment, and he recognized that he would be required to make couplings with the same. *Hatter v. Illinois C. R. Co.*, 69 *Miss.* 642, 13 *So. Rep.* 827.

The danger arising from the use, by a yard master, of a coupling consisting of a piece of brake-beam rod, partly bent, but not sufficiently to stay in place when the cars bump together, cannot be declared, as matter of law, one of the ordinary risks of the employment of a switchman injured in consequence thereof, and having no knowledge or notice of said facts. *Taylor v. Missouri Pac. R. Co.*, (Mo.) 16 *S. W. Rep.* 206.

A brakeman on a moving train fell between cars while engaged in uncoupling them, and into a culvert, so that he was killed. *Held*, that there was no evidence of any such defect in the cross-ties or culvert as would render the company liable. *Little Rock & Ft. S. R. Co. v. Townsend*, 21 *Am. & Eng. R. Cas.* 619, 41 *Ark.* 382.

203. Risks assumed by volunteers.*

—One having no interest in the performance of certain railroad work, but who volunteers to assist in such work, assumes all the risks incident to the work he has so undertaken. *Eason v. Sabine & E. T. R. Co.*, 65 *Tex.* 577.

A bystander who attempts to assist in the switching of cars of a construction train, at the request of the head brakeman left in charge of the switching while the conductor is temporarily absent attending to his usual duties at the station, is a mere volunteer and assumes all risks incident to the situation, especially where such brakeman has no authority to employ additional men, even though the existing force is insufficient. *Church v. Chicago, M. & St. P. R. Co.*, 50 *Minn.* 218, 52 *N. W. Rep.* 647.

If a boy who gets on an engine at the request of the fireman, to assist in getting water, be considered an employé, he assumes the risk of the employment. *Flower v. Pennsylvania R. Co.*, 69 *Pa. St.* 210.—**DIS- TINGUISHING** *Pennsylvania R. Co. v. Books*, 57 *Pa. St.* 339; *Rauch v. Loyd*, 31 *Pa. St.* 358; *Pennsylvania R. Co. v. Kelly*, 31 *Pa.*

St. 372; *Kay v. Pennsylvania R. Co.*, 65 *Pa. St.* 269.

Plaintiff, not being in the employ of defendant, at the request of a watchman attempted to signal and stop a train, and to that end attempted to board the train when in motion, and was seriously injured. The watchman had instructed plaintiff fully as to the proper signals to be given, but no request was made that he should attempt to board the train, nor did it appear that the watchman had any authority to make such a request. *Held*, that the service attempted was voluntarily assumed, and therefore at his own risk. *Blair v. Grand Rapids & I. R. Co.*, 24 *Am. & Eng. R. Cas.* 430, 60 *Mich.* 124, 26 *N. W. Rep.* 855.

204. No recovery for injuries from risks assumed.—

A servant who, in the execution of his master's business, receives an injury from one of the risks incident to the business, cannot hold the master responsible, but must bear the consequences himself. *Carpenter v. Mexican Nat. R. Co.*, 39 *Fed. Rep.* 315, 17 *Wash. L. Rep.* 630. *Woodworth v. St. Paul, M. & M. R. Co.*, 5 *McCrary (U. S.)* 574, 18 *Fed. Rep.* 282. *Prather v. Richmond & D. R. Co.*, 80 *Ga.* 427, 9 *S. E. Rep.* 530. *Chicago, B. & Q. R. Co. v. Clark*, 2 *Ill. App.* 596.—**FOLLOWED IN** *Chicago, B. & Q. R. Co. v. Van Hagen*, 2 *Ill. App.* 602.—*Dandie v. Southern Pac. R. Co.*, 42 *La. Ann.* 686, 7 *So. Rep.* 792. *Renfro v. Chicago, R. I. & P. R. Co.*, 86 *Mo.* 302. *Missouri Pac. R. Co. v. Callbreath*, 66 *Tex.* 526, 1 *S. W. Rep.* 622.—**FOLLOWING** *International & G. N. R. Co. v. Hester*, 64 *Tex.* 401; *Missouri Pac. R. Co. v. Watts*, 63 *Tex.* 549; *Watson v. Houston & T. C. R. Co.*, 58 *Tex.* 434.—*Norfolk & W. R. Co. v. Cottrell*, 31 *Am. & Eng. R. Cas.* 235, 83 *Va.* 512, 3 *S. E. Rep.* 123. *Kelley v. Chicago, M. & St. P. R. Co.*, 5 *Am. & Eng. R. Cas.* 469, 53 *Wis.* 74, 9 *N. W. Rep.* 816.—**QUOTING** *Flannagan v. Chicago & N. W. R. Co.*, 50 *Wis.* 462.—*Priestley v. Fowler*, 3 *M. & W.* 1. *Hutchinson v. York, N. & B. R. Co.*, 5 *Ex.* 343.

For accidental injuries incidental to the service, the employer is not responsible, either at common law or under the statute. *Mobile & O. R. Co. v. George*, 94 *Ala.* 199, 10 *So. Rep.* 145.

In such a case, in order to make a good complaint, it must be averred that the plaintiff had no knowledge of the danger. An allegation that the plaintiff was free

* Volunteer assisting employé assumes risks of employment, see note, 5 *L. R. A.* 792; 22 *Id.* 663.

Liability of company to one injured while volunteering to assist employé, see note, 54 *AM. REP.* 805.

from fault does not take the place of averments showing that the risk was not one knowingly assumed as an incident of his service. *Louisville, N. A. & C. R. Co. v. Corps*, 124 Ind. 427, 24 N. E. Rep. 1046.

205. — unless the risk was increased by company's negligence.—A servant who assumes the discharge of duties, the nature and mode of performance of which are fully known to him, voluntarily subjects himself to risks necessarily incident thereto, and unless such risks were increased by some other fault or negligence of the master, injury resulting therefrom will not be the subject of reparation by the master. *Wallis v. Morgan's L. & T. R. & S. Co.*, 38 La. Ann. 156. *Dandie v. Southern Pac. R. Co.*, 42 La. Ann. 686, 7 So. Rep. 792. *Texas & N. O. R. Co. v. Dillard*, 70 Tex. 62, 8 S. W. Rep. 113.

A railroad company is liable if it exposes its employés to unnecessary dangers, such as might be avoided by reasonable care in the construction of cars and apparatus. The risks of such dangers are not assumed by employés. *O'Neil v. St. Louis, I. M. & S. R. Co.*, 3 McCrary (U. S.) 423, 9 Fed. Rep. 337.

b. Patent Defects, Obvious Dangers, and Known Risks.

206. Statement of the rule.—A servant who knows the condition of the appliances or place in connection with which he is employed, or who in the exercise of ordinary observation ought to have known, and who knows, or ought to have known, the danger to which he may be thereby exposed, is to be deemed, in general, to have taken upon himself the risk. *Doyle v. St. Paul, M. & M. R. Co.*, 41 Am. & Eng. R. Cas. 376, 42 Minn. 79, 43 N. W. Rep. 787. *Drake v. Union Pac. R. Co.*, 2 Idaho 453, 21 Pac. Rep. 560. *Chicago & T. R. Co. v. Simmons*, 11 Ill. App. 147.—**DISTINGUISHING** *Naylor v. Chicago & N. W. R. Co.*, 53 Wis. 661, 11 N. W. Rep. 24; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Money v. Lower Vein Coal Co.*, 55 Iowa 671; *Hughes v. Winona & St. P. R. Co.*, 27 Minn. 137, 6 N. W. Rep. 553; *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Ladd v. New Bedford R. Co.*, 119 Mass. 413.—**WABASH, ST. L. & P. R. Co. v. Thompson, 15 Ill. App. 117. *Louisville, E. & St. L. Con. R. Co. v. Hanning*, 53 Am. & Eng. R. Cas. 452, 131 Ind. 528, 31 N. E. Rep. 187. *Michigan C. R. Co.***

v. Smithson, 1 Am. & Eng. R. Cas. 101, 45 Mich. 212, 7 N. W. Rep. 791.—**DISTINGUISHED IN** *Russell v. Minneapolis & St. L. R. Co.*, 32 Minn. 230. **QUOTED IN** *Thomas v. Missouri Pac. R. Co.*, 109 Mo. 187; *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112.—*Owen v. New York C. R. Co.*, 1 Lans. (N. Y.) 102; *affirmed (?)* 47 N. Y. 670, *mem. Gaffney v. New York & N. E. R. Co.*, 31 Am. & Eng. R. Cas. 265, 15 R. I. 456, 4 N. Eng. Rep. 33, 7 Atl. Rep. 284. *Latremouille v. Bennington & R. R. Co.*, 48 Am. & Eng. R. Cas. 265, 63 Vt. 336, 22 Atl. Rep. 656.

Where a servant enters upon employment from its nature necessarily hazardous, he assumes the usual risks and perils of the service, and also those risks which are apparent to ordinary observation. *Gibson v. Erie R. Co.*, 63 N. Y. 449, 20 Am. Rep. 552; *reversing* 5 Hun 31.—**APPLIED IN** *Williams v. Delaware, L. & W. R. Co.*, 39 Hun 430. **FOLLOWED IN** *Sweeney v. Berlin & J. Envelope Co.*, 101 N. Y. 520, 5 N. E. Rep. 358; *Evans v. Lake Shore & M. S. R. Co.*, 12 Hun 289. **QUOTED IN** *Cowhill v. Roberts*, 71 Hun 127. **REVIEWED IN** *Haas v. Buffalo, N. Y. & P. R. Co.*, 40 Hun 145.—*O'Neal v. Chicago & I. Coal R. Co.*, 132 Ind. 110, 31 N. E. Rep. 669. *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701, 16 Pac. Rep. 146. *Melzer v. Peninsular Car Co.*, 76 Mich. 94, 42 N. W. Rep. 1078.—**QUOTED IN** *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112.—*Fisher v. Chicago & G. T. R. Co.*, 77 Mich. 546, 43 N. W. Rep. 926. *Williams v. Delaware, L. & W. R. Co.*, 41 Am. & Eng. R. Cas. 254, 116 N. Y. 628, 22 N. E. Rep. 1117, 27 N. Y. S. R. 760; *reversing* 43 Hun 633, 6 N. Y. S. R. 872.—**APPLIED IN** *Spencer v. New York C. & H. R. R. Co.*, 51 N. Y. S. R. 386. **QUOTED IN** *Dering v. New York C. & H. R. R. Co.*, 50 N. Y. S. R. 832.—*Bailey v. Rome, W. & O. R. Co.*, 19 N. Y. S. R. 656, 49 Hun 377, 3 N. Y. Supp. 585. *Cowhill v. Roberts*, 71 Hun (N. Y.) 127.—**FOLLOWING** *Williams v. Delaware, L. & W. R. Co.*, 39 Hun 432. **QUOTING** *Gibson v. Erie R. Co.*, 63 N. Y. 449; *De Forest v. Jewett*, 88 N. Y. 264; *Devlin v. Smith*, 25 Hun 208, 89 N. Y. 476.—*Spencer v. New York C. & H. R. R. Co.*, 51 N. Y. S. R. 386, 67 Hun 196, 22 N. Y. Supp. 100.—**APPLYING** *Gibson v. Erie R. Co.*, 63 N. Y. 449; *Powers v. New York, L. E. & W. R. Co.*, 98 N. Y. 274; *Williams v. Delaware, L. & W. R. Co.*, 116 N. Y. 628, 27 N. Y. S. R. 760.

And if he knows of such defects, and is conscious of the extra hazards, the fact that he for a moment forgets their existence, and thereby sustains an injury, will not make the master liable. *Johnston v. Oregon S. L. & U. N. R. Co.*, 23 *Oreg.* 94, 31 *Pac. Rep.* 283.—FOLLOWING *Stone v. Oregon City Mfg. Co.*, 4 *Oreg.* 55; *Hurst v. Burnside*, 12 *Oreg.* 520, 8 *Pac. Rep.* 888.

Thus a company is not liable for the death of an employé, resulting from a collision caused by its failure to provide fences along the line of its road, if the deceased knew of the want of fences. *Sweeney v. Central Pac. R. Co.*, 8 *Am. & Eng. R. Cas.* 151, 57 *Cal.* 15.—FOLLOWED IN *Patton v. Central Iowa R. Co.*, 73 *Iowa* 306, 35 *N. W. Rep.* 149. NOT FOLLOWED IN *Magee v. North Pac. Coast R. Co.*, 78 *Cal.* 430, 20 *Pac. Rep.* 709, 21 *Pac. Rep.* 114.

The above rule applies, although the employer may have promised to remedy the defect, and might have prevented it by properly guarding against it. *Gaffney v. New York & N. E. R. Co.*, 31 *Am. & Eng. R. Cas.* 265, 15 *R. I.* 456, 4 *N. Eng. Rep.* 33, 7 *Atl. Rep.* 284. *Gowen v. Harley*, 56 *Fed. Rep.* 973.

The employé cannot maintain an action against the master merely on the ground that there was a safer mode in which the business might have been conducted, the adoption of which would have prevented the injury. *Simmons v. Chicago & T. R. Co.*, 18 *Am. & Eng. R. Cas.* 50, 110 *Ill.* 340.—FOLLOWING *Naylor v. Chicago & N. W. R. Co.*, 53 *Wis.* 661.—*Pennsylvania Co. v. Backes*, 133 *Ill.* 255, 24 *N. E. Rep.* 563; *affirming* 35 *Ill. App.* 375. *Naylor v. Chicago & N. W. R. Co.*, 5 *Am. & Eng. R. Cas.* 460, 53 *Wis.* 661, 11 *N. W. Rep.* 24.—APPROVED IN *Songstad v. Burlington, C. R. & N. R. Co.*, 38 *Am. & Eng. R. Cas.* 211, 5 *Dak.* 517; *Bryant v. Burlington, C. R. & N. R. Co.*, 66 *Iowa* 305. FOLLOWED IN *Simmons v. Chicago & T. R. Co.*, 110 *Ill.* 340. REVIEWED IN *Howland v. Milwaukee, L. S. & W. R. Co.*, 5 *Am. & Eng. R. Cas.* 578, 54 *Wis.* 226.

A servant assumes the risks caused by the master's negligent manner of conducting the business, if he knew them or they are obvious to one of ordinary understanding. *Bengtson v. Chicago, St. P., M. & O. R. Co.*, 47 *Minn.* 486, 50 *N. W. Rep.* 531.

If the implements or machine be one the danger from using which is apparent, and which does not result from any latent de-

fect, the machine itself being in general use, easy to understand, and requiring but little skill or practice to operate it, one injured in operating it will not be heard to complain that he was not informed of its construction or the danger of using it. *International & G. N. R. Co. v. McCarthy*, 64 *Tex.* 632.

When the servant accepts service, upon being furnished with machinery capable of doing the work required of him, which is ostensibly defective in some particular, by which it is obviously more dangerous than if it were complete and fully suitable, the servant has assumed the increased risk which may reasonably be anticipated from the defect, and no more; and if the defect rendered its use more hazardous than could reasonably have been discoverable by the use of ordinary care, then the master may be in default in the discharge of his duty, and may be liable for the injury produced by said defect in a manner not anticipated. *International & G. N. R. Co. v. Doyle*, 49 *Tex.* 190.

207. Scope and extent of the rule.

—A servant is bound to see patent and obvious defects in appliances furnished him, and assumes all patent and obvious risks, as well as those incident to the business. *Texas & P. R. Co. v. Rogers*, 57 *Fed. Rep.* 378.

A servant is presumed to know of defects in machinery or appliances which are obvious and open to observation. *Davidson v. Southern Pac. Co.*, 44 *Fed. Rep.* 476.

An employé of a railroad company is presumed to know of such dangers and risks as he has opportunity to know of, and unless he informs himself of them he cannot recover for resulting injuries. *St. Louis & S. F. R. Co. v. Marker*, 41 *Ark.* 542.

The conductor of a freight train is charged with knowledge of the kind of cars used in the train of which he has charge; so a conductor is charged with knowledge of the increased danger of running a train that contains a car higher than those in ordinary use, under a bridge. *Derby v. Kentucky C. R. Co.*, (Ky.) 4 *S. W. Rep.* 303.

Knowledge of the danger arising from defective machinery, as well as the existence of the defect, is necessary to bar a recovery by an employé suing a master for injuries resulting from the latter's negligence in furnishing him with such machinery. This rule, however, does not ap-

ply where the defect is so glaring and obvious that a simple knowledge of the defect would imply a knowledge of the danger arising therefrom. *Waldhier v. Hannibal & St. J. R. Co.*, 87 Mo. 37.—QUOTED IN *Worheide v. Missouri C. & F. Co.*, 32 Mo. App. 367.

Plaintiff was engaged with others in repairing a railroad bridge, and was injured by a timber falling on him, as he alleged, by reason of the company failing to employ a sufficient number of men to hoist it. *Held*, that such failure was a patent defect, and plaintiff could not recover. *Texas & P. R. Co. v. Rogers*, 57 Fed. Rep. 378.

208. Limits and exceptions to the

—A servant does not necessarily assume the risks incident to the use of unsafe machinery furnished by his master, because he knows its character and condition; it is also necessary that he should know, or by the exercise of common observation might have known, the risks attending its use. *Russell v. Minneapolis & St. L. R. Co.*, 32 Minn. 230, 20 N. W. Rep. 147.—DISTINGUISHING *Michigan C. R. Co. v. Smithson*, 1 Am. & Eng. R. Cas. 101, 45 Mich. 212; *Hathaway v. Michigan C. R. Co.*, 12 Am. & Eng. R. Cas. 249, 51 Mich. 253; *Toledo, W. & W. R. Co. v. Black*, 88 Ill. 112; *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 Ill. 365; *Toledo, W. & W. R. Co. v. Asbury*, 84 Ill. 429.—DISTINGUISHED IN *Robel v. Chicago, M. & St. P. R. Co.*, 35 Minn. 84. FOLLOWED IN *Hungerford v. Chicago, M. & St. P. R. Co.*, 41 Am. & Eng. R. Cas. 269, 41 Minn. 444, 43 N. W. Rep. 324; *Wuotilla v. Duluth Lumber Co.*, 37 Minn. 153, 33 N. W. Rep. 551, 5 Am. St. Rep. 832.—*Anderson v. Clark*, 155 Mass. 368, 29 N. E. Rep. 589.

As between master and servant, an open, visible risk is such a one as would in an instant appeal to the senses of an intelligent person. It is one so patent that it would be instantly recognized by a person familiar with the business. It is a risk about which there can be no difference of opinion in the minds of intelligent persons accustomed to the service. *Johnston v. Oregon S. L. & U. N. R. Co.*, 23 Oreg. 94, 31 Pac. Rep. 283.

Where, although the defect is apparent, it may require skill and judgment not possessed by ordinary observers, or by the servant, to give knowledge of hazards which may be apprehended therefrom, he does not assume those hazards. *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. Rep. 573, 43 N. Y.

S. R. 887; reversing 31 N. Y. S. R. 982, 10 N. Y. Supp. 521.

A laborer unskilled in railroad building, even if he has aided in repairing defects in a newly constructed road, is not necessarily chargeable with notice of the defective condition of the roadbed. *Colorado Midland R. Co. v. O'Brien*, 48 Am. & Eng. R. Cas. 235, 16 Colo. 219, 27 Pac. Rep. 701.

A baggage master is not presumed to know that defendant's schedules for running trains are defective. *Georgia R. & B. Co. v. Rhodes*, 56 Ga. 645.

The law will not presume because a brakeman, employed as such on the top of a box car, might by inspection have discovered that the cross-ties on the roadbed were rotten and dangerous, that by continuing such employment which carried him over the road he thereby assumed the risk as incident to his work. *Houston & T. C. R. Co. v. McNamara*, 59 Tex. 255.—REVIEWING *Porter v. Hannibal & St. J. R. Co.*, 71 Mo. 66.

Such a presumption will only be indulged against an employé in reference to machinery or appliances which his particular line of duty would require him to inspect or deal with. *Houston & T. C. R. Co. v. McNamara*, 59 Tex. 255. *Bowers v. Union Pac. R. Co.*, 4 Utah 215, 7 Pac. Rep. 251.

But this does not justify carelessness on the part of the employé, as the employer has a right to expect him to be alert to inform himself of existing conditions, and he cannot attack the employer from the shelter of unjustifiable ignorance of the business, machinery, and methods which he is employed to use. *Ragon v. Toledo, A. A. & N. M. R. Co.*, 97 Mich. 265, 56 N. W. Rep. 612.

209. Risk from defective track and grounds.—Trainmen have the right to assume that an ordinarily safe track has been provided, and are held to assume only the dangers resulting from such defects therein as are actually known to them, and such as are so patent as to make it negligence on their part not to see them. *Fl. Worth & D. C. R. Co. v. Wilson*, 3 Tex. Civ. App. 583, 24 S. W. Rep. 686.

Where a brakeman in a railroad yard knows that the guard rail of a switch is not blocked, he must be regarded as having assumed the danger of catching his foot in the same and being injured. *Haas v. Buffalo, N. Y. & P. R. Co.*, 40 Hun (N. Y.) 145.—APPLYING *Lovejoy v. Boston & L. R.*

Corp., 125 Mass. 79. REVIEWING *Gibson v. Erie R. Co.*, 63 N. Y. 449.—REVIEWED IN *Spencer v. New York C. & H. R. R. Co.*, 51 N. Y. S. R. 386.—*Mayer v. Chicago, R. I. & P. R. Co.*, 8 Am. & Eng. R. Cas. 527, 63 Iowa 562, 14 N. W. Rep. 340, 19 N. W. Rep. 680.—DISTINGUISHED IN *Kuhns v. Wisconsin, I. & N. R. Co.*, 70 Iowa 561; *Robel v. Chicago, M. & St. P. R. Co.*, 35 Minn. 84.—*Gleason v. New York & N. E. R. Co.*, 159 Mass. 68, 34 N. E. Rep. 79.—DISTINGUISHING *Hannah v. Connecticut River R. Co.*, 154 Mass. 529.

A brakeman employed by a railroad company in a switch yard, who has been working for a long time over standard open frogs, and who has had opportunity to become familiar with the obvious danger thereof, assumes the risk incurred concerning them, and the company is not liable for his death resulting from his catching his foot in such frog and being run over, although the frog could have been made safe by blocking it. *Richmond & D. R. Co. v. Risdon*, 48 Am. & Eng. R. Cas. 244, 87 Va. 335, 12 S. E. Rep. 786.

A person employed as a brakeman on a section of four miles of railroad, and notified that there were stone piles beside the road, and so near to it that a person on the side of a car passing them would be struck, is to be deemed to have assumed the risk from that cause, although the precise location of the danger was not stated to him. *Smith v. Winona & St. P. R. Co.*, 41 Am. & Eng. R. Cas. 289, 42 Minn. 87, 43 N. W. Rep. 968.

A brakeman of several months' experience was killed while attempting to make a coupling, by stepping into an open ditch under the track. The ditch was plainly visible and well known to the brakeman. *Held*, that the defect in the track was a patent one, the danger of which the brakeman must be regarded as having assumed. *De Forest v. Jewett*, 19 Hun (N. Y.) 509.

Plaintiff's intestate was employed to stand on an elevated railway near where men were at work, to signal trains, and was injured just after flagging one train, by another going in the opposite direction, and the company was charged with negligence in not providing a platform outside of the tracks on which to stand. *Held*, that the position was known to be dangerous, and that the intestate assumed the obvious risks attending it. *Kennedy v. Manhattan R.*

Co., 33 Hun (N. Y.) 457; *affirmed* (P) 102 N. Y. 742, *mem.*—APPROVING *Hough v. Texas & P. R. Co.*, 100 U. S. 213. DISTINGUISHING *Sheehan v. New York C. & H. R. R. Co.*, 91 N. Y. 332; *Plank v. New York C. & H. R. R. Co.*, 60 N. Y. 607. QUOTING *Gibson v. Erie R. Co.*, 63 N. Y. 449.—APPLIED IN *Cowhill v. Roberts*, 71 Hun 127. DISTINGUISHED IN *Hogan v. Smith*, 31 N. Y. S. R. 798. REVIEWED IN *Hogan v. Hendersen*, 2 N. Y. S. R. 119.

A brakeman was leaning out to throw off a defective brake, while his train was in motion, and struck the wing fence of a cattle-guard and was injured. He testified that he did not know of this particular cattle-guard and how close it was to the track, but it appeared that he did know of a large number of other cattle-guards along the track which were all constructed the same distance from it. *Held*, that he must be presumed as having known of the one injuring him, and as having assumed the risk. *Missouri Pac. R. Co. v. Somers*, 71 Tex. 700, 9 S. W. Rep. 741.—FOLLOWED IN *Missouri Pac. R. Co. v. Somers*, 78 Tex. 439. REVIEWED IN *Fordyce v. Culver*, 2 Tex. Civ. App. 569.

210. Risk from defective structures—Fences.—(1) *In general.*—If an employé accepts service with knowledge of the character and position of structures from which employés might be liable to receive injury, he cannot call upon his master to make alterations to secure greater safety, or in case of injury hold him liable. *Gibson v. Erie R. Co.*, 63 N. Y. 449, 20 Am. Rep. 552; *reversing* 5 Hun 31.—APPLIED IN *Wright v. Delaware & H. Canal Co.*, 40 Hun 343. APPROVED IN *Carbine v. Bennington & R. R. Co.*, 61 Vt. 348. FOLLOWED IN *Ryan v. Long Island R. Co.*, 51 Hun 607. NOT FOLLOWED IN *Chicago, M. & St. P. R. Co. v. Carpenter*, 56 Fed. Rep. 451. QUOTED IN *Kennedy v. Manhattan R. Co.*, 33 Hun 457.—*De Forest v. Jewett*, 8 Am. & Eng. R. Cas. 495, 88 N. Y. 264; *affirming* 23 Hun 490.—DISTINGUISHING *Plank v. New York C. & H. R. R. Co.*, 60 N. Y. 607. FOLLOWING *Gibson v. Erie R. Co.*, 63 N. Y. 449.—APPLIED IN *Williams v. Delaware, L. & W. R. Co.*, 39 Hun 430. DISTINGUISHED IN *Murtaugh v. New York C. & H. R. R. Co.*, 23 N. Y. S. R. 636. FOLLOWED IN *Sweeney v. Berlin & J. Envelope Co.*, 101 N. Y. 520, 5 N. E. Rep. 358. QUOTED IN *Cowhill v. Roberts*, 71 Hun

127.—*Ferguson v. Fall Brook Coal Co.*, 4 N. Y. S. R. 423.—REVIEWED *Appel v. Buffalo*, N. Y. & P. R. Co., 2 N. Y. S. R. 257.

(2) *Illustrations*.—Cattle strayed upon a railroad track by reason of a defective fence which the company was bound to maintain, and a collision threw the train from the track and injured a brakeman. At the trial he testified that he did not know of any defect in the fence, but there was other evidence tending to show that he knew that cattle had previously entered upon the track. *Held*, that this did not make a non-suit proper. He might not have known but the company had taken effective measures to prevent their coming on the track again. *Magee v. North Pac. Coast R. Co.*, 78 Cal. 430, 21 Pac. Rep. 114; *reversing on rehearing* 20 Pac. Rep. 709.

In such case it was not the duty of the brakeman to inquire whether the company had repaired its fences. He had a right to assume that it would do so. A servant is only charged with actual notice as to matters concerning which it is his duty to inquire. *Magee v. North Pac. Coast R. Co.*, 78 Cal. 430, 21 Pac. Rep. 114; *reversing on rehearing* 20 Pac. Rep. 709.

Proof that an employé of a railroad company was killed while acting as one of a volunteer fire company, by the explosion of a gas tank belonging to the company, over which there was a tar roof, a metal roof being usual and safer in such cases; that the reservoirs were some 12 feet from the fire, with a wall between, and covered by a wooden structure—will not support a verdict against the company for wilful neglect, where it appears that the person killed was familiar with the premises. *Collins v. Cincinnati, N. O. & T. P. R. Co.*, (Ky.) 18 S. W. Rep. 11.

An engineer came in contact with the signal post while leaning out of his locomotive and looking back for a signal. The post was only three feet and eight inches from the track. It appeared that he knew of certain signal posts along the road, but had never noticed the one injuring him, and had looked forward a moment before but did not notice anything. There were other obstructions along the road ahead about the same distance from the track that the signal post stood. *Held*, that he had assumed the risk from the signal post thus set and he could not recover. *Lovejoy v. Boston & L. R. Corp.*, 125 Mass. 79.—APPLIED IN *Haas* 5 D. R. D.—10.

v. Buffalo, N. Y. & P. R. Co., 40 Hun (N. Y.) 145. REVIEWED IN *Dalton v. Atlantic*, M. & O. R. Co., 4 Hughes (U. S.) 180.

The risk of collision with a projecting awning at a station, to a brakeman while climbing a car from another road, higher than others and having a side ladder, is assumed by him, both at common law and under the Massachusetts Employers' Liability Act, making an employer liable for injuries to an employé from any defect in the ways, works, or machinery which has not been discovered or remedied because of the negligence of the employer, where he is acquainted with the awning and familiar with the kind of cars, and the condition of the awning has not been changed for the worse during the time of his employment. *Fisk v. Fitchburg R. Co.*, 158 Mass. 238, 33 N. E. Rep. 510.

P., plaintiff's intestate, who was in the employ of the defendant as conductor of a freight train, while upon his train was struck and killed by the projecting roof of a depot building. P. had lived for many years at the place of the injury, and had been for a long time familiar with the road, passing over it daily. It did not appear that any change had been made in the building or in the road after he entered upon his employment. In an action to recover damages for the death thus caused—*held* (Miller, J., dissenting), that as the peculiar character of the roof and its near approach to passing cars were as patent to the deceased as to defendant's officers or agents, he assumed the risk when he entered upon the employment, and defendant was not liable. *Gibson v. Erie R. Co.*, 63 N. Y. 449, 20 Am. Rep. 552; *reversing* 5 Hun 31.—APPLIED IN *Spencer v. New York C. & H. R. Co.*, 51 N. Y. S. R. 386. FOLLOWED IN *De Forest v. Jewett*, 8 Am. & Eng. R. Cas. 495, 88 N. Y. 264. NOT FOLLOWED IN *Baltimore & O. R. Co. v. Rowan*, 23 Am. & Eng. R. Cas. 390, 104 Ind. 88. REVIEWED IN *Gorman v. McArdle*, 51 N. Y. S. R. 248; *Dalton v. Atlantic, M. & O. R. Co.*, 4 Hughes (U. S.) 180.

The plaintiff, a brakeman, jumped upon a moving train, and while climbing up the ladder on the side of the car, was struck by a pile of lumber near the track. He knew that the lumber was piled there. It was unloaded and piled there by the direction of the station agent. *Held*, that plaintiff had assumed the risks incident to his employ-

ment, and cannot recover for the voluntary assumption of a known risk. *Gaffney v. New York & N. E. R. Co.*, 31 *Am. & Eng. R. Cas.* 265, 15 *R. I.* 456, 4 *N. Eng. Rep.* 33, 7 *Atl. Rep.* 284.—DISTINGUISHING *Ferren v. Old Colony R. Co.*, 143 *Mass.* 197, 9 *N. E. Rep.* 608, 3 *N. Eng. Rep.* 330.

211. Risks from defective appliances, machinery, etc.—A servant assumes the risks of exposure incidental to the use of obviously dangerous machinery as between himself and the company. *Cumberland & P. R. Co. v. State*, 44 *Md.* 283, 45 *Md.* 229. *Anderson v. Minnesota & N. W. R. Co.*, 38 *Am. & Eng. R. Cas.* 206, 39 *Minn.* 523, 41 *N. W. Rep.* 104. *Hefferen v. Northern Pac. R. Co.*, 45 *Minn.* 471, 48 *N. W. Rep.* 1, 526. *Stoeckman v. Terre Haute & I. R. Co.*, 15 *Mo. App.* 503.—QUOTING *Porter v. Hannibal & St. J. R. Co.*, 71 *Mo.* 66.—*Evans v. Lake Shore & M. S. R. Co.*, 12 *Hun (N. Y.)* 289.—FOLLOWING *Gibson v. Erie R. Co.*, 63 *N. Y.* 449.—APPLIED IN *Williams v. Delaware, L. & W. R. Co.*, 39 *Hun* 430; *Wright v. Delaware & H. Canal Co.*, 40 *Hun* 343.—*Thorn v. New York City Ice Co.*, 11 *N. Y. S. R.* 845, 46 *Hun* 497, *mem.*

Obvious imperfections in methods or machinery, existing at the time of the employment, cannot be made the basis of a liability in favor of an employé who suffers an injury in the course of his employment; for the employer has a right to have and use imperfect methods and tools, and to ask others to enter his employ to aid him in such use, and in so doing he does not undertake to insure the employé. *Ragon v. Toledo, A. A. & N. M. R. Co.*, 97 *Mich.* 265, 56 *N. W. Rep.* 612. *Cagney v. Hannibal & St. J. R. Co.*, 69 *Mo.* 416.—FOLLOWING *Smith v. St. Louis, K. C. & N. R. Co.*, 69 *Mo.* 32.—*Gulf, C. & S. F. R. Co. v. Johnson*, 83 *Tex.* 628, 19 *S. W. Rep.* 151. *Hogelev. Wilson*, 5 *Wash.* 160, 31 *Pac. Rep.* 469.

An employé may contract to use defective machinery, and where he knows of the defect, and uses the machinery voluntarily, the law warrants the inference that he assumes the risks incident to such use. *Ragon v. Toledo, A. A. & N. M. R. Co.*, 97 *Mich.* 265, 56 *N. W. Rep.* 612. *Porter v. Hannibal & St. J. R. Co.*, 2 *Am. & Eng. R. Cas.* 44, 71 *Mo.* 66, 36 *Am. Rep.* 454.—QUOTED IN *Stoeckman v. Terre Haute & I. R. Co.*, 15 *Mo. App.* 503. REVIEWED IN *Houston & T. C. R. Co. v. McNamara*, 59

Tex. 255.—*Rocka v. Ocean Steamship Co.*, 3 *Misc. (N. Y.)* 526.

And he cannot call upon the employer to make alterations to secure greater safety. *Hickey v. Taaffe*, 105 *N. Y.* 26.—FOLLOWED IN *Oszkoscil v. Eagle Pencil Co.*, 25 *J. & S. (N. Y.)* 217.—*Sweeney v. Berlin & J. Envelope Co.*, 101 *N. Y.* 520, 5 *N. E. Rep.* 358.—DISTINGUISHING *Clarke v. Holmes*, 7 *H. & N.* 937; *Kain v. Smith*, 89 *N. Y.* 375. FOLLOWING *De Forest v. Jewett*, 88 *N. Y.* 264; *Hayden v. Smithville Mfg. Co.*, 29 *Conn.* 548; *Gibson v. Erie R. Co.*, 63 *N. Y.* 449.

In case of a patent defect, or such as the servant, if ordinarily observant, would have discovered by his ordinary use of the machinery or implement, his opportunity to know would be held as knowledge, whether in fact he knew of the defect or not. *Porter v. Hannibal & St. J. R. Co.*, 2 *Am. & Eng. R. Cas.* 44, 71 *Mo.* 66, 36 *Am. Rep.* 454.

A railroad employé does not assume the risk of injury from dangerous machinery, unless he knows the danger; and he cannot be held to have assumed the risk unless the character of the danger and circumstances are such as to show that he ought to have known and appreciated it. *Scanton v. Boston & A. R. Co.*, 38 *Am. & Eng. R. Cas.* 48, 147 *Mass.* 484, 18 *N. E. Rep.* 209, 7 *N. Eng. Rep.* 141.—APPROVED IN *Boss v. Northern Pac. R. Co.*, 2 *N. Dak.* 128.

The insufficient size of a stick to withstand the force applied is a matter open and obvious to the person using it, and the fact that it might break is a risk incident to the business in which he is engaged and one which he assumed. *Bohn v. Chicago, R. I. & P. R. Co.*, 106 *Mo.* 429, 17 *S. W. Rep.* 580.

An employé was killed while working near a rapidly revolving shaft, by coming in contact with it. *Held*, that he must be taken to have contracted with reference to the danger when he entered the company's service. *Van Horn v. Boston, H. T. & W. R. Co.*, 4 *N. Y. S. R.* 782, 42 *Hun* 654, *mem.*; *affirmed* in 113 *N. Y.* 634, *mem.*, 20 *N. E. Rep.* 878, 22 *N. Y. S. R.* 994.

212. Risk from defective engine or car.—A yard switchman, when he enters the company's service, assumes the risk of injuries resulting from such visible defects as a draw-head, on a locomotive, which is too short to allow sufficient space in which to stand when coupling the locomotive to

cars. *Brooks v. Northern Pac. R. Co.*, 47 Fed. Rep. 687.

The failure of a company to provide suitable cars and a sufficient complement of men does not entitle an employé, who has been injured through the negligence of a fellow-servant, to recover damages against the company, where it appears that he knowingly assumed the risk, and that no danger was increased or new danger accrued after the employment. *Long v. Coronado R. Co.*, 96 Cal. 269, 31 Pac. Rep. 170.—FOLLOWING *Martin v. California C. R. Co.*, 94 Cal. 326.

A railroad employé assumes the danger of his clothing catching upon a threaded screw projecting from the handle of a hand-car beyond the end of the nut, where he is aware of the fact and has ample opportunity of knowing the danger, and handles so constructed are a well-known device in use upon hand-cars, although there are safer appliances for the purpose. *Carey v. Boston & M. R. Co.*, 158 Mass. 228, 33 N. E. Rep. 512.—QUOTING *Goodnow v. Walpole Emery Mills*, 146 Mass. 261.

Where the plaintiff is shown to have been a railroad hand of several years' experience, he cannot recover damages for injuries caused by the hand-car upon which he was traveling leaving the track by reason of the lightness of its construction, the danger of traveling upon such car being one that should have been known to the plaintiff by the exercise of his judgment, and the risk being one of the risks of employment assumed by him. *Gulf, C. & S. F. R. Co. v. Williams*, 39 Am. & Eng. R. Cas. 292, 72 Tex. 159, 12 S. W. Rep. 172.

A locomotive engineer was killed in running his engine onto a burned bridge. It was alleged that the bridge had been set on fire by a previous defective engine as it passed over it; but there was evidence that the engineer himself had driven an engine of the same design and was familiar with its construction. *Held*, that an instruction to the effect that when the engineer took employment he assumed to understand an engine, and knew the dangers attending its use, and was presumed to have taken the risk of being injured by any peculiarity in the construction of the engine, should have been given. *Texas & P. R. Co. v. Minnick*, 57 Fed. Rep. 362.

213. Risk from the management and operation of trains.—There can be

no recovery for the death of an employé who was thrown to the ground and killed by the sudden stopping of the train, the alleged negligence being a failure on the part of the engineer to give the proper signals to stop, where it appears that the deceased fully knew where the train would stop. *Simmons v. Louisville & N. R. Co.*, (Ky.) 18 S. W. Rep. 1024.

A railroad laborer riding on a hand-car with fellow-servants, who injured his hand while aiding them in lifting the car off the track to avoid an approaching train, cannot recover on the ground that the company did not furnish a sufficient number of men to handle the car, if its weight and the number of men necessary to handle it were matters open to common observation, since in such case he assumed the risk as an incident to the employment. *St. Louis, A. & T. R. Co. v. Lemon*, 83 Tex. 143, 18 S. W. Rep. 331.

The dangers incident to the moving of cars by "staking off" are so patent to observation that a servant undertaking such work necessarily assumes the risk, and cannot hold his employer liable for a failure to warn him of the danger. *Watts v. Hart*, 7 Wash. 178, 34 Pac. Rep. 423, 771.

A brakeman, knowing that to turn a switch was incident to his employment, knowing its location and the manner of operating it, and knowing also the manner of making a flying switch, undertook, while aware that the cars were approaching, to turn the switch, and before he could get out of the way, he was struck and injured. *Held*, that he could not maintain an action against the company for the injuries. *Coombs v. Fitchburg R. Co.*, 53 Am. & Eng. R. Cas. 353, 156 Mass. 200, 30 N. E. Rep. 1140.

After some eight years of service about railroad yards, the plaintiff's intestate was crossing a track at night and was struck and killed by a slowly moving car without a light, when there was much surrounding noise in the yard. It appeared that the intestate knew the manner of doing business in the yard, and that no lights were carried, nor warning given of approaching engines or cars; and it appeared that he could have seen the car if he had looked. *Held*, that a nonsuit was properly granted. *Crouse v. New York C. & H. R. R. Co.*, 53 N. Y. S. R. 558, 23 N. Y. Supp. 1100, 70 Hun 37.

214. Risk from improper loading

of cars.—Where a brakeman attempts to couple a car which is so loaded that the lumber which it contains projects over the end of it so as to endanger the process of coupling, and the conductor knew or might have known that the car was thus improperly loaded, but it is not shown that he ordered the brakeman to attempt to make the coupling, the brakeman must be deemed to have observed the danger for himself, and the company is not liable for damages for fatal injuries received while attempting to couple the cars. *Brice v. Louisville & N. R. Co.*, (Ky.) 38 *Am. & Eng. R. Cas.* 38, 9 *S. W. Rep.* 288.

A brakeman was injured while coupling cars that were loaded with iron projecting over the ends. The evidence showed that the brakeman had been employed for two years, during which time it had been customary to load cars in the same way, and that no accident had happened. It appeared that the brakeman was perfectly familiar with the manner of loading cars, and there was expert evidence tending to show that cars so loaded were constantly being coupled without accident. *Held*, that this was a hazard which the brakeman assumed when he entered the service of the company. *Wabash, St. L. & P. R. Co. v. Deardorff*, 14 *Ill. App.* 401.

Plaintiff, a switchman, was injured while coupling a car loaded with iron rails so as to project beyond the ends of the car. Plaintiff was an experienced switchman, and he and his fellow-servants in the yard were authorized, when a car was received which was thought to be loaded so as to be dangerous, to report it to the foreman, whose duty it was to make it safe. When the car in question arrived, the foreman uncoupled it, and after it was shifted sent it to plaintiff to be coupled again; but there was no other evidence of notice to the foreman of the dangerous way in which the car was loaded. As the car approached plaintiff he noticed that the rails projected, but did not notice that they projected far enough to be dangerous. *Held*, that there was no risk imposed more than was usual in the business, and there was not sufficient evidence of negligence to find the company guilty. *Scott v. Oregon R. & N. Co.*, 28 *Am. & Eng. R. Cas.* 414, 14 *Oreg.* 211, 13 *Pac. Rep.* 98. *Mexican C. R. Co. v. Shean*, (Tex.) 18 *S. W. Rep.* 151.—APPROVING

Galveston, H. & S. A. R. Co. v. Lempe, 59 *Tex.* 19.

A piece of coal fell from a tender and injured a track-walker. His own evidence showed that he was familiar with how the coal was loaded on tenders, and had previously seen pieces fall to the track. *Held*, that he must be deemed as having assumed the risk. *Schultz v. Chicago & N. W. R. Co.*, 28 *Am. & Eng. R. Cas.* 404, 67 *Wis.* 616, 31 *N. W. Rep.* 321, 58 *Am. Rep.* 881.

215. Risk from danger while coupling cars.—A brakeman injured in coupling cars with different styles of coupling from those in use, owing to the failure of the company to warn him of the increased hazard, is not entitled to recover, where the risk is apparent and incident to his employment. *Louisville & N. R. Co. v. Boland*, 53 *Am. & Eng. R. Cas.* 169, 96 *Ala.* 626, 11 *So. Rep.* 667.—QUOTED IN *Holland v. Tennessee C., I. & R. Co.*, 91 *Ala.* 444, 8 *So. Rep.* 524. REVIEWED IN *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 *Ill.* 365.

Where a switchman is shown to be familiar with the construction of cars that he is called upon to couple, and knows that the company handles cars belonging to other companies, which differ in structure, which increases the risk of injury in coupling, he must be deemed as having assumed the risk attending such couplings. *Kohn v. McNulta*, 147 *U. S.* 238, 13 *Sup. Ct. Rep.* 298. *Michigan C. R. Co. v. Smithson*, 1 *Am. & Eng. R. Cas.* 101, 45 *Mich.* 212, 7 *N. W. Rep.* 791.—DISTINGUISHED IN *Louisville, N. A. & C. R. Co. v. Frawley*, 28 *Am. & Eng. R. Cas.* 308, 110 *Ind.* 18. QUOTED IN *Darracott v. Chesapeake & O. R. Co.*, 31 *Am. & Eng. R. Cas.* 157, 83 *Va.* 288.

In constructing a branch of one of the principal railroad lines of Kansas, dirt ballast was used between the tracks of the road, the dirt or filling not extending to the end of the ties, but the roadbed was raised at the centre, sloping downward toward the end of the ties, leaving no dirt under them. A head brakeman, familiar with the construction of the roadbed, embankment, and track, and having control of the movement of the train, just after dark, when the roadbed was covered with snow which had fallen after some sleet, directed the engineer to back the train up, and, while the train was moving slowly backward, he stepped in between two cars to uncouple them, and

Lempe, 59

der and in-
n evidence
th how the
ad had pre-
-ack. *Held*,
ng assumed
N. W. R.
04, 67 Wis.
Rep. 881.
er while
injured in
les of coup-
o the failure
he increased
r, where the
his employ-
u. *Boland*, 53
1, 626, 11 So.
and v. Ten-
44, 8 So. Rep.
olis, B. & W.

own to be
of cars that
1 knows that
ging to other
cture, which
coupling, he
med the risk
Kohn v. Mc-
Cl. Rep. 298.
on, 1 Am. &
12, 7 N. W.
N Louisville,
ey, 28 Am. &
QUOTED IN
D. R. Co., 31
a. 288.

of one of the
nsas, dirt bal-
s of the road,
nding to the
ed was raised
rd toward the
t under them.
with the con-
ankment, and
the movement
hen the road-
which had fallen
e engineer to
the train was
stepped in be-
le them, and

slipped and fell with his knee across the rail. In this condition he was run over and his knee crushed. Subsequently his injured leg was amputated; soon after he died. *Held*, that no negligence can be imputed to the company. *Clark v. Missouri Pac. R. Co.*, 48 Kan. 654, 29 Pac. Rep. 1138.

A brakeman had his arm crushed in trying to couple to another car a caboose the draw-bar of which was some six inches below that of the other car, and of cars generally. The caboose had been in that condition for a month, as the brakeman himself knew, and it had been reported for repairs; but the fact that the draw-bars were not on the same level must have been apparent to any one attempting to couple the cars, if he used his eyes. *Held*, that he could not recover. *Brewer v. Flint & P. M. R. Co.*, 56 Mich. 620, 23 N. W. Rep. 440.

c. Latent Defects, Dangers not Obvious, and Unknown Risks.

216. Generally.*—It is the duty of the master to search for latent defects in appliances furnished the servant to work with that would render them unsafe; but the servant is required to notice only such defects as are patent to ordinary observation. *Little Rock, M. R. & T. R. Co. v. Leverett*, 28 Am. & Eng. R. Cas. 459, 48 Ark. 333, 3 S. W. Rep. 50. *Gutridge v. Missouri Pac. R. Co.*, 105 Mo. 520, 16 S. W. Rep. 943. *Lofrano v. New York & Mt. V. Water Co.*, 29 N. Y. S. R. 557, 8 N. Y. Supp. 717. *Missouri Pac. R. Co. v. Lehmborg*, 75 Tex. 61, 12 S. W. Rep. 838.

Where a person is engaged in a dangerous employment the presumption of fact arises that he has knowledge of the ordinary perils of such employment; but there can be no presumption of knowledge of special dangers arising from a peculiar and exceptional state of affairs. *Whalen v. Illinois & St. L. R. & C. Co.*, 16 Ill. App. 320.

An inexperienced servant does not assume the risk of perils which he knows not of, and which are not called to his attention, but of such only as he knows, or by the exercise of ordinary care ought to know. *Campbell v. Eveleth*, 83 Me. 50, 21 Atl. Rep. 784.

217. Defect in track.—A brakeman

* How far servant may rely upon superior knowledge of master concerning risks, see note, 24 AM. ST. REP. 320.

who is injured by reason of the unsafe condition of the track is not bound to know of the unsafe condition. It is not in the line of his duty to see to the track; and he is not charged with knowledge where the defect is not so palpable that it might have been seen and known by him. *Pennsylvania R. Co. v. Zink*, 126 Pa. St. 288, 17 Atl. Rep. 614.

A knowledge of facts which involve a latent danger does not imply a knowledge of the danger itself; thus, where a young and inexperienced servant employed in coupling cars has his foot caught by an unblocked guard rail, and is run over and killed by a moving train, an instruction that his knowledge of the existence of the unblocked rail implied a knowledge and assumption of the attendant danger, was erroneous. *Davis v. St. Louis, I. M. & S. R. Co.*, 44 Am. & Eng. R. Cas. 690, 53 Ark. 117, 13 S. W. Rep. 801.

218. Defects in appliances and machinery.—Latent defects in machinery or other appliances are not a part of the ordinary risks which an employé assumes as incident to his employment. *Clowers v. Wabash, St. L. & P. R. Co.*, 21 Mo. App. 213.—MODIFYING *Gibson v. Pacific R. Co.*, 46 Mo. 169.—*Carpenter v. Mexican Nat. R. Co.*, 39 Fed. Rep. 315, 17 Wash. L. Rep. 630. *Galveston, H. & S. A. R. Co. v. Lempe*, 11 Am. & Eng. R. Cas. 201, 59 Tex. 19.—APPROVING *Naylor v. Chicago & N. W. R. Co.*, 53 Wis. 661. REVIEWING *Patterson v. Pittsburg & C. R. Co.*, 76 Pa. St. 389; *Mayes v. Chicago, R. I. & P. R. Co.*, 63 Iowa 562, 27 Alb. L. J. 24.—APPROVED IN *Songstad v. Burlington, C. R. & N. R. Co.*, 38 Am. & Eng. R. Cas. 211, 5 Dak. 517. FOLLOWED IN *Ft. Worth & D. C. R. Co. v. Wilson*, 3 Tex. Civ. App. 583.

It is the duty of a servant to use reasonable care to inform himself in respect to the hazards to which he may be exposed, but unless the risks are patent he is not under the same obligation to know the nature and extent thereof as is the master. And where the danger is not patent, and the machinery which he is called to use is in charge of a superior servant, he has a right to rely on the judgment of such superior. *McDonald v. Chicago, St. P., M. & O. R. Co.*, 41 Minn. 439, 43 N. W. Rep. 380.

An employé does not assume the risks arising from using defective machinery, where the defect is due to its internal con-

struction, and is not visible and is unknown to the employé. *So held*, where an employé was injured by the bursting of an emery wheel, which was apparently safe. *Murtough v. New York C. & H. R. R. Co.*, 23 N. Y. S. R. 636, 3 N. Y. Supp. 483.—DIS-
TINGUISHING *De Forest v. Jewett*, 88 N. Y. 269.

Plaintiff was injured, while engaged in the construction of a track, by the breaking of a hammer which was furnished him for use. There was no patent defect in the hammer, and neither the company nor its agents knew of any defect. *Held*, that plaintiff could not recover. *Georgia R. & B. Co. v. Nelms*, 39 Am. & Eng. R. Cas. 355, 83 Ga. 70, 9 S. E. Rep. 1049, 29 Cent. L. J. 352.—DISTINGUISHED IN *Central R. & B. Co. v. Ataway*, 90 Ga. 656.

219. Defective brakes.—A brakeman is bound to exercise reasonable and ordinary care to avoid injuries to himself; and if the brakes on the cars were defective and he knew, or might have known by ordinary attention, their condition, and thus exposed himself to danger, he cannot recover for an injury which he receives; but he is not required to inspect the brakes to see if there are latent or hidden defects about them. *Carpenter v. Mexican Nat. R. Co.*, 39 Fed. Rep. 315, 17 Wash. L. Rep. 630.—FOLLOWED IN *Little Rock & M. R. Co. v. Moseley*, 56 Fed. Rep. 1009.

Where a defect in a brake is not discoverable by a brakeman, except by stooping down and looking under the car, such defect is not of so obvious a nature as to charge the brakeman with the assumption of risks arising from its use. *Louisville, N. A. & C. R. Co. v. Buck*, 38 Am. & Eng. R. Cas. 152, 116 Ind. 566, 19 N. E. Rep. 453, 2 L. R. A. 520, 28 Am. L. Reg. 148.

A train was allowed to run down a grade when the track was covered with a heavy frost, and became unmanageable, left the track, and killed a brakeman. After the accident it was found that some of the brake-shoes had oil on them, which would tend to lessen the friction and grip of the brake. *Held*, this was a risk which the brakeman did not assume. (Per Hatch, J.) *Wooden v. Western N. Y. & P. R. Co.*, 46 N. Y. S. R. 77; see 43 N. Y. S. R. 218.

220. Defective engine.*—For in-

* Injury to employé caused by latent defect in engine. Instruction as to duty and liability of company, see 53 AM. & ENG. R. CAS. 244, *abstr.*

juries suffered from the explosion of an engine, caused by a latent defect which was not visible or capable of discovery by the closest inspection from within or without, and which was in fact not known to the railroad company or any of its servants, the railroad company is not liable to an action at the suit of a workman who is injured, unless it was guilty of negligence in failing to discover the defect. *Louisville & N. R. Co. v. Allen*, 28 Am. & Eng. R. Cas. 514, 78 Ala. 494.

221. Employe need not search for latent defects.—It is not incumbent upon the servant to search for latent defects in machinery or implements furnished him by his employer, but he has, without any investigation, the right to assume that they are safe and sufficient for the purpose. *Porter v. Hannibal & St. J. R. Co.*, 2 Am. & Eng. R. Cas. 44, 71 Mo. 66, 36 Am. Rep. 454. *Covey v. Hannibal & St. J. R. Co.*, 27 Mo. App. 170. *Burton v. Missouri Pac. R. Co.*, 32 Mo. App. 455. *Goodrich v. New York C. & H. R. R. Co.*, 116 N. Y. 398, 22 N. E. Rep. 397. *Missouri Pac. R. Co. v. Crenshaw*, 71 Tex. 340, 9 S. W. Rep. 262.

While the servant is not bound to search for latent defects, he must take notice of those which are open to his observation, and of which he has knowledge; and if, with such information, he continues to use the implement, he does so at his own risk, as to injuries arising from such known defects. *Covey v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 382, 86 Mo. 635.

It was not error to refuse an instruction that plaintiff could not recover unless it appeared that "plaintiff did not know of the defect and could not have known it by exercising care." Such charge does not indicate whether the ordinary care required of an employé was to observe what was patent, or the care of an inspection made to pass upon the condition of the machinery as fit or unfit for the use required. *Missouri Pac. R. Co. v. Crenshaw*, 71 Tex. 340, 9 S. W. Rep. 262.

222. Defects which company was unable to detect.—The rule requiring an employer to furnish employés with a reasonably safe place in which to work does not make the employer an insurer against injury to his employés, caused by the breaking of machinery or the explosion of a boiler while in use by the employé, provided such machinery is apparently in a safe condition

losion of an
ect which was
covery by the
n or without,
known to the
servants, the
e to an action
who is injured,
ence in failing
sville & N. R.
R. Cas. 514, 78

ot search for
cumbent upon
ent defects in
nished him by
without any in-
ume that they
the purpose.
R. Co., 2 Am.
5, 36 Am. Rep.
St. J. R. Co., 27
ssouri Pac. R.
h v. New York
398, 22 N. E.
Co. v. Crenshaw,
2.

ound to search
take notice of
is observation,
ledge; and if,
continues to use
t his own risk,
uch known de-
St. J. R. Co., 28
Mo. 635.

an instruction
ver unless it ap-
ot know of the
known it by ex-
e does not indi-
e required of
what was patent,
made to pass
machinery as fit
red. *Missouri*
Tex. 340, 9 S.

company was
rule requiring
employés with a
ch to work does
insurer against
ed by the break-
losion of a boiler
provided such
a safe condition

and the injury results from a latent weakness or a defect unknown to the employer, and one which the exercise of ordinary care and skill by the employer would not enable him to detect or guard against. An accident happening under such circumstances must be regarded as one of the risks incident to the employment which the employé assumes. *Racine v. New York C. & H. R. R. Co.*, 70 Hun 453, 53 N. Y. S. R. 680, 24 N. Y. Supp. 388.

When the undisputed evidence shows that the most careful inspection of machinery demanded by the law would not have discovered the defect in a brake-rod by which an employé was injured, and there being no proof that such defect was known, the employé is not entitled to recover damages for such injuries. *Louisville & N. R. Co. v. Campbell*, 97 Ala. 147, 12 So. Rep. 574.—QUOTING *Alabama G. S. R. Co. v. Arnold*, 84 Ala. 159.

A railroad company is only bound to furnish its employés with reasonably safe machinery and appliances, and beyond this the employé assumes the risk. So a company is not liable to a switchman, who is familiar with his duties, for an injury due to a defective spring in a draw-bar, of which neither the company nor its employés had any notice. *Atchison, T. & S. F. R. Co. v. Wagner*, 21 Am. & Eng. R. Cas. 637, 33 Kan. 660, 7 Pac. Rep. 204.

2. Working after Knowledge of Danger or Notice of Defects.

a. In General.

223. Statement of the rule.*—If a person knowing, or in duty bound to know, the hazards of his employment as the business is conducted, voluntarily continues therein, without protest or complaint, and without any promise of the master to do any act to render the same less hazardous, the master will not be liable for an injury he may sustain therein, unless it may be caused

*Servant continuing with knowledge of defective apparatus, see notes, 18 AM. & ENG. R. CAS. 19; 15 *Id.* 223; 4 L. R. A. 53.

Employé cannot recover for injuries resulting from defective cars, of which he has knowledge, see 44 AM. & ENG. R. CAS. 546, *abstr.*

More complaint by servant of defects in machinery, without promise by master to repair, does not justify continuance in service, see note, 23 AM. ST. REP. 386.

by the wilful act of the master. *Stafford v. Chicago, B. & Q. R. Co.*, 114 Ill. 244, 2 N. E. Rep. 185.—FOLLOWED IN *Illinois C. R. Co. v. Morrissey*, 45 Ill. App. 127. QUOTED AND FOLLOWED IN *Illinois C. R. Co. v. Neer*, 26 Ill. App. 356.—*South Fla. R. Co. v. Weese*, 32 Fla. 212, 13 So. Rep. 436. *Illinois C. R. Co. v. Neer*, 26 Ill. App. 356.—QUOTING AND FOLLOWING *Stafford v. Chicago, B. & Q. R. Co.*, 114 Ill. 244.—*Illinois C. R. Co. v. Morrissey*, 45 Ill. App. 127.—FOLLOWING *Stafford v. Chicago, B. & Q. R. Co.*, 114 Ill. 244.—*Umbach v. Lake Shore & M. S. R. Co.*, 8 Am. & Eng. R. Cas. 98, 83 Ind. 191.—CRITICISING *St. Louis & S. E. R. Co. v. Valirius*, 56 Ind. 511. QUOTING *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575.—*Greenleaf v. Illinois C. R. Co.*, 29 Iowa 14.—DISTINGUISHED IN *Sedgwick v. Illinois C. R. Co.*, 76 Iowa 340, 41 N. W. Rep. 35.—*Muldoroney v. Illinois C. R. Co.*, 39 Iowa 615, 8 Am. Ry. Rep. 487.—FOLLOWING *Kroy v. Chicago, R. I. & P. R. Co.*, 32 Iowa 357.—FOLLOWED IN *Wells v. Burlington, C. R. & N. R. Co.*, 56 Iowa 520. QUOTED IN *McKee v. Chicago, R. I. & P. R. Co.*, 48 Am. & Eng. R. Cas. 154, 83 Iowa 616. RECONCILED IN *Indianapolis & St. L. R. Co. v. Watson*, 33 Am. & Eng. R. Cas. 334, 114 Ind. 20, 12 West. Rep. 285, 14 N. E. Rep. 721.—*Way v. Illinois C. R. Co.*, 40 Iowa 341, 8 Am. Ry. Rep. 400.—FOLLOWING *Muldoroney v. Illinois C. R. Co.*, 36 Iowa 462.—FOLLOWED IN *Wells v. Burlington, C. R. & N. R. Co.*, 56 Iowa 520. RECONCILED IN *Indianapolis & St. L. R. Co. v. Watson*, 33 Am. & Eng. R. Cas. 334, 114 Ind. 20, 12 West. Rep. 285, 14 N. E. Rep. 721.—*Money v. Lower Vein Coal Co.*, 55 Iowa 671.—DISTINGUISHED IN *Chicago & T. R. Co. v. Simmons*, 11 Ill. App. 147.—*Atchison, T. & S. F. R. Co. v. Schroeder*, 47 Kan. 315, 27 Pac. Rep. 965.—FOLLOWING *Rush v. Missouri Pac. R. Co.*, 36 Kan. 129. REVIEWING *Leary v. Boston & A. R. Co.*, 139 Mass. 580; *Galveston, H. & S. A. R. Co. v. Drew*, 59 Tex. 10; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 542; *Woodley v. Metropolitan Dist. R. Co.*, L. R. 2 Ex. D. 384; *Wormell v. Maine C. R. Co.*, 79 Me. 397.—*Baltimore & P. R. Co. v. State*, 53 Am. & Eng. R. Cas. 379, 75 Md. 152, 23 Atl. Rep. 310.—FOLLOWING *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47; *Woodley v. Metropolitan Dist. R. Co.*, L. R. 2 Ex. D. 384.—*Price v. Hannibal & St. J. R. Co.*, 15 Am. & Eng. R. Cas. 168, 77 Mo. 508. *Davidson v. Cornell*, 132 N.

Y. 228, 30 *N. E. Rep.* 573, 43 *N. Y. S. R.* 887; reversing 31 *N. Y. S. R.* 982, 10 *N. Y. Supp.* 521. *Rumsey v. Delaware, L. & W. R. Co.*, 151 *Pa. St.* 74, 25 *Atl. Rep.* 37. *East Tenn., V. & G. R. Co. v. Gurley*, 17 *Am. & Eng. R. Cas.* 568, 12 *Lea (Tenn.)* 46. *Muldowney v. Illinois C. R. Co.*, 36 *Iowa* 462. *Lake Shore & M. S. R. Co. v. McCormick*, 5 *Am. & Eng. R. Cas.* 474, 74 *Ind.* 440. *Central R. Co. v. Haslett*, 74 *Ga.* 59. *Carr v. North River Constr. Co.*, 17 *N. Y. S. R.* 945, 48 *Hun* 266. *Wescott v. New York & N. E. R. Co.*, 153 *Mass.* 460, 27 *N. E. Rep.* 10. *Wink v. Weiler*, 41 *Ill. App.* 336. *Woodell v. West Virginia Imp. Co.*, 38 *W. Va.* 23, 17 *S. E. Rep.* 386.

In such a case the employé assumes the risk as increased by any defect, notwithstanding he may object or complain, unless the master expressly or impliedly promises to remedy the defect. *Indianapolis & St. L. R. Co. v. Watson*, 33 *Am. & Eng. R. Cas.* 334, 114 *Ind.* 20, 12 *West. Rep.* 285, 14 *N. E. Rep.* 721, 15 *N. E. Rep.* 824.—APPLYING *Russell v. Tillotson*, 140 *Mass.* 201; *Linch v. Sagamore Mfg. Co.*, 143 *Mass.* 206; *Hatt v. Nay*, 144 *Mass.* 186; *Buzzell v. Laconia Mfg. Co.*, 48 *Me.* 113, 77 *Am. Dec.* 212; *Galveston, H. & S. A. R. Co. v. Drew*, 59 *Tex.* 10, 46 *Am. Rep.* 261; *Webber v. Piper*, 38 *Hun (N. Y.)* 353, 33 *Alb. L. J.* 64; *Pennsylvania Co. v. Lynch*, 90 *Ill.* 333. DISTINGUISHING *Snow v. Housatonic R. Co.*, 8 *Allen (Mass.)* 441; *Indiana Car Co. v. Parker*, 100 *Ind.* 181; *Patterson v. Pittsburg & C. R. Co.*, 76 *Pa. St.* 389. RECONCILING *Kroy v. Chicago, R. I. & P. R. Co.*, 32 *Iowa* 357; *Greenleaf v. Dubuque & S. C. R. Co.*, 33 *Iowa* 52; *Muldowney v. Illinois C. R. Co.*, 39 *Iowa* 615; *Lumley v. Caswell*, 47 *Iowa* 159; *Way v. Illinois C. R. Co.*, 40 *Iowa* 341. REVIEWING *Holmes v. Clarke*, 6 *H. & N.* 349; *Greene v. Minneapolis & St. L. R. Co.*, 31 *Minn.* 248.—REVIEWED IN *Worthington v. Central Vt. R. Co.*, 64 *Vt.* 107.

If a servant knows that what is provided is not safe and fit he should quit the employment; and if he does not, but continues in it, he is deemed to have assumed the risk of all such known defects, unless he has been coerced or induced by the master to believe that the defect will be remedied. *Illinois C. R. Co. v. Jones*, 11 *Ill. App.* 324.

The simple protest against the use of the machinery, by the employé, when directed to use it, will not vary the rule, if,

when having knowledge of the risk, he obeys the order. *Galveston, H. & S. A. R. Co. v. Drew*, 59 *Tex.* 10.—APPLIED IN *Indianapolis & St. L. R. Co. v. Watson*, 33 *Am. & Eng. R. Cas.* 334, 114 *Ind.* 20, 12 *West. Rep.* 285, 14 *N. E. Rep.* 721. QUOTED IN *Patnode v. Harter*, 20 *Nev.* 303, 21 *Pac. Rep.* 679. REVIEWED IN *Atchison, T. & S. F. R. Co. v. Schroeder*, 47 *Kan.* 315.

But the employé is not bound to exercise care in knowing the fact of the defect or danger unless it is in the line of his duty. *Taylor, B. & H. R. Co. v. Taylor*, 79 *Tex.* 104, 14 *S. W. Rep.* 918.

The foreman of men engaged in excavating on a railroad cannot recover of the company for an injury received from a fractious horse that he had seen work for a week. If the horse was unfit for the work, it was the duty of the foreman to know it and send him back. *Smith v. Drake*, 125 *Pa. St.* 501, 17 *Atl. Rep.* 449.

224. Scope and extent of the rule.—The law presumes that an employé had notice of the things connected with his business which it is his duty to know, and with which he had ample opportunity to become acquainted. *Atchison, T. & S. F. R. Co. v. Alsdurf*, 47 *Ill. App.* 200.

If the defect be of such a character that the owner or person using the defective machinery could not fail to observe it, he is charged with knowledge of the defect from mere use; but if it be a latent defect actual knowledge must be proved. *Belair v. Chicago & N. W. R. Co.*, 43 *Iowa* 662, 14 *Am. Ry. Rep.* 575.

Where a brakeman is injured by reason of a defective car he cannot recover from the company if it appears that he knew of the defect, or by the exercise of ordinary diligence might have known it, although it appears that the conductor of the train knew of the defect and failed to inform the brakeman before ordering him to use the car. *Louisville & N. R. Co. v. Law*, (Ky.) 21 *S. W. Rep.* 648.

If an employé complains to his employer, but not on his own account, of the defective condition of premises on which he is employed, and, upon an assurance which does not induce him to remain, that the defect shall be remedied, continues in the employment, with full knowledge of the risk, and is injured by reason of such defect, he must be taken to have assumed the risk, or not to have been in the exercise of due care,

and cannot recover against the employer for his injuries. *Lewis v. New York & N. E. R. Co.*, 153 *Mass.* 73, 26 *N. E. Rep.* 431.

It is the duty of an engineer to know the duties of a station agent along the line of the road he is running upon, so far as they relate to the proper discharge of the engineer's duty. *Hewitt v. Flint & P. M. R. Co.*, 31 *Am. & Eng. R. Cas.* 249, 67 *Mich.* 61, 11 *West. Rep.* 148, 34 *N. W. Rep.* 659.

Where there is no express promise to repair, or request to continue in the service, the employé assumes the risks incident to a service conducted with machinery, implements, or appliances known by himself as well as the employer to be defective and dangerous. The rule should also apply to an implied promise to repair. *Gulf, C. & S. F. R. Co. v. Brentford*, 79 *Tex.* 619, 15 *S. W. Rep.* 561.

A brakeman stepped in a cattle-guard while attempting to make a coupling and was killed. He had been running over the road three weeks or more, but it did not appear that he had done any switching at this point. The cattle-guard was plainly visible, with wing fences which were very noticeable. *Held*, that he must have known that the cattle-guard was there, and it is to be presumed that he contracted with reference to it and assumed the risk. *Henderson v. Coons*, 31 *Ill. App.* 75.

225. Limits and exceptions to the rule.—Unless it shall appear that a servant, injured while in his master's service, had knowledge of the dangers of the service from the master's neglect of duty, it will not be presumed. *Chicago & E. I. R. Co. v. Hines*, 132 *Ill.* 161, 23 *N. E. Rep.* 1021; *affirming* 33 *Ill. App.* 271.

The fact that a servant knows the defective condition of the instrumentalities with which he works does not necessarily charge him with contributory negligence, or the assumption of the risks growing out of such defects. He must also understand, or ought, in the exercise of ordinary prudence, to understand, the risks to which these defects expose him. *Wootilla v. Duluth Lumber Co.*, 37 *Minn.* 153, 33 *N. W. Rep.* 551, 5 *Am. St. Rep.* 832.—*FOLLOWING* *Russell v. Minneapolis & St. L. R. Co.*, 32 *Minn.* 230, 20 *N. W. Rep.* 147; *Cook v. St. Paul, M. & M. R. Co.*, 34 *Minn.* 45, 24 *N. W. Rep.* 311.

There is a material distinction between knowledge of a defect in defective machin-

ery furnished to an employé, and knowledge on his part of the danger of using or continuing to use such machinery until the danger is reasonably apparent. The master is not absolved from liability by the mere fact that the servant used the machinery in its defective condition, for whether the servant used ordinary care under the circumstances is for the jury. *St. Louis & S. F. R. Co. v. McClain*, 80 *Tex.* 85, 15 *S. W. Rep.* 789. *Cook v. St. Paul, M. & M. R. Co.*, 34 *Minn.* 45, 24 *N. W. Rep.* 311.

The servant does not, by simply remaining in the employ of his master with knowledge of the defects in the machinery which he is obliged to use, assume the risks attendant upon such use. Such a result follows only where he remains in the master's service without objection or protest against the continuance of the defects. *Greenleaf v. Dubuque & S. C. R. Co.*, 33 *Iowa* 52.—*FOLLOWING* *Kroy v. Chicago, R. I. & P. R. Co.*, 32 *Iowa* 357.—*DISTINGUISHED IN* *Sedgwick v. Illinois C. R. Co.*, 76 *Iowa* 340, 41 *N. W. Rep.* 35; *Collins v. Burlington, C. R. & N. R. Co.*, 83 *Iowa* 346. *RECONCILED IN* *Indianapolis & St. L. R. Co. v. Watson*, 33 *Am. & Eng. R. Cas.* 334, 114 *Ind.* 20, 12 *West. Rep.* 285, 14 *N. E. Rep.* 721. *REVIEWED IN* *Perigo v. Chicago, R. I. & P. R. Co.*, 52 *Iowa* 276.

Knowledge of a defect and failure to complain are not always conclusive upon a servant. *East Tenn., V. & G. R. Co. v. Gurley*, 17 *Am. & Eng. R. Cas.* 568, 12 *Lea (Tenn.)* 46.

A servant, by continuing in the business of his master after he becomes aware of defects in appliances furnished him by his master, does not necessarily assume the risk of all injuries which may result from such defects. If the defects grow out of the want of ordinary care and vigilance on the part of the master in providing or maintaining the appliances, and are not so serious but that with care and prudence on the part of the servant the appliances may be safely used, and at the request of the master he continues to use them, and in using exercises care and prudence, if injury result to him notwithstanding, he may hold the master liable. *Flynn v. Kansas City, St. J. & C. B. R. Co.*, 18 *Am. & Eng. R. Cas.* 23, 78 *Mo.* 195.—*QUOTING* *Snow v. Housatonic R. Co.*, 8 *Allen (Mass.)* 447.—*Richmond & D. R. Co. v. Norment*, 84 *Va.* 167, 4 *S. E. Rep.* 211.

Where the defect is visible, yet if, by reason of his youth and inexperience, the servant (a boy seventeen years old) was not aware of the danger to which he was exposed in operating the defective car coupling (consisting of a bent pin and misshapen link fastened in the draw-head), it is the duty of the master to apprise him of such danger; and mere knowledge of such defect without apprehension of the probable consequent danger will not defeat the servant's recovery. *Gains v. Chicago, R. I. & P. R. Co.*, 37 Mo. App. 221.

If a person of ordinary prudence would not have believed the defects dangerous, he may disregard them without losing his right to complain, if he suffers from the defect while pursuing his ordinary course. *Colorado C. R. Co. v. Ogden*, 3 Colo. 499.—REVIEWING *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441.—FOLLOWED IN *Burlington & C. R. Co. v. Liehe*, 17 Colo. 280.

In an action by a brakeman for personal injuries he charged the company with negligence in requiring him, in the discharge of his duties, to pass over a car-load of machinery without providing any foot-board as a means of passing over it. It appeared that he knew that the company was accustomed to have cars loaded without foot-boards, but it did not appear that it was usual to place such cars in the train where brakemen were required to pass over them. *Held*, that he could not be said to have assumed the risk by accepting the service. *Hosie v. Chicago, R. I. & P. R. Co.*, 75 Iowa 683, 37 N. W. Rep. 963.—REVIEWED IN *McKee v. Chicago, R. I. & P. R. Co.*, 48 Am. & Eng. R. Cas. 154, 83 Iowa 616.

226. Notice of danger and peril connected with place of work.—Where plaintiff's intestate had been for a long time engaged with others in removing a bank of earth, by repeatedly undermining the same, so as to bring the earth down from above, and he must have known as well as any one the danger attending the work, and he made no objection to the method of doing the work, and he was finally killed by the sudden falling of earth upon him, there can be no recovery. *Rasmussen v. Chicago, R. I. & P. R. Co.*, 18 Am. & Eng. R. Cas. 54, 65 Iowa 236, 21 N. W. Rep. 583. *Naylor v. Chicago & N. W. R. Co.*, 5 Am. & Eng. R. Cas. 460, 53 Wis. 661, 11 N. W. Rep. 24.

Conceding that a servant was in the line

of his duty when he voluntarily went to work in a ditch, if he knew all the dangers of the employment which were then apparent to any one, he took upon himself the risk of those dangers. *Schadewald v. Milwaukee, L. S. & W. R. Co.*, 55 Wis. 569, 13 N. W. Rep. 458.

An employé who continues work in a railway tunnel, with full knowledge that the company has provided no one to give warning of trains, and fully aware of the dangerous nature of the employment, cannot recover for an injury caused by being struck by a train. *Woodley v. Metropolitan Dist. R. Co.*, 46 L. J. Ex. D. 521, L. R. 2 Ex. D. 384.

227. Notice of defects in track or roadbed, generally.*—A servant's knowledge of the unsafe condition of the track, if it is in fact unsafe, will not defeat a recovery, if it was not so dangerous as to threaten immediate danger, or if he might have reasonably supposed that he could safely work on it with the use of care and caution. *Mahoney v. St. Louis & H. R. Co.*, 108 Mo. 191, 18 S. W. Rep. 895.—QUOTING *Soeder v. St. Louis, I. M. & S. R. Co.*, 100 Mo. 673; *Huhn v. Missouri Pac. R. Co.*, 92 Mo. 440.

An engineer is not bound to quit the service, nor does he assume all risks from want of repair, unless the track is so far out of repair, to his knowledge, that it would be necessarily dangerous to the mind of a prudent person to run an engine over it. *Devlin v. Wabash, St. L. & P. R. Co.*, 28 Am. & Eng. R. Cas. 524, 87 Mo. 545.

If low joints in a railway track causing jolts and jars are to be expected by a brakeman because of their frequency, damages are not recoverable on that account by an employé who subjects himself to such occurrences, unless it is made to appear that the company has been guilty of negligence such as would increase the danger which the employé assumes. *Texas & N. O. R. Co. v. Dillard*, 70 Tex. 62, 8 S. W. Rep. 113.—FOLLOWING *International & G. N. R. Co. v. Hester*, 64 Tex. 401.

A section hand, knowing the bad condition of the road over which he was accustomed to pass upon a hand-car in going to and returning from his work, assumes

* When engineer may recover for personal injuries received while running train over road which he knows to be somewhat out of repair, see note, 47 AM. REP. 430.

the risk of passing over such defective way. His knowledge of the general bad condition is sufficient without actual knowledge of the particular defective rail which caused the injury. *Green v. Cross*, 79 Tex. 130, 15 S. W. Rep. 220.

Plaintiff, who was employed by the owners of a private railroad to put it in good condition, was thrown from the train while riding on a flat car on a load of cross-ties, by the jolting of the train while crossing a defect in the roadbed. *Held*, that from the nature of his duties plaintiff knew or ought to have known the defective condition of the railroad, and the danger of traveling over it in the manner he was doing, and that he could not recover. *White v. Kennon*, 39 Am. & Eng. R. Cas. 330, 83 Ga. 343, 9 S. E. Rep. 1082.

A railroad track spread by reason of the ties being rotten, so that the nails would not hold the rails in place, and a train left the track and killed a fireman. The company claimed that he knew of the condition of the track, and therefore took all of the hazards of the employment, and introduced evidence showing that any one passing over the road could not avoid knowing that the general condition of the track was rough. *Held*, that knowledge of the general bad condition of the track would not charge the fireman with knowledge that the ties were rotten. *Graham v. Chapman*, 11 N. Y. Supp. 318, 33 N. Y. S. R. 349, 58 Hun 602.

228. Notice of obstructions, projections, and structures near track.

—A brakeman is not chargeable with knowledge of a projecting rock on the side of the track, nor is his ignorance of it imputable to him as contributory negligence, since he has a right to assume that the roadbed and all appliances are in a reasonably safe and suitable condition; but if he had actual knowledge of it, and continued in the service after the lapse of a reasonable time for its removal, he will be held to have assumed the additional risk. *Georgia Pac. R. Co. v. Davis*, 92 Ala. 300, 9 So. Rep. 252.

If a servant enter into an employment involving dangers of personal injury which the master might have avoided, he takes upon himself the risk of all the hazards incident to the employment, the existence and nature of which were known to him when he entered the service, and which he had no reason to expect would be obviated or removed. The principle applied to the case

of a servant who was injured by coming in contact with a roof or awning projecting from the side of an elevator over a side track upon which the servant was engaged in moving freight cars. *Clark v. St. Paul & S. C. R. Co.*, 2 Am. & Eng. R. Cas. 240, 28 Minn. 128, 9 N. W. Rep. 581.—DISTINGUISHED IN *Robel v. Chicago, M. & St. P. R. Co.*, 35 Minn. 84. REVIEWED IN *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701, 16 Pac. Rep. 146.

Where a brakeman was injured by an awning projecting from a station house, and it appeared he had been on the road but two months, and, except two trips, had always passed the station at night—*held*, not sufficient to authorize the supposition that he knew of the danger and had assumed the risk. *Illinois C. R. Co. v. Welch*, 52 Ill. 183.—REVIEWED IN *Whalen v. Illinois & St. L. R. & C. Co.*, 16 Ill. App. 320.

A telephone wire was stretched above a track in a street, by authority of the municipality, so as to be only about four feet above the top of freight cars, and after it had been up some five weeks, a brakeman, while in the discharge of his duties on top of a freight car, struck the wire and was knocked to the ground and killed. The evidence showed that he had been a railroad employé for twelve years, and for three years had been running on this part of the road, and had frequently passed under the wire, and had never complained of it. *Held*, that the employé had assumed the risk, and that there was not sufficient proof of negligence to justify a submission to the jury. *Dalton v. Atlantic, M. & O. R. Co.*, 4 Hughes (U. S.) 180.—DISTINGUISHING *Chicago, B. & Q. R. Co. v. Gregory*, 58 Ill. 272, 11 Am. Ry. Rep. 75. REVIEWING *Bessex v. Chicago & N. W. R. Co.*, 45 Wis. 477, 18 Am. Ry. Rep. 58; *Lovejoy v. Boston & L. R. Co.*, 125 Mass. 79; *Gibson v. Erie R. Co.*, 63 N. Y. 449; *Hough v. Texas & P. R. Co.*, 100 U. S. 213.

A freight conductor, while ascending a side ladder to the top of a freight car, was carried against a cattle chute and injured. *Held*, that if he knew, or ought reasonably to have known, the precise danger to him, in the course of his employment, of the cattle chute being too near the track, and saw fit, notwithstanding, to continue in the employment, he assumed the extraordinary as well as ordinary risks of the service; but this consequence of acquiescence ought to

rest on positive knowledge, or reasonable means of positive knowledge, of the precise danger assumed—not on a vague surmise of the possibility of danger. *Dorsey v. Phillips & C. Constr. Co.*, 42 Wis. 583, 15 Am. Ry. Rep. 148.—DISTINGUISHED IN *Peschel v. Chicago, M. & St. P. R. Co.*, 17 Am. & Eng. R. Cas. 545, 62 Wis. 338; *Robel v. Chicago, M. & St. P. R. Co.*, 35 Minn. 84. FOLLOWED IN *Hulehan v. Green Bay, W. & St. P. R. Co.*, 12 Am. & Eng. R. Cas. 208, 58 Wis. 319.

220. Notice of defects in yards and depot grounds.—A yard master is not required to quit the service of the company, or to fail or refuse to perform the work devolving upon him, although he knew of the dangerous condition of the company's yard, provided the same was not so far dangerous as to threaten immediate injury, or the condition of the yard was not so dangerous but that he, as a reasonably prudent man, could come to a well-grounded conclusion that he could safely perform his duty for the benefit of his employer. If he be killed under such circumstances, without contributory fault on his part, his next of kin may recover. *Dwyer v. St. Louis & S. F. R. Co.*, 52 Fed. Rep. 87.—APPROVING *New Jersey & N. Y. R. Co. v. Young*, 49 Fed. Rep. 723.

A switchman was injured while coupling cars, through the alleged failure of the company to keep the spaces between the ends of the ties properly filled. He had been working five nights in a yard a mile long and half a mile wide, and he testified that he did not know the condition of the track at the place of the accident. Held, that an instruction that "plaintiff could not recover if he began or continued work with knowledge of the defect, and that he was bound to take notice of apparent defects," sufficiently covered this case; and a further charge that "before taking service in the yard he was bound to inform himself of the condition of all the tracks," was properly refused. *Little Rock & M. R. Co. v. Mosely*, 56 Fed. Rep. 1009.

Plaintiff, while attempting in the daytime to uncouple a moving freight car from the engine, was injured by reason of stepping into an unfilled space between the ties, near the rail, from two to four inches deep, caused by a failure to ballast the side track the whole width. The side track had been in that condition during the time of plaintiff's employment, and he had passed the place of the injury frequently in the discharge of his

duties, but testified that he supposed the track was smooth. Held, that there was a failure to show negligence on the part of the defendant; that the plaintiff was, or ought to have been, familiar with the side track, and if he was not, common prudence dictated that he should not venture between the moving car and engine without first looking under the car to examine the character of the roadbed. *Ragon v. Toledo, A. & N. M. R. Co.*, 97 Mich. 265, 56 N. W. Rep. 612.—QUOTING *Batterson v. Chicago & G. T. R. Co.*, 53 Mich. 125; *Gibson v. Erie R. Co.*, 63 N. Y. 449; *Illick v. Flint & P. M. R. Co.*, 67 Mich. 632.

A brakeman who continues in the service of a railroad company with knowledge that the guard of a switch is made of T-rail, cannot recover for injuries sustained in consequence of his foot being caught between the guard and the frog, notwithstanding it may appear that if the guard had been made of a different rail it would have been less dangerous. *Smith v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 32.—APPROVED IN *Carbine v. Bennington & R. R. Co.*, 61 Vt. 348.

230. Notice of unblocked frogs and guard rails.—Where a brakeman enters the service of a railroad company contemplating the use of unblocked frogs, he assumes the attendant risk; whether in such case the company would have promoted the safety of its operatives by substituting blocked for unblocked frogs, and whether its duty of reasonable care exacted this, are questions that cannot affect its liability. *St. Louis, I. M. & S. R. Co. v. Davis*, 54 Ark. 389, 15 S. W. Rep. 895.—DISTINGUISHING *St. Louis, I. M. & S. R. Co. v. Box*, 52 Ark. 368.—*Wood v. Locke*, 147 Mass. 604, 18 N. E. Rep. 578. *Wilson v. Winona & St. P. R. Co.*, 31 Am. & Eng. R. Cas. 244, 37 Minn. 326, 33 N. W. Rep. 908, 5 Am. St. Rep. 851. *Appel v. Buffalo, N. Y. & P. R. Co.*, 111 N. Y. 550, 19 N. E. Rep. 93, 20 N. Y. S. R. 90; reversing 40 Hun 632, mem., 2 N. Y. S. R. 257.—FOLLOWED IN *McNeil v. New York, L. E. & W. R. Co.*, 71 Hun 24; *Ireland v. Gardner*, 4 Silv. Sup. Ct. 119. REVIEWED IN *Spencer v. New York C. & H. R. R. Co.*, 51 N. Y. S. R. 386.

Whether it is negligence or not to construct switches without blocks between the main rail and the guard rail, a switchman who has continued work for two months after he knew that there were no blocks will be held, as a matter of law, as having

assumed the risk. *Rush v. Missouri Pac. R. Co.*, 28 Am. & Eng. R. Cas. 484, 36 Kan. 129, 12 Pac. Rep. 582.—FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Schroeder*, 47 Kan. 315. QUOTED IN *Clark v. Missouri Pac. R. Co.*, 48 Kan. 654; *Union Pac. R. Co. v. Monden*, 50 Kan. 539.—*Atkyn v. Wabash R. Co.*, 41 Fed. Rep. 193, 23 Ohio L. J. 151.

231. Notice of excavations, etc., near track.—It was the habit of switchmen, in taking trains into a depot, to run along a path at the side of the track. In this path was a dry well, partially covered with a car door. A switchman was killed by stepping into this hole and being thereby thrown between the moving cars. In an action by his widow the jury found that the plaintiff's husband knew the condition of the premises, and had so known it for years. *Held*, that the plaintiff is not entitled to recover. *Needham v. Louisville & N. R. Co.*, 85 Ky. 423, 3 S. W. Rep. 797, 11 S. W. Rep. 306.

Plaintiff's intestate was employed as a switchman and car coupler in a freight yard drained by a system of small, open ditches running across the tracks between the ties, which were in existence when he entered the employment, and remained without any change or alteration, every one of which was well known to him, and while engaged in coupling cars he stepped into one of these sluices, fell under the cars, and was killed. *Held*, that the company was not liable. *De Forest v. Jewett*, 8 Am. & Eng. R. Cas. 495, 88 N. Y. 264; affirming 23 Hun 490.—DISTINGUISHING *Plank v. New York C. & H. R. R. Co.*, 60 N. Y. 607. FOLLOWING *Gibson v. Erie R. Co.*, 63 N. Y. 449.—FOLLOWED IN *Appel v. Buffalo, N. Y. & P. R. Co.*, 111 N. Y. 550, 19 N. E. Rep. 93, 20 N. Y. S. R. 90.

232. Notice of platform near the track.—A company erected a platform so as to leave but a few inches between it and passing cars, and after it had been in use two or three years a baggage man who had been in the company's service for more than two years, while making up a train was knocked off the platform by a train and killed. The evidence showed that he had knowledge of the manner in which the platform was constructed, or by the use of ordinary care should have had knowledge. *Held*, that the company was not liable. *Perigo v. Chicago, R. I. & P. R. Co.*, 52 Iowa 276, 3 N. W. Rep. 43.—REVIEWING

Greenleaf v. Dubuque & S. C. R. Co., 33 Iowa 52.—FOLLOWED IN *Wells v. Burlington, C. R. & N. R. Co.*, 56 Iowa 520. REVIEWED IN *McKee v. Chicago, R. I. & P. R. Co.*, 48 Am. & Eng. R. Cas. 154, 83 Iowa 616.

233. Notice of defective fences.—A brakeman during a long term of service upon a railroad must be held to have observed the fact that the wing fences of the cattle-guards were too near the track to permit a person to swing out from the bottom of a passing car with safety. Accordingly, if such a brakeman is injured in this manner he is not entitled to recover, although at the time he was endeavoring to ascertain if there was anything wrong under the train. *McKee v. Chicago, R. I. & P. R. Co.*, 48 Am. & Eng. R. Cas. 154, 83 Iowa 616, 50 N. W. Rep. 209.—QUOTING *Muldowney v. Illinois C. R. Co.*, 39 Iowa 620; *Wells v. Burlington, C. R. & N. R. Co.*, 2 Am. & Eng. R. Cas. 243, 56 Iowa 524; *Gould v. Chicago, B. & Q. R. Co.*, 22 Am. & Eng. R. Cas. 289, 66 Iowa 590. REVIEWING *Perigo v. Chicago, R. I. & P. R. Co.*, 52 Iowa 276; *Hosic v. Chicago, R. I. & P. R. Co.*, 75 Iowa 686.

234. Notice of the absence of fences.—A company is not liable for the death of an employé, resulting from a collision with live stock, caused by failure of the company to fence its track, where it appears that the employé knew that the track was not fenced. *Sweeney v. Central Pac. R. Co.*, 57 Cal. 15. *Fleming v. St. Paul & D. R. Co.*, 27 Minn. 111, 6 N. W. Rep. 448.—FOLLOWED IN *Patton v. Central Iowa R. Co.*, 73 Iowa 306, 35 N. W. Rep. 149.

An employé of a company continuing in such employment with knowledge of the fact that the road is unfenced, does not thereby waive his right to recover for injuries caused by the want of a fence. *Quackenbush v. Wisconsin & M. R. Co.*, 62 Wis. 411, 22 N. W. Rep. 519.

235. Notice of unguarded highway crossing.—The death of an experienced railroad employé, caused by a collision at a dangerous and unguarded highway crossing, while he was riding on the pilot of an engine, the situation of the crossing and the dangers incurred having been observed for a long time without complaint, is attributable to the risk of his employment, and there can be no recovery therefor. *Rumsey v. Delaware, L. & W. R.*

Co., 53 *Am. & Eng. R. Cas.* 376, 6 *Kulp (Pa.)* 359.

236. Notice of defective bridges.

—One in the service of a railroad company, in the capacity of baggage master, assumes the increased risk resulting from an insufficient bridge on the line of road over which he runs, and waives any claim upon the employer for damages, if he has notice of its dangerous character and thereafter voluntarily continues in the service. *Louisville, N. A. & C. R. Co. v. Sandford*, 117 *Ind.* 265, 19 *N. E. Rep.* 770.

The fact that an employé knew of the defective condition of a bridge and negligently ventured thereon in the discharge of his official duty is no defense to an action against the company for the injury caused by failure to construct and keep in repair a safe bridge. *Groff v. Cincinnati & I. R. Co.*, 1 *Cin. Super. Ct.* 264.

An engineer ran his engine onto a burned bridge and was killed. It appeared that the bridge had been fired by an engine that had previously passed, and the company was charged with negligence in not keeping a watchman or track walker at the bridge; but it appeared that the engineer knew that no person was stationed at the bridge. *Held*, that such failure was not a ground for recovery, as he must be deemed as having assumed the risk. *Texas & P. R. Co. v. Minnick*, 57 *Fed. Rep.* 362.

237. Notice of overhead bridges.

Where it was shown that a brakeman, who was knocked from the top of a freight car by a bridge, had been employed on the same portion of the road for several years, and knew the height of the bridges, but remained in the service without protest—*held*, that he thereby waived the negligence of the company in that regard. *Wells v. Burlington, C. R. & N. R. Co.*, 2 *Am. & Eng. R. Cas.* 243, 56 *Iowa* 520, 9 *N. W. Rep.* 364. —FOLLOWING *Perigo v. Chicago, R. I. & P. R. Co.*, 52 *Iowa* 276; *Muldoney v. Illinois C. R. Co.*, 39 *Iowa* 615; *Kroy v. Chicago, R. I. & P. R. Co.*, 32 *Iowa* 357; *Way v. Illinois C. R. Co.*, 40 *Iowa* 341. —FOLLOWED IN *Coates v. Burlington, C. R. & N. R. Co.*, 15 *Am. & Eng. R. Cas.* 265, 62 *Iowa* 486. QUOTED IN *McKee v. Chicago, R. I. & P. R. Co.*, 48 *Am. & Eng. R. Cas.* 154, 83 *Iowa* 616. REVIEWED IN *Patton v. Central Iowa R. Co.*, 73 *Iowa* 306, 35 *N. W. Rep.* 149.—*Rains v. St. Louis, I. M. & S. R. Co.*, 5 *Am. & Eng. R. Cas.* 610, 71 *Mo.*

164.—FOLLOWING *Devitt v. Pacific R. Co.*, 50 *Mo.* 302.—*Williams v. Delaware, L. & W. R. Co.*, 41 *Am. & Eng. R. Cas.* 254, 116 *V. Y.* 628, 22 *N. E. Rep.* 1117, 27 *N. Y. S. R.* 760; *reversing* 43 *Hun* 633, 6 *N. Y. S. R.* 872.—FOLLOWING *Gibson v. Erie R. Co.*, 63 *N. Y.* 449.—DISTINGUISHED IN *Wallace v. Central Vt. R. Co.*, 138 *N. Y.* 307, 52 *N. Y. S. R.* 351. QUOTED IN *Fitzgerald v. New York C. & H. R. R. Co.*, 36 *N. Y. S. R.* 755, 12 *N. Y. Supp.* 932. REVIEWED IN *Lynch v. New York, L. E. & W. R. Co.*, 44 *N. Y. S. R.* 663, 63 *Hun* 635, 18 *N. Y. Supp.* 417.—*Carbine v. Bennington & R. R. Co.*, 38 *Am. & Eng. R. Cas.* 45, 61 *Vt.* 348, 17 *Atl. Rep.* 491.

A brakeman was killed in the daytime, by striking his head against a low bridge with which he was familiar. When leaving the station, about ten minutes before reaching the bridge, he was warned by the fireman to look out for it. Defendant demurred to the evidence. *Held*: (1) that the demurrer was properly sustained; (2) that although the defendant may not have been free from blame on account of the lowness of the bridge, yet decedent's want of proper care contributed to the injury, and defendant was not liable; (3) as decedent was fully aware of the character of the bridge, and had ample opportunity to become familiar with it, by continuing in the employment he assumed the risk of being injured by said bridge, as incident to the employment. *Williamson v. Newport News & M. V. Co.*, 48 *Am. & Eng. R. Cas.* 276, 34 *W. Va.* 657, 12 *S. E. Rep.* 824.—DISTINGUISHING *Baltimore & O. R. Co. v. Rowan*, 104 *Ind.* 88; *Kane v. Northern C. R. Co.*, 128 *U. S.* 91; *Cooper v. Pittsburgh, C. & St. L. R. Co.*, 24 *W. Va.* 51. REVIEWING *Sheeler v. Chesapeake & O. R. Co.*, 81 *Va.* 188; *Clark v. Richmond & D. R. Co.*, 78 *Va.* 709; *Owen v. New York C. R. Co.*, 1 *Lans. (N. Y.)* 108.

Four low overhead bridges were maintained over a track in close proximity to each other. The company maintained a warning sign before passing the first bridge in going in each direction, but no signs between any of the bridges. An employé, who had been running on the road for three months, and knew that the signs were a warning for all of the bridges, was injured in passing the second bridge. *Held*, that having knowledge of how the signs were maintained and of the existence of all of the bridges, he must be regarded as having assumed the risk. *Ryan v. Long*

Island R. Co., 51 Hun 607, 22 N. Y. S. R. 655, 4 N. Y. Supp. 381.—FOLLOWING GIBSON *v.* Erie R. Co., 63 N. Y. 449.—QUOTED IN Fitzgerald *v.* New York C. & H. R. R. Co., 59 Hun 225, 36 N. Y. S. R. 755, 12 N. Y. Supp. 932.

238. Notice of defects in appliances, machinery, etc., generally.*—

An employé who knowingly continues the use of a defective tool or machine, without complaint and without promise of repairs, assumes the risk incident thereto, and cannot recover for an injury caused thereby. *Louisville, E. & St. L. Con. R. Co. v. Allen*, 47 Ill. App. 465. *Davidson v. Southern Pac. Co.*, 44 Fed. Rep. 476. *Western & A. R. Co. v. Bishop*, 50 Ga. 465.—QUOTED IN *Baker v. Western & A. R. Co.*, 68 Ga. 699.—*Baker v. Western & A. R. Co.*, 68 Ga. 699. *Chicago & A. R. Co. v. Munroe*, 85 Ill. 25. *Lake Shore & M. S. R. Co. v. Roy*, 5 Ill. App. 82. *Chicago & G. W. R. Co. v. Travis*, 44 Ill. App. 466. *Needham v. Louisville & N. R. Co.*, 85 Ky. 423, 3 S. W. Rep. 797, 11 S. W. Rep. 306. *Illick v. Flint & P. M. R. Co.*, 67 Mich. 632, 12 West. Rep. 440, 35 N. W. Rep. 708.—DISTINGUISHED IN *Sweet v. Michigan C. R. Co.*, 87 Mich. 559.—*Hefferen v. Northern Pac. R. Co.*, 45 Minn. 471, 48 N. W. Rep. 1, 526. *Cagney v. Hannibal & St. J. R. Co.*, 69 Mo. 416.—APPROVED IN *Carbine v. Bennington & R. R. Co.*, 61 Vt. 348.—*Dibb v. Dry Dock, E. B. & B. R. Co.*, 16 N. Y. S. R. 922, 49 Hun 607, 1 N. Y. Supp. 640. *Crutchfield v. Richmond & D. R. Co.*, 78 N. Car. 300, 16 Am. Ry. Rep. 212.—APPLIED IN *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112.—*Stone v. Oregon City Mfg. Co.*, 4 Oreg. 52. *New York, L. E. & W. R. Co. v. Lyons*, 119 Pa. St. 374, 11 Cent. Rep. 834, 13 Atl. Rep. 205, 21 W. N. C. 277.—QUOTING *Mansfield C. & C. Co. v. McEnery*, 91 Pa. St. 185.—*Philadelphia & R. R. Co. v. Hughes*, 33 Am. & Eng. R. Cas. 348, 119 Pa. St. 301, 11 Cent. Rep. 822, 13 Atl. Rep. 286, 21 W. N. C. 166.—QUOTED IN *Mensch v. Pennsylvania R. Co.*, 150 Pa. St. 598.—*Hooper v. Columbia & G. R. Co.*, 28 Am. & Eng. R. Cas. 433, 21 So. Car. 541, 53 Am. Rep. 691.—QUOTED IN *Adkins v. Atlanta & C. A. L. R. Co.*, 31 Am. & Eng. R. Cas. 281, 27 So. Car. 71, 2 S. E. Rep.

849.—*Houston & T. C. R. Co. v. Myers*, 8 Am. & Eng. R. Cas. 114, 55 Tex. 110.—FOLLOWED IN *Dallas City R. Co. v. Beeman*, 74 Tex. 291.—*International & G. N. R. Co. v. McCarthy*, 64 Tex. 632. *Missouri Pac. R. Co. v. Somers*, 78 Tex. 439, 14 S. W. Rep. 779.—FOLLOWING *Missouri Pac. R. Co. v. Somers*, 71 Tex. 700.—*Gulf, C. & S. F. R. Co. v. Brentford*, 79 Tex. 619, 15 S. W. Rep. 561. *Carbine v. Bennington & R. R. Co.*, 38 Am. & Eng. R. Cas. 45, 61 Vt. 348, 17 Atl. Rep. 491.—APPROVING GIBSON *v.* Erie R. Co., 63 N. Y. 449; *Baylo v. Delaware, L. & W. R. Co.*, 40 N. J. L. 23; *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47; *Devitt v. Pacific R. Co.*, 50 Mo. 302; *Smith v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 32; *Cagney v. Hannibal & St. J. R. Co.*, 69 Mo. 416.—*Ballou v. Chicago & N. W. R. Co.*, 5 Am. & Eng. R. Cas. 480, 54 Wis. 257, 41 Am. Rep. 31, 11 N. W. Rep. 559.—APPLIED IN *Cowan v. Chicago, M. & St. P. R. Co.*, 80 Wis. 284. QUOTED IN *Kelly v. Abbot*, 21 Am. & Eng. R. Cas. 633, 63 Wis. 307. REVIEWED IN *Goltz v. Milwaukee, L. S. & W. R. Co.*, 41 Am. & Eng. R. Cas. 282, 76 Wis. 136.

Unless the master, by urging or coercing him into danger, or in some other way, directly contributes to the injury. *Chicago, R. I. & P. R. Co. v. Clark*, 11 Ill. App. 104.

Or unless he was induced by his employer to believe a change would be made. *Chicago, M. & St. P. R. Co. v. Standart*, 16 Ill. App. 145.—QUOTING *Pennsylvania Co. v. Lynch*, 90 Ill. 333.—*Chicago, B. & Q. R. Co. v. Merckes*, 36 Ill. App. 195. *Wink v. Weiler*, 41 Ill. App. 336.

Nor would it alter the rule if an employé knowingly used a dangerously defective tool under the immediate orders of a superior employé. *Central R. Co. v. Haslett*, 74 Ga. 59.

When the servant knows of defective appliances, he has the option of taking upon himself the risks of continuing in the employment, or quitting. He may relieve himself of the risk if he brings the facts to the knowledge of the master, and receives such promises or assurances as either to show an express assumption of the risk by the master, or to afford the servant reasonable guaranty that the danger will be removed in time to prevent injury to him. To have either of these effects, what has passed between them should appear to have had in view either a transfer of the risk from the

* Servant using defective apparatus with knowledge of defect, see notes, 15 Am. & Eng. R. Cas. 180; 18 Id. 49; 53 Id. 274.

fic R. Co.,
are, L. &
254, 116
7 N. Y. S.
5 N. Y. S.
Erie R. Co.,
N. Wallace
302, 52 N.
rald v. New
S. R. 755,
N. Lynch v.
N. Y. S. R.
417.—Car-
38 Am. &
ll. Rep. 491.
ne daytime,
low bridge
then leaving
before reach-
by the fire-
endant de-
i: (1) that
stained; (2)
ay not have
of the low-
t's want of
injury, and
as decedent
of the bridge,
become fa-
the employ-
eing injured
the employ-
News & M.
276, 34 W.
DISTINGUISH-
Rowan, 104
Co., 128 U.
& St. L. R.
G Sheeler v.
a. 188; Clark
a. 709; Owen
s. (N. Y.) 108.
were main-
proximity to
maintained a
the first bridge
no signs be-
An employé,
the road for
at the signs
bridges, was
ond bridge.
of how the
the existence
be regarded
Ryan v. Long

servant to the master, or the removal of the dangerous condition as a protection to the servant. *International & G. N. R. Co. v. Turner*, 3 Tex. Civ. App. 487, 23 S. W. Rep. 146.—RECONCILING *Gulf, C. & S. F. R. Co. v. Donnelly*, 70 Tex. 371.

A section hand working under a boss was injured while using a hammer and cleaver which he knew to be defective. *Held*, that he could not recover against the company, though it appeared that there were no other tools to be had. *Baker v. Western & A. R. Co.*, 68 Ga. 699.—QUOTING *Central R. & B. Co. v. Kenney*, 58 Ga. 490; *Johnson v. Western & A. R. Co.*, 55 Ga. 133; *Western & A. R. Co. v. Bishop*, 50 Ga. 465.

The plaintiff having been injured by the falling upon his foot of an iron frame while he was engaged with other servants of defendant in moving it upon the truck, but no negligence of defendant or its servants being shown, and plaintiff not having been unaware of the circumstances which he alleges as the cause of the injury, but having continued in the service of the company without objection, the grant of a nonsuit in the action brought by him for the injury was proper. *Schubbe v. Central R. & B. Co.*, 85 Ga. 592, 11 S. E. Rep. 876.

A painter employed in painting a ceiling, and using for that purpose, during a period of 11 days, iron hooks supplied by his employer in which there is an apparent defect, and the position of which he changes two or three times a day, by continuing to use such hooks assumes the risk of accident from the defect, and has no cause of action against his employer. *Goltz v. Milwaukee, L. S. & W. R. Co.*, 41 Am. & Eng. R. Cas. 282, 76 Wis. 136, 44 N. W. Rep. 752.—REVIEWING *Wedgwood v. Chicago & N. W. R. Co.*, 41 Wis. 478; *Ballou v. Chicago & N. W. R. Co.*, 54 Wis. 257.

Where an employé worked for several months without complaining that the company's staff for the performance of the work in which he was engaged was not sufficient, the company is not liable for an injury alleged to have happened by reason of its negligence in failing to employ a sufficient number of servants. In such case the question of the negligence of the company is not for the jury. *Skipper v. Eastern Counties R. Co.*, 9 Ex. 223, 23 L. J. Ex. 23, 3 C. L. R. 185.

230. Notice of defects in engines.
—Where an explosion happens through the

negligent manner in which the engine is managed by the engine driver, and kills the latter; or if he had good reason to believe the boiler was unsafe; or if, by the exercise of ordinary skill, he could have learned that the engine was unsafe, and still used it, no recovery can be had for his death; and in a suit by his personal representative to recover for his death, the explosion will not afford *prima facie* evidence of negligence against the company. *Toledo, W. & W. R. Co. v. Moore*, 77 Ill. 217.—FOLLOWED IN *Kranz v. White*, 8 Ill. App. 583.—*Monaighan v. New York C. & H. R. R. Co.*, 45 Hun 113, 9 N. Y. S. R. 672.—DISTINGUISHING *Hawley v. Northern C. R. Co.*, 82 N. Y. 370.—QUOTED IN *Hankins v. New York, L. E. & W. R. Co.*, 55 Hun 51, 28 N. Y. S. R. 59, 8 N. Y. Supp. 272.

Where the step of a railroad engine is slightly defective, and the conductor of the train has full knowledge of the condition of such step, and continues to use it, he cannot recover damages from the company for injuries claimed to have resulted from the defective condition of the step, and received by him while using it. *Jackson v. Kansas City, L. & S. K. R. Co.*, 15 Am. & Eng. R. Cas. 178, 31 Kan. 761, 3 Pac. Rep. 501.

The knowledge by a switchman of the slanting and dangerous condition of the foot-board, by reason of which he was killed, will preclude a recovery for his death, unless the foot-board was not so dangerous as to threaten immediate injury, or the deceased might have reasonably supposed that he could with care and caution have safely used it. *O'Mellia v. Kansas City, St. J. & C. B. R. Co.*, 115 Mo. 205, 21 S. W. Rep. 503.

240. Notice of defects in cars.—A railroad brakeman who continues upon a freight train on which a box car in common use on railroads as a caboose is thus used, takes the risk incident to the want of platform or guard railing at the end of such car. *Davis v. Baltimore & O. R. Co.*, 153 Pa. St. 314, 25 Atl. Rep. 498.

A street-car driver was injured through a defect in the platform on which he stood; but the evidence showed that he had known of the defect for some time. *Held*, that he must be regarded as having assumed the risk. *Rogers v. Gakeston City R. Co.*, 76 Tex. 502, 13 S. W. Rep. 540.—FOLLOWED IN *St. Louis, A. & T. R. Co. v. Lemon*, 83 Tex. 143.

The plaintiff, employed and transported without fare, in a small car used only by employés, offered evidence tending to prove that he was injured by the car jumping from the track, caused by the carelessness of the company in using defective wheels, in this, that the flanges of the wheels were not as deep as the wheels of other cars, and that the wheels were worn flat. It did not appear that the plaintiff rode upon the car under any special orders of the company, or made any report of the alleged defects to the company or to any of its officers, or that he had any promise or assurance of the company that it would remedy the defects in the wheels of the car, or provide new wheels; and before the injury complained of, the defects in the wheels (if any existed) were plainly visible, and the plaintiff not only had full opportunity to acquire knowledge of the condition of the wheels, but must have known their condition. *Held*, that even if the defects existed in the wheels, the company was not liable to the plaintiff, because he must be held to have either voluntarily run the risk of being injured, or to have been guilty of contributory negligence. *McQueen v. Central Branch U. P. R. Co.*, 15 *Am. & Eng. R. Cas.* 226, 30 *Kan. Rep.* 689, 1 *Pac. Rep.* 139.

241. Notice of defects in dump-car.

—Where a section master was injured by using a dump car, which it was necessary for him to use in the prosecution of his work, after he knew that it was out of order and in a dangerous condition, although he had been ordered by his superior to get another car—*held*, that the injury was the result of his own carelessness, and that he could not recover. *Pleasants v. Raleigh & A. A. L. R. Co.*, 95 *N. Car.* 195.

If, in such case, both the master and servant had known of the dangerous condition of the car, and the servant had continued to use it and been injured in consequence, he could not recover; but it would be otherwise if the servant had reported the condition of the car to the master, and he had promised to have it repaired promptly, and the servant had used it for a reasonable time while waiting for the repairs to be made. *Pleasants v. Raleigh & A. A. L. R. Co.*, 95 *N. Car.* 105.

242. Notice of defects in brakes or coupling apparatus.—An employé on a construction train, who is aware that the brakes on the cars are defective, or who has

had an opportunity to know it, and still continues in such employment, cannot recover for injuries sustained by reason of such defective brakes. *St. Louis & S. E. R. Co. v. Britz*, 72 *Ill.* 256.

The fact that the plaintiff knew that the brake would not properly control the motion of the car, without applying unusual force, did not conclusively charge him with notice that injury might be expected from the act of using the brake. *Newhart v. St. Paul City R. Co.*, 51 *Minn.* 42, 52 *N. W. Rep.* 983.

A yard switchman was injured while making a coupling, by reason of cars being constructed with different modes of coupling, which rendered the work peculiarly hazardous; but the evidence showed that the same kind of cars had been coming into the yard daily for some time, which was as well known to the switchman as to the company. *Held*, that he assumed the risk of the employment. *Chicago, B. & Q. R. Co. v. Montgomery*, 15 *Ill. App.* 205. *Burns v. Chicago, M. & St. P. R. Co.*, 28 *Am. & Eng. R. Cas.* 409, 69 *Iowa* 450, 30 *N. W. Rep.* 25.

243. Notice of defects in hand-cars.—An employé cannot recover for an injury caused by a defect in a hand-car, when he was aware of such defect and continued to use the car. *Johnson v. Western & A. R. Co.*, 55 *Ga.* 133.—QUOTED IN *Baker v. Western & A. R. Co.*, 68 *Ga.* 699.

A section master in temporary charge of a hand-car must note such defects in it as are discoverable in the reasonable and ordinary exercise of diligence in the course of his duty, and decline or cease to use it if it be obviously unsafe; otherwise, he cannot recover for an injury to himself which his declaration alleges to have been caused, in part, by the defective character or condition of the car. *Central R. & B. Co. v. Kenney*, 58 *Ga.* 485, 16 *Am. Ry. Rep.* 131.—CRITICISED IN *Central R. Co. v. Haslett*, 74 *Ga.* 59. DISTINGUISHED IN *Savannah & W. R. Co. v. Phillips*, 90 *Ga.* 829. FOLLOWED IN *Kenney v. Central R. Co.*, 61 *Ga.* 590; *Central R. Co. v. Kenney*, 64 *Ga.* 100. QUOTED IN *Baker v. Western & A. R. Co.*, 68 *Ga.* 699.

In an action by an employé against a railroad company for personal injury resulting from negligence in equipment of a hand-car, wherein contributory negligence was a defense, it is not positive error to charge that plaintiff cannot recover "if the handle

of the lever car was defective, and such defect was known to him, and he accepted, or continued in the service, using the same with full knowledge of the defects," nor "if he might, by the exercise of ordinary care, have escaped the injury." *East Tenn. V. & G. R. Co. v. Smith*, 15 *Am. & Eng. R. Cas.* 224, 9 *Lea (Tenn.)* 685.—APPLIED IN *Powers v. New York, L. E. & W. R. Co.*, 21 *Am. & Eng. R. Cas.* 609, 98 *N. Y.* 274.

244. Knowledge of the dangerous manner of the management of company's business.—A night watchman in a railroad freight yard, knowing the danger he encounters, assumes the risk of his employment if he works without a lantern, although he has made several applications for one, but has been put off with indefinite promises. *Indianapolis & St. L. R. Co. v. Watson*, 33 *Am. & Eng. R. Cas.* 334, 114 *Ind.* 20, 12 *West. Rep.* 285, 14 *N. E. Rep.* 721, 15 *N. E. Rep.* 824.

A company is not bound to change its manner of using its side tracks, nor adopt the most improved ways or appliances in business; and if one of its servants, knowing, or having ample means of knowing from long-continued employment, the way and manner in which the side tracks are used, continues in the employment without complaint, and if from such way and manner is subjected to risks or accident, he is presumed to assume such risks, and, if injured thereby, cannot recover. *Hewitt v. Flint & P. M. R. Co.*, 31 *Am. & Eng. R. Cas.* 249, 67 *Mich.* 61, 11 *West. Rep.* 148, 34 *N. W. Rep.* 659.

245. Knowledge of absence of switch marker.—In an action for the death of an engineer, it appeared that decedent had been over the main line a number of times, but had never made but one trip over the branch on which he was killed; that the defendant had no switch marker to indicate the distance to the junction with its main line; and that decedent, when returning with a train at night, ran into the junction and overturned the train. The court instructed the jury that if deceased, "previous to going out upon the trip when he was killed, had knowledge that there were no marks or signs, and consequent danger, and so voluntarily assumed the risk," he could not recover. *Held*, that the instruction limited the knowledge of decedent to the time previous to the trip on which he was killed,

and that the court should have added, "or in the performance of his duties must have known that there were no markers." *Union Pac. R. Co. v. Monden*, 53 *Am. & Eng. R. Cas.* 363, 50 *Kan.* 539, 31 *Pac. Rep.* 1002.—QUOTING *Rush v. Missouri Pac. R. Co.*, 36 *Kan.* 136; *Hayden v. Smithville Mfg. Co.*, 29 *Conn.* 552.

246. Knowledge of absence of turntable.—Where one applied for and was employed to perform the duties of a fireman on a particular run, and had knowledge that, for the want of a turntable, the engine was run backward three times every day, he assumed the risk attendant upon the running of the train backward. *Kuhns v. Wisconsin, I. & N. R. Co.*, 70 *Iowa* 561, 31 *N. W. Rep.* 868.—DISTINGUISHING *Mayes v. Chicago, R. I. & P. R. Co.*, 63 *Iowa* 562.

247. Knowledge of dangerous manner of running trains.—A section man who had worked more than three months on the track of a railroad, where about one third of the trains passing over the same were irregular or extra trains, not running on schedule time, is chargeable with notice of the practice to run such trains, and assumes the risk incident to the service from that cause. *Larson v. St. Paul, M. & M. R. Co.*, 44 *Am. & Eng. R. Cas.* 529, 43 *Minn.* 423, 45 *N. W. Rep.* 722.—FOLLOWING *O'ison v. St. Paul, M. & M. R. Co.*, 38 *Minn.* 117, 35 *N. W. Rep.* 866.

A servant who accepted service on a switch train under a conductor, having full knowledge of a custom to disregard a rule in respect to switching a car from the main track to a siding without being under the personal supervision of the conductor, and who continued in the service, must be held to have waived all right of action for injuries arising from doing the work in such a manner in the conductor's absence. *Lake Shore & M. S. R. Co. v. Knittel*, 33 *Ohio St.* 468.

A locomotive engineer was on a fast freight train and ran into a train ahead of him, which was running on slower schedule time. He had notice of a general practice of the company not to notify engineers of the position of trains ahead. *Held*, that it was his duty to observe any train that was ahead, and he will be regarded as having assumed the risk of injury arising from a collision. *Illinois C. R. Co. v. Neer*, 31 *Ill. App.* 126.

added, "or
must have
markers."

53 Am. &
Pac. Rep.
Pac. R.
Smithville

presence of
for and
duties of a
had knowl-
rtable, the
times every
ndant upon
ard. *Kuhns*
o Iowa 561,
DISTINGUISH-
R. Co., 63

dangerous
ns.—A sec-
e than three
road, where
passing over
a trains, not
chargeable
to run such
cident to the
Arson v. St.
o Eng. R.
W. Rep. 722.
aul, M. & M.
Rep. 866.

ervice on a
, having full
regard a rule
rom the main
tag under the
nductor, and
must be held
action for in-
work in such
presence. *Lake*
l, 33 Ohio St.

s on a fast
rain ahead of
lower schedule
eral practice
engineers of
Held, that it
rain that was
rising as having
Neer, 31 Ill.

A workman, after finishing his work, was told by his foreman that there were twenty minutes before the next train, which was understood to mean the next regular train. Whereupon the workman, with others, mounted a hand-car to go to the next station, was overtaken by a special train, and killed. No carelessness was attributable to the special train after the hand-car was discovered on the track; no flags were sent out by the hand-car men, and a rule of the railroad company, known to the hand-car men, stated that "they may expect a train in either direction without signals being shown for it." *Held*, that the workman assumed the risk of riding on the hand-car by voluntarily and without objection mounting it when no flags had been sent out, and also the risk of any omission on the company's part to signal the special train, by mounting the car with full knowledge of the above rule. *McGrath v. New York & N. E. R. Co.*, 18 Am. & Eng. R. Cas. 5, 14 R. I. 357; *affirmed* in 15 R. I. 95. —REVIEWED IN *Criswell v. Pittsburgh, St. L. & C. R. Co.*, 30 W. Va. 798.

A brakeman who was injured by having his foot crushed, charged the company with negligence in putting another brakeman in charge as conductor without supplying his place as brakeman. The evidence tended to show that the brakeman was fully competent to act as conductor; and if he was not, plaintiff was fully cognizant of the arrangement and made no objection to it. It further appeared that such arrangement was usual with train hands, and to have been for their mutual accommodation and advantage, and with their general concurrence and assent. *Held*, that the plaintiff could not complain of any increased risk by such arrangement. *Robinson v. Houston & T. C. R. Co.*, 46 Tex. 540, 13 Am. Ry. Rep. 303.—QUOTED IN *Dallas v. Gulf, C. & S. F. R. Co.*, 21 Am. & Eng. R. Cas. 575, 61 Tex. 196.

248. Notice of improper manning and equipment of trains.—If a servant of a company remains in its employment, when he knows the performance of the duties required of him will expose him to danger from the want of a watchman on the rear car of trains in the yard where he is engaged in making up trains, etc., or for the want of a sufficient number of hands to operate trains, it will be presumed he voluntarily assumed the risk, and waived what-

ever, if any, obligation rested on the company in that respect; and if injury ensues, he is without remedy. *Chicago & N. W. R. Co. v. Donahue*, 75 Ill. 106.

A person employed as night watcher, who is injured by a train running over him, cannot recover damages for the injury on the ground that the company has failed to provide a suitable number of helpers on the train, when he has continued in the service for some time without objection, knowing the number of helpers employed. In such case he must be taken to have assumed the risk of injury from such cause. *Chicago & E. I. R. Co. v. Geary*, 17 Am. & Eng. R. Cas. 606, 110 Ill. 383. —DISTINGUISHING *Flike v. Boston & A. R. Co.*, 53 N. Y. 551.

By the custom and regulations of a company, trains in convoy were equipped each with one engineman, one fireman, one conductor, and one brakeman. The conductor of a train in convoy on such road had his leg crushed by collision with the train immediately following his, and died shortly thereafter. In an action against the company by the widow of the deceased to recover damages for his loss—*held*, that if he had knowledge of this custom at the time of his employment and afterwards, and with such knowledge continued for eight or nine months in his employment, as conductor on trains in convoys thus equipped, and also knew that the train following his on the night of the collision was equipped in the same manner, such knowledge on his part would prevent a recovery on account of any supposed deficiency in equipment in this respect. *Baltimore & O. R. Co. v. State*, 41 Md. 268, 6 Am. Ry. Rep. 276. —DISTINGUISHING *Wright v. New York C. R. Co.*, 28 Barb. (N. Y.) 80.—REVIEWED IN *Philadelphia, W. & B. R. Co. v. State*, 10 Am. & Eng. R. Cas. 792, 58 Md. 372.

249. Duty to notify the company.*—It is the duty of the servant of a railroad to see that the machinery that he uses is in repair, and when it is not, to report the fact to the company, and it is negligence on his part to fail to do so; and the company will not be liable for any injury occasioned by such machinery being out of repair. *Toledo, W. & W. R. Co. v. Eddy*, 72 Ill. 138.—REVIEWED IN *Chicago & A. R. Co. v. Bragionier*, 119 Ill. 51.

* Servant failing to complain of defective apparatus, see note, 18 Am. & Eng. R. Cas. 22.

In an action by an employé for personal injuries, a general charge that if the engine was defective and the plaintiff knew of its defective condition and neglected to inform the defendant, or some servant of the defendant superior to himself in its service, then the plaintiff could not recover, unless the jury believed from the evidence that plaintiff was aware that the defendant, or some servant of defendant superior to the plaintiff in its employment, knew of the defective condition of the engine, and that the burden of proving these facts was upon the plaintiff, taken in connection with the evidence, is free from error. *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378, 11 So. Rep. 733.

When an employé continues in the service after discovering defects in the machinery in use connected with the employment which endanger his safety, and which increase the risk ordinarily incident to the service, it is his duty to inform the employer, whose failure to repair in a reasonable time after his promise to do so will relieve the employé from any implied waiver of the defects until after a reasonable time has elapsed after the promise. *Gulf, C. & S. F. R. Co. v. Donnelly*, 70 Tex. 371, 8 S. W. Rep. 52.—RECONCILED IN *International & G. N. R. Co. v. Turner*, 3 Tex. Civ. App. 487.

One of the rules of a railroad company reads as follows: "They" (the brakemen) "are charged with the management of the brakes, and the proper display and use of the signals. They must examine and know for themselves that the brakes, ladders, running boards, steps, etc., which they are to use are in proper condition, and, if not, put them so, or report them to the proper parties, and have them put in order before using." *Held*, if a brakeman on a train, knowing such rule of the railroad company, also knowing that the nut on top of the standard of the brake, used to hold the brake-wheel on, was off, but without putting it in proper condition himself, or reporting it to the proper parties, uses it unnecessarily to check the speed of the train, by which use the brake-wheel comes off, throwing him onto the track, whereby he is injured, such brakeman is guilty of contributory negligence, at least; and in such case no recovery should be had against the railroad company. *Beall v. Pittsburgh, C. & St. L. R. Co.*, 38 W. Va. 525, 18 S. E. Rep. 729.

A train collided with live stock and was

thereby thrown from the track and killed the engineer. The railroad company was charged with negligence in not providing safe fences and not providing a proper cow-catcher. There was no charge that the company knew of the defects in either. *Held*, that as he was more liable to know of defects than the company, it is a duty that he owed, not only to the company but to the public, to make known defects either in the fences or in the engine, so as to avoid such collision. *McMillan v. Saratoga & W. R. Co.*, 20 Barb. (N. Y.) 449.

b. After Promise to Remedy or Repair.

250. Statement of the rule.—A servant does not assume risks of danger by remaining in the service after the master has promised to remove the danger, and he may recover for an injury received within what would be a reasonable time to make the necessary improvements to avoid the injury. *New Jersey & N. Y. R. Co. v. Young*, 49 Fed. Rep. 723, 1 U. S. App. 96, 1 C. C. A. 428. *Chicago & G. W. R. Co. v. Travis*, 44 Ill. App. 466. *Belair v. Chicago & N. W. R. Co.*, 43 Iowa 662, 14 Am. Ry. Rep. 575. *Roux v. Blodgett & D. Lumber Co.*, 85 Mich. 519, 48 N. W. Rep. 1092.

Unless he should continue in the employment when the danger is so imminent that no prudent man would undertake to perform the service. *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *affirming* 9 Ill. App. 319.

It must be considered that the master takes upon himself the responsibility of any accident that may occur before the expiration of such reasonable time. *Joliet, A. & N. R. Co. v. Velie*, (Ill.) 26 N. E. Rep. 1086.

251. Extent of the rule.—Where, after complaint made by an operator of a machine to the superintendent that it is defective and unsafe, the superintendent repairs it and tells the operator that he has done so, it is not negligence for the latter to continue to work at the machine, although it afterwards appears that the repairs were not substantial. *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592, 15 Pac. Rep. 484.

While it is the fault of the servant if he

* Servants using apparatus under promise of officers to repair, see note, 18 AM. & ENG. R. CAS. 35; 77 AM. DEC. 224; 23 AM. ST. REP. 385.

ck and killed
company was
not providing
a proper cow-
ge that the
ts in either.
le to know of
is a duty that
company but to
fects either in
o as to avoid
Saratoga &
49.

y or Repair.

rule.*—A ser-
danger by re-
the master has
er, and he may
d within what
to make the
avoid the in-
Co. v. Young,
96, 1 C. C. A.
v. Travis, 44
go & N. W.
Ry. Rep. 575.
r Co., 85 Mich.

ue in the em-
s so imminent
undertake to
ri Furnace Co.
ng 9 Ill. App.

at the master
responsibility of
before the ex-
me. Joliet, A.
26 N. E. Rep.

rule.—Where,
operator of a
nt that it is de-
erintendent re-
or that he has
for the latter
e machine, al-
s that the re-
Atchison, T. &
n. 592, 15 Pac.

e servant if he

nder promise of
AM. & ENG. R.
M. ST. REP. 385.

undertakes without sufficient skill, or applies less than the occasion requires, a section man who complains of the bad condition of the tool with which he is to work, and is promised a new and good one, and is told to work with the defective tool until the others arrive, and, relying on such a promise, and there being no immediate danger, does so, and is injured by the use of the defective tool, is entitled to recover for the damages resulting. His solicitation of employment in a certain line of work is not an assertion that he can perform the labor with defective tools. *Southern Kan. R. Co. v. Crocker*, 38 Am. & Eng. R. Cas. 203, 41 Kan. 747, 21 Pac. Rep. 785.

Under a promise to restore defective machinery necessary to the safety of the employes in their work, and a request that the servant go on with the work, a servant doubtless is given ground to believe that a defect will be repaired before he will again be called upon to place himself in danger from it; and the fact that he may be subsequently injured through the defect ought not to defeat his right to recover if he was ignorant of the continued existence of the defect at the time the injury occurred. *Gulf, C. & S. F. R. Co. v. Brentford*, 79 Tex. 619, 15 S. W. Rep. 561.—FOLLOWED IN *St. Louis, A. & T. R. Co. v. Lemon*, 83 Tex. 143.

252. Limits to the rule.*—Where an employé knows that the danger is great and immediate, such as a reasonably prudent man would not assume, he cannot recover for an injury, even though he remain in the employer's service in reliance upon the latter's promise to remedy the defects which produced the danger. *Indianapolis & St. L. R. Co. v. Watson*, 33 Am. & Eng. R. Cas. 334, 114 Ind. 20, 12 West. Rep. 285, 14 N. E. Rep. 721, 15 N. E. Rep. 824.—CRITICISING *Ft. Wayne, J. & S. R. Co. v. Gildersleeve*, 33 Mich. 133.—*St. Louis, A. & T. R. Co. v. Kelton*, 55 Ark. 483, 18 S. W. Rep. 933. And to the same effect, see *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *affirming* 9 Ill. App. 319.

It has never been held that the promise of the master to repair a defective machine or implement used in his business and known by both to be dangerous will relieve

the servant from the ordinary result of contributory negligence on his part, though cases may be found in which stress was laid on the fact that such a promise was made. *Gulf, C. & S. F. R. Co. v. Brentford*, 79 Tex. 619, 15 S. W. Rep. 561.

253. What constitutes a promise to repair.—A yard master who is authorized to make requisition for necessary engines and machinery is the proper person to notify of a defect, and his promise to repair is binding on the company; but the burden of proof to establish such promise is on the person who claims the benefit of it. *Parody v. Chicago, M. & St. P. R. Co.*, 5 McCrary (U. S.) 38, 15 Fed. Rep. 205.

Where a switchman told the yard master that he objected to the switch engine in use because there were no run-boards on the pilot, and was told that the engine would only be there a few days, and that if the old one was not repaired soon he would have a new one, the question was properly submitted to the jury whether or not the switchman complained of the defective engine and continued in the employment on the promise that a suitable one would be provided. *Pieart v. Chicago, R. I. & P. R. Co.*, 82 Iowa 148, 47 N. W. Rep. 1017.

Any acts or expressions by which the deceased gave the proper agent of the defendant to understand that he was unwilling to continue in the employment without run-boards on the engine were a sufficient complaint, and the complaint was properly made to the yard master; the court properly left it to a jury to determine whether the defendant was negligent in not providing an engine with run-boards, whether the deceased made a sufficient complaint thereof, and whether he was induced to continue in the employment by the assurances of the defendant that a proper engine would be furnished. *Pieart v. Chicago, R. I. & P. R. Co.*, 82 Iowa 148, 47 N. W. Rep. 1017.

Where a section foreman to whom a yard master applied to improve a defective track in the yard, so as to lessen the risk, notified him that he could not do it without orders from his superior, but upon a subsequent application promised conditionally that he would do it if he "got time some Saturday afternoon," his promise was insufficient to bind the company and relieve the yard master from his own risk. *Wilson v. Winona & St. P. R. Co.*, 31 Am. & Eng. R. Cas.

* Servant continuing in service after failure of master to repair machinery as promised cannot recover for injuries, see note, 23 AM. ST. REP. 387.

245, 37 *Minn.* 326, 33 *N. W. Rep.* 908, 5 *Am. St. Rep.* 851.

254. Injury must be within a reasonable time after promise made.

—Where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as it would be reasonable to allow for its performance; i. e., for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept. *Parody v. Chicago, M. & St. P. R. Co.*, 5 *McCrory (U. S.)* 38, 15 *Fed. Rep.* 205.—FOLLOWING *Hough v. Texas Pac. R. Co.*, 100 *U. S.* 213.

255. Particular applications of the rule—Insufficient rules.—Where complaint had been made to the proper official

of the company that its regulations were insufficient to protect him, and the company had indicated that it would correct the evil, the car repairer was justified in remaining in the service of the company. *St. Louis, A. & T. R. Co. v. Triplett*, 48 *Am. & Eng. R. Cas.* 283, 54 *Ark.* 289, 15 *S. W. Rep.* 831, 16 *S. W. Rep.* 266.

256. — dangerous working place.

—Plaintiff and others, who were employed to shovel snow from the track, hesitated about going out on a cold night where there was no shelter or chance to make a fire, but were assured that if they would go a train should be kept near by in which they could get warm. The company failed to keep a train near by, and plaintiff's feet were frozen. *Held*, that he might recover for the injury. *Hyatt v. Hannibal & St. J. R. Co.*, 19 *Mo. App.* 287.

Plaintiff was employed as a car repairer, and his duties required him to go under cars which stood on a switch which was used by moving trains. He called attention of the superintendent to the danger of his position, who promised to place a guard so as to give him timely warning of approaching trains, but which he failed to do, and plaintiff was injured. *Held*, that he had not assumed the risk of the business so as to prevent a recovery. *Wall v. Texas & P. R. Co.*, 2 *Tex. Unrep. Cas.* 432.

The petition alleged that plaintiff was employed by defendant as a fireman of a stationary engine on a pile-driver car; that while shoveling coal into the engine one of defendant's locomotives jolted the car, and plaintiff was thrown off; that the end of a

small house, inclosing the engine for the protection of plaintiff, had been removed; that the accident would not have happened if the end of the house had been replaced; that defendant had promised to replace it, and, relying thereon, plaintiff remained in its employ. *Held*, that a demurrer to the petition was properly overruled, as the facts alleged are within the exception to the general rule that an employé cannot recover for injuries received from defective machinery, of which he had notice. *Southern Pac. Co. v. Leash*, 2 *Tex. Civ. App.* 68, 21 *S. W. Rep.* 563.—QUOTING *Hough v. Texas & P. R. Co.*, 100 *U. S.* 224.

The only evidence of a promise was the plaintiff's testimony that defendant's foreman, in answer to plaintiff's inquiries of "How about the back part of the house?" and "Are you going to have this fixed up?" said that he would like to get through there; that when it was taken down, "they said they would put it back right away"; that he thought they would put it up on Sunday; and that after the accident, in response to his declaration of "You see what you have done," the foreman said, "Do you suppose we were going to accommodate you?" *Held*, that a verdict for plaintiff was against the evidence. *Southern Pac. Co. v. Leash*, 2 *Tex. Civ. App.* 68, 21 *S. W. Rep.* 563.

257. — defective siding.—In an action by a conductor against his road for personal injury, it was competent for him to prove that he was injured while running cars onto a siding which was dangerous; that he had notified the superintendent of the danger, and he had promised to repair it, and had requested plaintiff to continue in service, but no repairs had been made. *Patterson v. Pittsburg & C. R. Co.*, 76 *Pa. St.* 389.—DISTINGUISHED IN *Indianapolis & St. L. R. Co. v. Watson*, 33 *Am. & Eng. R. Cas.* 334, 114 *Ind.* 20, 12 *West. Rep.* 285, 14 *N. E. Rep.* 721; *Pennsylvania R. Co. v. MacKinney*, 37 *Am. & Eng. R. Cas.* 153, 124 *Pa. St.* 462. QUOTED IN *Colorado C. R. Co. v. Ogden*, 3 *Colo.* 499; *Flynn v. Kansas City, St. J. & C. B. R. Co.*, 78 *Mo.* 195; *Kehler v. Schwenk*, 151 *Pa. St.* 505. REVIEWED IN *Conroy v. Vulcan Iron Works*, 62 *Mo.* 35; *Huhn v. Missouri Pac. R. Co.*, 31 *Am. & Eng. R. Cas.* 221, 92 *Mo.* 440, 10 *West. Rep.* 405, 4 *S. W. Rep.* 937; *Galveston, H. & S. A. R. Co. v. Lempe*, 59 *Tex.* 19.

258. — defective machinery and appliances.

— There are circumstances under which a person, being in the employ of a railroad, having notice of defects in equipments and machinery, may recover for an injury resulting therefrom, as where, on discovering the defect, he is assured by the superior that it is not dangerous, or that it will be timely repaired, whereupon, in reliance thereon, he remains, being himself careful and vigilant. *Muirhead v. Hannibal & St. J. R. Co.*, 19 Mo. App. 634. *International & G. N. R. Co. v. Turner*, 3 Tex. Civ. App. 487, 23 S. W. Rep. 146.

Unless the defect is so evidently dangerous that it would be reckless and foolish for a servant to use the appliance, even under a promise that it should be repaired immediately. *Lutz v. Atlantic & P. R. Co.*, (N. Mex.) 53 Am. & Eng. R. Cas. 478, 30 Pac. Rep. 912.

Where it appeared the servant had been in the employ for six months and had known of the defects within a few days after entering the service, he having called the attention of the foreman to the defect, and was assured by him that the defect would be remedied, it was error for the court to charge the jury that "the plaintiff would not be guilty of negligence in working with defective machinery, though he might know of its defects, if he had informed the master or his agent of the defect and the master or his agent had promised to fix the machinery." This was upon the weight of testimony. Besides, negligence is a question for the jury to determine upon the entire facts. *International & G. N. R. Co. v. Williams*, 82 Tex. 342, 18 S. W. Rep. 700.

259. — defective car or hand-car.

— It is a complete answer to a charge of contributory negligence that a brakeman complained of the defects in a car to the conductor in charge of the train, and received his assurance that necessary repairs should be made, and that he remained in the company's service in consequence of that assurance. *Louisville & N. R. Co. v. Kenley*, 92 Tenn. 207, 21 S. W. Rep. 326.

Where a foreman of a section on a railroad gives notice to the proper officers of the company of a defect in the hand-car used by him and a promise is made him by said officers to furnish a new car or repair the old one, it is not contributory negligence for him to continue to use the old car

a reasonable length of time. What is such reasonable length of time depends on circumstances and is for the jury. *Texas & P. R. Co. v. Kane*, (Tex.) 15 Am. & Eng. R. Cas. 218.—QUOTING AND DISTINGUISHING *Houston & T. C. R. Co. v. Myers*, 55 Tex. 110.

3. Where Employé has Equal Facility for Knowledge.**260. Statement of the rule.*—**

Where employer and employé have equal knowledge, and the latter continues the service, each party takes the risk, unless the employer undertakes to give special directions. *Davis v. Detroit & M. R. Co.*, 20 Mich. 105.—DISTINGUISHING *Indianapolis & C. R. Co. v. Love*, 10 Ind. 556.—*Crutchfield v. Richmond & D. R. Co.*, 78 N. Car. 300, 16 Am. Ky. Rep. 212.

Where the servant has equal knowledge with the master of the construction and condition of the roadbed of a company, and knows all of the dangers and hazards incident to his work thereon, such servant assumes all the risks and hazards of his employment. *Clark v. Missouri Pac. R. Co.*, 48 Kan. 654, 29 Pac. Rep. 1138.—QUOTING *Rush v. Missouri Pac. R. Co.*, 36 Kan. 129; *Burlington & C. R. Co. v. Liehe*, 17 Colo. 280, 29 Pac. Rep. 175.—*Hewitt v. Flint & P. M. R. Co.*, 31 Am. & Eng. R. Cas. 249, 67 Mich. 61, 11 West. Rep. 148, 34 N. W. Rep. 659. *Keenan v. New York, L. E. & W. R. Co.*, 49 N. Y. S. R. 513, 21 N. Y. Supp. 445, 2 Misc. 34.

Where the servant has equal knowledge with the master of defects in machinery he cannot recover for an injury resulting therefrom, unless it be shown that he notified the master of the same and was induced to remain by the promise of a remedy. *Burlington & C. R. Co. v. Liehe*, 17 Colo. 280, 29 Pac. Rep. 175.—APPROVING *Louisville & N. R. Co. v. Orr*, 84 Ind. 50. FOLLOWING *Colorado C. R. Co. v. Ogden*, 3 Colo. 499.—QUOTED IN *Clark v. Missouri Pac. R. Co.*, 48 Kan. 654.—*Nashville, C. & St. L. R. Co. v. Handman*, 13 Lea (Tenn.) 423.

Unless the master, by urging upon the servant or coercing him into danger, or in some other way, directly contributes to the injury. *Chicago, B. & Q. R. Co. v. Smith*,

* Liability of a master for injury to servant where danger of employment is equally known to both, see note, 9 AM. ST. REP. 343.

18 Ill. App. 119. *Peoria, D. & E. R. Co. v. Hardwick*, 48 Ill. App. 562.

An employé cannot maintain an action against a company for personal injuries in the performance of services not within the scope of his duty, where his opportunity for observing the danger was equal to that of the company. *Houston & T. C. R. Co. v. Fowler*, 8 Am. & Eng. R. Cas. 504, 56 Tex. 452.

261. Its extent and limits.—Before an employé can recover for injuries received through defective machinery or appliances he must prove that he did not know, and had not equal means with the employer of knowing, that the machine or appliance was defective. *Louisville, N. A. & C. R. Co. v. Sanford*, 117 Ind. 265, 19 N. E. Rep. 770.

This principle only applies where the servant is under the same obligation as the master to know the condition of the same. While a servant may have an opportunity he is not bound to make a critical examination of the condition of an implement or item of machinery before using it to ascertain if it contains any latent defects, unless so required by the terms of his employment. *Louisville, E. & St. L. R. Co. v. Berry*, 2 Ind. App. 427, 28 N. E. Rep. 714. *Porter v. Hannibal & St. J. R. Co.*, 2 Am. & Eng. R. Cas. 44, 71 Mo. 66, 36 Am. Rep. 454.—CRITICISING *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548. DISAPPROVING *Williams v. Clough*, 3 H. & N. 258; *Griffiths v. Gidlow*, 3 H. & N. 648; *Dynen v. Leach*, 40 Eng. L. & Eq. 491.—FOLLOWED IN *Muirhead v. Hannibal & St. J. R. Co.*, 19 Mo. App. 634.

If the danger is apparent, and is as well known to the employé as to the employer, the former takes the risk of it; but if the employer knew, or by exercise of ordinary care might have known, that the employment was hazardous to a degree beyond what it fairly imports, he is bound to inform the latter of such fact. *Thompson v. Chicago, M. & St. P. R. Co.*, 4 McCrary (U. S.) 629, 14 Fed. Rep. 564.

The rule of contributory negligence applies to a case of this character, but with much less force than to a case where a servant is injured in the ordinary course of his employment, and not exposing himself to unusual dangers in obedience to the orders of his superiors. *Thompson v. Chicago, M. & St. P. R. Co.*, 4 McCrary (U. S.) 629, 14 Fed. Rep. 564.

Where the servant has full and equal knowledge with the master that the machinery or materials employed are defective, or that the fellow-servant is incompetent, and he remains in the service, this may constitute contributory negligence; but if it appears that the master has promised to amend the defect, or other like inducement to remain has been held out to the servant, the mere fact of his continuing in the employment does not of itself, as matter of law, exonerate the master from liability, but the question of contributory negligence is one of fact for the jury. (Allen, J., dissenting.) *Laning v. New York C. & N. Y.*, 521.—DISTINGUISHING *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441.—DISTINGUISHED IN *Powers v. New York, L. E. & W. R. Co.*, 21 Am. & Eng. R. Cas. 609, 98 N. Y. 274. FOLLOWED IN *Chapman v. Erie R. Co.*, 55 N. Y. 579. QUOTED IN *Newell v. Ryan*, 40 Hun (N. Y.) 286; *Stewart v. New York, O. & W. R. Co.*, 8 N. Y. Supp. 19.

The facts that the foreman of the gang in which plaintiff was engaged directed him, after turning a switch, to mount the second car from the engine for the purpose of aiding in sending the unloaded cars down to the repair shop, and that plaintiff was injured in mounting said car in consequence of its having a broken jaw-brace, are not sufficient to warrant a jury in finding the defendant company guilty of negligence, where there is no evidence that such foreman was charged with the business of inspecting the cars, or knew of the defect in said car, or had any better means of knowledge than plaintiff. *Flannagan v. Chicago & N. W. R. Co.*, 2 Am. & Eng. R. Cas. 150, 50 W's. 462, 7 N. W. Rep. 337.—REVIEWING *Brabbits v. Chicago & N. W. R. Co.*, 38 Wis. 289; *Smith v. Chicago, M. & St. P. R. Co.*, 42 Wis. 526; *Bessex v. Chicago & N. W. R. Co.*, 45 Wis. 477; *Schultz v. Chicago, M. & St. P. R. Co.*, 48 Wis. 375.

262. Rule where employe has greater facilities for knowledge.—

A servant employed about dangerous machinery assumes the risks of such employment; and where he is injured in consequence of a defect in the machinery about which he is employed, and which is placed under his care, and from the nature of his employment, and his duties in connection therewith, he is better acquainted with the condition of such machinery and the dan-

ger of the service, than his employer or any of his fellow-servants, he cannot recover in an action against his employer for such injuries. *Week v. Fremont Mill Co.*, 3 Wash. 629, 29 Pac. Rep. 215.

4. Extra Risks and Hazards.

a. In General.

203. Must not subject employe to extra hazards.*—The employer impliedly agrees that he will not subject the employé, through fraud, negligence, or malice, to greater risks than those which fairly and properly belong to the particular service in which the employé is to be engaged. *Lake Shore & M. S. R. Co. v. McCormick*, 5 Am. & Eng. R. Cas. 474, 74 Ind. 440. *Riley v. West Virginia C. & P. R. Co.*, 27 W. Va. 145.

204. Employe does not ordinarily assume extraordinary hazards.—Servants do not assume those extra hazards which spring from the failure of the master to exercise reasonable care in providing such rules and regulations for the conduct of his business as to afford his servants reasonable means of protection. *Irvine v. Flint & P. M. R. Co.*, 53 Am. & Eng. R. Cas. 210, 89 Mich. 416, 50 N. W. Rep. 1008.

It is the duty of the company to keep its road in a reasonably safe condition, and the employé has the right to assume that a part of the road he by his employment is not called upon to inspect or repair is in such condition. *Taylor, B. & H. R. Co. v. Taylor*, 79 Tex. 104, 14 S. W. Rep. 918.

And if the master suffers machinery to become so bad that the hazard is greatly increased, this increased hazard becomes the risk of the master. *Bridges v. St. Louis, I. M. & S. R. Co.*, 6 Mo. App. 389.

205. What deemed risks made hazardous by the company.—Where the master fails to furnish suitable machinery and see that it is properly protected, or to employ careful and prudent servants to manage and operate such machinery, the risks resulting from such failure are extra-hazardous, and such extra hazards are not among the risks which the employé assumes as a part of his contract of hiring. *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. Rep. 162.

* Duty of master not to expose servant to extraordinary risks, see note, 7 L. R. A. 172.

A risk made hazardous by the act of the employer cannot be said to be one which he, by the exercise of reasonable care and diligence, could not reasonably have become aware of and provided against, nor is it one which the employé assumed when he embarked in the service as incident thereto, nor is it one equally apparent to the observation of both employer and employé, nor is it one the mere failure to observe which by the employé is chargeable as contributory negligence. *Cragg v. Chicago & W. M. R. Co.*, 91 Mich. 624, 52 N. W. Rep. 62.

b. Voluntarily Assumed.

206. Statement of the rule.*—A servant assumes the risk of extraordinary danger which is obvious to him and is voluntarily undertaken. *Pittsburgh, C. & St. L. R. Co. v. Adams*, 23 Am. & Eng. R. Cas. 408, 105 Ind. 151, 5 N. E. Rep. 187. *Downey v. Sawyer*, 157 Mass. 418, 32 N. E. Rep. 654. *Woods v. St. Paul & D. R. Co.*, 39 Minn. 435, 40 N. W. Rep. 510. *Smith v. Winona & St. P. R. Co.*, 41 Am. & Eng. R. Cas. 289, 42 Minn. 87, 43 N. W. Rep. 968. *Williams v. Delaware, L. & W. R. Co.*, 39 Hun (N. Y.) 430.—APPLYING *Gibson v. Erie R. Co.*, 63 N. Y. 449; *De Forest v. Jewett*, 88 N. Y. 264; *Evans v. Lake Shore & M. S. R. Co.*, 12 Hun 289.—FOLLOWED IN *Cowhill v. Roberts*, 71 Hun 127.—*Keenan v. New York, L. E. & W. R. Co.*, 21 N. Y. Supp. 445.

Even though he undertakes to perform the hazardous duty because urged to do so by the master. *Diehl v. Lehigh Iron Co.*, 140 Pa. St. 487, 21 Atl. Rep. 430.

Where a servant is temporarily engaged in more hazardous work than that for which he was employed, he takes upon himself all such risks incident to the work as are equally open to observation of himself and the master. *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. Rep. 162.

The servant assumes not only the ordinary risks of the employment, but also those superadded by negligent omission of the master to perform a duty to the servant, which are known to the servant. *International & G. N. R. Co. v. Turner*, 3 Tex. Civ. App. 487, 23 S. W. Rep. 146.

207. Its extent and limits.—While a servant assumes the ordinary risks only of

* Voluntary assumption of risk of known danger, see note, 4 L. R. A. 214.

his employment, and the master assumes the duty of furnishing safe appliances, still if a servant, having sufficient intelligence to appreciate the dangers to which he will be exposed, knowingly consents to occupy a place set apart to him, he assumes the risks incident thereto, and dispenses with the obligation of the master to furnish him with a better place; but if, by reason of youth and inexperience, he is not acquainted with the dangers incident to the work or to the place which he is engaged to occupy, he does not assume the risks of his employment, and the master will be held to indemnify him against the consequences of his failure to give him proper instruction. *Emma Cotton Seed Oil Co. v. Hale*, 56 Ark. 232, 19 S. W. Rep. 600. *Gulf, C. & S. F. R. Co. v. Wells*, (Tex.) 16 S. W. Rep. 1025.

If an employé discovers that the service has become more hazardous than usual, or than he had anticipated, by reason of defective machinery, the retaining of unfaithful fellow-servants, or from any other cause, the general rule is, he must quit the service or assume the extra risks to which he is exposed. The law imposes no obligation on the master to take more care of the servant than the latter is willing to observe for his own personal safety. *Missouri Furnace Co. v. Abend*, 107 Ill. 44; affirming 9 Ill. App. 319.—QUOTED IN Chicago, B. & Q. R. Co. v. Stafford, 16 Ill. App. 84.

A party has a right to contract to perform any lawful business, however hazardous it may be, and notwithstanding it is rendered more risky than it otherwise would be by the manner in which the employer conducts it; and in such case the employé takes the attendant risk. *Scott v. Oregon R. & N. Co.*, 28 Am. & Eng. R. Cas. 414, 14 Oreg. 211, 13 Pac. Rep. 98.

While the servant assumes such extraordinary risks as he may knowingly and voluntarily see fit to encounter, he does not stand upon the same footing as the master as respects the matter of care in inspecting and investigating the risks to which he may be exposed. He has a right to presume that the master will do his duty in that respect, so that, when directed by proper authority to perform certain services, or to perform them in a certain place, he will ordinarily be justified in obeying orders without being chargeable with contributory negligence or with the assumption of the risks of so doing. But he must not rashly and deliberately ex-

pose himself to unnecessary and unreasonable risks which he knows and appreciates. *Cook v. St. Paul, M. & M. R. Co.*, 34 Minn. 45, 24 N. W. Rep. 311.—DISTINGUISHED IN *Robel v. Chicago, M. & St. P. R. Co.*, 35 Minn. 84; *Lindvall v. Woods*, 39 Am. & Eng. R. Cas. 339, 41 Minn. 212, 4 L. R. A. 793, 42 N. W. Rep. 1020.

208. Remaining in service after knowledge of increased danger.—The employé, by remaining in the employer's service after the discovery of imminent and threatening danger incident to his work, is deemed to have assumed the risk. *Pollich v. Sellers*, 42 La. Ann. 623, 7 So. Rep. 786. *Kielley v. Belcher Silver Min. Co.*, 3 Sawy. (U. S.) 500.

If a brakeman is required to perform his duties in a manner known to be perilous, when a safer mode might be adopted, it becomes the duty of the brakeman to determine whether he will accept service under such rules, or remain in such employment. If he accepts and remains he must be deemed to have assumed the extra hazard of doing the work as required by the employer, and what additional dangers attend such performance of the work is a question of fact, not of law. *Peoria, D. & E. R. Co. v. Puckett*, 42 Ill. App. 642.

But it does not follow that such employé cannot by any possibility recover for an injury received while doing the work in the more dangerous though required manner. He only assumes the extra hazards attendant upon the required manner of doing the work, and if he executes the duty with care and caution, proportionate to such additional dangers, it cannot be said that he has failed to use ordinary care merely because he consented to undertake the performance of an act in a manner required, when a less dangerous mode might have been adopted by the employer. *Peoria, D. & E. R. Co. v. Puckett*, 42 Ill. App. 642.

If a brakeman be required to do such work, and while attempting to perform it with care and prudence commensurate with the increased danger of such duty he is injured, not by some peril attendant upon the manner of doing the work, but by a danger arising from a failure of the railroad company to use reasonable care to discharge a duty incumbent by law upon it, a recovery may be had for such injury. *Peoria, D. & E. R. Co. v. Puckett*, 42 Ill. App. 642.

In this class of cases it is necessary to de-

unreason-
appreciates.
p. 34 Minn.
ISHED IN
R. Co., 35
39 Am. &
4 L. R. A.

vice after
danger.—
n the em-
very of im-
incident to
assumed the
Ann. 623, 7
Silver Min.

perform his
be perilous,
adopted, it
eman to de-
service un-
uch employ-
ins he must
e extra haz-
aired by the
dangers at-
e work is a
Peoria, D. &
642.

uch employé
over for an
work in the
red manner.
ards attend-
of doing the
uty with care
such addi-
d that he has
erely because
performance
l, when a less
been adopted
& E. R. Co.

l to do such
o perform it
ensurate with
uty he is in-
stant upon the
t by a danger
railroad com-
o discharge a
it, a recovery
Peoria, D. &
p. 642.
cessary to de-

termine, before a recovery can be had, that the risk imposed by the company upon the employé was of unusual character; and where the company adopts a mode of doing a certain kind of business more dangerous than some other mode would be, and its employé, knowing the fact, continues in its employment, and acquiesces in such mode, he cannot, in case of injury, claim that he was exposed to danger of an extraordinary or unusual character. *Scott v. Oregon R. & N. Co.*, 28 Am. & Eng. R. Cas. 414, 14 *Org.* 211, 13 *Pac. Rep.* 98.—APPROVING *Gottlieb v. New York, L. E. & W. R. Co.*, 100 N. Y. 462. QUOTING *Pittsburgh & C. R. Co. v. Sentmeyer*, 92 Pa. St. 276. REVIEWING *Day v. Toledo, C. S. & D. R. Co.*, 42 Mich. 523; *Atchison, T. & S. F. R. Co. v. Plunkett*, 25 Kan. 188; *Flannagan v. Chicago & N. W. R. Co.*, 50 Wis. 462; *Northern C. R. Co. v. Husson*, 101 Pa. St. 1.

A foreman of a switching crew is not precluded from recovering for injuries received through defects in an engine because, after he has complained of the defects to the yard master, in the hurry of business, in the discharge of his duties, and possibly for his personal convenience, he rides on the engine and is injured. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 26 *Fed. Rep.* 897.

260. — through fear of losing employment.*—If a servant, of full age, required to perform duties more dangerous than those embraced in his original hiring, undertakes them, knowing their dangerous character, although unwillingly and from fear of losing his employment, and is injured by reason of his inexperience, he cannot maintain an action against the master. *Leary v. Boston & A. R. Co.*, 23 Am. & Eng. R. Cas. 383, 139 *Mass.* 580, 52 *Am. Rep.* 733, 2 *N. E. Rep.* 115.—DISTINGUISHING *O'Connor v. Adams*, 120 *Mass.* 427; *Union Pac. R. Co. v. Fort*, 17 *Wall. (U. S.)* 553; *Lalor v. Chicago, B. & Q. R. Co.*, 52 *Ill.* 401; *Jones v. Lake Shore & M. S. R. Co.*, 49 *Mich.* 573.—REVIEWED IN *Atchison, T. & S. F. R. Co. v. Schroeder*, 47 *Kan.* 315.

Where the fellow-servants of another employé are not guilty of any negligence, and such other employé, knowing the dangerous character of the work which he is required

to do, undertakes the same, although unwillingly, for fear of losing his employment, and is injured, he has no cause of action against the master. *Southern Kan. R. Co. v. Moore*, 49 *Kan.* 616, 31 *Pac. Rep.* 138.

270. Extra risk from defective bridges.—An action cannot be maintained for the death of a brakeman who voluntarily undertook to perform his duties when his attention had been called to the extra peril to be assumed with respect to a low bridge. *Fitzgerald v. New York C. & H. R. R. Co.*, 36 *N. Y. S. R.* 755.

The negligence of the employer is waived by the employé. This waiver cannot be affected by the rapidity or promptness with which he may be required to act at the time of the accident. *Brossman v. Lehigh Valley R. Co.*, 113 *Pa. St.* 490, 6 *Atl. Rep.* 226, 57 *Am. Rep.* 479.

Plaintiff's intestate was employed as the engineer and conductor of a construction train, and was killed, in attempting to cross a river, by the falling of a bridge during a great flood. The evidence showed that he directed and controlled the movements of the train, and was under no orders from any superior to cross the river at that time, and his only motive in crossing seemed to be to be at his place of work the next morning. He had examined the bridge during the day and knew, or should have known, that the waters were rapidly rising, and knew of the imminent danger of the trestles approaching the bridge being washed away. *Held*, that there could be no recovery for his death. *Columbus & W. R. Co. v. Bridges*, 38 *Am. & Eng. R. Cas.* 136, 86 *Ala.* 448, 5 *So. Rep.* 864.

271. Extra risk from the management and operation of trains.—Rules of a company to be binding on employés must be brought to their attention, or be given such publicity that the employés are bound to take notice of them, when knowledge will be presumed. So a brakeman who has been in the employ of the company for three months is not charged with notice of a rule as to the management of trains, so as to impose upon him the risk of injury, where it appears that the rule was not in the order book of the company, and had been posted some time before his employment, but where there is nothing to show that it was still posted at any time during his employment. *Wooden v. Western N. Y. & P. R. Co.*, 18 *N. Y. Supp.* 768.

* Risk assumed by employé unwillingly undertaking dangerous work, see 53 AM. & ENG. R. CAS. 355, *abstr.*

The measure of risk which a fireman ought to incur by remaining upon a locomotive, and assisting a sleepy engineer to run the train, is only that which his duty and obligations to the company, under all the circumstances, impose upon him. If he subjects himself to any greater risk, and is thereby injured, he is not without fault, and cannot recover. *Carroll v. East Tenn., V. & G. R. Co.*, 41 *Am. & Eng. R. Cas.* 307, 82 *Ga.* 432, 10 *S. E. Rep.* 163.

A brakeman was employed upon a mixed passenger, freight, and construction train; it was a custom upon the road at certain places to push flat cars ahead of the engine; the brakeman's duty required him to occupy a position on one of these cars when so propelled; such position was more dangerous than one in the rear of the engine. While employed on a flat car in front of the engine, the brakeman, upon his first trip, received injuries from which he died. *Held*, that if the increased risk was within the ordinary scope of the employment of a brakeman on such a train, or if deceased contracted with reference to the road's custom to propel flat cars ahead of the engine, he will be deemed to have assumed the increased risk; otherwise not. If deceased did not assume the increased risk his administratrix is entitled to recover, provided the emergency was such that an ordinarily prudent person would have acted as he did. *Fordyce v. Lowman*, 57 *Ark.* 160, 20 *S. W. Rep.* 1090.

An engineer left the company's shops on a dark night and was killed while walking through the yards by a backing engine without any rear lights. He was familiar with the tracks and the manner of running trains and engines in the yard. *Held*, that he assumed the risk of injury from the ordinary operation of trains. *Williams v. Delaware, L. & W. R. Co.*, 2 *N. Y. Supp.* 435, 18 *N. Y. S. R.* 857, 50 *Hun* 600, *mem.*

In an action for the death of a brakeman, the negligence charged was the use of a particular broad-gauge car body upon a narrow-gauge truck, not adapted thereto. The carriage of broad-gauge cars upon narrow-gauge trucks was a part of defendant's ordinary business, and cars like the one referred to had been carried quite often. In the absence of proof that the carrying of this car, in the manner complained of, was an unusual occurrence on the road of defendant company, and the plaintiff's testimony showing that the brakeman accepted

his employment with full knowledge of the practice of thus carrying such cars, and the risks incident thereto, there could be no recovery for the injuries received. *Titus v. Bradford, B. & K. R. Co.*, 136 *Pa. St.* 618, 20 *Atl. Rep.* 517.

Where it is the established practice and one of the rules of a company to run special or irregular trains at any time without notice in advance to station agents or section men, who are required to govern themselves accordingly, and it appears from the evidence that an engine with snow-plow is a train of that class—*held*, that sending out such a train over the road in a storm, without such notice, was not negligence, but that the risks to trackmen attending its use are among those assumed by those employes, if they are informed of the rule, or if, from their observation and knowledge of the practice of the company in respect to running such trains, they knew, or ought to have known in the exercise of ordinary intelligence and reasonable prudence, that such a train might be expected. *Olson v. St. Paul, M. & M. R. Co.*, 33 *Am. & Eng. R. Cas.* 386, 38 *Minn.* 117, 35 *N. W. Rep.* 866.—FOLLOWED IN *Larson v. St. Paul, M. & M. R. Co.*, 44 *Am. & Eng. R. Cas.* 529, 43 *Minn.* 423.

272. — of hand-cars.—Where the sole act of negligence relied on is participated in, and voluntarily consented to, by the injured workman, with full knowledge of the peril, the question of the master's liability does not arise. *So held*, where the negligence charged was that, with knowledge of an approaching train, the section foreman continued to propel a hand-car along a curved portion of the track running through a deep cut without sending a lookout ahead to give warning, in which conduct the injured workman participated with the full knowledge of the hazard, he having been running up and down the same section daily for three months, and it not appearing that he was acting under the express orders of the foreman in remaining on the car, or that he remained thereon against his will. *Hammond v. Chicago & G. T. R. Co.*, 48 *Am. & Eng. R. Cas.* 377, 83 *Mich.* 354, 47 *N. W. Rep.* 965.

If such a case evidence that the foreman was intemperate to an extent which made him an unsafe and unfit man for his position is irrelevant, it not being claimed that he had been drinking or was under the in-

fluence of liquor on the day of the accident. *Hammond v. Chicago & G. T. R. Co.*, 48 *Am. & Eng. R. Cas.* 377, 83 *Mich.* 334, 47 *N. W. Rep.* 965.

An employé in charge of a hand-car on a railway track, whose duty it was to return with it before night, stopped by the way and spent the evening in social pleasure at neighboring saloons, and wrongfully delayed his return till it became too dark to observe freight cars which had in the mean time been left by the railway company standing on the track. *Held*, that he voluntarily, under the circumstances, took the risk of running his car in the darkness. *Stiney v. Duluth & W. R. Co.*, 46 *Minn.* 384, 49 *N. W. Rep.* 187.

273. Extra risk from car loaded with nitro-glycerine.—A railroad company which undertakes to accommodate another company by switching over its track a car loaded with dangerous merchandise, has a right to assume that the consignor has exercised due care in packing it. *Foley v. Chicago & N. W. R. Co.*, 6 *Am. & Eng. R. Cas.* 161, 48 *Mich.* 622, 12 *N. W. Rep.* 879, 42 *Am. Rep.* 481.

A manufacturer of nitro-glycerine contracted with a railroad company for the transportation of a quantity, and the latter requested another railroad company to move the car loaded therewith some distance over its track. The company so requested sent a switchman to perform the service, and he was killed by the explosion of a can while it was being loaded. The loading was done by employés of the manufacturer, and the switchman had no control or authority over them. He, however, knew the dangerous character of the work. *Held*, that there was no ground of action against the company which employed the switchman. *Foley v. Chicago & N. W. R. Co.*, 6 *Am. & Eng. R. Cas.* 161, 48 *Mich.* 622, 12 *N. W. Rep.* 879, 42 *Am. Rep.* 481.

274. Extra danger in coupling cars.—The curve in a railroad track in its yards was so great that coupling cars from the inside was very dangerous. *Held*, that no recovery could be had for a brakeman killed while so coupling. He assumed the risks of the business. *Tuttle v. Detroit, G. H. & M. R. Co.*, 31 *Am. & Eng. R. Cas.* 217, 122 *U. S.* 189, 7 *Sup. Ct. Rep.* 1166.—FOLLOWING *Randall v. Baltimore & O. R. Co.*, 109 *U. S.* 478.—FOLLOWED IN *Twitchell v. Grand Trunk R. Co.*, 39 *Fed. Rep.* 419.

REVIEWED IN *Norfolk & W. R. Co. v. Jackson*, 85 Va. 489, 8 S. E. Rep. 370.

It was the habit upon the railroad where plaintiff's decedent was employed to uncouple the engine from the freight train at a certain station while the train was in motion, and the decedent had, without protest or objection, contributed to the establishment of this custom, and its performance generally devolved upon, and, in the particular instance, was voluntarily assumed by him. *Held*, that the railroad company was not liable in an action by his administrator to recover damages on account of his being killed while in the performance of this customary work. *Kroy v. Chicago, R. I. & P. R. Co.*, 32 *Iowa* 357, 10 *Am. Ky. Rep.* 48.—DISTINGUISHED IN *Hosie v. Chicago, R. I. & P. R. Co.*, 75 *Iowa* 683, 37 *N. W. Rep.* 963.

If the plaintiff, a brakeman, undertook to couple the cars when he knew that they were moving too fast to enable him to make the coupling with safety, he assumed the risk, and cannot recover for the injury received; but though he knew that they were moving too fast at the time when he descended to make the coupling, yet if he had good reason to believe, from all the facts and circumstances, that the conductor had brought them to a safe speed at the time when he actually made the coupling, and the conductor was negligent in failing to do so, the plaintiff cannot be charged with negligence, and he may recover. *Henry v. Sioux City & P. R. Co.*, 21 *Am. & Eng. R. Cas.* 644, 66 *Iowa* 52, 23 *N. W. Rep.* 260.

A company which used in its trains an old mail car which was lower than the others—*held*, not liable to its servant, who knowingly incurred the risk, for an injury resulting from the coupling of such old car with another, though the danger was greater than with cars of equal height. *Fl. Wayne, J. & S. R. Co. v. Gildersleeve*, 33 *Mich.* 133.—DISTINGUISHED IN *Hulett v. St. Louis, K. C. & N. R. Co.*, 67 *Mo.* 239. QUOTED IN *Thomas v. Missouri Pac. R. Co.*, 109 *Mo.* 187.

An experienced brakeman was ordered by the conductor to attach a car loaded with lumber, which projected forward and compelled him to stoop in making the coupling. In doing so he delayed a little, and his fingers were caught in the coupling-link and hurt. *Held*, that he could not maintain an action against the railway company, as he

fully understood the difficulty to be guarded against, and the conductor was not shown to have been in fault in any way. *Day v. Toledo, C. S. & D. R. Co.*, 2 *Am. & Eng. R. Cas.* 126, 42 *Mich.* 523, 4 *N. W. Rep.* 203.—REVIEWED IN *Scott v. Oregon R. & N. Co.*, 28 *Am. & Eng. R. Cas.* 414, 14 *Oreg.* 211.

Where a switchman who is acquainted with all of the surroundings attempts to descend a car ladder for the purpose of uncoupling the car, knowing that unless the train is stopped he must strike a post less than 20 feet distant, and without knowing that his signal to stop the train has been received and acted upon, and in order to give which he was obliged to look towards the engine, and must have seen the steam emitted therefrom, which is alleged in the declaration to have prevented the engineer from seeing the signal, he must be held to have assumed the risk and danger in descending the ladder. *Pennington v. Detroit, G. H. & M. R. Co.*, 90 *Mich.* 505, 51 *N. W. Rep.* 634.

275. — cars with defective coupling apparatus.—A company is not liable for injury received by an employé while coupling cars having double buffers, simply because a higher degree of care is required in using them than in those differently constructed. *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 *Ill.* 365.—DISTINGUISHING *Toledo, W. & W. R. Co. v. Fredericks*, 71 *Ill.* 294.—DISTINGUISHED IN *Russell v. Minneapolis & St. L. R. Co.*, 32 *Minn.* 230. REVIEWED IN *Louisville & N. R. Co. v. Boland*, 53 *Am. & Eng. R. Cas.* 169, 96 *Ala.* 626, 11 *So. Rep.* 667.

Where a brakeman knows that a car is broken and unsafe, and has been warned not to try to couple it, but attempts it and is killed, there can be no recovery from the company. *Barkdoll v. Pennsylvania R. Co.*, (*Pa.*) 13 *Atl. Rep.* 82.

A brakeman who has 18 months' experience is supposed to know that stock cars of the company have no bumpers, and has assumed the increased risk of using such cars. *Houston & T. C. R. Co. v. Barrager*, (*Tex.*) 14 *S. W. Rep.* 242.

No recovery can be had for the death of a brakeman resulting from the use of cars having mismatched couplings, where he continued to use them over a year without the company's promise to change them, as he thereby assumes the extra risk incident thereto. *Norfolk & W. R. Co. v. McDon-*

ald, 88 *Va.* 352, 13 *S. E. Rep.* 706. *McLaren v. Williston*, 48 *Minn.* 299, 51 *N. W. Rep.* 373.

A brakeman was injured in making a coupling, and charged negligence of the company in that the draw-head of the engine and the draw-head of the car were of unequal height, and that the link attached to the engine which was to be used in making the coupling was straight, when it should have been crooked. It appeared that when he attempted to make the coupling he saw that the draw-heads were of unequal height, and that the link was straight. *Held*, that he assumed the responsibility of attempting to use a straight link. *Welch v. New York C. & H. R. R. Co.*, 43 *N. Y. S. R.* 958, 63 *Hun* 625, *mem.*, 17 *N. Y. Supp.* 342.

A brakeman was injured by reason of having to use what was alleged to be defective coupling fixtures. It appeared that the draw-head of a car pulled out while *en route*, which necessitated using what is called the "three-link coupling." It appeared that such coupling is as safe as an ordinary one-link coupling for moving cars forward, but is more dangerous to couple while the cars are in motion; but it further appeared that such couplings were frequent. *Held*, that the brakeman must be presumed as having assumed the increased risk of using such coupling as one of the ordinary perils of the employment. *Darracott v. Chesapeake & O. R. Co.*, 31 *Am. & Eng. R. Cas.* 157, 83 *Va.* 288, 2 *S. E. Rep.* 511.—QUOTED IN *Bennett v. Northern Pac. R. Co.*, 2 *N. Dak.* 112.

c. Working under Orders or Outside of Scope of Employment.

276. Statement of the rule.*—Where a railway employé is injured while in the performance of work to which he was wrongfully assigned, and which he had never agreed to do, he is entitled to recover damages from the company. *Jones v. Lake Shore & M. S. R. Co.*, 8 *Am. & Eng. R. Cas.* 221, 49 *Mich.* 573, 14 *N. W. Rep.* 551.

Where the master gives an order to a servant to do an act, at a time or under circumstances which render the doing of the act extra hazardous, and the servant in obeying the order receives an injury, the

* Perilous duties outside scope of servant's employment. *see notes*, 33 *AM. & ENG. R. CAS.* 285; 31 *Id.* 280; 5 *L. R. A.* 792.

master is liable, unless to obey the order was plainly to imperil life or limb. *Stephens v. Hannibal & St. J. R. Co.*, 28 *Am. & Eng. R. Cas.* 538, 86 *Mo.* 221.—APPLIED IN *Ballard v. Chicago, R. I. & P. R. Co.*, 51 *Mo. App.* 453.

A freight conductor cannot recover for personal injuries received while uncoupling cars, where it appears that such was no part of his duty, and contrary to the rules of the company, unless there was a pressing emergency requiring him to do the uncoupling. *Kane v. Savannah, F. & W. R. Co.*, 85 *Ga.* 858, 11 *S. E. Rep.* 493.

277. Scope and extent of the rule, generally.—Where the master orders a servant to do something which involves encountering a risk not contemplated in his employment, although the risk is equally open to the observation of both, it does not necessarily follow that the servant either assumes the increased risk, or is negligent in obeying the order. If the apparent danger is such that a man of ordinary prudence would not take the risk, the servant acts at his peril; but unless the apparent danger is such as to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service, or assume all additional risk, but may obey the order, using care in proportion to the risk which he apparently assumes. *Nall v. Louisville, N. A. & C. R. Co.*, 48 *Am. & Eng. R. Cas.* 309, 129 *Ind.* 260, 28 *N. E. Rep.* 183, 611.

An employer cannot escape liability for an injury suffered by a laborer while at work for him, on the ground that he was hurt outside of working hours, and therefore while not in his employment. A workman who stays upon his employer's premises during the noon recess to eat his dinner is not a trespasser; he has implied permission to stay there, and if called on to resume work before the recess has expired it is his duty to do so. And whatever he does under such circumstances is within the scope of his employment, and to that extent not voluntary. *Broderick v. Detroit Union R. S. & D. Co.*, 56 *Mich.* 261, 22 *N. W. Rep.* 802, 56 *Am. Rep.* 382.—DISTINGUISHED IN *Cole v. Chicago & N. W. R. Co.*, 33 *Am. & Eng. R. Cas.* 274, 71 *Wis.* 114.

Whatever a workman does under competent authority for the comfort and convenience of his fellow-workmen is presumed to be for his employer's benefit, and such

work is not so foreign to his employment that he would be justified in refusing to do it. *So held*, where a workman was called upon during noon recess to open a ventilator, and was severely injured while doing it. *Broderick v. Detroit Union R. S. & D. Co.*, 56 *Mich.* 261, 22 *N. W. Rep.* 802, 56 *Am. Rep.* 382.

Although the plaintiff was aware of the danger, yet, as he was compelled by the orders of his employer to work where he was working when the accident happened, the maxim *Volenti non fit injuria* did not apply, and he was entitled to recover. *Thrussell v. Handyside*, 20 *Q. B. D.* 359.—APPLYING *Membury v. Great Western R. Co.* (not reported). DISTINGUISHING *Thomas v. Quartermaine*, 17 *Q. B. D.* 414; *Yarmouth v. France*, 19 *Q. B. D.* 647; *Woodley v. Metropolitan Dist. R. Co.*, 2 *Ex. D.* 384; *Wiggett v. Fox*, 11 *Ex. D.* 832; *Collis v. Selden*, L. R. 3 *C. P.* 495. QUOTING *Heaven v. Pender*, 11 *Q. B. D.* 503.

A person of full age and of ordinary intelligence entered the employ of a railroad corporation as a freight truckman, loading and unloading cars in its yard and shifting freight in its freight houses. After working in this capacity about three years, he was directed to perform, in addition to his regular duties, those of a fireman, from one to three hours a day, upon an engine which was used to shift freight cars in the yard, where there were many tracks, sidings, frogs, and switches, and to make up trains. He had acted as such fireman about twenty times, when, while standing on the footboard of the engine, with his back towards the direction in which it was moving, and waiting for its speed to slacken so that he could get off, he was jolted off, and injured. He had been brought up on a farm, and had ridden but six times in railroad cars. In an action against the corporation, he testified that the engine was going so fast that he thought it unsafe to get off; that he never got off the engine at any other time when it was in motion, except when it was nearly at a standstill; and that he used to observe a jolting of the engine as he stood in the cab. *Held*, that the injury was caused by one of the risks assumed by him in his employment, and that the action could not be maintained. *Leary v. Boston & A. R. Co.*, 23 *Am. & Eng. R. Cas.* 383, 139 *Mass.* 580, 52 *Am. Rep.* 733, 2 *N. E. Rep.* 115.

278. Obeying orders without the knowledge of an increase of risk.—

Where the work ordered to be done is not obviously dangerous, nor of such a nature that the servant can see that it cannot be performed with safety, or where it is such that reasonable and prudent persons might have a different opinion about the danger, the servant has a right to rely upon the master's judgment. *Harrison v. Denver & R. G. W. R. Co.*, 7 *Utah* 523, 27 *Pac. Rep.* 723.

An inexperienced brakeman who has been accustomed to make certain kinds of couplings only, does not assume the increased risk arising from dangerous couplings which he is ordered to make, not having been warned of the increased danger. *Hungerford v. Chicago, M. & St. P. R. Co.*, 41 *Am. & Eng. R. Cas.* 269, 41 *Minn.* 444, 43 *N. W. Rep.* 324.

279. Obeying orders for work outside of employment.—If the employer or his authorized agent leads the employé to expose himself to a danger not ordinarily incident to the employment, which is known to the former and unknown to the latter, whereby the latter is injured, an action lies against the employer to recover damages for the injury. *Thompson v. Chicago, M. & St. P. R. Co.*, 4 *McCrary (U. S.)* 629, 14 *Fed. Rep.* 564.

If a master orders the servant to do some act outside of the duties ordinarily incident to his employment, and subjecting him to additional hazard, but which service could be made safe by special care upon the part of the master, the servant has the right to assume that such special care will be taken, and the failure of the master to exercise such care will render him liable. *Louisville, E. & St. L. Con. R. Co. v. Hanning*, 53 *Am. & Eng. R. Cas.* 452, 131 *Ind.* 528, 31 *N. E. Rep.* 187.

In such a service, outside of the duties of his ordinary employment, the servant does not necessarily assume the additional hazard in undertaking to perform the unusual and extra service, even though the dangers attending it are obvious. If the apparent danger is such that a person of ordinary prudence, exercising that prudence, would refuse to encounter it, the employé proceeds at his peril. Otherwise he may undertake the service, using care proportioned to the apparent increased risk; and if in so doing he is injured by the em-

ployer's fault, he may recover for the injury. *Louisville, E. & St. L. Con. R. Co. v. Hanning*, 53 *Am. & Eng. R. Cas.* 452, 131 *Ind.* 528, 31 *N. E. Rep.* 187.

280. Limits and exceptions to the rule, generally.—The servant's implied assumption of risks is confined to the particular work and class of work for which he is employed; and if the master orders him to work temporarily in another department of the general business, where the work is of such a different nature and character that it cannot be said to be within the scope of the employment, and where he is associated with a different class of employés, he will not, by obeying such orders, necessarily thereby assume the risks incident to the work and the risk of negligence on the part of such employés. *Pittsburgh, C. & St. L. R. Co. v. Adams*, 23 *Am. & Eng. R. Cas.* 408, 105 *Ind.* 151, 5 *N. E. Rep.* 187.

Where an employé at the time of receiving an injury is in the performance of duties outside of his regular employment, he will nevertheless be held to have assumed the risks incident to those duties, and cannot recover if the injury is the result of a want of due care on his part. *Wormell v. Maine C. R. Co.*, 31 *Am. & Eng. R. Cas.* 272, 79 *Me.* 397, 4 *N. Eng. Rep.* 692, 10 *Atl. Rep.* 49.—REVIEWED IN *Atchison, T. & S. F. R. Co. v. Schroeder*, 47 *Kan.* 315.

Damages cannot be recovered for injuries alleged to have been received by an employé of a railroad company while in the performance of a service not within the scope of his duty, if his opportunity for observing the danger was equal to that of the company; nor is the company guilty of negligence if the performance of an unusually dangerous service was required for good reason, as for the safety of the passengers. *Houston & T. C. R. Co. v. Fowler*, 8 *Am. & Eng. R. Cas.* 504, 56 *Tex.* 452.

It is a sufficient defense that the track, culverts, etc., were substantial and durable and were supervised in their construction by competent engineers, so as to be able to withstand all ordinary storms in that locality; and the fact that the storm which caused the accident was of extraordinary and unprecedented violence did not render the company liable on the ground of negligence. *Houston & T. C. R. Co. v. Fowler*, 8 *Am. & Eng. R. Cas.* 504, 56 *Tex.* 452.

If the employé was in the midst of the storm, and had the opportunity to observe the degree of danger attending the performance of the service, damages cannot be recovered of the company on the ground that the latter knew the danger and the former did not. *Houston & T. C. R. Co. v. Fowler*, 8 Am. & Eng. R. Cas. 504, 56 Tex. 452.—QUOTED IN *Woodward Iron Co. v. Jones*, 80 Ala. 123; *Patnode v. Harter*, 20 Nev. 303, 21 Pac. Rep. 682.

281. — Illustrations.—Where a railroad company is in the habit of receiving from other railroads cars loaded with timbers which project over the ends of the cars so far as to make it dangerous for any one, except a careful, skillful, and prudent person, to attempt to couple the cars together, it is not negligence for the railroad company to order and permit such a person, who has been in the employ of the railroad company doing that kind of business for about five months, to attempt to make such a coupling, where the attempt is to be made in broad daylight, although it may be raining at the time. *Atchison, T. & S. F. R. Co. v. Plankett*, 2 Am. & Eng. R. Cas. 127, 25 Kan. 188.—DISTINGUISHING *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa 32.—QUOTED IN *Jackson v. Missouri Pac. R. Co.*, 104 Mo. 448. REVIEWED IN *Scott v. Oregon R. & N. Co.*, 28 Am. & Eng. R. Cas. 414, 14 Oreg. 211.

The plaintiff testified that he was employed to wheel scrap iron from the yard into the shop, where the hammer was, and to fill the tank with water and to bring ice, and that the first time he worked at the hammer was on the morning of the accident. *Held*, that this did not afford him a right to recover, inasmuch as it appeared from his own testimony, that he had been at work there for two months, made no objection when he was called on to work at the hammer, and voluntarily undertook the employment. *Hammathly v. Northern C. R. Co.*, 46 Md. 280, 18 Am. Ry. Rep. 188.—DISTINGUISHING *Union Pac. R. Co. v. Fort*, 17 Wall. (U. S.) 553.

The foreman of a gang of bridge builders, an intelligent adult, who consents to a direction to take an engine and his men and do some switching, and makes no objection on account of his want of experience, cannot recover for an injury received while coupling cars, which he was not personally directed to do, owing to a defective coup-

ling appliance on the engine, not shown to have been known to the company. No negligence of the employer can be predicated upon such a state of facts alone. *Cole v. Chicago & N. W. R. Co.*, 33 Am. & Eng. R. Cas. 274, 71 Wts. 114, 37 N. W. Rep. 84, 5 Am. St. Rep. 201.—DISTINGUISHING *Ohio & M. R. Co. v. Hammersley*, 28 Ind. 2; *Lalor v. Chicago, B. & Q. R. Co.*, 52 Ill. 401; *Pittsburgh, C. & St. L. R. Co. v. Adams*, 105 Ind. 151; *Jones v. Lake Shore & M. S. R. Co.*, 49 Mich. 573; *Mann v. Oriental Print Works*, 11 R. I. 152; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Broderrick v. Detroit Union R. S. & D. Co.*, 56 Mich. 251; *Cook v. St. Paul, M. & M. R. Co.*, 34 Minn. 45; *Dowling v. Allen*, 74 Mo. 13; *Union Pac. R. Co. v. Fort*, 17 Wall. (U. S.) 553; *Benzing v. Steinway*, 101 N. Y. 547; *O'Connor v. Adams*, 120 Mass. 427.

282. Knowledge that obedience involves very great danger.—Where a master commands a servant to go outside of his regular employment to do a work which is attended with special danger, and the servant, in response to the specific commands of his master, goes and does the work in the way and at the time directed, the fact that the servant knew it was dangerous does not exonerate the master from responsibility, or make the servant guilty of contributory negligence, unless the character of the danger be so patent and so extreme that no one but a foolhardy, reckless man would attempt it. *English v. Chicago, M. & St. P. R. Co.*, 24 Fed. Rep. 906.

But where a servant has equal means of knowing the danger, so that the master and servant stand equal in that respect, and the servant is not specifically commanded as to the time and manner in which the work may be done, but is told to do a particular thing, and has such discretion that he can have some control over the means, time, and manner of doing the work, then, unless he does it in a way and with the means which will be safest, he is guilty of contributory negligence. *So held*, where an employé was sent to do labor on a sloping, slippery, and unprotected platform, and fell and was injured, where it appeared that he knew the danger as well as the company. *English v. Chicago, M. & St. P. R. Co.*, 24 Fed. Rep. 906.

A servant is not bound, under all circumstances and at all hazards, to obey the

orders of his master. He cannot recover damages of the master for injuries received while obeying the latter's order, if he had time to deliberate, and voluntarily, and with knowledge of the peril, placed himself in a position in which he was more than likely to be injured. *McDermott v. Hannibal & St. J. R. Co.*, 28 *Am. & Eng. R. Cas.* 528, 87 *Mo.* 385.

The fact that the employé knowingly undertook to use a dangerously defective tool, under the immediate command of a superior employé, will not give him a right to recover. *Baker v. Western & A. R. Co.*, 68 *Ga.* 699.—**QUOTING** *Western & A. R. Co. v. Adams*, 55 *Ga.* 279.

A railroad employé cannot recover for injuries received while using a defective or overcrowded hand-car, where his own evidence shows that he used it knowing its defective or overcrowded condition; and the right to recover is not affected by the fact that he was acting under the immediate command of a superior employé. *Bell v. Western & A. R. Co.*, 70 *Ga.* 566. *Bradshaw v. Louisville & N. R. Co.*, (Ky.) 21 *S. W. Rep.* 346.

Plaintiff, while engaged with others in excavating a tunnel, was injured by earth falling on him, caused by its being loosened up or cracked in blasting. It appeared that the danger was apparent to the plaintiff. *Held*, that he could not recover, though his foreman, after knowledge of the danger, ordered him to do the work without notifying him of the danger. *Anderson v. Winston*, 31 *Fed. Rep.* 528.

283. Obeying the orders of a co-employee.—The fact that a servant undertakes a dangerous piece of work by the direction of a fellow-servant who does not stand in the relation to him of vice-principal, will not render the principal liable for injuries received. *Watts v. Hart*, 7 *Wash.* 178, 34 *Pac. Rep.* 423, 771. *Pittsburgh, C. & St. L. R. Co. v. Adams*, 23 *Am. & Eng. R. Cas.* 408, 105 *Ind.* 151, 5 *N. E. Rep.* 187.—**DISTINGUISHED** IN *Cole v. Chicago & N. W. R. Co.*, 33 *Am. & Eng. R. Cas.* 274, 71 *Wis.* 114.

So held, where a yard man was killed while coupling cars by request of the engineer, by the negligence of the engineer, it not being a part of the duty of the yard man to couple the cars. *Bradley v. Nashville, C. & St. L. R. Co.*, 14 *Lea (Tenn.)* 374.—**FOLLOWING** *Nashville & C. R. Co. v. McDaniel*,

12 *Lea* 386. **REVIEWING** *Nashville, C. & St. L. R. Co. v. Wheelless*, 10 *Lea* 748.

284. Obeying the orders of a superior servant — Vice-principal.—Where the employer places one employé under the control and direction of another, and the latter, in the exercise of the authority so conferred, orders the former into a place of unusual danger, and thus exposes him to extraordinary peril, of the existence and extent of which he is not advised, the employer is liable. *Thompson v. Chicago, M. & St. P. R. Co.*, 4 *McCrary (U. S.)* 629, 14 *Fed. Rep.* 564. *Chicago & G. E. R. Co. v. Harney*, 28 *Ind.* 28.

A master is liable for an accident which happens in consequence of an improper and inconsiderate order, such as no one exercising ordinary care would have given, when such order is given by a foreman or superintendent having authority not only to give orders as to work, but to discharge the person to whom it is given; but if an accident happens from some negligence of the foreman, which negligence related to the foreman's duties as a co-laborer with the person injured, and which might just as readily have happened with one having no such authority, the master is not liable. *Fitzgerald v. Honkomp*, 44 *Ill. App.* 365.—**QUOTING** *Chicago & A. R. Co. v. May*, 108 *Ill.* 288.

Though the employé knew of the danger, his right to recover for injuries resulting therefrom would not necessarily be defeated if he was acting at the time under the immediate orders of a superior. *Greenleaf v. Illinois C. R. Co.*, 29 *Iowa* 14.—**QUOTED** IN *Kroy v. Chicago, R. I. & P. R. Co.*, 32 *Iowa* 357.

A person employed to load and unload cars about a depot was directed to couple cars by the superintendent of the depot and grounds, which was not in the line of his employment, and of which he had no experience, which was known to the superintendent. The engine was so negligently handled as to bring the cars together with great force, killing the employé. *Held*, that the company was liable for his death. *Lator v. Chicago, B. & Q. R. Co.*, 52 *Ill.* 401.—**DISTINGUISHING** *Honner v. Illinois C. R. Co.*, 15 *Ill.* 550; *Illinois C. R. Co. v. Cox*, 21 *Ill.* 20.—**DISTINGUISHED** IN *Capper v. Louisville, E. & St. L. R. Co.*, 21 *Am. & Eng. R. Cas.* 525, 103 *Ind.* 305; *Peterson v. Whitebreast C. & M. Co.*, 50 *Iowa* 673;

Leary v. Boston & A. R. Co., 23 Am. & Eng. R. Cas. 383, 139 Mass. 580, 52 Am. Rep. 733; New Orleans, J. & G. N. R. Co. v. Harrison, 48 Miss. 112; Cole v. Chicago & N. W. R. Co., 33 Am. & Eng. R. Cas. 274, 71 Wis. 114. NOT FOLLOWED IN *Ross v. New York C. & H. R. Co.*, 5 Hun (N. Y.) 488. REVIEWED IN *Vicksburg & M. R. Co. v. Wilkins*, 47 Miss. 404.

Plaintiff's intestate was a workman engaged in repairing cars that were run onto what were known as safety tracks, but went under a car standing on what was known as the storage track, to obtain materials generally obtained elsewhere, and was killed. He was acquainted with a rule forbidding any work on that track. *Held*, that the fact that his foreman directed him to go under the car would not make the company liable, in the absence of evidence that the foreman was authorized to change or interfere with the rules of the company, and so direct him. *Keenan v. New York, L. E. & W. R. Co.*, 21 N. Y. Supp. 445, 49 N. Y. S. R. 513, 2 Misc. 34.

A freight train, in running down a grade, left the track and killed a brakeman. Under a rule of the company it was left to the judgment of the conductor whether he would run the train down as a whole or whether he would detach a portion of it and call for extra help; but on this occasion he attempted to run the train down as a whole. *Held*, that the brakeman did not assume the risk of accident simply because he knew of such authority, but where it appeared that he did not have equal facilities for determining the danger. *Wooden v. Western N. Y. & P. R. Co.*, 25 N. Y. Supp. 977, 5 Misc. 537.

In order for the company to avoid liability in such a case on the ground that the brakeman assumed the risk, the company must show that the brakeman knew, or was bound to know, of the danger in time to enable him to decline to continue in the service. *Wooden v. Western N. Y. & P. R. Co.*, 25 N. Y. Supp. 977, 5 Misc. 537.

5. Risks Assumed by Repairers and Construction Hands.

285. Generally.—When an employé accepts employment upon a construction train for the purpose of finding and repairing washouts caused by a severe storm, with a knowledge of all the facts, and of the

purpose for which the train started, he assumes the extrahazardous risks of such employment; and there can be no recovery for injuries or death occasioned in the course of such employment, if no negligence appears on the part of the company in the selection of employés in charge of the train, or in the careless running of such train. *Vaughn v. California C. R. Co.*, 83 Cal. 18, 23 Pac. Rep. 215.

286. Risks from unsafe working place—Working under car.—To go under a car standing alone upon a side track for the purpose of repairing it is not in itself a dangerous service, the hazards of which are assumed by a person employed in that business; and where it appears that one whose business it was to repair cars on certain repair tracks, which were always protected, was ordered by his foreman to repair a car standing upon another side track, where he was injured by another car being pushed against the one he was under, in the absence of proof that a switchman had been placed, or other precautions taken to protect the car, it will be presumed, from the fact of the accident, that no precautions were taken. *Luebke v. Chicago, M. & St. P. R. Co.*, 15 Am. & Eng. R. Cas. 183, 59 Wis. 127, 17 N. W. Rep. 870, 48 Am. Rep. 483.

Deceased was a car inspector and repairer. When a car needed repairs it was optional with him to repair it where it stood, have it switched to a track set apart for that purpose, or taken into shops. Whenever he needed assistance he applied to the foreman of the wood shop. Upon the occasion in question he undertook to repair the draw-bar of a car which was standing upon one of the main tracks. He applied for assistance and was furnished with a man. He directed the assistant to hold the draw-bar in position while he went under the car to put a pin in position. While so engaged a train, which neither of them could see, backed onto the car underneath which the deceased was, inflicting injuries from which he died. Plaintiff claimed that the defendant was negligent in not providing a suitable place in which to make the repairs, and in not furnishing a competent helper or helpers. *Held*, that no recovery could be had, for under the circumstances the danger was in both respects an obvious one which the deceased assumed by putting himself in that position. *Latremouille v. Bennington & R. R. Co.*, 48 Am. & Eng. R.

Cas. 265, 63 *Vt.* 336, 22 *Atl. Rep.* 656. *Campbell v. Pennsylvania R. Co.*, (Pa.) 24 *Am. & Eng. R. Cas.* 427, 2 *Atl. Rep.* 489.

287. Risks from defective track and roadbed.—A person engaged to work in and about the construction of a railroad assumes the ordinary risks of such employment, including the risk of being transported to and from his work on a construction train over a newly constructed road, and cannot expect the road and roadbed to be in as perfect and safe condition before it is finished as if the same had been completed and open for public travel. *Colorado Midland R. Co. v. O'Brien*, 48 *Am. & Eng. R. Cas.* 235, 16 *Colo.* 219, 27 *Pac. Rep.* 701.—APPROVED IN *Colorado Midland R. Co. v. Naylor*, 17 *Colo.* 501.

But he has a right to expect a degree of care and skill equal to that ordinarily exercised during the progress of a railroad construction. *Colorado Midland R. Co. v. Naylor*, 17 *Colo.* 501, 30 *Pac. Rep.* 249.—APPLYING *Colorado Midland R. Co. v. O'Brien*, 16 *Colo.* 219.

He does not assume the increased risk arising from the neglect of the railway company, unknown to him or not ascertainable by ordinary diligence, to use proper care to learn the condition of the track and to prevent accidents to its employés. Such neglect, however, must be shown by one seeking to recover for damages arising from an injury caused thereby. *Carlson v. Oregon S. L. & U. N. R. Co.*, 53 *Am. & Eng. R. Cas.* 135, 21 *Oreg.* 450, 28 *Pac. Rep.* 497.—DISTINGUISHING *Anderson v. Bennett*, 16 *Oreg.* 515, 8 *Am. St. Rep.* 311; *Miller v. Southern Pac. Co.*, 20 *Oreg.* 285; *Murphy v. Boston & A. R. Co.*, 88 *N. Y.* 146, 42 *Am. Rep.* 240; *Meloy v. Chicago & N. W. R. Co.*, 77 *Iowa* 743, 14 *Am. St. Rep.* 325; *Bowen v. Chicago, B. & K. C. R. Co.*, 95 *Mo.* 268; *Rosenbaum v. St. Paul & D. R. Co.*, 38 *Minn.* 173, 8 *Am. St. Rep.* 653; *Madden v. Minneapolis & St. L. R. Co.*, 32 *Minn.* 303.—DISTINGUISHED IN *Fisher v. Oregon S. L. & U. N. R. Co.*, 22 *Oreg.* 533.

The single spiking of three ties, coupled with an entire omission to spike the fourth, upon a curve of five or six degrees, is negligence not contemplated by the contract of a construction employé. *Colorado Midland R. Co. v. Naylor*, 17 *Colo.* 501, 30 *Pac. Rep.* 249.

Plaintiff's intestate was killed while engaged as a laborer in repairing a track

which had fallen into decay and had been partially abandoned. He was killed while riding on a construction train, by its leaving the track, caused by the space at the side of the rails, where the flanges of the wheels run, being filled with frozen mud. The company's general foreman, who had charge of the repairs and the condition of the track, had attempted to remove the frozen earth, but had not sufficiently done so. *Held*, that the rule requiring the company to provide a safe track is qualified when applied to such case, and the employé assumed the risks incident to riding on the defective track. *Brick v. Rochester, N. Y. & P. R. Co.*, 21 *Am. & Eng. R. Cas.* 605, 98 *N. Y.* 211; *reversing* (?) 31 *Hun* 453.

288. Risks from defective bridges.

—A shoveler sent out on a work-train to aid in clearing the track where it had been obstructed by land slides, assumes only such risks as belong to his work; and this does not include the risk of accident from defects in a bridge over which the train went, where ordinary care would have detected such defects and avoided the accident. *Conlon v. Oregon S. L. & U. N. R. Co.*, 53 *Am. & Eng. R. Cas.* 356, 23 *Oreg.* 499, 32 *Pac. Rep.* 397.

A person engaged by a railroad in repairing the track after an unusual storm and washout does not assume the risk of the company's failure before the storm to make needed repairs to the bridge over which his repair train must pass, or its failure after the storm to send out persons in advance of the train to discover the condition of the track and bridges, and to take such steps as were necessary to prevent accidents. *Conlon v. Oregon S. L. & U. N. R. Co.*, 53 *Am. & Eng. R. Cas.* 356, 23 *Oreg.* 499, 32 *Pac. Rep.* 397.—QUOTING *Knahtla v. Oregon S. L. & U. N. R. Co.*, 21 *Oreg.* 136, 27 *Pac. Rep.* 91; *Carlson v. Oregon S. L. & U. N. R. Co.*, 21 *Oreg.* 450, 28 *Pac. Rep.* 497.

289. Risks from defective cars.

Where a company is in the habit of taking damaged cars from one station to another for repairs, and a person is employed to couple and switch such cars, and while so engaged is injured by reason of the broken condition of a car, the presumption is that he undertook the employment subject to all the risks incident to the place, and that this was one of the risks he expected to incur when he accepted the employment. *Chicago & N. W. R. Co. v. Ward*, 61 *Ill.* 130,

13 *Am. Ry. Rep.* 434. *Watson v. Houston & T. C. R. Co.*, 11 *Am. & Eng. R. Cas.* 213, 58 *Tex.* 434.

An employé so engaged assumes the risk of injury by mistaking a damaged car for a sound one, whether it result through accident, or the error or omission of a fellow-servant. *Fraker v. St. Paul, M. & M. R. Co.*, 15 *Am. & Eng. R. Cas.* 256, 32 *Minn.* 54, 19 *N. W. Rep.* 349.—DISTINGUISHING *Fay v. Minneapolis & St. L. R. Co.*, 30 *Minn.* 231.—*Yeaton v. Boston & L. R. Corp.*, 15 *Am. & Eng. R. Cas.* 253, 135 *Mass.* 418.

Plaintiff was a brakeman employed in defendant's yard at S.; there were inspectors whose duty it was, on the arrival of every train in the yard, to examine each car, and if any injury or defect was discovered, to remove the car from the train and place it upon a track known as the "cripple track" for repairs, and in this work plaintiff was employed. In attempting to couple two cars, one of which had a broken draw-head, in order that the latter might be placed on said track, plaintiff was injured. The defect might easily have been seen. *Held*, that the action was not maintainable; that plaintiff took the necessary risk of his employment, one of the purposes of which was to handle and remove disabled cars; that under the circumstances he had no right to assume that the couplings were perfect; if he did not know the condition of the one which caused the injury, he was bound to assume that it might be disabled and govern his action accordingly, and so was chargeable with negligence. *Arnold v. Delaware & H. Canal Co.*, 125 *N. Y.* 15, 25 *N. E. Rep.* 1064, 34 *N. Y. S. R.* 372; *affirming* 16 *N. Y. S. R.* 310, 1 *N. Y. Supp.* 409.—DISTINGUISHING *Goodrich v. New York C. & H. R. R. Co.*, 116 *N. Y.* 398.

A neglect to chain or prop up the defective draw-head, as was the rule and custom of the business in the yard, if not chargeable in some degree to plaintiff himself, was at least a neglect of his co-servants, and not a failure of duty on the part of the master. *Arnold v. Delaware & H. Canal Co.*, 125 *N. Y.* 15, 25 *N. E. Rep.* 1064, 34 *N. Y. S. R.* 372; *affirming* 16 *N. Y. S. R.* 310, 1 *N. Y. Supp.* 409.

200. Risks from defective engine.

—A company is not liable to its employé for injuries received while running a defective engine to the machine shop for repair, if he knew of the defect which made the re-

pair necessary. When the employé is not chargeable with the knowledge of such defect, the question of negligence in the use of the defective engine is to be decided by the jury. *Houston & T. C. R. Co. v. O'Hare*, 64 *Tex.* 600.

201. Risks from running, passing, or backing trains.—From the nature of the work of track repairing it must be done between passing trains, and one who engages to do it, assumes the risk of accidents. *Coyne v. Union Pac. R. Co.*, 133 *U. S.* 370, 10 *Sup. Ct. Rep.* 382. *Kennedy v. Pennsylvania R. Co.*, (Pa.) 17 *Atl. Rep.* 7.

W., employed as a repair man, while proceeding down the track on a hand-car, on a very foggy morning, to surface up the track, was run into by an extra train coming in an opposite direction at a rapid speed and without any previous warning, and was permanently injured by the collision. It was the practice of the company, of which W. had knowledge, to run extra trains without previous notice. *Held*, that W. could not recover. *Pennsylvania R. Co. v. Wachter*, 15 *Am. & Eng. R. Cas.* 187, 60 *Md.* 395.

A freight train broke in two and plaintiff's intestate was a brakeman on the rear portion, and after stopping his portion of the train, and while engaged in repairing the defect, he was killed by the forward portion running back against it. *Held*, that the risk of recoupling the train was one of the risks of the employment, and the company was not liable for the negligence of the engineer in backing on him. (Dykman, J., dissenting.) *Course v. New York, L. E. & W. R. Co.*, 17 *N. Y. S. R.* 715, 49 *Hun* 609, 2 *N. Y. Supp.* 312.

202. Risks from dangers incident to clearing away wrecks.—A track repairer assumes the risk of injury from handling a derrick and removing wrecks, where he continues in the employment after having been called upon to engage in such work, and with full knowledge that it is part of the work included in his employment. *Slatterly v. New York, L. E. & W. R. Co.*, 21 *N. Y. S. R.* 552, 51 *Hun* 638, 4 *N. Y. Supp.* 910.

6. Negligence of Co-employés.*

203. Statement of the rule.—By virtue of the contract for service, an em-

*Risks assumed by employés continuing in service with knowledge of incompetency of fel-

ployé assumes the risks of injury from the negligence of fellow-servants engaged in the same business or common employment. *Totten v. Pennsylvania R. Co.*, 11 *Fed. Rep.* 564. *Thompson v. Chicago, M. & St. P. R. Co.*, 4 *McCrary (U. S.)* 629, 14 *Fed. Rep.* 564.—QUOTED IN *Consolidated Coal Co. v. Wombacher*, 31 *Ill. App.* 288.—*Pullman Palace Car Co. v. Laack*, 143 *Ill.* 242, 32 *N. E. Rep.* 285. *Ohio & M. R. Co. v. Robb*, 36 *Ill. App.* 627. *Michigan C. R. Co. v. Dolan*, 32 *Mich.* 510. *Howd v. Mississippi C. R. Co.*, 50 *Miss.* 178.—FOLLOWED IN *Louisville, N. O. & T. R. Co. v. Petty*, 41 *Am. & Eng. R. Cas.* 444, 67 *Miss.* 255, 7 *So. Rep.* 351.—*New Orleans, J. & G. N. R. Co. v. Hughes*, 49 *Miss.* 258.—COMMENTING ON *Little Miami R. Co. v. Stevens*, 20 *Ohio* 415; *Cleveland, C. & C. R. Co. v. Keary*, 3 *Ohio St.* 201; *Mad River & L. E. R. Co. v. Barber*, 5 *Ohio St.* 557. REVIEWING *Murray v. South Carolina R. Co.*, 1 *McMull. (So. Car.)* 398.—*Brodeur v. Valley Falls Co.*, 16 *R. I.* 448, 17 *Atl. Rep.* 54. *Texas Mex. R. Co. v. Whitmore*, 11 *Am. & Eng. R. Cas.* 195, 58 *Tex.* 276.

Provided that such servants are competent. *Toledo, W. & W. R. Co. v. Durkin*, 76 *Ill.* 395. *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 *Miss.* 258. *Craig v. Chicago & A. R. Co.*, 54 *Mo. App.* 523. *Plank v. New York C. & H. R. Co.*, 1 *T. & C. (N. Y.)* 319; affirmed in 60 *N. Y.* 607, *mem.* *Wild v. Oregon S. L. & U. N. R. Co.*, 21 *Oreg.* 159, 27 *Pac. Rep.* 954. *Melville v. Missouri River, Ft. S. & G. R. Co.*, 4 *McCrary (U. S.)* 194.

Unless the employer has neglected to use ordinary care in the selection of the culpable employés. *Brown v. Central Pac. R. Co.*, (Cal.) 12 *Pac. Rep.* 512. *Gardner v. Michigan C. R. Co.*, 24 *Am. & Eng. R. Cas.* 435, 58 *Mich.* 584, 26 *N. W. Rep.* 301. *Baltimore & O. R. Co. v. McKenzie*, 24 *Am. & Eng. R. Cas.* 395, 81 *Va.* 71.—REVIEWING *Lewis v. St. Louis & I. M. R. Co.*, 59 *Mo.* 495.

It is an obligation resting upon the employer to furnish adequate and safe appliances for his employés, such as are usual in the particular business in which they are

engaged. This is a duty implied from the contract of service, and a failure to provide them renders the employer liable for injuries resulting therefrom; but after this is done employés take all the risks involved in the work in which they are engaged, and of their own and their fellow-servants' negligence. *Hudson v. Ocean Steamship Co.*, 2 *Silv. App.* 75, 110 *N. Y.* 625, *mem.*, 17 *N. E. Rep.* 342; affirming 38 *Hun* 644, *mem.*

204. Scope and extent of the rule.—Where the ordinary duties and occupations of the servants of a common master are such that one is necessarily exposed to hazard by the carelessness or negligence of another, they must be supposed to have voluntarily assumed the risks of such carelessness or negligence when they entered the service. *Chicago & N. W. R. Co. v. Scheuring*, 4 *Ill. App.* 533. *Kelley v. Chicago, St. P., M. & O. R. Co.*, 35 *Minn.* 490, 29 *N. W. Rep.* 173. *Slater v. Jewett*, 5 *Am. & Eng. R. Cas.* 515, 85 *N. Y.* 61, 39 *Am. Rep.* 627.

A servant assumes all the usual risks of his employment, including the risk of injury from the carelessness of fellow-servants, provided they have been prudently chosen and not retained in the employer's service after he has knowledge of their unfitness or negligence. And he assumes the risk of a fellow-servant's negligence even though the latter is in a position of greater responsibility or a different line of employment, so long as both are in the same general business, so that the negligence of one may contribute to the danger of the other. *Quincy Min. Co. v. Kitts*, 42 *Mich.* 34, 3 *N. W. Rep.* 240.—QUOTED IN *Hunn v. Michigan C. R. Co.*, 78 *Mich.* 513; *Harrison v. Detroit, L. & N. R. Co.*, 41 *Am. & Eng. R. Cas.* 398, 79 *Mich.* 409.—*Taylor v. Evansville & T. H. R. Co.*, 41 *Am. & Eng. R. Cas.* 437, 121 *Ind.* 124, 22 *N. E. Rep.* 876, 6 *L. R. A.* 584, 41 *Alb. L. J.* 173.

The negligence of a servant of a railway company of one grade is as much one of the risks of the business as that of another; and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts or omissions on the part of one class of servants and not those of another class. *Robinson v. Houston & T. C. R. Co.*, 46 *Tex.* 540, 13 *Am. Ry. Rep.* 303.—FOLLOWED IN *Gulf, C. & S. F. R. Co. v. Blohn*, 73 *Tex.* 637, 4 *L. R. A.* 764, 11 *S. W. Rep.* 867.—*Dallas v. Gulf, C. & S. F.*

low-servants, see note, 48 *Am. & Eng. R. Cas.* 273.

Knowledge of incompetency by employer and ignorance of by employé, see 53 *Am. & Eng. R. Cas.* 534, *abstr.* See also FELLOW-SERVANTS, 3, 75.

R. Co., 21 *Am. & Eng. R. Cas.* 575, 61 *Tex.* 196.—QUOTING *Robinson v. Houston & T. C. R. Co.*, 46 *Tex.* 550.

The rule is applicable to servants who, though employed in the same general business, have their service in distinct branches of it. *Dallas v. Gulf, C. & S. F. R. Co.*, 21 *Am. & Eng. R. Cas.* 575, 61 *Tex.* 196.

A servant assumes the risk arising from the known incompetency of a fellow-servant, of which he does not complain or make known to his employer. *Latremouille v. Bennington & R. R. Co.*, 48 *Am. & Eng. R. Cas.* 265, 63 *Vt.* 336, 22 *Atl. Rep.* 656.

A servant, although a minor, assumes the risk of the negligence of fellow-servants as a hazard incident to his service. *Hefferen v. Northern Pac. R. Co.*, 45 *Minn.* 471, 48 *N. W. Rep.* 1, 526.

A servant only assumes the ordinary risks of the service, such as are liable to happen in the performance of the work in which he engages; but if he has contracted to serve in any specified branch or department of the master's general business, he assumes the risks arising from the negligence of those of his fellow-servants, and not his superiors in authority, who are engaged in the same business; but he does not assume risks beyond this. *Kidley v. Belcher Silver Min. Co.*, 3 *Saxy. (U. S.)* 437.

Whilst plaintiff, a brakeman, was climbing a car in the execution of his employment, a step gave way and he fell upon the track and lost his arm. The court instructed the jury that the brakeman took upon himself the risk of the carelessness of fellow-servants, and upon its being shown that the company employed competent and reliable car inspectors, a verdict for the plaintiff was set aside and a new trial granted. *Hays v. Pennsylvania R. Co.*, 42 *N. J. L.* 446.

205. Limits and exceptions to the rule.—The rule that a servant assumes the hazards incident to the business, including that of the carelessness of a fellow-servant, is qualified by the exceptions that the servant is not to be exposed to perils or hazards against which he might be guarded by proper diligence on the part of the master; and in providing machinery and other apparatus the master is bound to observe all the care which the exigencies of the situation reasonably require. *Hough v. Texas & P. R. Co.*, 100 *U. S.* 213, 21 *Am. Ry. Rep.* 451.—APPLIED IN *Pullman Palace Car Co. v. Laack*, 143 *Ill.* 242. APPROVED IN *Kennedy*

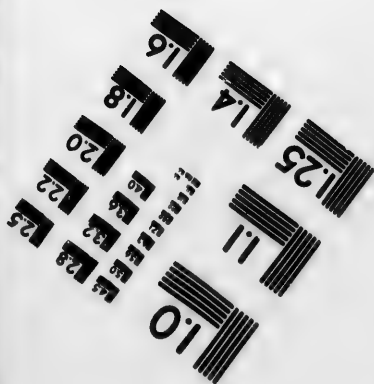
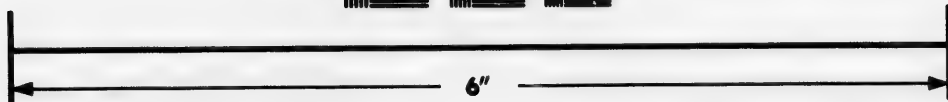
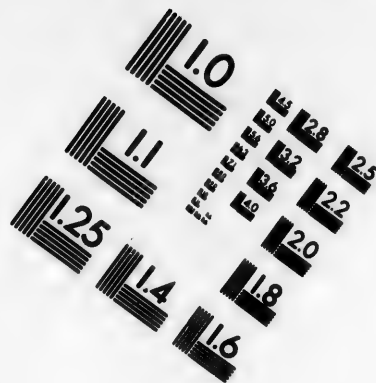
v. Manhattan R. Co., 33 *Hun (N. Y.)* 457. DISTINGUISHED IN *Peschel v. Chicago, M. & St. P. R. Co.*, 17 *Am. & Eng. R. Cas.* 545, 62 *Wis.* 338; *Missouri Pac. R. Co. v. McCally*, 41 *Kan.* 639, 655, 21 *Pac. Rep.* 574. FOLLOWED IN *Cowles v. Richmond & D. R. Co.*, 2 *Am. & Eng. R. Cas.* 90, 84 *N. Car.* 309, 37 *Am. Rep.* 620; *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 31 *Fed. Rep.* 527; *Pullman Palace Car Co. v. Harkins*, 55 *Fed. Rep.* 932; *Little Rock & M. R. Co. v. Moseley*, 56 *Fed. Rep.* 1009. QUOTED IN *Northern Pac. R. Co. v. Charles*, 51 *Am. & Eng. R. Cas.* 198, 51 *Fed. Rep.* 562, 7 *U. S. App.* 359, 2 *C. C. A.* 380.

The master is not to knowingly employ or retain incompetent or habitually negligent co-servants, and he is not to permit to be used in his business defective machinery, whereby the ordinary dangers of the service are increased. The extra hazards resulting from the master's failure to perform his duties to his employés do not come within the risk which the latter assumes, and for an injury resulting from them, or such as are not obvious, and of which the servant has not notice, the master is liable. *United States Rolling Stock Co. v. Wilder*, 25 *Am. & Eng. R. Cas.* 414, 116 *Ill.* 100, 5 *N. E. Rep.* 92. *Craig v. Chicago & A. R. Co.*, 54 *Mo. App.* 523.—REVIEWING *Stoddard v. St. Louis, K. C. & N. R. Co.*, 65 *Mo.* 514.

A servant is not bound to investigate or find out whether the common master had used reasonable care in the selection of those already employed, with whom he is to perform his duties. *St. Louis, A. & T. H. R. Co. v. Corgan*, 49 *Ill. App.* 229.

An employé has the right to assume that only competent co-employés will be employed; and the employer cannot avoid responsibility for an injury to one employé by another, where he has employed unskilful or incompetent workmen. *Sweeney v. New York Steam Co.*, 25 *N. Y. S. R.* 598, 6 *N. Y. Supp.* 528; affirmed in 117 *N. Y.* 642, *mem.*, 22 *N. E. Rep.* 1131, *mem.*, 27 *N. Y. S. R.* 977.

An employé does not assume the risk created by the negligent act of a vice-principal in making unsafe work which he specifically orders the employé to perform. *Taylor v. Evansville & T. H. R. Co.*, 41 *Am. & Eng. R. Cas.* 437, 121 *Ind.* 124, 6 *L. R. A.* 584, 22 *N. E. Rep.* 876. *Lake Shore & M. S. R. Co. v. Knittel*, 33 *Ohio St.* 468.



Photographic Sciences Corporation

**23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503**

1.8
2.0
2.2
2.5
2.8
3.2
3.6
4.0
4.5
5.0

10
01
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99

If an employé knows that another employé is habitually negligent, or that the materials with which he works are defective, and he continues his work without objection, and without being induced by his employer to believe that a change will be made, he will be deemed to have assumed the risk, and cannot recover for an injury resulting therefrom. *Kroy v. Chicago, R. I. & P. R. Co.*, 32 Iowa 357, 10 Am. Ry. Rep. 48.—DISTINGUISHED IN *Vese v. Lancashire & Y. R. Co.*, 2 H. & N. 728; *Little Miami R. Co. v. Stevens*, 20 Ohio 415; *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201. QUOTING *Mad River & E. R. Co. v. Barber*, 5 Ohio St. 541. *Greenleaf v. Illinois C. R. Co.*, 29 Iowa 14.—FOLLOWED IN *Greenleaf v. Dubuque & S. C. R. Co.*, 33 Iowa 52; *Muldowney v. Illinois C. R. Co.*, 39 Iowa 615; *Wells v. Burlington, C. R. & N. R. Co.*, 56 Iowa 530. RECONCILED IN *Indianapolis & St. L. R. Co. v. Watson*, 33 Am. & Eng. R. Cas. 334, 114 Ind. 20, 12 West. Rep. 285, 14 N. E. Rep. 721.

A person in the employment of the consignee of a car-load of goods, who undertakes himself to move the car out to the place of unloading, instead of requiring the company to do it, is not an employé of the company, and does not assume the risk of an injury resulting from the negligence of an employé of the company. The law relating to fellow-servants does not apply. *Conlan v. New York C. & H. R. R. Co.*, 74 Hun 115, 26 N. Y. Supp. 659, 56 N. Y. S. R. 316.

A married woman cooking on a work train, accompanying a car where the hands of the company are boarded, the price of the board being paid by the company to the husband, and deducted from the men's wages, is not a fellow-servant with the employés running the train; and she does not therefore assume the risk arising from their negligence. *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. Rep. 288.

A servant in the employ of a railway company, in going to his work upon a hand-car, was thrown from the car and injured. That the defective condition of the track may have been owing to want of care on the part of employés charged with the duty of repairing the track does not require the application of the doctrine of fellow-servants, so as to relieve the defendant from liability. *Southern Pac. R. Co. v. Aylward*, 79 Tex. 675, 15 S. W. Rep. 697.

III. CONTRIBUTORY NEGLIGENCE OF EMPLOYEE.

1. In General.*

296. Duty of employee to use care.

—A servant having knowledge of danger about him must use diligence and care in protecting himself from harm. *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. Rep. 999.

And if he wilfully and imprudently encounters such danger the employer is, generally, not responsible for the injury caused thereby. *Johnson v. Chesapeake & O. R. Co.*, 38 W. Va. 206, 18 S. E. Rep. 573.

A person employed to work with or around dangerous machinery is bound to exercise his thinking faculties, and give careful attention as to how he passes around it; and if he failed to do so, and is injured in consequence, he is guilty of contributory negligence, which will prevent his recovery for such injury. *Stone v. Oregon City Mfg. Co.*, 4 Oreg. 52.—QUOTING *Pittsburgh, Ft. W. & C. R. Co. v. Evans*, 53 Pa. St. 255.—*Hughes v. Winona & St. P. R. Co.*, 27 Minn. 137, 6 N. W. Rep. 553.—DISTINGUISHED IN *Chicago & T. R. Co. v. Simmons*, 11 Ill. App. 147.

While there is an implied contract between employer and employé that the former shall provide suitable means, appliances, and instrumentalities with which to perform the labors required of the latter, and also that the latter shall be advised by the former of all dangers incident to the service of which the latter is not cognizant, yet the failure of the employer in this regard furnishes no excuse for the conduct of an employé who voluntarily incurs a known danger. *Simmons v. Chicago & T. R. Co.*, 18 Am. & Eng. R. Cas. 50, 110 Ill. 340.

An action cannot be maintained against a railroad corporation for personal injuries occasioned to a brakeman in its employ by being struck by a bridge while on a moving train, and resulting in his death, if the evidence wholly fails to show that he was using due care, or that his death was not instantaneous. *Riley v. Connecticut River R. Co.*, 15 Am. & Eng. R. Cas. 181, 135 Mass. 292.—FOLLOWING *Corcoran v. Boston & A. R. Co.*, 133 Mass. 507.—NOT FOLLOWED IN *Burns v. Chicago, M. & St. P. R. Co.*, 69 Iowa 450. REVIEWED IN *Maier v. Boston & A. R. Co.*, 158 Mass. 36.

* Contributory negligence of employés generally, see 44 AM. & ENG. R. CAS. 562, *abstr.*

297. Degree of care — Ordinary prudence.*—The employé is required to use ordinary care and prudence to avoid injury, and when there are two ways of discharging his duties, he must select that which is safer, or less dangerous; but he is not required to leave the post of duty assigned by his employer, unless his continuance at that place would, under the principle above stated, amount to contributory negligence. *Highland Ave. & B. R. Co. v. Walters*, 91 *Ala.* 435, 8 *So. Rep.* 357.

Where the employment sought and accepted is dangerous, it is the duty of the employé to at least exercise reasonable and ordinary care to avoid injury. If the employment is a hazardous service, he is required to use very great precautions to avoid injury. *Union Pac. R. Co. v. Estes*, 37 *Kan.* 715, 16 *Pac. Rep.* 131.—DISTINGUISHED IN *Missouri Pac. R. Co. v. McCally*, 41 *Kan.* 639, 655, 21 *Pac. Rep.* 574.—*Parker v. Georgia Pac. R. Co.*, 83 *Ga.* 539, 10 *S. E. Rep.* 233. *Lake Shore & M. S. R. Co. v. Roy*, 5 *Ill. App.* 82. *Chicago, B. & Q. R. Co. v. Avery*, 8 *Ill. App.* 133. *Deppe v. Chicago, R. I. & P. R. Co.*, 36 *Iowa* 52. *Taylor v. Missouri Pac. R. Co.*, (*Mo.*) 16 *S. W. Rep.* 206. *Shoner v. Pennsylvania Co.*, 130 *Ind.* 170, 28 *N. E. Rep.* 616, 29 *N. E. Rep.* 775. *Georgia R. & B. Co. v. McDade*, 59 *Ga.* 73. *Murphy v. New York C. & H. R. R. Co.*, 11 *Daly (N. Y.)* 122. *St. Louis & S. F. R. Co. v. McClain*, 80 *Tex.* 85, 15 *S. W. Rep.* 789.

An employé is bound to use ordinary care to avoid the dangers that arise, whether usually incident to the service or not. *Schroeder v. Chicago & A. R. Co.*, 53 *Am. & Eng. R. Cas.* 436, 108 *Mo.* 322, 18 *S. W. Rep.* 1094. *Alcorn v. Chicago & A. R. Co.*, 53 *Am. & Eng. R. Cas.* 87, 108 *Mo.* 81, 18 *S. W. Rep.* 188.—QUOTING *Darracott v. Chesapeake & O. R. Co.*, 31 *Am. & Eng. R. Cas.* 157, 83 *Va.* 288.—*Crutchfield v. Richmond & D. R. Co.*, 78 *N. Car.* 300, 16 *Am. Ry. Rep.* 212.

A servant is under the same obligation to provide for his own safety from dangers of which he has notice, or might discover by the use of ordinary care, as a master is to provide it for him. *Wormell v. Maine C. R. Co.*, 31 *Am. & Eng. R. Cas.* 272, 79 *Me.*

397, 4 *N. Eng. Rep.* 692, 10 *Atl. Rep.* 49.—REVIEWING *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 *Ill.* 365; *Ft. Wayne, J. & S. R. Co. v. Gildersleeve*, 33 *Mich.* 133; *Wheeler v. Wason Mfg. Co.*, 135 *Mass.* 298; *Hathaway v. Michigan C. R. Co.*, 51 *Mich.* 253, 47 *Am. Rep.* 569.

It is proper for a court to refuse to charge that the same degree of care is required from an employé engaged in his duty upon the track, that is required from a person crossing the track or from one not an employé going upon the track for any purpose. *Roll v. Northern C. R. Co.*, 15 *Hun (N. Y.)* 496; *affirmed in 80 N. Y.* 647, *mem.*

298. Care such as used by prudent persons under like circumstances.—

The servant of a railway company, to recover for a personal injury growing out of negligence of the company, must have used ordinary care on his part, considering his surroundings; that is, such care as a man of ordinary prudence would usually exercise under the same or like circumstances. *Wabash R. Co. v. Elliott*, 4 *Am. & Eng. R. Cas.* 651, 98 *Ill.* 481. *Schultz v. Chicago & N. W. R. Co.*, 44 *Wis.* 638, 18 *Am. Ry. Rep.* 146.

If, having been duly notified of danger, the employé fails, from inattention, indifference, absent mindedness, or forgetfulness, to inform himself of the particular facts, or to take the necessary steps to avoid injury—in other words, if he fails to exercise the care, watchfulness, and caution which men of ordinary prudence would exercise under the circumstances—he is guilty of contributory negligence. *Louisville & N. R. Co. v. Hall*, 39 *Am. & Eng. R. Cas.* 298, 87 *Ala.* 708, 4 *L. R. J.* 710, 6 *So. Rep.* 277.

It is not under all circumstances contributory negligence in a servant to expose himself to danger which he could avoid. If the danger be not so great nor so imminent that a man of ordinary prudence would refuse to encounter it in the performance of his duty, the servant who voluntarily incurs the danger is not necessarily guilty of contributory negligence. *Louisville, N. A. & C. R. Co. v. Hobbs*, 3 *Ind. App.* 445, 29 *N. E. Rep.* 934.

299. Effect of employe's negligence as a defense, generally.*—A railroad

* As to duty of servant to use reasonable care to avoid personal injury, see note, 6 *L. R. A.* 584.

* Contributory negligence of servants as a defense, see note, 36 *AM. DEC.* 286. See also 44 *AM. & ENG. R. CAS.* 562, *abstr.*

employé cannot recover for injuries received, if his own negligence contributed in part to the injury. *Daub v. Northern Pac. R. Co.*, 18 Fed. Rep. 625; *Bauer v. St. Louis, I. M. & S. R. Co.*, 46 Ark. 388.—QUOTING *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439; *Schofield v. Chicago, M. & St. P. R. Co.*, 114 U. S. 617; *Williams v. Chicago, M. & St. P. R. Co.*, 64 Wis. 1, 24 N. W. Rep. 423; *Holland v. Chicago, M. & St. P. R. Co.*, 18 Fed. Rep. 243.—*Slavin v. New York, N. H. & H. R. Co.*, 63 Conn. 573; *Central R. & B. Co. v. Kitchens*, 83 Ga. 83, 9 S. E. Rep. 827; *Chicago, B. & O. R. Co. v. Merckes*, 36 Ill. App. 195.

Where the employé and the company were equally to blame for the injury, the company is not liable. *Indianapolis & C. R. Co. v. Love*, 10 Ind. 554. *Vicksburg & M. R. Co. v. Wilkins*, 47 Miss. 404.—DISTINGUISHING *Little Miami R. Co. v. Stevens*, 20 Ohio 415. REVIEWING *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541; *Lalor v. Chicago, B. & O. R. Co.*, 52 Ill. 401.—*Cornwall v. Charlotte, C. & A. R. Co.*, 97 N. Car. 11, 2 S. E. Rep. 659.

But this rule is subject to the qualification that contributory negligence will not defeat the action, if the defendant might, by the exercise of reasonable care and prudence, have avoided the consequence of the injured party's negligence. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679.—QUOTED IN *Southern Pac. Co. v. Lafferty*, 57 Fed. Rep. 536. REFERRED TO IN *Northern Pac. R. Co. v. Sullivan*, 53 Fed. Rep. 219, 10 U. S. App. 473, 3 C. C. A. 506.

Negligence or carelessness not contributing to the injury, would not prevent a recovery. *Savannah, F. & W. R. Co. v. Barber*, 71 Ga. 644.

A person engaged as a car inspector with full knowledge of the dangers incident to the service, who is injured by the engine of another company, which has the privilege of running over the same track, through the negligence of the engineer of the lessee company, cannot recover from the company employing him, unless he be free from negligence contributing to the injury. *Bauer v. St. Louis, I. M. & S. R. Co.*, 46 Ark. 388.—QUOTING *Clark v. Chicago, B. & O. R. Co.*, 92 Ill. 43.

Where an employé sues for a personal injury sustained by him in consequence of a hand-car leaving the track, upon which car he was riding, and the running of which he

controlled, he must, in order to recover, show affirmatively that he was free from fault, or that there was negligence by the company sufficient to have caused the run-off. *Central R. & B. Co. v. Kenney*, 58 Ga. 485, 16 Am. Ry. Rep. 131.

When employés, aware of the dangers, voluntarily use implements which they know, or, by the exercise of the knowledge they possess, might know, are not so well adapted to their business as other implements, they cannot recover damages for injuries resulting therefrom, which might have been avoided by the use of that ordinary care which it is the duty of every one to use. *Houston & T. C. R. Co. v. Conrad*, 62 Tex. 627.

Such is particularly the case when the work in which the injured party was engaged was not such as was contemplated by his employer to be performed in the manner done by him. *Houston & T. C. R. Co. v. Conrad*, 62 Tex. 627.

300.—as a defense in statutory actions.—In an action under section 2590, Ala. Code of 1886, by an employé against a company for a personal injury, the defense of contributory negligence is open to the employer; but the mere fact that the employé has performed work knowing it to be dangerous does not of itself constitute contributory negligence; it must appear that he performed the dangerous work in a negligent manner. *Mobile & B. R. Co. v. Holborn*, 84 Ala. 133, 4 So. Rep. 146.—REVIEWED IN *Wilson v. Louisville & N. R. Co.*, 85 Ala. 269.

The defense is established by proof that the employé, having discovered the defect or obstruction which caused the injury, failed to give notice of it, and yet continued in the service; but if he gave reasonable notice on discovering it, his further continuance in the service would not amount to contributory negligence, unless the peril thereby became so imminent and impending that a man of reasonable prudence would not have continued in the service. *Highland Ave. & B. R. Co. v. Walters*, 91 Ala. 435, 8 So. Rep. 357.—DISAPPROVED IN *Kansas City, M. & B. R. Co. v. Burton*, 53 Am. & Eng. R. Cas. 115, 97 Ala. 240, 12 So. Rep. 88.

Illinois Rev. St. 1874, p. 582, provides that every person operating machinery by means of a tumbling rod or line of shafting, shall keep the same safely boxed or secured while

running. Defendant company maintained a pump at a water station which was worked by horse power, the pump being connected by a tumbling rod or shaft with the horse power, and the plaintiff was injured while operating the same by the shaft catching in his clothes. *Held*, that the rule of contributory negligence prevailed in an action under the statute for the injury, as in other cases. *Wabash, St. L. & P. R. Co. v. Thompson*, 10 Ill. App. 271.—REVIEWING *Illinois C. R. Co. v. Hetherington*, 83 Ill. 510.

Section 193, Miss. Const. 1890, which provides that "knowledge by any employé injured of the defective or unsafe character or condition of any machinery, ways, or appliance shall be no defense to an action for injury caused thereby, except," etc., abolishes the defense of contributory negligence in such actions, unless the negligence of such employé be wilful or reckless. *Welsh v. Alabama & N. R. Co.*, 70 Miss. 20, 11 So. Rep. 723.

Where, in such case, the employé testified that he had seen that the appliance causing the injury was defective, but had reported it and believed, or had reason to believe, it had been remedied, it was for the jury to say whether he was wilfully or recklessly negligent in his use of it. *Welsh v. Alabama & N. R. Co.*, 70 Miss. 20, 11 So. Rep. 723.

An action for a personal injury caused by collision with a moving train, under the provisions of the Tenn. Code, §§ 1166 *et seq.*, will not lie in behalf of a servant or employé of the company, whose negligence caused or contributed to the accident or collision occasioning the injury. *East Tenn. V. & G. R. Co. v. Rush*, 15 Lea (Tenn.) 145.—QUOTING *Louisville & N. R. Co. v. Robertson*, 9 Heisk. (Tenn.) 276; *Louisville & N. R. Co. v. Burke*, 6 Coldw. (Tenn.) 45.

301. Must proximately contribute to the injury.—Though the master be guilty of negligence, yet if the injury to plaintiff be the proximate result of his own negligence, he cannot recover. *Sexton v. Turner*, 89 Va. 341, 15 S. E. Rep. 862. *Colorado C. R. Co. v. Ogden*, 3 Colo. 499. *Houston & T. C. R. Co. v. O'Hare*, 64 Tex. 600. *O'Neal v. Chicago & I. C. R. Co.*, 132 Ind. 110, 31 N. E. Rep. 669.

If the evidence of either the plaintiff or the defendant clearly shows that the plaintiff was guilty of the negligence which was

the direct cause of the injury, there can be no recovery against the defendant. *Cawley v. Winifrede R. Co.*, 31 W. Va. 116, 5 S. E. Rep. 318.—FOLLOWING *Riley v. West Virginia C. & P. R. Co.*, 27 W. Va. 145.

The mere fact alone that the injuries received by an employé were inflicted while such employé was acting in disobedience of known rules, will not relieve the master of liability; but if the violation in whole or in part of such rules is the cause of the injury, it will prevent a recovery by the employé. *San Antonio & A. P. R. Co. v. Wallace*, 44 Am. & Eng. R. Cas. 564, 76 Tex. 636, 13 S. W. Rep. 565.—APPROVED IN *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112.

Where it appears that an employé could have averted an accident by the exercise of ordinary care and has failed to do so, and an injury is the proximate result of his failure to do so, it would be offering a premium for negligence to allow him to recover, as well as being oppressive to the company and detrimental to the interests of the public. *Callahan v. Louisville & N. R. Co.*, 11 Fed. Rep. 536.

If an employé be injured by reason of negligence in moving the train while he is endeavoring, in the line of his duty, to lift or put in shape a bumper, the fact that the bumper was defective will not bar a recovery. *Central R. & B. Co. v. Lanier*, 83 Ga. 587, 10 S. E. Rep. 279.

Negligence in running a train through a city at a greater rate of speed than is allowed by an ordinance will not defeat a recovery for an injury to an employé, where the speed of the train does not cause the injury. *Lake Shore & M. S. R. Co. v. Parker*, 41 Am. & Eng. R. Cas. 339, 131 Ill. 557, 23 N. E. Rep. 237; *affirming* 33 Ill. App. 405.

The contributory negligence of an employé will not prevent his recovery for personal injuries, where the presumed cause of the injury is a want of sufficient servants, or their incompetency. *Harvey v. New York C. & H. R. R. Co.*, 19 Hun (N. Y.) 556.

The conductor of a freight train, in violation of the known rules of the company, boarded his train while it was moving, and while standing upon the top of a box car was knocked off and killed by a scaffold suspended over a bridge. There was evidence to the effect that it was customary and sometimes the duty of conductors, although forbidden by a rule, to be on the top

of a box car, and that the conductor could not board the train while going back to the caboose, on account of obstructions along the track. *Held*, that the conductor was guilty of contributory negligence, which precluded a recovery for his death. *San Antonio & A. P. R. Co. v. Wallace*, 44 *Am. & Eng. R. Cas.* 564, 76 *Tex.* 636, 13 *S. W. Rep.* 565.

302. Illustrations of what is proximate cause.—A brakeman engaged in switching cars, and who had control of all such work done by his train, switched some cars on a side track and left them in such a position that while ascending, by order of the conductor, the ladder at the side of another car passing on the main track, very shortly afterwards, there was not space enough to permit his body to pass safely between the cars, and he was caught and killed. *Held*, that his contributory negligence was the proximate cause of his death, and there could be no recovery. *Newman v. Chicago, M. & St. P. R. Co.*, 44 *Am. & Eng. R. Cas.* 555, 80 *Iowa* 672, 45 *N. W. Rep.* 1054.

The jury having found that it was negligence for an employé to leave a car which was standing near another car which was moving, the act of so leaving will be deemed the proximate cause of the injury. *Dacey v. Old Colony R. Co.*, 153 *Mass.* 112, 26 *N. E. Rep.* 437.

303. Illustrations of what is not proximate cause.—It cannot be said that the employé injured by an obstruction near the track was negligent in being in the position in which he was when struck, although at the time he was making an effort to alight while the train was moving rapidly, such purpose and effort not being the proximate cause of the injury. *Kansas City, M. & B. R. Co. v. Burton*, 53 *Am. & Eng. R. Cas.* 115, 97 *Ala.* 240, 12 *So. Rep.* 88.

A section hand stood on the lower step of a car and was injured by coming in contact with the lever of a switch which was so constructed as to rub the side of the car. *Held*, that the proximate cause of the injury was the negligent construction of the switch, and not his standing where he did. *Boss v. Northern Pac. R. Co.*, 5 *Dak.* 308, 40 *N. W. Rep.* 590.

304. What acts constitute contributory negligence, generally.*—

* What acts constitute contributory negligence

In the absence of any special circumstances, an experienced switchman who is proceeding with his customary duties between two tracks, where the observance of care will enable him to perform such duties in safety, cannot be said to be so absorbed in his duty as to exempt him from the necessity of exercising care for his own safety, and his failure to do so constitutes contributory negligence. *Cincinnati, I., St. L. & C. R. Co. v. Long*, 31 *Am. & Eng. R. Cas.* 138, 112 *Ind.* 166, 11 *West. Rep.* 322, 13 *N. E. Rep.* 659.

An employé whose duty with his co-employés is to unload from cars and stick up in piles in the company's lumber yards sawed oak timber deposited there to be used in the manufacture and repair of cars, cannot recover damages of the company for an injury received by the falling upon him of an adjoining pile, caused by the negligence of himself and of his co-employés. *Langlois v. Maine C. R. Co.*, 84 *Me.* 161, 24 *Atl. Rep.* 804.

Plaintiff was sent out with others on a hand-car to shovel snow, in charge of a boss, on a very cold morning, and twice remarked that he believed his feet were frozen, and mildly requested the car to stop and let him walk, which was not done; but it appeared that it would have been proper for him to have used the brakes and stopped the car. After arrival at the place of work, he could have availed himself of shelter and fire, but he did not do so, and continued to work for a considerable time, when his feet were found badly frozen. *Held*, that his own contributory negligence defeated a recovery. *Farmer v. Central Iowa R. Co.*, 67 *Iowa* 136, 24 *N. W. Rep.* 895.

A station master to whom were given the charge and management of all the freight trains within his division, and on whom the special duty devolved of keeping the track clear of obstructions, while engaged in attending to his own personal affairs, was crossing the railway less than 80 rods from a public highway, and was run over and injured by one of the trains. The engineer failed to ring the bell or sound the whistle. *Held*, that the station master was not merely an employé of the company, but, being its agent, having superintendence of the

in employés, see notes, 48 *AM. & ENG. R. CAS.* 407; 53 *Id.* 444.

freight trains, he could not hold the company responsible for the negligence of the engineer in failing to sound the bell or whistle; that if he was not at the time acting as such agent he was failing in his duty, and could not make his negligence the foundation of a recovery. *Evans v. Atlantic & P. R. Co.*, 62 Mo. 49.

305. What acts do not constitute contributory negligence, generally.

—Where a fireman has no authority to interfere with the engineer in the management of a train, negligence cannot be imputed to him because he did not endeavor to enforce obedience to the regulations of the company upon the engineer. *New Jersey & N. Y. R. Co. v. Young*, 49 Fed. Rep. 723, 1 U. S. App. 96, 1 C. C. A. 428.

A delay of a moment or two by the plaintiff in obeying the orders of the conductor, while putting on his overcoat and gloves, necessary precautions against the inclement weather, does not constitute contributory negligence on his part, although the slight delay may have caused his collision with a projecting rock in passing it. *Georgia Pac. R. Co. v. Davis*, 92 Ala. 300, 9 So. Rep. 252.

When a railroad employé conducts himself in accordance with the rules and customs of his occupation as required by his employer, the mere fact that he attempts a hazardous act will not make him guilty of negligence. *Louisville, E. & St. L. Con. R. Co. v. Utz*, 133 Ind. 265, 32 N. E. Rep. 881.

If the employé exercised ordinary and reasonable care in the performance of the duties in which he was engaged, at the time of the injury, he was not guilty of contributory negligence. *Greenleaf v. Dubuque & S. C. R. Co.*, 33 Iowa 52.

One employed as a man of all work about a round house and required to assist in taking engines in and out of the round house, who has not been specially instructed as to his duties, is not to be held chargeable with negligence upon uncertain and nice distinctions as to the limits of his employment, when in good faith he performs a service outside the line of his duty. *Grannis v. Chicago, St. P. & K. C. R. Co.*, 81 Iowa 444, 46 N. W. Rep. 1067.

A head brakeman, in the absence of instructions to the contrary, cannot as matter of law be charged with negligence or a violation of duty in riding on the engine in conformity with the usual custom of head

brakemen, sanctioned by the chief officers and agents of the corporation. *Sprong v. Boston & A. R. Co.*, 58 N. Y. 56, 9 Am. Ry. Rep. 475; affirming 60 Barb. 30, 3 T. & C. 54.—REFERRED TO IN *Booth v. Boston & A. R. Co.*, 67 N. Y. 593.

Plaintiff's intestate, who was employed in a grain elevator, was killed while engaged in unloading a car, the brakes of which were set, by another car coming violently against it and forcing it from its position. It appeared that he was rightfully there, and engaged in the discharge of his duties, under circumstances not requiring the exercise of special caution. Held, that the jury might find that he was in the exercise of due care. *Maguire v. Fitchburg R. Co.*, 34 Am. & Eng. R. Cas. 9, 146 Mass. 379, 6 N. Eng. Rep. 33, 15 N. E. Rep. 904.—DISTINGUISHING *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257.—APPLIED IN *Maher v. Boston & A. R. Co.*, 158 Mass. 36.

306. Effect of lack of skill and experience.—Ordinarily, when an adult person solicits employment in a particular line of work, the act of solicitation is an assertion by the person seeking employment that he is competent to discharge all its ordinary duties; and it is one of the general implied conditions of every contract for service with an adult person that the servant is competent to discharge the duties for which he is employed. It is the fault of the servant if he undertakes without sufficient skill, or applies less than the occasion requires. *Union Pac. R. Co. v. Estes*, 37 Kan. 715, 16 Pac. Rep. 131.

But the company is liable to a passenger or subordinate employé injured by the unskillfulness of such employé. *Alexander v. Louisville & N. R. Co.*, 25 Am. & Eng. R. Cas. 458, 83 Ky. 589.

Where a company has knowledge of the extent of skill and information of a brakeman, it cannot defend an action for personal injuries caused by defective machinery, by showing the brakeman's want of proper skill. *Goins v. Chicago, R. I. & P. R. Co.*, 37 Mo. App. 221.

Where an inexperienced employé is injured while doing work as marked out and directed by a superintendent who had experience, and where plaintiff did not foresee the danger, a jury are warranted in finding him free from contributory negligence. *Texas & P. R. Co. v. French*, (Tex. Civ. App.) 22 S. W. Rep. 866.

307. Remaining in service involving danger.—The fact that an employé knows, or could know by ordinary care, of defects in the appliances about which he works which render his employment more than ordinarily hazardous, and still remains in the employment until he is injured, tends to show contributory negligence, but is not conclusive of such negligence. *Perigo v. Chicago, R. I. & P. R. Co.*, 55 Iowa 326, 7 N. W. Rep. 627.

When a servant is fully aware of the difficulties and hazards he is required or expected to encounter, and without objection or protest undertakes or continues in the hazardous occupation, subjecting himself voluntarily to danger that may reasonably be anticipated and of which he is fully aware, he should not be exonerated from the consequences of his own rashness or negligence by a mere blind trust in the superior wisdom of his master or his master's agent, to whom he is subordinate. *Jones v. Roach*, 9 J. & S. (N. Y.) 248.—**DIS-tinguishing** *Plank v. New York C. & H. R. R. Co.*, 60 N. Y. 607.

An employé being justified in relying upon the inspection of all points of danger by his superior, would not be negligent in remaining at work if the danger which existed could not be seen by him. *Deppe v. Chicago, R. I. & P. R. Co.*, 38 Iowa 592.

A servant is not necessarily chargeable with negligence in remaining in the master's employment, although he may know that the appliances for carrying on the business are defective and insufficient, if the dangers or risks are not such that, as a prudent man, he was bound not to assume them, and to refuse to continue in the service. *Thorpe v. Missouri Pac. R. Co.*, 89 Mo. 650, 2 S. W. Rep. 3.

The knowledge of a freight brakeman of the unsafe condition of a track, caused by a defective rail, will not defeat a recovery for his death, if it was not so dangerous as to threaten immediate injury, or if he might have reasonably supposed that he could safely work about it by the use of care and caution. *Soeder v. St. Louis, I. M. & S. R. Co.*, 100 Mo. 673, 13 S. W. Rep. 714.—**QUOTED IN** *Mahaney v. St. Louis & H. R. Co.*, 108 Mo. 191; *Hughes v. Fagin*, 46 Mo. App. 37.

When a workman or servant gives notice to his employer of a defect in the machinery

which he is required to use, and, relying on his employer's promise to have the defect remedied, continues in the service, he is not guilty of contributory negligence, "at least until a reasonable time elapses within which to make the repairs." *Woodward Iron Co. v. Jones*, 80 Ala. 123.

308. Failure of employe to inform himself.—The employé is charged with the knowledge of such defects as he could have ascertained by the exercise of reasonable care and diligence to inform himself. *Ohio & M. R. Co. v. Percy*, 128 Ind. 197, 27 N. E. Rep. 479. *Haeden v. Sioux City & P. R. Co.*, (Iowa) 48 N. W. Rep. 733.

But unless the risks are patent he is not under the same obligation to know the nature and extent thereof as is the master. *McDonald v. Chicago, St. P., M. & O. R. Co.*, 41 Minn. 439, 43 N. W. Rep. 380.

Negligence in a servant may consist, and often does, in failing to know as well as in failing to do; and such is always the case where it is his duty to inform himself and to know. *Hewitt v. Flint & P. M. R. Co.*, 31 Am. & Eng. R. Cas. 249, 67 Mich. 61, 11 West. Rep. 148, 34 N. W. Rep. 659.

It is the duty of an engineer running trains upon a chartered railroad to know who is in possession of the line and its franchises, or to use due diligence to ascertain. *Dunlap v. Richmond & D. R. Co.*, 81 Ga. 136, 7 S. E. Rep. 283.

Where an employé is injured by being knocked from a car by another car placed dangerously near on a side track, if it appears that he did not, in the exercise of ordinary care, know the circumstance, and was without actual knowledge of the proximity of the car, or had no reason to believe that it was dangerously near, and that the proximity was not due to previous negligence on his part, a recovery cannot be defeated upon the theory that he was remiss in not informing himself of the situation. *Kansas City, M. & B. R. Co. v. Burton*, 53 Am. & Eng. R. Cas. 115, 97 Ala. 240, 12 So. Rep. 88.

The fact that plaintiff was one of a crew acting under the orders of a yard master, which placed a car in dangerous proximity to the main track, plaintiff having no actual knowledge of the danger, does not impute to him such remissness in failing to inform himself of the dangerous position of the car as will defeat an action for injuries thereby sustained. *Kansas City, M. & B. R. Co. v.*

Burton, 240, 12 S.

Plaint
by timbe
the cons
company
care in p
gerous d
fitness o
in not p
evidence
penter, a
timbers
only arr
fore, an
timber
construc
did not
tunity to
charge h
H. & S
rep. Cas

309.
heed w

railway f
of reaso
company
have be
plains, h
ligence
not rec
Kitterin
Am. &
IV. Rep
C. R. C
Illinois
Lower
FOLLOW
Co., 36
M. R.
Minn.
GUISH
Co., 38

If an
and cor
until h
having
cannot
R. Co.,
see Gu
Tex. Ca

When

of the
* Var
manage
ings. C
44 Am.

Burton, 53 *Am. & Eng. R. Cas.* 115, 97 *Ala.* 240, 12 *So. Rep.* 88.

Plaintiff sued to recover damages caused by timbers falling on him while engaged in the construction of a railroad bridge. The company set up as a defense the want of care in plaintiff in not learning of the dangerous condition of the work, and the unfitness or negligence of the superintendent in not providing against the accident. The evidence showed that plaintiff was a carpenter, and had been engaged in framing timbers some two miles distant, and had only arrived at the bridge the evening before, and that his business was to frame timber only, and not to superintend the construction of the bridge. *Held*, that he did not have such knowledge, or an opportunity to obtain such knowledge, as would charge him with a want of care. *Galveston, H. & S. A. R. Co. v. Sullivan*, 2 *Tex. Unrep. Cas.* 315.

300. Failure to act on notice or heed warning.*—Where an employé of a railway company knew, or by the exercise of reasonable care could have known, of the company's negligence, whereby he claims to have been injured, and of which he complains, he was guilty of contributory negligence in incurring the danger, and he cannot recover for the injury so sustained. *Kitteringham v. Sioux City & P. R. Co.*, 18 *Am. & Eng. R. Cas.* 14, 62 *Iowa* 285, 17 *N. W. Rep.* 585.—**FOLLOWING** *Way v. Illinois C. R. Co.*, 40 *Iowa* 341; *Muldowney v. Illinois C. R. Co.*, 39 *Iowa* 615; *Money v. Lower Vein Coal Co.*, 55 *Iowa* 671. **NOT FOLLOWING** *Muldowney v. Illinois C. R. Co.*, 36 *Iowa* 462.—*Olson v. St. Paul, M. & M. R. Co.*, 33 *Am. & Eng. R. Cas.* 386, 38 *Minn.* 117, 35 *N. W. Rep.* 866.—**DISTINGUISHED** IN *Oleson v. Chicago, B. & N. R. Co.*, 38 *Minn.* 412.

If an employé knows of a defective track, and continues to use it without complaint until he is injured, he will be deemed as having contributed to his own injury, and cannot recover. *Smith v. Memphis & L. R. R. Co.*, 18 *Fed. Rep.* 304. To the contrary see *Gulf, C. & S. F. R. Co. v. Shearer*, 1 *Tex. Civ. App.* 343, 21 *S. W. Rep.* 133.

Where an employé, sufficiently apprised of the danger, rashly undertakes an act in

connection with the manipulation of machinery at which he is employed, his employer is relieved from responsibility for any injury which results. *McDade v. Washington & G. R. Co.*, 26 *Am. & Eng. R. Cas.* 325, 5 *Mackey (D. C.)* 144. *Odell v. New York C. & H. R. R. Co.*, 120 *N. Y.* 323, 24 *N. E. Rep.* 478, 31 *N. Y. S. R.* 27; *reversing* 42 *Hun* 655, 6 *N. Y. S. R.* 99.

Unless the injury is wholly the fault of the defendant. *Stewart v. Philadelphia, W. & B. R. Co., (Del.)* 17 *Atl. Rep.* 639.

If plaintiff, a brakeman, was reasonably notified of the low bridge overhead by which he was injured, "this put him on the lookout, and on inquiry and observation"; and if thereby he might have ascertained the location of the bridge, but failed to use due diligence to do so, his want of knowledge was his own fault, and his ignorance was contributory negligence. In such case knowledge and notice are not synonymous. *Louisville & N. R. Co. v. Hall*, 48 *Am. & Eng. R. Cas.* 170, 91 *Ala.* 112, 8 *So. Rep.* 371.

An employé who is injured while working in car shops, and who is not shown to have received notice, or to have knowledge, of perils incident to his employment, cannot be charged with contributory negligence in case of injury. *Smith v. Peninsular Car Works*, 60 *Mich.* 501, 27 *N. W. Rep.* 662, 1 *Am. St. Rep.* 542.

310. Honest mistake in effort to perform duty.—The conductor of a passenger train was injured in stepping off the rear platform of the last car, in a tunnel, under the momentary impression that it was not the last car of the train. *Held*, that it was proper to refuse an instruction that he could not recover if he knew the number of cars in the train. He might know the number of cars, and yet be so occupied with his various duties that he might for a moment forget the number without being charged with contributory negligence. *Fiero v. New York C. & H. R. R. Co.*, 71 *Hun (N. Y.)* 213.

In such case the conductor was only charged with the exercise of the care of a prudent person to avoid injury, and such care is consistent with forgetting for a moment, in the press of other duties, the number of cars in the train. *Fiero v. New York C. & H. R. R. Co.*, 71 *Hun (N. Y.)* 213.

Whether contributory neglect be active or passive, it will not vary the rule if the

* Various injuries to employés caused by mismanagement or failure to give proper warnings. Contributory negligence as a defense, see 44 *AM. & ENG. R. CAS.* 644, *abstr.*

action of the person injured results from an honest effort by him to perform some duty connected with his station, or thought to be so by some superior who directs him. *Louisville & N. R. Co. v. McCoy*, 15 *Am. & Eng. R. Cas.* 277, 81 *Ky.* 403.

311. Assuming that signals will be obeyed.—Where a brakeman attempted to pick a coupling-pin from the track as a train was slowly backing toward him, having first signaled the fireman who was in charge of the locomotive to stop, and was injured by the failure of the fireman to obey the signal, he was held to be free from contributory negligence depriving him of the right to recover. *Steele v. Central R. Co.*, 43 *Iowa* 109.—DISTINGUISHED IN *Bucklew v. Central Iowa R. Co.*, 64 *Iowa* 603.

Where the plaintiff had signaled the engine to stop, and the circumstances were such that he could not easily tell whether it had stopped or not, he had a right to presume that his signal would be obeyed; and there was no error in permitting him to testify that when he went upon the track he thought the engine had plenty of time to stop, and had stopped. In such a case he would not be negligent in being mistaken in his belief. *Pringle v. Chicago, R. I. & P. R. Co.*, 18 *Am. & Eng. R. Cas.* 91, 64 *Iowa* 613, 21 *N.W. Rep.* 108.

Plaintiff before going between cars which were uncoupled and stood a little apart, to repair a coupling, erected a proper signal flag, but was injured by other cars being pushed down against the train. *Held*, that he was not, as a matter of law, chargeable with contributory negligence, as he had a right to assume that other employes would not disregard his signal flag. *Murphy v. New York C. & H. R. R. Co.*, 118 *N. Y.* 527, 23 *N. E. Rep.* 812, 29 *N. Y. S. R.* 941; *affirming* 10 *N. Y. S. R.* 156, 44 *Hun* 242.—CRITICISED IN *Potter v. New York C. & H. R. R. Co.*, 136 *N. Y.* 77. REVIEWED IN *Noonan v. New York C. & H. R. R. Co.*, 42 *N. Y. S. R.* 41, 16 *N. Y. Supp.* 678.

312. Assuming that company will perform its duty.—A servant is not negligent in presuming that his master has performed his duty. *Irvine v. Flint & P. M. R. Co.*, 53 *Am. & Eng. R. Cas.* 210, 89 *Mich.* 416, 50 *N. W. Rep.* 1008.

A servant assumed a position which was not hazardous in itself, but was made so through an act done by the master without notice to the servant. *Held*, that the ser-

vant was not guilty of contributory negligence, he having the right to assume that he would not be put in danger by an act of the master over which he had no control. *Wills v. Cape Girardeau S. W. R. Co.*, 44 *Mo. App.* 51.

In an action for personal injuries received by plaintiff while under a car repairing it, the evidence showed that before he went under the car his foreman promised to watch and see that he was not injured, but while he was still under the car he went away, with plaintiff's knowledge, and that plaintiff continued the work with the promise of two of his fellow-servants to keep a watch, which they failed to do. *Held*, that this did not justify an instruction to find for the defendant; that if the jury believed that the foreman went away with the plaintiff's knowledge, they might reasonably conclude that plaintiff still relied upon him to provide other means for his protection. *Missouri Pac. R. Co. v. Williams*, 75 *Tex.* 4, 12 *S. W. Rep.* 835.

313. Voluntarily assuming a position of peril.*—An employe of a company who voluntarily puts himself in a dangerous position, at a time and place when and where he had no right to be, and when he must have known that the company did not require or anticipate his presence, and is injured by one of its trains because of his own want of common prudence, cannot recover of the company for such injury. *Loeffler v. Missouri Pac. R. Co.*, 96 *Mo.* 267, 9 *S. W. Rep.* 580.—RECONCILED IN *Mauerman v. St. Louis, I. M. & S. R. Co.*, 41 *Mo. App.* 348.

An employe who leaves his post of duty and goes to a known place of danger and is injured is guilty of such contributory negligence as to defeat a recovery, unless it appears that some new duty or obligation to the employer, outside of his regular employment, called him to the place of danger. *So held*, where plaintiff's intestate was charged with the duty of stretching a chain across a street where a railroad crossed, to act as a gate or warning to persons driving on the street when trains were approaching, and whose duties did not require him to go upon the track, but who was killed by a passing train, without any known reason

* Contributory negligence in assuming dangerous position, see 41 *AM. & ENG. R. CAS.* 330, *abstr.*

why he w
York C. &

Althou
the mast
uncovere
guilty of
works in
dition, th
in that re
tilla v. D
N. W. R.

314.—
car.—An
in cleanin
for that p
person in
guilty of
v. Ohio &
Rep. 915.

An emp
negligenc
when the
compels h
Co., 40 *Id.*
v. Central

315.—
employe is
on or ne
there at h
for injury
& W. R.

An emp
front of a
is guilty
as to just
for his de
(Pa.) 3 *A.*

One wh
train whi
merely to
justified i
movement
would hav
lins v. B
Iowa 346.

If a sec
his grasp
down upo
and there
dump-car
grade at t
hour, unt
him, he is
and there

*Chicago &
& Eng. R.
S. App. 47.*

5 D.

why he was on the track. *Sammon v. New York C. & H. R. R. Co.*, 6 J. & S. (N. Y.) 414.

Although it be negligence on the part of the master to leave dangerous machinery uncovered, yet the servant is not necessarily guilty of contributory negligence because he works in the vicinity of it knowing its condition, the measure of the duty of the two in that regard not being the same. *Wootilla v. Duluth Lumber Co.*, 37 Minn. 153, 33 N. W. Rep. 551, 5 Am. St. Rep. 832.

314. — under a locomotive or car.—An inexperienced servant employed in cleaning a locomotive, who gets under it for that purpose without first notifying the person in charge of it of his intention, is guilty of contributory negligence. *Spencer v. Ohio & M. R. Co.*, 130 Ind. 181, 29 N. E. Rep. 915.

An employé is not guilty of contributory negligence because he goes under cars when the proper performance of his duties compels him to do so. *Berry v. Central R. Co.*, 40 Iowa 564. — FOLLOWED IN *Bucklew v. Central Iowa R. Co.*, 64 Iowa 603.

315. — on the track.—Unless an employé is acting under orders in remaining on or near the track, he places himself there at his own peril, and cannot recover for injury there received. *Moore v. Norfolk & W. R. Co.*, 87 Va. 489, 12 S. E. Rep. 968.

An employé who stands on the track in front of an engine backing down the track is guilty of such contributory negligence as to justify a nonsuit in an action brought for his death. *Keyes v. Pennsylvania Co.*, (Pa.) 3 Atl. Rep. 15.

One who turns his back to a moving train while standing on a railway track, merely to satisfy his curiosity, will not be justified in relying upon a custom as to the movement of trains which, if observed, would have rendered his action safe. *Collins v. Burlington, C. R. & N. R. Co.*, 83 Iowa 346, 49 N. W. Rep. 848.

If a section man on a hand-car releases his grasp on the handle of the car and goes down upon the roadbed between the cars, and there stands still or walks toward a dump-car following the hand-car down grade at the rate of three or four miles an hour, until such dump-car strikes and kills him, he is guilty of contributory negligence, and there can be no recovery for his death. *Chicago & N. W. R. Co. v. Davis*, 53 Am. & Eng. R. Cas. 461, 53 Fed. Rep. 61, 10 U. S. App. 422, 3 C. C. A. 429.

5 D. R. D.—13.

Plaintiff was engaged, with others, in building a fence along a double track and was required to carry posts from one side of the tracks to the other. He stopped on the north track to allow a train to pass on the other, and was killed by a train coming around a curve about 200 feet away and running thirty-five to forty miles an hour on the track on which he stood. There was no need of his stopping on the track; he had been at work three days and knew the frequency with which trains passed, and had been cautioned by the foreman to be careful. *Held*, that his own contributory negligence defeated a recovery. *Harris v. Missouri Pac. R. Co.*, 40 Mo. App. 255. — DISTINGUISHING *Gessley v. Missouri Pac. R. Co.*, 32 Mo. App. 413.

Plaintiff was injured while uncoupling standing cars, by a pier engine and coal train running into the cars. When he went between the cars he saw the engine stalled on an up grade, and the train only about twenty feet from the cars. He was delayed by a tight pin. The engine gave no warning by bell or whistle, but its exhaust as it climbed the grade could be heard a long way. *Held*, that he could not recover. *Chesapeake & O. R. Co. v. Lee*, 84 Va. 642, 5 S. E. Rep. 579.

316. — near the track.—When the plaintiff's own negligence is the proximate cause of damage to his person, by reason of his placing himself between two railroad tracks at a place where he ought not to have been in the proper performance of his duty as an employé of the company, and with his back toward an approaching train, which strikes him, he cannot recover on account of the negligence of the company in displaying no light upon the train, or in not complying with the precautions required by a municipal ordinance. *Ryall v. Central Pac. R. Co.*, 76 Cal. 474, 18 Pac. Rep. 430.

Contributory negligence *per se* forbids an employé to recover for injury sustained by him while walking in a notoriously dangerous place near the track and not keeping the proper lookout for an approaching train. *Hoffinger v. Minneapolis, L. & M. R. Co.*, 43 Minn. 503, 45 N. W. Rep. 1131.

One employed as a fireman, only by the trip, while off duty negligently placed himself in such a position that a passing train must strike him. *Held*, he cannot recover for injuries so received. *Moore v. Norfolk & W.*

R. Co., 87 Va. 489, 12 S. E. Rep. 968. — QUOTING *Baltimore & O. R. Co. v. Whittington*, 30 Gratt. (Va.) 805; *Darracott v. Chesapeake & O. R. Co.*, 83 Va. 294. RE-VIEWING *Dun v. Seaboard & R. R. Co.*, 78 Va. 645.

317. — near dynamite cartridges.

—Plaintiff's intestate was engaged to remove an ice gorge from a river, and was killed by an explosion of dynamite just before beginning work. It appeared that the ice was to be broken up by explosions of the dynamite, and then the intestate was to push it out; and while other employés were thawing out the dynamite cartridges in a pail over an open fire the explosion occurred, when he was standing a few feet away. The evidence tended to show that the company did not exercise proper care, either as to the manner of building the fire and thawing out the cartridges, or in the selection of men who knew the dangers of explosions. *Held*, that the intestate was not chargeable with contributory negligence simply because the day was cold and he stood near the fire, where there was nothing to show that he knew that the cartridges were over the fire. *Stewart v. New York, O. & W. R. Co.*, 28 N. Y. S. R. 215, 54 Hun 638, 5 Sike. Sup. Ct. 198, 8 N. Y. Supp. 19; affirmed in 126 N. Y. 631, mem., 36 N. Y. S. R. 1013.

318. Working on the track. —

Where an employé on the track is injured by a train running at an unusual rate of speed in order to make up time, he cannot recover in the absence of evidence to show that the engineer discovered, or by the exercise of care could have discovered, the plaintiff in time to have checked the train. *Stephens v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 538, 86 Mo. 221.

Where a person engaged in making repairs on a railway track knew that a train was approaching but a short distance away, but nevertheless turned his back to it, stooped down, and continued his work, and while in this position was struck by the train and was injured, he was guilty of such contributory negligence as would prevent a recovery, though the defendant was handling the car which caused the injury in a negligent manner and in violation of a city ordinance. *Kelly v. Union R. & T. Co.*, 11 Mo. App. 1.

An employé of a railroad company who is engaged in mending the track, who,

whilst he might get further off, stands near enough to the track to be struck by a train if perchance there should be an increase of speed or a change of cars, is guilty of the grossest imprudence and negligence. No man is justified in placing himself near a passing train upon any such idea or presumption, and for an injury sustained by so doing he or his representative cannot recover. *Baltimore & O. R. Co. v. Whittington*, 30 Gratt. (Va.) 805. — QUOTED IN *Moore v. Norfolk & W. R. Co.*, 87 Va. 489.

Freight cars were loaded on a wharf and were then "kicked" down the track, where they were made up into a train. Plaintiff's intestate, a car inspector, who was familiar with the manner of moving the cars, notified the conductor of the train to leave a space open between the cars, so that he could examine one of them, and without further precautions went between the cars, and was killed by another car striking the train and closing the space where he stood. *Held*, that the accident was the result either of his own negligence, or that of his fellow-servant, and in either event there could be no recovery. *Whitmore v. Boston & M. R. Co.*, 150 Mass. 477, 23 N. E. Rep. 220.

In an action for injuries occasioned to a brakeman, it appeared that the plaintiff was injured while running in the night on a platform on which he had a right to run in the discharge of his duty. *Held*, that the court could not say, as a matter of law, that he was guilty of negligence in stepping on the edge of the platform, although but a few inches intervened between him and the moving cars. *Sweat v. Boston & A. R. Co.*, 156 Mass. 284, 31 N. E. Rep. 296.

319. Walking in dangerous places in the dark. — Where a watchman in a railroad yard uses a platform appropriated to the transfer of freights for the purpose of running along it at night in the dark, he does so at his own risk, it not appearing that the platform was intended by the company for such a purpose, or that he had any reason to think it was so intended. *Hamilton v. Richmond & D. R. Co.*, 83 Ga. 346, 9 S. E. Rep. 670.

In an action by an employé for injuries sustained by falling into a pit between a turntable and a water tank while he was walking there at night without any lantern, there being no light in the neighborhood, where the evidence showed that such employé could, by the use of ordinary care,

have avoided the accident, the plaintiff cannot recover, even if some defect in the track was raised. *East Tennessee R. Co. v. E.*, 16 S. E. 2d 101.

A person who is injured by a passing train upon any such idea or presumption, and for an injury sustained by so doing he or his representative cannot recover. *Baltimore & O. R. Co. v. Whittington*, 30 Gratt. (Va.) 805. — QUOTED IN *Moore v. Norfolk & W. R. Co.*, 87 Va. 489.

320. S.

round h.

tween the

to sleep,

across a

engine which

that he did

employés

it seemed

doing so

lighted, e

employés

this fact

Held, a c

gence. *A*

15 Am. &

321. I

—Where

ous servi

asleep at

jury, ther

employer

R. Co., 1

East Ten

(*Tenn.*) 1

When

place on

fainted a

was not

but if he

thus inju

wanton o

defendan

was he a

have avoided the accident, he cannot recover, even if the company was guilty of some degree of negligence. *Countryman v. East Tenn., V. & G. R. Co.*, 89 Ga. 835, 16 S. E. Rep. 84.

A person who had been working at the river end of a pier on which railroad tracks were laid, leaving his work after dark, while walking up the pier on the platform, which was raised above the tracks, was injured by falling off. The accident occurred by his turning aside in the dark to pass around some iron that lay on the platform, thinking that he would find the edge of the platform by touching cars that he supposed were there, but which were not there. There was no evidence that he had seen cars at that point during the day, nor that he acted upon information from others who had seen the cars there. *Held*, that he was guilty of contributory negligence. *Harden v. New York C. & H. R. R. Co.*, 17 J. & S. (N. Y.) 503.

320. Sleeping between tracks in round house.—A fireman lay down between the tracks in a round house and went to sleep, and while asleep threw one limb across a rail, and was so injured by an engine which was run into the round house that he died. There was no evidence that employes were required to sleep there, yet it seemed that they were in the habit of doing so. The round house was not lighted, except by the small lanterns which employes might carry about with them, but this fact was well known to the fireman. *Held*, a clear case of contributory negligence. *Price v. Hannibal & St. J. R. Co.*, 15 Am. & Eng. R. Cas. 168, 77 Mo. 508.

321. Falling asleep while on duty.—Where one voluntarily assumes continuous service, becomes exhausted and falls asleep at his work, and thereby suffers injury, there can be no recovery from the employer. *Nattress v. Philadelphia & R. R. Co.*, 150 Pa. St. 527, 24 Atl. Rep. 753. *East Tenn., V. & G. R. Co. v. Rush*, 15 Lea (Tenn.) 145.

When a brakeman, required to be at a place on a railway track to signal a train, fainted and became unable to get away, he was not guilty of contributory negligence; but if he negligently fell asleep and was thus injured, he cannot recover except for wanton or reckless conduct on the part of defendant's engineer; yet in neither case was he a trespasser on the track. *Helton v.*

Alabama Midland R. Co., 97 Ala. 275, 12 So. Rep. 276.

322. Crossing track in front of train.—Deceased was employed as a carpenter by defendant company, and in order to get to his work had to cross several tracks, where the company was generally transferring cars. On the morning of the accident deceased attempted to cross between two cars about two feet apart, when the engine attached to one end of the train, which was not visible to him, backed and caused the cars to come together, which produced his death. *Held*, that his own contributory negligence prevented a recovery. *Lord v. Pueblo S. & R. Co.*, 12 Colo. 390, 21 Pac. Rep. 148.

The plaintiff, as custodian of the defendant's oil house, had to place the switch lights on the stands every evening, and collect them for cleaning and filling every morning. While engaged in collecting the lamps one morning, and while walking between two of the defendant's tracks, the plaintiff saw the mail and express car pushed by a switch engine coming toward him on the main track, and stepped onto a side track and turned, with his back to the approaching car, to give warning to one S. that a man with a team was on the crossing. Before he had turned facing the car again the car had been "kicked" by the engine onto the side track, and the same struck the plaintiff while in the act of taking a lamp from the switch stand, and injured him. The evidence showed that the car in question was regularly taken from the side track every morning, and pushed back to a train on the main track, and that the car had never been known to be pushed back onto the side track after it had been pulled out. *Held*, that the plaintiff was guilty of contributory negligence, and was not, therefore, entitled to recover damages of the defendant for the injuries sustained. *Collins v. Burlington, C. R. & N. R. Co.*, 83 Iowa 346, 49 N. W. Rep. 848.—**DISTINGUISHING** *Greenleaf v. Dubuque & S. C. R. Co.*, 33 Iowa 53; *Baldwin v. St. Louis, K. & N. W. R. Co.*, 63 Iowa 210.

A workman while on his way home in the evening stood talking with a companion by a railway track where three roads ran side by side, and where, by daylight, the track could be seen for two miles. He had drunk two glasses of beer. He was forty years old and familiar with the locality, and he also knew

that a train was due. A well-illuminated passenger train, which had broken its headlight and had substituted an ordinary lantern therefor, approached, and was seen by several persons in the neighborhood. The workman, however, did not see it, but heard a rumbling which he supposed came from some vanishing train on one of the other tracks. He stepped on the track nearest him, with his companion, and both were struck, the latter being killed. *Held*, that he did not exercise due care. *Mahlen v. Lake Shore & M. S. R. Co.*, 14 *Am. & Eng. R. Cas.* 687, 49 *Mich.* 585, 14 *N. W. Rep.* 556.—FOLLOWING *Lake Shore & M. S. R. Co. v. Miller*, 25 *Mich.* 274.

A yard switchman opened a switch to allow certain cars to pass, and then walked on the track on which the engine that had switched the cars was slowly moving, and was struck by it and killed. The evidence showed that he had been in service about thirty years, and was a careful, temperate man. *Held*, that a nonsuit was properly granted on the ground that the evidence did not affirmatively show that he was free from contributory negligence. *Dering v. New York C. & H. R. R. Co.*, 50 *N. Y. S. R.* 832, 67 *Hun* 650, 22 *N. Y. Supp.* 344.—QUOTING *Powers v. New York C. & H. R. R. Co.*, 38 *N. Y. S. R.* 561; *Gibson v. Erie R. Co.*, 63 *N. Y.* 449; *Williams v. Delaware, L. & W. R. Co.*, 116 *N. Y.* 629, 27 *N. Y. S. R.* 760.

Plaintiff was engaged in building a station at the terminus of the defendant's track. Trains would run up to the station, where the cars were cut loose from the engine, and another engine would back up and take the cars out. After cars had been thus pulled out plaintiff was directed to go under a platform which was near the track, and get some material; just as he was stooping for the purpose of doing so, he was struck by the backing engine. The engineer saw him before the engine was put in motion, and it was backed without any signal; but plaintiff knew from the manner of operating the trains that it would be backed very soon. *Held*, that as the engine was not in motion when he crossed the track, he was not chargeable with contributory negligence. *German v. Suburban Rapid Transit Co.*, 13 *N. Y. Supp.* 897, 37 *N. Y. S. R.* 360.

323. Walking upon the track.—

A brakeman was ordered to go up the track to a switch, and instead of walking between

the tracks, where it was perfectly safe, walked on one of the tracks and was run down by a train and killed, while apparently giving no heed to approaching trains. *Held*, that he was guilty of contributory negligence. *Pennsylvania Co. v. O'Shaughnessy*, 41 *Am. & Eng. R. Cas.* 479, 122 *Ind.* 588, 23 *N. E. Rep.* 675.

A section man walking along the track of his master's railway, upon the approach of a train stepped from the track to the right of way, and the train while passing him was derailed, in consequence of a defective track and rapid running, and a car fell upon him and killed him. *Held*, if he knew of the defective track, as by reason of work thereon, and also the speed of the train, and made no further effort to avoid the danger than merely to step off the track on the right of way, he was equally negligent with the engineer, and there can be no recovery in case of concurring negligence. *McKenna v. Missouri Pac. R. Co.*, 54 *Mo. App.* 161.

A brakeman left his train to close a switch, and then, without any necessity therefor, walked along a parallel track to overtake his train, when he was hit by an engine of another company. *Held*, that his contributory negligence prevented a recovery. *Mulherrin v. Delaware, L. & W. R. Co.*, 81 *Pa. St.* 366, 15 *Am. Ry. Rep.* 456.—FOLLOWED IN *Pittsburgh, Ft. W. & C. R. Co. v. Collins*, 87 *Pa. St.* 405. NOT FOLLOWED IN *Deans v. Wilmington & W. R. Co.*, 107 *N. Car.* 686. QUOTED IN *St. Louis, I. M. & S. R. Co. v. Monday*, 31 *Am. & Eng. R. Cas.* 424, 49 *Ark.* 257, 4 *S. W. Rep.* 782; *Toomey v. Southern Pac. R. Co.*, 86 *Cal.* 374; *Tennis v. Inter-State Con. R. T. R. Co.*, 45 *Kan.* 503.

An employé whose duty required him to go a distance of about four hundred feet along the line of the track, and across the same, after waiting until a train had passed stepped upon the track behind it, walking in the same direction it was moving, and was run over and killed by cars which had become detached and were following the train. *Held*, that he was not guilty of contributory negligence. (Seevers, J., dissenting, holds that whether or not the deceased was rightfully on the track in the performance of his duty was a question for the jury.) *Farley v. Chicago, R. I. & P. R. Co.*, 2 *Am. & Eng. R. Cas.* 108, 56 *Iowa* 337, 9 *N. W. Rep.* 230. —DISTINGUISHING *Murphy v. Chicago, R. I. & P. R. Co.*, 38 *Iowa* 539.

The deceased, a track repairer, while walking along the track to work, was killed by a locomotive going in the same direction. The track was level and the view unobstructed. The engine and tender had followed deceased a few moments after he started, and had only gone about thirteen hundred feet when the accident occurred. *Held*, that while the deceased may have been guilty of contributory negligence in walking upon the track, and in not seeing the engine, yet the case was properly submitted to the jury on the issue whether the engineer used proper care to see the danger in which deceased had placed himself, and to avoid injuring him. *Schlereth v. Missouri Pac. R. Co.*, 115 Mo. 87, 21 S. W. Rep. 1110.

As a switchman, who was obliged in the ordinary course of his duty to cross a track in the station yard to get to a switch, was walking along the ends of the ties, which projected some sixteen inches beyond the rails, he was struck by an engine approaching from behind, and his arm cut off at the shoulder. The engine was going faster than allowed by law, and the bell was not rung. *Held*, in an action for damages, that there was no such negligence on the switchman's part as would relieve the company from liability for the injury. *Canada Southern R. Co. v. Jackson*, 17 Can. Sup. Ct. 316.

324. Crossing bridge or trestle in front of approaching train.—A city let a contract for rebuilding a bridge over a railroad track, and plaintiff's intestate was killed while engaged in work on the bridge. It appeared that in taking down and rebuilding abutments of the bridge men were called from one side of the track to the other as they were needed, and the intestate was killed in thus crossing the track; but it appeared that if a larger force of men had been employed there would have been no necessity for crossing the track. *Held*, that the company was not liable. *Sweeney v. Boston & A. R. Co.*, 1 Am. & Eng. R. Cas. 138, 128 Mass. 5.

Where a track walker while on a bridge sees a train a half mile away, and thinks that he can get across the bridge by running, falls and hurts himself, he cannot recover from the company for the injury on the ground that the company had not sufficiently provided for his safety by requiring more frequent signals to be given by engines approaching the bridge, where it ap-

pears that the injury was not caused by the absence of such signals, and where it further appears that he could have turned back with safety, or stepped to one side, after discovering the engine. *Gibson v. Oregon S. L. & U. N. R. Co.*, 23 Oreg. 493, 32 Pac. Rep. 295.

A section hand was traveling on a hand-car with about a dozen other men, and in passing over a trestle they saw a train approaching between a half and a quarter of a mile away. It appeared that all might have escaped if the car had been stopped at once; and all of the others did escape except plaintiff, who was behind the others in the car, and was the last to leave it. The men called to the train to stop, but no one flagged it. Plaintiff jumped to the trestle, and thence to the ground, and was injured. *Held*, that there was no proof of negligence on the part of the company; but there was proof of contributory negligence on the part of the plaintiff, and he could not recover. *Texas & P. R. Co. v. Wagner*, 2 Tex. App. (Civ. Cas.) 291.

Plaintiff and other laborers were usually carried across a bridge in the evening, when their work was done, to their lodging place, on a train, but on the night of the accident they were informed by their boss that they would have to walk across. There was no place to walk except on the track, but persons could step aside to allow trains to pass. A train was heard coming from the rear at the time, but plaintiff, being somewhat disabled physically, failed to get off the track before he was struck by the engine. His own evidence showed that the boss had told them that no engine would cross for two hours, and it would be perfectly safe to walk over, and that he was injured as above described; but there was evidence for the defendant that he was injured while attempting to jump on the front of the moving engine. *Held*, there being a conflict of evidence, that the question of contributory negligence was properly left to the jury. *Amato v. Northern Pac. R. Co.*, 46 Fed. Rep. 561.

325. Failure to look and listen.—The rule applicable to a traveler approaching a track, requiring him to look, and attributing to him contributory negligence if he do not, is not applicable to a servant of the company on the track repairing it. *Shorer v. Pennsylvania Co.*, 130 Ind. 170, 28 N. E. Rep. 616, 29 N. E. Rep.

775. *Crowley v. Burlington, C. R. & N. R. Co.*, 18 *Am. & Eng. R. Cas.* 56, 65 *Iowa* 658, 20 *N. W. Rep.* 467, 22 *N. W. Rep.* 918.—FOLLOWING *Ominger v. New York C. & H. R. R. Co.*, 4 *Hun* (N. Y.) 159. QUOTING *Goodfellow v. Boston, H. & E. R. Co.*, 106 *Mass.* 461.

The rule that one going upon the track of a railroad is required to look and listen for approaching trains does not apply to the conductor of a train, who, in a common switch yard, steps upon the adjacent track of another company for the purpose of signaling his engineer. *McMarshall v. Chicago, R. I. & P. R. Co.*, 80 *Iowa* 757, 45 *N. W. Rep.* 1065.

A flagman who is employed to signal the approach of trains cannot recover for injuries received by reason of his failure to see a train, which he is employed to see and signal. *Clark v. Boston & A. R. Co.*, 1 *Am. & Eng. R. Cas.* 134, 128 *Mass.* 1.

326. — before attempting to cross track.—If an employé is called to work in a place of danger, where he is required to give his attention to the work in hand, he may rely on the company providing him a safe place; but this rule does not apply where the employé is merely crossing a track for the purpose of getting his tools. In such case the mere act of walking does not necessarily engross his attention, and it is his duty to see or hear approaching trains. *Holland v. Chicago, M. & St. P. R. Co.*, 5 *McCrory* (U. S.) 549, 18 *Fed. Rep.* 243.—DISTINGUISHING *Goodfellow v. Boston, H. & E. R. Co.*, 106 *Mass.* 461.

Plaintiff, a laborer, engaged in excavating for a track, had to cross where there were three or four tracks for his tools, but where there was an unobstructed view of approaching trains. He waited for a freight train to pass and then stepped upon the next track without looking, and was struck by a train going in the opposite direction. *Held*, that his own negligence would defeat a recovery, though the engineer was negligent also in not giving the statutory signals. *Holland v. Chicago, M. & St. P. R. Co.*, 5 *McCrory* (U. S.) 549, 18 *Fed. Rep.* 243.—FOLLOWING *Chicago, R. I. & P. R. Co. v. Houston*, 95 *U. S.* 697; *Schofield v. Chicago, M. & St. P. R. Co.*, 2 *McCrory* 268, 8 *Fed. Rep.* 488.—APPROVED IN *Bertelson v. Chicago, M. & St. P. R. Co.*, 5 *Dak.* 313, 40 *N. W. Rep.* 531. QUOTED IN *Bauer v. St. Louis, I. M. & S. R. Co.*, 46 *Ark.* 388.

Plaintiff's husband, a section foreman, was killed while a flying switch was being made. The evidence showed that the track for several miles in either direction from the place of accident was straight, and the view unobstructed; that deceased attempted to cross the track in full view of the section train which ran upon him, and not more than twenty or thirty feet from it; that it was in motion, and that he was crossing the track diagonally, with his back turned partly toward the section train. *Held*, that as it must be inferred from the evidence that the deceased did not look or listen before attempting to cross the track, he was guilty of contributory negligence, which precluded a recovery. *Elliot v. Chicago, M. & St. P. R. Co.*, 38 *Am. & Eng. R. Cas.* 62, 5 *Dak.* 523, 41 *N. W. Rep.* 758, 3 *L. R. A.* 363.—APPLYING *Chicago & N. W. R. Co. v. Donahue*, 75 *Ill.* 106; *Ernst v. Hudson River R. Co.*, 39 *N. Y.* 61; *Weber v. New York C. & H. R. R. Co.*, 58 *N. Y.* 451; *Baltimore & O. R. Co. v. Depew*, 40 *Ohio St.* 121; *Simmons v. Chicago & T. R. Co.*, 110 *Ill.* 340; *Baltimore & P. R. Co. v. Jones*, 95 *U. S.* 439; *Ormsbee v. Boston & P. R. Corp.*, 14 *R. I.* 102; *Grethen v. Chicago, M. & St. P. R. Co.*, 22 *Fed. Rep.* 609; *Haley v. New York C. & H. R. R. Co.*, 7 *Hun* (N. Y.) 84; *Myers v. Indianapolis & St. L. R. Co.*, 113 *Ill.* 386.

A railroad employé got off a train where he was well acquainted, and where there were several parallel and crossing tracks, and walked to an adjoining track only a few feet away, where he was almost immediately struck by another train. It appeared that the train could be seen and heard for a considerable distance. *Held*, that the employé's negligence barred recovery for the injury. *Lenix v. Missouri Pac. R. Co.*, 76 *Mo.* 86.

A person who had ten years' experience was killed at night, while crossing a yard track, by a slowly moving car. It appeared that he knew that cars might pass at any time without signals, and that he could have seen the car if he had looked. *Held*, that the evidence failed to show that he was free from contributory negligence. *Crowe v. New York C. & H. R. R. Co.*, 23 *N. Y. Supp.* 1100, 70 *Hun* 37, 53 *N. Y. S. R.* 558.

327. — before stepping upon the track.—A switch repairer, knowing the custom of a railway company to cut trains

in two at the point where he was working, saw a train approaching, stepped off the track to avoid what proved to be the first section, and upon its passing immediately resumed work on the track, with his back toward the approaching second section. He was run over and injured. *Held*, that his contributory negligence was such as to prevent a recovery. *Haden v. Sioux City & P. R. Co.*, (Iowa) 48 N. W. Rep. 733.—DISTINGUISHING *Farley v. Chicago, R. I. & P. R. Co.*, 56 Iowa 337, 9 N. W. Rep. 230.—*Haley v. New York C. & H. R. R. Co.*, 7 Hun (N. Y.) 84.—APPLIED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758.

It does not constitute negligence for an employé of a railroad company to step on the track, in the course of duty, in the way of a train backing down toward him, if he has reason to believe the train will be stopped before reaching him. *Steele v. Central R. Co.*, 43 Iowa 109.

328. — while at work upon or near track.—A plaintiff is not entitled to recover in an action for the negligent killing of his intestate, where the deceased, who was a youth over fourteen years of age, while in the employ of the company, sat or stood upon the track, in a position to see an approaching train for more than half a mile, until he was run over by the train and killed, the defendant's employés in charge of the train neither actually knowing, nor being guilty of reckless or wanton negligence in not knowing, the perilous position of deceased in time to avert the danger by the use of any possible diligence. *Nave v. Alabama G. S. R. Co.*, 54 Am. & Eng. R. Cas. 151, 96 Ala. 264, 11 So. Rep. 391.—QUOTING *Glass v. Memphis & C. R. Co.*, 94 Ala. 581.

Where a section hand working on a railroad track sees a freight train approaching, and gets off the track to let it pass, and immediately afterward steps upon the track, when he is struck by a detached part of the train following the part just passed, and is killed, and it appears that the separation of the train was accidental, and not discovered by those in the rear cars in time to avert the injury, and the deceased might, by the use of ordinary care, have discovered that the cars had been detached, and the approach of the car which struck him, in time to avoid all danger, no recovery can be had

for his death. *Myers v. Indianapolis & St. L. R. Co.*, 113 Ill. 386, 1 N. E. Rep. 899.—APPLIED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758.

It is the duty of a section hand who is at work upon a side track in the yard of a railroad company, and who knows that it is customary to shunt or kick cars along the tracks in the yard, unattended, for the purpose of making up trains, and that cars have just been run onto the track where he is at work, to keep a lookout for moving cars; and if he fails so to do, and is injured by a car coming down upon him unattended, he is guilty of such contributory negligence as will bar a recovery. *Schaille v. Lake Shore & M. S. R. Co.*, 97 Mich. 318, 56 N. W. Rep. 565.—DISTINGUISHING *Schindler v. Milwaukee, L. S. & W. R. Co.*, 87 Mich. 410. REVIEWING *Murphy v. New York C. & H. R. R. Co.*, 11 Daly (N. Y.) 122; *Campbell v. Pennsylvania R. Co.*, (Pa.) 2 Atl. Rep. 489.

Plaintiff was an employé of the defendant, doing repair work in one of its yards. He had long experience, and knew that switch engines were constantly moving to and fro making up trains. While working with his back toward approaching cars, in a place where the view was unobstructed, he was run over and injured by cars moving slowly. *Held*, that he was guilty of contributory negligence which would prevent a recovery. *Aerkfetz v. Humphreys*, 53 Am. & Eng. R. Cas. 459, 145 U. S. 418, 12 Sup. Ct. Rep. 835.

Where a servant of the company was in a proper place on the track in the discharge of his duty, he was not wilfully negligent in not looking out for cars, of the approach of which he had no warning. *Louisville & N. R. Co. v. Potts*, 92 Ky. 30, 17 S. W. Rep. 185.

Plaintiff and others were engaged in grading a new track alongside of and parallel with defendant's original or main track. The ordinary duties of the work frequently required them to be in such close proximity to defendant's original track as to be liable to be struck by passing trains. It had been the uniform practice of those operating trains to give the workmen warning of their approach. *Held*, that the workmen had the right to rely on the continued performance of this duty, without the necessity, while engrossed in their work, of themselves keeping a constant lookout for approaching trains. *Erickson v. St. Paul & D. R. Co.*,

41 *Minn.* 500, 5 *L. R. A.* 786, 43 *N. W. Rep.* 332.

329. — while walking along the track.—Deceased, who was eighteen years old, hired himself to defendant as a switchman and car coupler; while he was engaged in shoving a car from a side track to a main track he was caught between the tender of the engine and a car, and crushed to death. He was looking toward the engine, when he should have been looking ahead at the car before him; if he had been at the place where he should have been, he would not have been hurt. No negligence was shown on the part of the defendant's servants or agent. *Held*, in an action by the deceased's mother, that a verdict for the defendant was demanded by the evidence. *Littlejohn v. Central R. Co.*, 74 *Ga.* 396.

A yard master, who had eight years' experience, walked from one track to another but a few feet away, and then started along the track, walking on the ends of the ties, without looking back to see if a train, which a few minutes before had been run on the switch, was approaching, and was hit by the train and injured. *Held*, that he was guilty of contributory negligence. *Ellis v. Houston*, 4 *N. Y. Supp.* 732.

The company employing plaintiff maintained a track parallel with and close to defendant's track. Plaintiff rode home on an engine, and just before it stopped looked both ways for trains, and then left the engine backwards on the side next to defendant's track, and was struck by a train when he had taken a step or two. *Held*, that he should have looked and listened after the engine stopped, and not having done so, he failed to exercise proper care for his own safety. *Smith v. New York C. & H. R. Co.*, 44 *N. Y. S. R.* 55, 63 *Hun* 624, 17 *N. Y. Supp.* 400; *affirmed* in 137 *N. Y.* 562, *mem.*, 50 *N. Y. S. R.* 933.

Where the evidence tended to show that the employé was told by the engineer of the engine which struck him that it would not start for fifteen minutes, but that it actually struck him in about seven minutes, he could not be charged with negligence in not keeping a vigilant watch in his rear up to the time of the accident, even though, had he done so, he might have been able to get off the track in time to avoid the injury; for he had a right to repose some confidence in what had been told him. *Hawley v. Chi-*

cago, B. & Q. R. Co., 71 *Iowa* 717, 29 *N. W. Rep.* 787.

330. Choosing between several courses of action.—If there are two apparent ways of discharging the required service, one more dangerous than the other, the employé is bound to select the latter, and is guilty of such negligence as will bar an action for damages, if he selects the former and is thereby injured; and if the danger is so imminent and apparent, in either way, that a careful and prudent man would not incur the risk, he cannot recover, unless the evidence shows that the injury was caused by the reckless, wanton, or wilful negligence of the defendant's employés. *Mobile & O. R. Co. v. George*, 94 *Ala.* 199, 10 *So. Rep.* 145. *Louisville & N. R. Co. v. Orr*, 91 *Ala.* 548, 8 *So. Rep.* 360. *Memphis & C. R. Co. v. Graham*, 53 *Am. & Eng. R. Cas.* 396, 94 *Ala.* 545, 10 *So. Rep.* 283. *St. Louis B. & I. Co. v. Brennan*, 20 *Ill. App.* 555. *Pennsylvania Co. v. O'Shaughnessy*, 41 *Am. & Eng. R. Cas.* 479, 122 *Ind.* 588, 23 *N. E. Rep.* 675. *Union Pac. R. Co. v. Estes*, 37 *Kan.* 715, 16 *Pac. Rep.* 131. *Dandie v. Southern Pac. R. Co.*, 42 *La. Ann.* 686, 7 *So. Rep.* 792.

The fact that the injury occurred, not from the way selected, but from the defect in the ways, works, and machinery complained of, when but for such defect the duty might have been performed with reasonable safety, will not bar a recovery because of contributory negligence on the ground that there was another mode of performing the work. *Louisville & N. R. Co. v. Pearson*, 97 *Ala.* 211, 12 *So. Rep.* 176.

It is only when it clearly appears, and the facts are undisputed, that the injured employé had voluntarily chosen a dangerous position, a safer one having been provided by the company, that the court can say, as a matter of law, that the selection was such contributory negligence as would defeat a recovery. *Missouri Pac. R. Co. v. McCally*, 41 *Kan.* 639, 655, 21 *Pac. Rep.* 574.

A servant cannot recover of the master for injuries received in consequence of his having left his place of duty and improperly engaged in the performance of the duties of another. *Schaub v. Hannibal & St. J. R. Co.*, 106 *Mo.* 74, 16 *S. W. Rep.* 924.

Where, in an action for negligence by an employé for injuries received in unhitching a dump-car, the evidence shows clearly that

there were several methods of hitching in common use, the choice between them being a matter of judgment depending on surrounding conditions, the owner had the absolute right to select according to his own judgment. *Kehler v. Schwenk*, 144 Pa. St. 348, 22 Atl. Rep. 910.

Where the injuries complained of were caused immediately by the act of the servant in walking from the point to which he had been transported and put at work by the master to a place where he could obtain necessary and proper shelter and protection from the elements, the master cannot be relieved from liability, in case it appears that the servant's act in so walking was apparently rendered necessary by the master's negligent act, and was not in itself negligent. *Schumaker v. St. Paul & D. R. Co.*, 46 Minn. 39, 48 N. W. Rep. 559.

Plaintiff and another were charged with the duty of moving a box from the door of one car to that of another a few feet away on an adjoining track. It appeared that they could lift the box on their shoulders, but instead they ran a rope through the handle of the box and one stood on either car and attempted to swing the box across. The rope gave way, which caused plaintiff to fall and be injured. *Held*, that the company was not liable, the injury being caused by the joint negligence of plaintiff and his fellow-servant. *Gowen v. Harley*, 56 Fed. Rep. 973.

Plaintiff was working with others in loading heavy stone on cars by means of a derrick. When a stone had been lifted ready to swing onto the car, plaintiff was directed to go on the car, and in doing so passed under the stone, but was injured by reason of a chain breaking and letting it fall. The evidence showed that he could have entered the car with safety at either end, or could have passed around to the other side, and that a defect in the chain was known to some of the employes and probably to plaintiff. *Held*, that he was guilty of contributory negligence in attempting to pass under the stone. *Kinney v. Corbin*, 132 Pa. St. 341, 19 Atl. Rep. 141.

331. In emergencies or situations of peril, generally.*—While it is a gen-

* When an employé may recover for injuries received in apprehending danger which did not exist in fact, and putting himself in a position where he was injured, see 41 AM. & ENG. R. CAS. 326, *abstr.*

eral rule that the servant has no claim on the master for damages for an injury received by voluntarily assuming to do something which the master did not employ him to do, yet in the case of emergency he may, of his own volition, step outside of the line of his usual duties; and if this departure is only such as the necessities of the case fairly and reasonably call for, keeping in view the character of the work he is called upon to do, it will not of itself defeat a recovery of damages in case he is injured. Whether he is guilty of negligence is a question for the jury, and his conduct must be tried in the light of all the surroundings. *Barry v. Hannibal & St. J. R. Co.*, 98 Mo. 62, 11 S. W. Rep. 308. *Wynn v. Central Park, N. & E. R. Co.*, 133 N. Y. 575, *mem.*, 30 N. E. Rep. 721, 44 N. Y. S. R. 673, 4 *Silv. App.* 214; *reversing* 38 N. Y. S. R. 181, 14 N. Y. Supp. 172.

The mere facts that an engineer running a train upon a railroad, after seeing a signal to stop, and after reversing his engine, might with probable safety to himself have gotten off from his locomotive before its collision with another train then approaching, and that he remained at his post grasping the reversing lever and throttle until the collision occurred, will not justify the court in holding, as matter of law, that he was negligent. *Cottrill v. Chicago, M. & St. P. R. Co.*, 47 Wis. 634, 3 N. W. Rep. 376.

Plaintiff was an engineer running on a single track, and on a foggy morning saw another engine approaching, reversed his engine, and jumped, receiving serious injuries. The engines stopped before colliding, but within a few feet of each other. *Held*, that the question of whether the circumstances justified him in jumping was properly left to the jury. He could not be charged with imprudence in jumping simply because the engines stopped before striking. *Gross v. Pennsylvania, P. & B. R. Co.*, 42 N. Y. S. R. 808, 62 Hun 619, 16 N. Y. Supp. 616.

Where a baggage master upon a train, in imminent danger of collision, jumps therefrom, it is no defense to an action for injuries sustained that the conductor ordered him not to jump. When a collision is inevitable, such action becomes one of reasonable precaution. *Georgia R. & B. Co. v. Rhodes*, 56 Ga. 645.

332. Peril occasioned by the negligence of the company.—When danger

is imminent, the law does not demand that accuracy of judgment required under other circumstances. So where the negligent manner of running a train put plaintiff and others, who were in charge of a hand-car on the track, in imminent peril, the company is not released from liability for an injury that plaintiff received in trying to get the car off the track, because he did not exercise the soundest discretion in his efforts to do so. *Roll v. Northern C. R. Co.*, 15 Hun (N. Y.) 496; affirmed in 80 N. Y. 647, mem. *South West, Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. Rep. 365.

Where an employé, while running a hand-car, is put in sudden apprehension of a dangerous collision with a locomotive approaching from an opposite direction, and the threatened collision is due alone to the negligence of the company, whether it is rash or reckless to leap from the car, or whether he should have remained upon it, or left it by means less hazardous than jumping, is question for the jury. *Smith v. Wrightsville & T. R. Co.*, 41 Am. & Eng. R. Cas. 320, 83 Ga. 671, 10 S. E. Rep. 361.

333. — or the acts of its officers or agents.—A railroad employé placed in a position of danger and peril by the negligence of a superior officer is not guilty of contributory negligence in taking a mistaken course through fear and fright occasioned by such peril. *Richmond & D. R. Co. v. Brown*, 89 Va. 749, 17 S. E. Rep. 132.

A brakeman, acting under the orders of a conductor, and in an emergency which gave him no time for reflection, attempted to catch a fast-moving freight car. It was in the night-time, his lantern had gone out, and the ground was uneven. His foot slipped and he was injured. Held, that the finding of the jury that there was no contributory negligence would not be disturbed. *Fox v. Chicago, St. P. & K. C. R. Co.*, 53 Am. & Eng. R. Cas. 430, 86 Iowa 368, 53 N. W. Rep. 259.

Where a collision is caused by the negligence of the conductor in failing to notice the signals displayed at a station, or by the negligence of the operator at the station in displaying improper signals, and by reason thereof a car collides with another standing on the track, where it had a right to be, with forty or fifty of the railroad section hands on board, and one of them jumps from the car to the ground to avoid the effects of the collision, and in so doing re-

ceives an injury which results in his death, he cannot be considered guilty of contributory negligence; and the company is liable for the damages thus sustained. *Haney v. Pittsburgh, C. & St. L. R. Co.*, 38 W. Va. 570, 18 S. E. Rep. 748.

334. Assuming greater risks to save life or property.—Exposure of life by an employé to save life is neither wrongful nor negligent, if attempted within the scope of his duty, unless made under circumstances constituting rashness in the judgment of prudent persons. *Condiff v. Kansas City, Ft. S. & G. R. Co.*, 48 Am. & Eng. R. Cas. 417, 45 Kan. 256, 25 Pac. Rep. 562.—**APPROVING** *Eckert v. Long Island R. Co.*, 43 N. Y. 502.

Persons are justified in assuming greater risks to protect human life than would be sanctioned in other circumstances. *Schroeder v. Chicago & A. R. Co.*, 53 Am. & Eng. R. Cas. 436, 108 Mo. 322, 18 S. W. Rep. 1094.

If a servant, in his attempt to save his employer's property from destruction, acts as a reasonable and prudent man would have acted under similar circumstances, he will not be held guilty of negligence. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. Rep. 285.

A car company will not be permitted to escape the consequences of its own negligence, and defeat an employé's claim for damages for personal injury, by setting against him his faithful endeavor to save its property from a danger which such negligence created. *Pullman Palace Car Co. v. Laack*, 41 Ill. App. 34.—**QUOTING** *Wasmer v. Delaware, L. & W. R. Co.*, 80 N. Y. 215.

335. Effect of wilful negligence of employe.—An action will not lie in behalf of an agent or servant of a company where his negligence or wilful act caused, or contributed to cause, the accident or collision occasioning him injury. *Louisville & N. R. Co. v. Burke*, 6 Coldw. (Tenn.) 45.

If an employé wilfully encounters dangers which are known to him, or are notorious or apparent, the employer is not responsible for an injury occasioned thereby. *Humphreys v. Newport News & M. V. Co.*, 39 Am. & Eng. R. Cas. 363, 33 W. Va. 135, 10 S. E. Rep. 39.

336. Comparative negligence.—An employé of a railroad company who is killed or injured must be free from fault in order to recover; and the rule which allows a

partial recovery against a railroad company, notwithstanding the contributory negligence of the plaintiff or person injured, does not apply to the case of an injury sustained by an employé. *East Tenn., V. & G. R. Co. v. Maloy*, 31 *Am. & Eng. R. Cas.* 352, 77 *Ga.* 237, 2 *S. E. Rep.* 941.

Where a railroad employé sues, if it appear that his own act contributed to the injury, he cannot recover, unless his negligence was slight and that of the defendant gross in comparison. *Illinois C. R. Co. v. Brookshire*, 3 *Ill. App.* 225.

337. Imputed negligence.—An employé of a railway company riding on a free pass is affected with the contributory negligence of the driver of the train in causing a collision with a train of another company, and is so identified with such driver as to disentitle him to maintain an action for damages against such other company, which was also guilty of negligence. *Armstrong v. Lancashire & Y. R. Co.*, 33 *L. T.* 228, *L. R.* 10 *Ex.* 47, 44 *L. J. Ex.* 89, 23 *W. R.* 295.

338. Recovery notwithstanding employé's negligence.*—Because a servant knows of one defect or danger, he does not take the risk of another of which he has no knowledge; and if both contribute to injure him he is entitled to recover, provided but for the unknown defect the accident would not have happened. *Missouri Pac. R. Co. v. Somers*, 78 *Tex.* 439, 14 *S. W. Rep.* 779.—FOLLOWED IN *Ft. Worth & D. C. R. Co. v. Wilson*, 3 *Tex. Civ. App.* 583.—*Ft. Worth & D. C. R. Co. v. Wilson*, 3 *Tex. Civ. App.* 583, 24 *S. W. Rep.* 686.—FOLLOWING *Galveston, H. & S. A. R. Co. v. Lempe*, 59 *Tex.* 19; *Missouri Pac. R. Co. v. Somers*, 78 *Tex.* 439.

339. — when by use of care company could have prevented the injury.—Where an employé is injured, contributory negligence is not a defense if it appears that the company, by the exercise of proper care, could have avoided the consequences of the employé's negligence. *Chesapeake & O. R. Co. v. Lee*, 84 *Va.* 642, 5 *S. E. Rep.* 579. *Mason v. Richmond & D. R. Co.*, 53 *Am. & Eng. R. Cas.* 183, 111 *N. Car.* 482, 16 *S. E. Rep.* 698. *McKean v. Burlington, C. R. & N. R. Co.*, 55 *Iowa* 192.

* A car coupler guilty of contributory negligence may recover where the engineer was wantonly negligent, see 44 *AM. & ENG. R. CAS.* 552, *abstr.*

7 *N. W. Rep.* 505. *Williams v. South & N. Ala. R. Co.*, 91 *Ala.* 635, 9 *So. Rep.* 77.

But this doctrine cannot apply where there is no evidence that the injury could have been averted after the employé had put himself in a place of danger. *Louisville & N. R. Co. v. Wallace*, 90 *Tenn.* 53, 15 *S. W. Rep.* 921.

340. Contributory negligence of volunteers.—A railway company is not liable for injuries inflicted through the negligence of its servants upon a stranger to the company while engaged in the voluntary service of uncoupling its cars, if by his negligence he contributed to the injury complained of. *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 *Miss.* 112.—FOLLOWED IN *Everhart v. Terre Haute & I. R. Co.*, 4 *Am. & Eng. R. Cas.* 599, 78 *Ind.* 292, 41 *Am. Rep.* 567.

A man volunteered to do a service for a railway company, and he was killed while walking the track in the performance of such service, the evidence showing a want of care on his part. *Held*, that there could be no recovery against the company. *Barstow v. Old Colony R. Co.*, 28 *Am. & Eng. R. Cas.* 473, 143 *Mass.* 535, 10 *N. E. Rep.* 255.

2. Negligence in the Operation of Trains, or in the Use of Appliances, Machinery, etc.

341. Duty to exercise care in the management of trains.—The imperfect equipment of a train does not relieve the conductor from the exercise of due care and diligence in its management. *Mobile & M. R. Co. v. Clanton*, 59 *Ala.* 392.

342. — or in the use of machinery, etc.—In the use of machinery and appliances the employés of railroad companies must use ordinary care to protect themselves from injury. *Chicago & A. R. Co. v. Bragonier*, 119 *Ill.* 51, 7 *N. E. Rep.* 688; *reversing* 11 *Ill. App.* 516. *Henderson v. Coons*, 31 *Ill. App.* 75. *Houston & T. C. R. Co. v. Conrad*, 62 *Tex.* 627. *Gutridge v. Missouri Pac. R. Co.*, 105 *Mo.* 520, 16 *S. W. Rep.* 943.

Where one engaged in car shops is employed as a skilled workman, and must necessarily work with dangerous implements, the law imposes upon him a high degree of care on his part to avoid injury. *Chicago & A. R. Co. v. Mahoney*, 4 *Ill. App.* 262.

343. What acts constitute contributory negligence, generally.—

If patently defective instrumentalities are furnished an employé for his use he must not only know, or be in duty bound to know, their actual character and condition, but must understand, or by the exercise of ordinary observation realize, the risks to which he is exposed by their use, before he is chargeable with contributory negligence. *Hungerford v. Chicago, M. & St. P. R. Co.*, 41 Am. & Eng. R. Cas. 269, 41 Minn. 444, 43 N. W. Rep. 324.

Plaintiff was injured while attempting to make a coupling, by a movement of the cars. There was a conflict of evidence as to who was responsible for the movement, but there was some evidence tending to show that they were moved in obedience to a signal given by plaintiff himself. *Held*, that if the jury believed that he gave such signal he was guilty of contributory negligence and could not recover. *Hudson v. Charleston, C. & C. R. Co.*, 55 Fed. Rep. 248.

A freight train was delayed by trains ahead, and the conductor and brakeman went to sleep in the caboose, the conductor remarking that a semaphore which stood near would take care of them; but it appeared that the object of the semaphore was only to signal incoming trains, and it at the time was displaying a white light. The conductor knew that other trains would soon follow, and in such case a rule of the company required him to post signals, which he failed to do, and was killed while asleep, by the following train running onto the caboose. *Held*, that the conductor had failed to exercise ordinary care. *Lake Shore & M. S. R. Co. v. Hunt*, 18 Ill. App. 288.

Plaintiff was a car repairer, and seeks to recover for injuries alleged to have been caused by defendant's failure to furnish him competent assistance in doing certain work, and by its negligence in failing to keep its yard free from snow and ice. But it appearing that he knew the condition of the yard, and that the car on which the work was to be done was placed at the position in the yard indicated by him, and that he undertook to do the work alone, without calling for help until after he had slipped and fallen and received the injury complained of, though competent help was at hand and responded to his call as soon

as made—*held*, as matter of law, that he could not recover. *Way v. Chicago & N. W. R. Co.*, 76 Iowa 393, 41 N. W. Rep. 51.

A fireman was killed by reason of a switch being misplaced, so that his locomotive ran off the track. The placing of the switch was not traced to the company or any of its employés. *Held*, that plaintiff was rightly nonsuited. The cause of the death was either by reason of his own carelessness or that of a fellow-employé engaged in the same general business. *Tinney v. Boston & A. R. Co.*, 62 Barb. (N. Y.) 218; *affirmed* in 52 N. Y. 632, *mem.*—**DIS- TINGUISHING** *Brickner v. New York C. R. Co.*, 2 Lans. (N. Y.) 506; *Sprong v. Boston & A. R. Co.*, 60 Barb. 30. **EXPLAINING** *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441; *Warner v. Erie R. Co.*, 39 N. Y. 468; *Faulkner v. Erie R. Co.*, 49 Barb. 324.

In an action for damages by the conductor on a cable car, for injuries received by him in pushing a trail car from the power house so as to attach it to the grip car, it was shown that the track outward from the power house was on a slightly upward incline, requiring vigorous pushing to get a car out; that there was an open space under the track in the power house, and that the men pushed the cars by walking along a plank placed on the side of the track; that the doorway through which the cars had to pass from the house allowed but three and a half inches between the car and the pier on the side; that plaintiff in pushing out the car took hold of one of the uprights on the side of the car, and, failing to let go when he came to the doorway, was caught by the car and the walls of the pier, and was badly injured; that plaintiff had been recently employed, had never done this work before, and had not been informed of the danger. *Held*, that he was guilty of contributory negligence, as the danger was apparent. *Jennings v. Tacoma R. & M. Co.*, 7 Wash. 275, 34 Pac. Rep. 937.

344. — and what do not.—Plaintiff was engaged with six or seven other men to tear down a shed some sixty or seventy feet long, by sawing it in two, cutting off the supporting posts, and then pushing it over. Plaintiff went to the roof and sawed it in two. While he was on the roof the other men cut off the posts without his knowledge, and after he came down and was in the act of cutting off a post, the

shed fell
the ju
was no
Clevel
56 Fed

A l
the en
gently
no evi
positio
of his
then ju
of atte
upon t
of his
circum
stop a
before
mott v.
180, 52

Plain
making
a defect
ing wit
plate ri
loose a
middle,
which d
the poi
the pla
edge th
affect h
Waldh
Mo. 37
Missou

While
fects w
has info
to the s
ing in a
plaintiff
speci
to ente
tion of
have kn
v. Han

Plain
and was
an over
existed,
time of
from th
guilty c
v. East
Y. Sup
A bra
off du

shed fell and he was injured. *Held*, that the jury were justified in finding that he was not guilty of contributory negligence. *Cleveland, C., C. & St. L. R. Co. v. Brown*, 56 *Fed. Rep.* 804.

A brakeman was killed by falling over the end board of a car which had negligently been left out of place. There being no evidence to show that he knew of its position until he approached it at the time of his death—*held*, that whether he was then justified in incurring the unusual risk of attempting to pass over it would depend upon the haste required in the performance of his duties; and the deceased under all circumstances would not be required to stop and place the end board in position before attempting to pass over it. *McDermott v. Iowa Falls & S. C. R. Co.*, 85 *Iowa* 180, 52 *N. W. Rep.* 181.

Plaintiff, a switchman, was injured while making a coupling, by catching his foot in a defective frog. The frog was a solid casting with a steel point set in, and had a steel plate riveted on the top; but the point was loose and the plate was broken about the middle, so that it worked across a rail, which caused the accident. He knew that the point was loose, but did not know that the plate was broken. *Held*, that knowledge that the point was loose would not affect his right to recover for the injury. *Waldhier v. Hannibal & St. J. R. Co.*, 87 *Mo.* 37. — DISTINGUISHED IN *Towner v. Missouri Pac. R. Co.*, 52 *Mo. App.* 648.

While a servant must take notice of defects which he discovers, and of which he has information, and of such as are obvious to the senses, yet the defect in the frog being in a department of the work with which plaintiff had nothing to do by way of inspection or repair, it was not his duty to enter upon an inquiry as to the condition of the whole frog, although he may have known its point was loose. *Waldhier v. Hannibal & St. J. R. Co.*, 87 *Mo.* 37.

Plaintiff was a newly engaged brakeman and was injured by coming in contact with an overhead bridge which he did not know existed, and which he could not see at the time of the injury, by reason of the smoke from the engine. *Held*, that he was not guilty of contributory negligence. *Dukes v. Eastern Distilling Co.*, 51 *Hun* 605, 4 *N. Y. Supp.* 562.

A brakeman having been for several days off duty, and having no opportunity of

learning the condition of a tank and attachments before he was hurt, and being in the discharge of his duty, was not guilty of contributory negligence in ascending a ladder near the tank. *Texas & P. R. Co. v. Hohn*, 1 *Tex. Civ. App.* 36, 21 *S. W. Rep.* 942. — DISAPPROVING *Davis v. Columbia & G. R. Co.*, 28 *Am. & Eng. R. Cas.* 448, 21 *So. Car.* 93; *Clark v. Richmond & D. R. Co.*, 18 *Am. & Eng. R. Cas.* 84, 78 *Va.* 709. FOLLOWING *Houston & T. R. Co. v. Oram*, 49 *Tex.* 345; *Bonner v. La None*, 80 *Tex.* 119.

345. Failure to examine and inspect the track and roadbed.—An engineer of a railroad which is in general use, although having knowledge that the rails of the track are old, light, and well worn, is not bound to pursue the inquiry, and to determine for himself and at his own peril whether the road is or is not fit for use. *Devlin v. Wabash, St. L. & P. R. Co.*, 28 *Am. & Eng. R. Cas.* 524, 87 *Mo.* 545.

346. Failure to examine and inspect appliances, etc., generally.—The burden of furnishing safe machinery, appliances, surroundings, etc., is upon the master; and while he is not liable for defects and damages of which the servant is fully informed, yet the servant is authorized to rely upon the acts of the master in that respect, and is under no primary obligation to investigate and test the fitness and safety of the machinery, surroundings, etc., in the absence of notice that there is something wrong in that respect. *Cleveland, C., C. & St. L. R. Co. v. Walter*, 45 *Ill. App.* 642.

An employé must use the faculties which he possesses; and if there should be a visible defect in a tool used by him which he could see by looking, he is guilty of negligence if he does not look, unless some reasonable excuse is given for his not doing so. *McBride v. Indianapolis F. & S. Co.*, 5 *Ind. App.* 482, 32 *N. E. Rep.* 579. — APPLYING *Rietman v. Stolte*, 120 *Ind.* 314.

In performing the duties of his place a servant is bound to take notice of the ordinary operation of familiar laws of gravitation, and to govern himself accordingly. If he fails to do so the risk is his own. If the instrumentalities furnished by the master for the performance of the servant's duties are defective, and the servant is aware of this, though not aware of the degree of defectiveness, he is bound to use his eyes to see that which is open and ap-

parent to any person using his eyes; and if he fails to do so he cannot charge the consequences upon his master. *Walsh v. St. Paul & D. R. Co.*, 2 *Am. & Eng. R. Cas.* 144, 27 *Minn.* 367, 8 *N. W. Rep.* 145.

A servant in the use of appliances furnished him by the master is bound to take notice of those dangerous defects of which he has knowledge, and which are obvious to his senses; but he is not bound to investigate for himself a department of work with which he has nothing to do, and to set up his judgment against that of his master as to the safety of such appliances. *Devlin v. Wabash, St. L. & P. R. Co.*, 28 *Am. & Eng. R. Cas.* 524, 87 *Mo.* 545.

347. Failure to inspect cars.—There is no legal presumption that it is the duty of the conductor of a railway freight train to inspect the cars and machinery of his train, or that he is chargeable with negligence for using unsafe cars if the defect was such that it might have been discovered by inspection. *Ransier v. Minneapolis & St. L. R. Co.*, 21 *Am. & Eng. R. Cas.* 601, 32 *Minn.* 331, 20 *N. W. Rep.* 332.—APPROVED IN *Cincinnati, H. & D. R. Co. v. McMullen*, 38 *Am. & Eng. R. Cas.* 165, 117 *Ind.* 439, 20 *N. E. Rep.* 287.—*Cincinnati, H. & D. R. Co. v. McMullen*, 38 *Am. & Eng. R. Cas.* 165, 117 *Ind.* 439, 20 *N. E. Rep.* 287.—APPROVING *Ransier v. Minneapolis & St. L. R. Co.*, 32 *Minn.* 331.

A conductor being the representative of the company in the command and management of the train, and not being under the immediate control and direction of a superior, is held to ordinary and reasonable care and diligence, not only in the management of the train, but also in the due inspection of the cars, machinery, and apparatus of the train, as to their sufficiency and safety; and if he receive an injury while neglecting such duty, he can have no right of action against the company. *Mad River & L. E. R. Co. v. Barber*, 5 *Ohio St.* 541.

A brakeman is not chargeable with contributory negligence because he attempts to couple cars before examining the coupling appliances to see whether they are safe or not. *Mahoney v. New York C. & H. R. R. Co.*, 39 *N. Y. S. R.* 911, 60 *Hun* 586, 15 *N. Y. Supp.* 501; affirmed in 131 *N. Y.* 623, *mem.*, 43 *N. Y. S. R.* 962.—FOLLOWING *Goodrich v. New York C. & H. R. R. Co.*, 116 *N. Y.* 398, 26 *N. Y. S. R.* 767.

If the employé of a railroad company is

injured by reason of defects in a car transferred to said company by another railroad, and by the rules of the company, known to said employé, it is his duty to inspect said cars, he cannot recover for injuries caused simply by his failure to make the inspection. *Ft. Wayne, C. & L. R. Co. v. Gruff*, 132 *Ind.* 13, 31 *N. E. Rep.* 460.—REFERRING TO *Chicago, St. L. & P. R. Co. v. Fry*, 131 *Ind.* 319.

348. — brakes and brake attachments.—That a railway company may have employed car inspectors at certain local stations to inspect cars will not relieve brakemen using the same from their duty of inspecting that part of the machinery they are expected to handle, and reporting defects to the company. Their duty in this respect remains as imperative as if they were the sole inspectors. It is not in the power of the company to relieve its brakemen of this duty. *Chicago & A. R. Co. v. Bragonier*, 119 *Ill.* 51, 7 *N. E. Rep.* 688; reversing 11 *Ill. App.* 516.

Where a rule of a railway company imposes no higher duty upon a brakeman, in regard to the inspection of that part of the machinery of cars he is required to use, than the law requires of him, an omission of duty by other employés of the company will not relieve him from the duties and obligations the law imposes. *Chicago & A. R. Co. v. Bragonier*, 119 *Ill.* 51, 7 *N. E. Rep.* 688; reversing 11 *Ill. App.* 516.

Where one to whom a railroad company owes the exercise of due care is furnished with a car having a defective brake, and is injured thereby, he cannot recover for such injury if he knew that defective and dangerous cars were frequently left by the company for his use, and could have ascertained by reasonable care on his part the defect in the car causing the injury. *Roddy v. Missouri Pac. R. Co.*, 104 *Mo.* 234, 15 *S. W. Rep.* 1112.

Employés have a right to presume that the machinery and appliances provided for their use are safe. So where a brakeman is injured by reason of a nut being off a bar, without his knowledge, and it not being his duty to provide such things, he is not chargeable with contributory negligence. *Chicago & E. I. R. Co. v. Hagar*, 11 *Ill. App.* 498.—REVIEWED IN *Kincaid v. Oregon S. L. & U. N. R. Co.*, 22 *Oreg.* 35.

The fact that a car is in actual use justifies a brakeman in assuming that it is fit to

use, and
tributor
without
New Y.
48 *N. Y.*
argume
M. R. C.
Rep. 47

A bra
a brake
Four of
where t
were ru
an agre
viding
engines
amine t
takesuff
and refu
expose
agreeme
be atten
in the m
machine
but it w
the defe
expert.

Co., 45 *N.*
Y. Supp.
mem., 32
915.

A rul
trains to
whether
binding
offered
car is to
mains at
waiting
at any ti
it would
run to th
is injured
not char
because
O'Malley
51 *N. Y.*
Supp. 48
York, L.
N. Y. S.

The pl
train and
train. F
defective
action by
juries to
the plain

use, and he is not necessarily guilty of contributory negligence in attempting to use it without first examining it. *Van Tassell v. New York, L. E. & W. R. Co.*, 1 Misc. 299, 48 N. Y. S. R. 767, 20 N. Y. Supp. 708; *re-argument denied in 2 Misc.* 592. *Ohio & M. R. Co. v. Pearcey*, 128 Ind. 197, 27 N. E. Rep. 479.

A brakeman was killed by the breaking of a brake which he was attempting to set. Four of the spokes of the brake wheel broke where they joined the rim, and the ends were rusty. The company put in evidence an agreement signed by the brakeman, providing that before working with any cars, engines, machinery, or tools he should examine their condition, and that he should take sufficient time to make the examination, and refuse to obey any order which would expose him to danger. *Held*, that such agreement only required the brakeman to be attentive and vigilant to discover defects in the machinery, and to refrain from using machinery if he learned it was defective; but it was no defense where it appeared that the defect could only be discovered by an expert. *Pratt v. Lake Shore & M. S. R. Co.*, 45 N. Y. S. R. 715, 63 Hun 616, 18 N. Y. Supp. 682; *affirmed in* 136 N. Y. 654, *mem.*, 32 N. E. Rep. 1016, 49 N. Y. S. R. 915.

A rule requiring brakemen on freight trains to examine and know for themselves whether brakes are safe or not is only binding where a reasonable opportunity is offered for the examination. So where a car is taken into a train, and it only remains at the station ten or fifteen minutes waiting for another train and liable to move at any time, so that going under to examine it would be extremely dangerous, and it is run to the next station, where the brakeman is injured by a defect in the brakes, he is not chargeable with contributory negligence because he did not examine the brakes. *O'Malley v. New York, L. E. & W. R. Co.*, 51 N. Y. S. R. 366, 67 Hun 130, 22 N. Y. Supp. 48. — **EXPLAINING** *LaCroy v. New York, L. E. & W. R. Co.*, 132 N. Y. 570, 43 N. Y. S. R. 711.

The plaintiff was the foreman of a work train and lived with his wife upon such train. His wife was injured by reason of a defective brake on one of the cars. In an action by the husband to recover for the injuries to his wife—*held*, that the fact that the plaintiff might by the exercise of dili-

gence have discovered the defect, would not prevent a recovery against the company where it was not his duty to inspect the appliances. *Missouri Pac. R. Co. v. White*, 48 Am. & Eng. R. Cas. 206, 80 Tex. 202, 15 S. W. Rep. 808.

349. Failure to report defects to the company.—The law imposing a high degree of care upon all employees of railway companies engaged in the running of their trains, to insure the safety of those in the service, makes it the duty of a brakeman on a railway train to see that the brakes on the cars are always in proper order for working, and report all defects therein to the company; and if he suffers a personal injury in consequence of the neglect to perform that duty, no recovery can be had against his employer. *Chicago & A. R. Co. v. Bragonier*, 119 Ill. 51, 7 N. E. Rep. 688; *reversing in* 11 Ill. App. 516. — **REVIEWING** *Illinois C. R. Co. v. Jewell*, 46 Ill. 99; *Toledo, W. & W. R. Co. v. Eddy*, 72 Ill. 138.

It was the duty of a flagman to make fires in the stove on one of the cars of a railroad company, which he did. There was a defect in the manner in which the stove was fastened, such as to make it unsafe to build a fire therein on account of the dangers incident to railroad traveling; and this was such an open and patent defect as he could have easily seen, but on account of his own negligence he carelessly overlooked it and failed to report it that it might be remedied. *Held*, that he was guilty of contributing, by his own negligence and carelessness, to the injury which he received, and was not entitled to recover. *Atlanta & C. A. L. R. Co. v. Ray*, 22 Am. & Eng. R. Cas. 281, 70 Ga. 674.

350. Failure of employee to keep in repair machinery under his charge.

—In an action for the death of a brakeman there was evidence tending to show that he was thrown down and killed by reason of a nut, which held the wheel of the brake in place, having come off the upright shaft, which caused the accident. *Held*, that if the jury believed this evidence, the company was not liable, as it was the duty of the brakeman to see that the brake was in fit condition. *Illinois C. R. Co. v. Jewell*, 46 Ill. 99. — **APPROVED IN** *Harper v. Indianapolis & St. L. R. Co.*, 47 Mo. 567. **REVIEWED IN** *Chicago & A. R. Co. v. Bragonier*, 119 Ill. 51.

In such case there was other evidence

tending to show that he was thrown from the train by its oscillation, caused by the sudden application of the brakes while the train was running at a high rate of speed on a down grade, through the reckless manner of the engineer in running the train, his general recklessness being known to the company. *Held*, that the company was liable if the accident was caused in this way. *Illinois C. R. Co. v. Jewell*, 46 Ill. 99.

In an action by an employé for damages resulting from the giving way of certain steps leading up to a platform for loading coal, where the evidence shows that the steps were constantly used by him in his work, and they were not under the special care of any other employé except plaintiff and a fellow-workman, the plaintiff will be charged with negligence for not seeing that the steps were in order; and an instruction to the jury that if they found plaintiff was employed to handle coal at the coal house and platform, and nothing was said to him by his employer in regard to looking after the safety of the steps, then it was not a part of plaintiff's duty to see that the steps were kept in a reasonably safe condition, is error; and another instruction, to the effect that plaintiff was bound to use ordinary care to avoid injury, does not take the place of a proper instruction to the jury, presenting the subject of plaintiff's duty. *Stroble v. Chicago, M. & St. P. R. Co.*, 28 Am. & Eng. R. Cas. 510, 70 Iowa 555, 31 N. W. Rep. 63.

351. Negligence in the manner of using tools, etc.—Where a servant hired to labor in connection with machinery fails to use such reasonable care and prudence as would have prevented the happening of an accident, and is injured by the machinery, he is guilty of contributory negligence and his employer is thereby absolved from responsibility, although but for a defect in the machinery and the negligence of the employer the injury would not have happened. *Washington & G. R. Co. v. McDade*, 44 Am. & Eng. R. Cas. 505, 135 U. S. 554, 10 Sup. Ct. Rep. 1044.

Where an employer furnishes tools to his employes which are reasonably safe if used in a proper manner, and an employé is injured by their use in some improper manner which he could not have foreseen, a charge that he could not recover if he could have avoided the consequences of the employer's negligence by the use of ordinary

care would not be applicable, because no one who is himself free from fault is bound by this rule, unless he sees the danger or has reason to apprehend the same. *Central R. & B. Co. v. Ataway*, 90 Ga. 656, 16 S. E. Rep. 956.

Where there was no evidence tending to show that the machinery by which the plaintiff's son lost his life was of defective construction, or that it was improperly adjusted or insufficiently oiled, or that the defendant's officers or agents knew of any latent defects therein, and where it affirmatively appeared that the deceased voluntarily assumed a dangerous and unnecessary position in handling the machinery, and that if he had exercised the most ordinary care he would have handled it in a different manner and would not have been hurt, it results, as a matter of law, that the plaintiff showed no right of recovery, and a judgment in his favor should be reversed, without remanding the cause. *Sparks v. Kansas City, S. & M. R. Co.*, 31 Mo. App. 111.

352. Using machinery, etc., after knowledge of defects.—If a servant has knowledge of the unsafe and defective character of appliances which must be used in and about his work, and continues the work without objection, he cannot recover for injuries sustained because of the use of such appliances. *East St. Louis P. & P. Co. v. McElroy*, 29 Ill. App. 504. *Texas & P. R. Co. v. Bradford*, 28 Am. & Eng. R. Cas. 479, 66 Tex. 732, 2 S. W. Rep. 595.

Where the instrumentality with which a servant is required to perform service is so glaringly defective that a man of common prudence would not use it, the master cannot be held responsible for damages resulting from its use. But if a servant incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonable to suppose it may be safely used with great skill or care, mere knowledge of the defects on the servant's part will not defeat a recovery. Negligence on the part of the servant, in such cases, does not necessarily arise from his knowledge of the defect, but is a question of fact, to be determined from such knowledge and the other circumstances in evidence. *Huhn v. Missouri Pac. R. Co.*, 31 Am. & Eng. R. Cas. 221, 92 Mo. 440, 10 West. Rep. 405, 4 S. W. Rep. 937.—*REVIEWING SNOW v. Housatonic R. Co.*, 8 Allen (Mass.) 441; *Patterson v. Pittsburg*

& C. R. Co., 76 Pa. St. 389.—QUOTED IN *Mahoney v. St. Louis & H. R. Co.*, 108 Mo. 191.

Where a yard man, after years of experience, is injured in using a car which he knew to be imperfect, and where his instructions are to examine cars and not to use them if found imperfect, but to send them to the yard for repairs, there can be no recovery. *Shields v. New York C. & H. R. Co.*, 4 *Silv. App.* 162, 30 *N. E. Rep.* 596.

Though a turntable was defective, yet if a person injured while on it was not by the orders of his superior or the nature or necessity of his employment, or some established custom of the company, obliged to be in the position he occupied when the accident occurred, but voluntarily and unnecessarily put himself there, he was guilty of such contributory negligence as would preclude recovery. *East Tenn., V. & G. R. Co. v. Toppins*, 11 *Am. & Eng. R. Cas.* 222, 10 *Lea (Tenn.)* 58.

353. Remaining on defective engine or car.—An engineer is not chargeable with contributory negligence because he uses an engine after he has informed the company of a defect therein, where he continues the use under a request to do so until it can be exchanged for another engine. *Sioux City & P. R. Co. v. Foulaison*, 16 *Neb.* 578, 49 *Am. Rep.* 724.

In an action by a fireman for injuries caused by a defective wheel of a locomotive, evidence that the wheel was open to plaintiff's inspection, and was so worn as to be more than ordinarily dangerous, will not necessarily defeat a recovery where it was a matter of skill and judgment to know how much wear and tear it would stand, and plaintiff was not an expert in the matter. *Bridges v. St. Louis, I. M. & S. R. Co.*, 6 *Mo. App.* 389.

No negligence on the part of the company being alleged in the declaration except that "the engine, by reason of the carelessness and negligence of the defendant, struck against the freight car with violence so great, unnecessary, and unusual as to cause the draw-bar to hurl the coupling-pin from its place, causing it to strike against the left side of the head of your petitioner," and the evidence of the plaintiff himself showing that there was no negligence in handling the engine, and that the real cause of the injury was that the brake was not in a proper condition for safe use, and that the

plaintiff knew of the defect when he exposed himself to the danger, the court did not err in granting a nonsuit. *Nelson v. Central R. & B. Co.*, 88 *Ga.* 225, 14 *S. E. Rep.* 210.

If the wreck in which the plaintiff was injured was produced solely by the defective and cracked wheel—in other words, if it would not have occurred but for this defect—and the plaintiff was ignorant thereof, then the fact that he did not abandon the engine upon discovering the defect in the brake (if he did discover it) would not amount to contributory negligence sufficient to preclude a recovery, though the defective brake may have contributed to the injury; while on the other hand, if the latter defect in the machinery was the sole or efficient cause of the derailment, without which it would not have happened, and plaintiff was cognizant of such defect in the brake, then he could not recover, notwithstanding his ignorance of the defect in the wheel, and which may have assisted in producing the catastrophe. *St. Louis & S. F. R. Co. v. McClain*, 80 *Tex.* 85, 15 *S. W. Rep.* 789.

A brakeman is not chargeable with contributory negligence because he stays on a train after he knows that a step is missing from one of the cars over which he may have to pass, where he is told by the conductor that the car shall be removed from the train at a junction ahead, if it was found on examination not to contain perishable freight. *Kane v. Northern C. R. Co.*, 128 *U. S.* 91, 16 *Wash. L. Rep.* 715, 9 *Sup. Ct. Rep.* 16.—DISTINGUISHED IN *Williamson v. Newport News & M. V. Co.*, 34 *W. Va.* 657. FOLLOWED IN *Graham v. Pennsylvania R. Co.*, 39 *Fed. Rep.* 596, 12 *N. J. L. J.* 231.

354. Remaining on engine in face of impending collision.—An engineer of a passenger train might have jumped from his engine when he saw the danger, and thus probably have avoided much danger; but to save his passengers he remained at his post and lost his life. *Held*, that he was not guilty of contributory negligence. *Pennsylvania Co. v. Roney*, 12 *Am. & Eng. R. Cas.* 223, 89 *Ind.* 453, 46 *Am. Rep.* 173.

In determining whether a locomotive engineer, injured by a collision while running a train upon a railway, was guilty of negligence in remaining at his post and not jumping off before the collision, the standard of ordinary care and prudence on his

part must be fixed with reference to the peculiar responsibilities of his employment. *Coltrill v. Chicago, M. & St. P. R. Co.*, 47 Wis. 634, 3 N. W. Rep. 376.—QUOTED IN *Central R. Co. v. Crosby*, 74 Ga. 737.

355. Failure to discover obstructions on track.—In an action for the death of an engineer who was killed by a rock having fallen from the mountain side to the track, an instruction to the effect that if the obstruction could have been seen a sufficient distance ahead of the train for the train to have been checked by the use of such precaution as was usual under such circumstances, a failure of the engineer to discover the obstruction, or, if he saw it in time, to take such precaution, would prevent a recovery, correctly states the law as to the amount of care that the engineer should have exercised. *Little Rock & Ft. S. R. Co. v. Voss*, (Ark.) 18 S. W. Rep. 172.

When a railroad engineer has notice that another train is on the track which is not running on time, but which may be at any point at almost any time, in approaching a dangerous curve in the road at ordinary speed without taking any precaution to ascertain whether the track is clear he is guilty of such negligence as will preclude a recovery on his part for injuries caused by a collision with the other train. *Blessing v. St. Louis, K. C. & N. R. Co.*, 7 Mo. App. 594; affirmed on another point in 77 Mo. 410.

There can be no recovery for the death of an employé who has been engaged for seventeen years in conducting coal cars down an incline or "gravity road," where he is killed by allowing his cars to run into others in front, it being his duty to keep a watch for cars ahead. *Moules v. Delaware & H. Canal Co.*, 141 Pa. St. 632, 21 Atl. Rep. 733.

Where freight cars stored on a siding had gotten loose and were on the main track, and in so moving had set the switch at danger, an engineer who pulls out of a station at a high rate of speed, and fails to look for the target, only reversing his engine when he sees the cars, cannot recover for injuries received in jumping from his engine, as he is guilty of contributory negligence. *Norfolk & W. R. Co. v. Williams*, 89 Va. 165, 15 S. E. Rep. 522.

Plaintiff's contention that fog prevented him from seeing the danger signal was untenable, because of the rule that "a signal imperfectly displayed, or the absence of a

signal where one is usually shown, must be regarded as a danger signal." *Norfolk & W. R. Co. v. Williams*, 89 Va. 165, 15 S. E. Rep. 522.

Where a freight engineer is killed by his train running onto a rock and earth which had fallen on the track from the mountain side, it cannot be said that he was guilty of contributory negligence where it appears that he was running at from nine to seventeen miles an hour at the time of the wreck, on a dark morning before daylight; that his engine was a powerful one, carrying a headlight that shone about one hundred yards ahead, and that he was an experienced engineer, acquainted with the locality, and ought to have known that the locality was liable to be obstructed, and had been instructed on that run to look out for obstructions; that if he had kept a steady lookout he might have seen the obstruction in time to stop the train; and that the signal of down brakes was given but a moment before the accident. *Little Rock & Ft. S. R. Co. v. Voss*, (Ark.) 18 S. W. Rep. 172.

Where an engineer is killed by means of a rock having fallen from the mountain side to the track, and it appears that it was a season of wet weather, which caused the rock to loosen and roll down, being a season tending to make the place of the accident dangerous, the engineer could not be held guilty of contributory negligence, unless the jury believed that he knew, or ought reasonably to have known, of the condition, and that he had been cautioned to use extra care and failed to do so. *Little Rock & Ft. S. R. Co. v. Voss*, (Ark.) 18 S. W. Rep. 172.

356. Struck by obstructions near track.—It being a matter of common knowledge that freight cars are so constructed that employés in the discharge of their duties on freight trains often find it necessary to extend their person beyond the surface of the cars, an employé is not guilty of contributory negligence because his person, at the moment of collision, unnecessarily protruded beyond the outer surface of the car, but for which fact he would not have been injured. *Kansas City, M. & B. R. Co. v. Burton*, 53 Am. & Eng. R. Cas. 115, 97 Ala. 240, 12 So. Rep. 88.

357. — by bridge.—As to whether a company is liable for the death of a brakeman who, while swinging himself around

the car to reach a ladder, threw his body out so far as to come in contact with a bridge, which threw him to the track, where he was run over and killed, see *Illick v. Flint & P. M. R. Co.*, 67 Mich. 632, 12 West. Rep. 440, 35 N. W. Rep. 708.

358. — by fence.—An engineer is not as a matter of law guilty of contributory negligence in failing to stop the train to correct a defect, when it appears he did not know how close a fence, by which he was struck and injured while correcting the defect, was to the passing train. *Murphy v. Wabash R. Co.*, 115 Mo. 111, 21 S. W. Rep. 562.

359. — by standing cars.—An employé knocked from a car by another car placed dangerously near on a side track cannot be held to have been negligent because he exposed his person beyond the outer surface of the car at the moment of the collision. *Kansas City, M. & B. R. Co. v. Burton*, 53 Am. & Eng. R. Cas. 115, 97 Ala. 240, 12 So. Rep. 88.

Since the injured employé only knew the general position of the car which caused the accident, and not having had anything to do with stopping it there, he cannot be said to have known of its proximity at the place where it stopped; and hence negligence in allowing his body to extend beyond the surface of the car on which he was riding as it passed that point cannot be ascribed to him. *Kansas City, M. & B. R. Co. v. Burton*, 53 Am. & Eng. R. Cas. 115, 97 Ala. 240, 12 So. Rep. 88.

If the injured employé's attention was called to the dangerous position of the car, and he himself gave the signal for stopping it at the place where it was left, he was guilty of such contributory negligence as would prevent a recovery in subsequently exposing himself to injury. So, if it were left to him to determine, and he did determine, where the car should be stopped, he was guilty of negligence, regardless of his conduct at the time of receiving the injury. But these facts do not follow from the fact that he gave the engineer a signal to stop the car at the place in question, since that may have been done in compliance with specified directions and without supervision or knowledge on his part. *Kansas City, M. & B. R. Co. v. Burton*, 53 Am. & Eng. R. Cas. 115, 97 Ala. 240, 12 So. Rep. 88.

360. — by switch pole.—It cannot be said as a matter of law that a switchman

who has had but two weeks' experience about a yard where he is injured, is guilty of contributory negligence by riding on a freight-car ladder in passing a switch pole which stands but twenty inches from the wall of the car. *Johnston v. Oregon S. L. & U. N. R. Co.*, 23 Oreg. 94, 31 Pac. Rep. 283. —QUOTING *Johnson v. St. Paul, M. & M. R. Co.*, 43 Minn. 53, 44 N. W. Rep. 884.

361. — by telegraph pole.—Some freight cars were standing on a side track, to be attached to a train which was upon the passing track of the road. A locomotive and one car were switched onto the side track, a brakeman coupled the cars, and as they were moving out he climbed up on the side of a car next to the passing track, but finding another brakeman on the top of one of the cars, he started down on the other side of the car—the business side—to turn the switch so as to throw the engine back upon the passing track. In descending the car, the brakeman was struck by a standing telegraph pole, which was only eighteen inches from the car, and was knocked between the cars and killed. *Held*, that the brakeman was not guilty of such contributory negligence as would preclude a recovery. *Chicago & I. R. Co. v. Russell*, 91 Ill. 298. —APPROVED IN *Boss v. Northern Pac. R. Co.*, 2 N. Dak. 128. DISTINGUISHED IN *Robel v. Chicago, M. & St. P. R. Co.*, 35 Minn. 84. REVIEWED IN *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701, 16 Pac. Rep. 146.

It appeared that just before the accident the brakeman had hold of the round of the ladder above the roof of the car; that his feet were on the first round, the rounds being about a foot apart; that that position extended his body backward from the line he would have occupied if he had stood upright, thus increasing the danger of a collision with the pole. *Held*, not such negligence as should affect a recovery. *Chicago & I. R. Co. v. Russell*, 91 Ill. 298.

362. Failure to reverse engine.—It being customary for trains to pass through stations under control, an engineer whose orders read not to stop at stations (though the order was subsequently changed without his knowledge) is not guilty of negligence in failing to reverse his engine on feeling the train brakes set, it appearing that the train was about to pass through a station. *McDermott v. Iowa Falls & S. C. R. Co.*, 85 Iowa 180, 52 N. W. Rep. 181.

363. Running at immoderate rate of speed.*

—Where a train is being run at night in a season of wet weather, and the engineer has been instructed to run with care, and he knows, or has sufficient means of knowing and ought to know, the danger of that part of the road where the accident occurred, it is his duty to run at such speed as to enable him to stop the train after an obstruction on the track could be seen by the use of the headlight; and if he fails to do so and is killed, there can be no recovery for his death. *Little Rock & Ft. S. R. Co. v. Voss*, (Ark.) 18 S. W. Rep. 172. *Sweeney v. Minneapolis & St. L. R. Co.*, 22 Am. & Eng. R. Cas. 302, 33 Minn. 153, 22 N. W. Rep. 289.—DISTINGUISHING *Abbott v. Chicago, M. & St. P. R. Co.*, 30 Minn. 482. FOLLOWING *Mantel v. Chicago, M. & St. P. R. Co.*, 33 Minn. 62.

Though a company is bound to keep its track in a safe and sound condition, yet where an engineer was running his train at a much greater rate of speed than was allowed, for making up lost time, and in consequence of this, and a battered rail on a curve, the train was thrown from the track, and he severely injured—*held*, that owing to his own reckless conduct he could not hold the company responsible for damages. *Illinois C. R. Co. v. Patterson*, 69 Ill. 650.

A train drawn by a locomotive in charge of T., an engineer, ran off at a switch, and seriously injured him. At the time of the accident the train was running at the rate of ten miles an hour. The rules of the company required all trains to slacken their speed to six miles an hour when passing a switch. *Held*, that T., the engineer, directly contributed to the accident by which he was injured, and could not recover damages for his injury. *Memphis & C. R. Co. v. Thomas*, 51 Miss. 637.—APPROVED IN *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112.

Where an engineer ran in a dense fog at a rate of fifteen to twenty miles an hour, crossing over a switch from one track to another, it being his duty to ascertain if the second track was clear, and collided with another engine and was injured—*held*, that the injury was due to his own contributory negligence, and he could not

* Contributory negligence of engineer in running train at a high or prohibited rate of speed, see 41 AM. & ENG. R. CAS 346, *abstr.*; 33 *Id.* 363, *abstr.*

recover. *Wert v. Keim*, (Pa.) 13 Atl. Rep. 548.

A freight conductor, injured by the derailment of a train, cannot recover if the accident was occasioned by the negligent speed of the train under his direction. *Gorham v. Kansas City & S. R. Co.*, 113 Mo. 408, 20 S. W. Rep. 1060.

In an action for the death of a conductor of a gravel train, who was killed in a wreck, it appeared that he was at fault in not having his caboose at the rear end of the cars, and that both he and his engineer were at fault in running the train too fast. *Held*, that if such fault contributed to the injury there could be no recovery. *St. Louis, I. M. & S. R. Co. v. Morgart*, 45 Ark. 318.

A brakeman who, by the exercise of ordinary care, had the power to regulate the speed of approaching cars, cannot recover for an accident of which his failure to check the rate of speed was in part the proximate cause. *Muldrowney v. Illinois C. R. Co.*, 39 Iowa 615, 8 Am. Ry. Rep. 487.—DISTINGUISHED IN *Hosie v. Chicago, R. I. & P. R. Co.*, 75 Iowa 683, 37 N. W. Rep. 963.

Plaintiff, a switchman, was ordered by the yard master, in the presence of the engineer, to take a switch engine to a certain transfer boat and bring away the passengers. There was no conductor, and there was a conflict of evidence as to whether the switchman or engineer was in authority. On the way the engine ran off the track and plaintiff was injured, which was caused either by the reckless manner in which it was run, or a defect in the track. *Held*, regardless of which was in actual authority if plaintiff contributed to the injury by engaging in a foolhardy enterprise of running the engine at excessive speed, by advising it actively or ordering it, or consenting to it, he was himself negligent, if this rate of speed either caused or contributed to the accident, without reference to whether he was a fellow-servant or not, if he knew of the danger and so conducted himself. *Smith v. Memphis & L. R. R. Co.*, 18 Fed. Rep. 304.

364. — approaching a bridge.—It is contributory negligence for an engineer to approach a bridge in course of construction at a rate of twenty-five miles an hour, and if an accident occurs he cannot recover. *Norfolk & W. R. Co. v. Williams*, 89 Va. 165, 15 S. E. Rep. 522.

365. Going under an overhead bridge.*

A brakeman cannot recover for injuries sustained by coming in collision with an overhead bridge while necessarily on the roof of a freight car, if he knew the bridge was a low one, where he might have avoided it by stooping. *Owen v. New York C. R. Co.*, 1 *Lans. (N. Y.)* 108; *affirmed (?)* 47 *N. Y.* 670, *mem.*—REVIEWED IN *Clark v. Richmond & D. R. Co.*, 18 *Am. & Eng. R. Cas.* 78, 78 *Va.* 709, 49 *Am. Rep.* 394; *Williamson v. Newport News & M. V. Co.*, 34 *W. Va.* 657.

The fact that a company has violated the *N. Y. Act of 1884*, ch. 439, requiring railroad companies to maintain warning signals at overhead bridges which are dangerous to employes, will not render the company liable to a brakeman who is injured by a bridge which he knows is low enough to be dangerous, and where no warning signals were maintained. *Fitzgerald v. New York C. & H. R. R. Co.*, 59 *Hun* 225, 36 *N. Y. S. R.* 755, 12 *N. Y. Supp.* 932.—QUOTING *Ryan v. Long Island R. Co.*, 51 *Hun* 608.

A brakeman on top of a moving train is not, as matter of law, chargeable with negligence simply because he does not constantly bear in mind the precise location where his train and where every bridge over the track is. *Wallace v. Central Vt. R. Co.*, 138 *N. Y.* 302, 52 *N. Y. S. R.* 351, 33 *N. E. Rep.* 1069; *reversing* 63 *Hun* 632, *mem.*, 43 *N. Y. S. R.* 639, 18 *N. Y. Supp.* 280.

A brakeman on a freight train knew that certain overhead bridges were too low to allow him to stand on the top of the cars, and had been cautioned in regard to them; but he attempted to pass a bridge while seated upon the top of a brake, which elevated him higher than he would have been if standing. *Held*, such contributory negligence as to defeat a recovery for his death. *Devitt v. Pacific R. Co.*, 50 *Mo.* 302, 3 *Am. Ry. Rep.* 533.—APPROVED IN *Carbine v. Bennington & R. R. Co.*, 61 *Vt.* 348. DISTINGUISHED IN *Barton v. St. Louis & I. M. R. Co.*, 52 *Mo.* 253. FOLLOWED IN *Dale v. St. Louis, K. C. & N. R. Co.*, 63 *Mo.* 455, *Elliott v. St. Louis & I. M. R. Co.*, 67 *Mo.* 272; *Rains v. St. Louis, I. M. & S. R. Co.*, 5 *Am. & Eng. R. Cas.* 610, 71 *Mo.* 164. NOT FOLLOWED IN *Baltimore & O. R. Co. v. Rowan*, 23 *Am.*

& *Eng. R. Cas.* 390, 104 *Ind.* 88. QUOTED IN *Clark v. Richmond & D. R. Co.*, 18 *Am. & Eng. R. Cas.* 78, 78 *Va.* 709, 49 *Am. Rep.* 394.

The plaintiff was necessarily on the top of a car in the performance of his duty. There was no evidence to show that he knew, at the time of the accident, that he was near a bridge, the night being dark; and it was a matter of doubt whether he even knew that the bridge was too low. The bell rope was not connected before the train left the station, but this did not appear to have been through any neglect of his, and for all that appeared, the train might not have been completed until just before starting, and until the engine was attached no connection could be made. *Held*, that the plaintiff could not be deemed guilty of contributory negligence. *McLaughlin v. Grand Trunk R. Co.*, 12 *Ont.* 418.

366. Failure to heed signal.

Where an engineer is warned, by a signal of danger ahead, not to proceed with his train, and immediately thereafter another signal is given, which indicates that he might proceed with safety, but both signals are continuously displayed together, so as to leave it in doubt which signal should be regarded, it is negligence for him to go on with the train; and if he does do so, and a collision ensues in which he loses his life, his widow cannot recover for his homicide. *Devine v. Savannah, F. & W. R. Co.*, 89 *Ga.* 541, 15 *S. E. Rep.* 781.

Where it was the duty of the conductor killed to hold his train until the proper signal was given for him to make the crossing of another road, and the signal was given for the train on the other road to cross, and while it was in the act of crossing, such conductor negligently failed to observe the signal, and undertook to make the crossing in disregard of such signal, which was well understood, whereby a collision occurred resulting in the conductor's death—*held*, that no recovery could be had in an action by his personal representative against either of the railway companies whose trains collided. *Chicago & N. W. R. Co. v. Snyder*, 28 *Am. & Eng. R. Cas.* 611, 117 *Ill.* 376, 7 *N. E. Rep.* 604; *reversing* 18 *Ill. App.* 640, *mem.*

367. Relying upon unauthorized signal.—The conductor of a train is not authorized to rely on a signal which is not given in accordance with the rules of the

* Liability of company to employé-injured by an overhead bridge. Contributory negligence, see 28 *AM. & ENG. R. CAS.* 555, *abstr.*

company, and if he does he cannot recover for a consequent injury so received by him. *Columbus & W. R. Co. v. Bridges*, 38 *Am. & Eng. R. Cas.* 136, 86 *Ala.* 448, 5 *So. Rep.* 864.

368. Climbing upon or crawling under cars.—It is contributory negligence to climb up a car higher and wider than ordinary freight cars, without looking to see how near the car comes to the roof of a station, or if there is a ladder on the opposite side of the car. *Platt v. Chicago, St. P., M. & O. R. Co.*, 84 *Iowa* 694, 51 *N. W. Rep.* 254.

Where an experienced freight brakeman, instead of using side ladders provided by the railroad company for mounting cars, goes between the cars of a moving train, and crawls over or under the bumpers of the cars in order to reach a foothold or handhold on the opposite side, which he could use as a ladder to enable him to get to the top of the cars, no claim can be sustained for damages on account of the resulting consequences. *Wilson v. Michigan C. R. Co.*, 94 *Mich.* 20, 53 *N. W. Rep.* 797.—FOLLOWING *Glover v. Scotten*, 82 *Mich.* 369.

Plaintiff, while in the performance of his duty as defendant's car-catcher, was climbing upon a moving car by means of a ladder at the end thereof, and was injured by the collision of his car with another on the same track. An instruction to the effect that plaintiff should have chosen the safer of the two ladders at the ends of the car was properly refused, because (1) there was no evidence that there was a ladder in good repair at the other end; and (2) it cannot be said as matter of law that it was his duty to inspect both ends of the car to ascertain where the ascent could be made with the greatest safety, in view of the facts that the car was moving, that the night was dark, and that promptness of action on his part was necessary. *Chase v. Burlington, C. R. & N. R. Co.*, 38 *Am. & Eng. R. Cas.* 148, 76 *Iowa* 675, 39 *N. W. Rep.* 196.

369. Making up trains.—Where a brakeman has been in the service of a railroad company for a number of years, and is familiar with the mode of making up trains, he is bound to act upon the knowledge thus acquired, and to act with prudence and care to avoid the peril which this knowledge informed him he was exposed to in making up the trains in the company's yard. *Penn-*

sylvania Co. v. O'Shaughnessy, 41 *Am. & Eng. R. Cas.* 479, 122 *Ind.* 588, 23 *N. E. Rep.* 675.

370. Riding in dangerous place, generally.*—The employé of a railway company who voluntarily leaves his post and is injured while upon another part of the train where the exposure is greater, is presumably guilty of negligence contributing to the injury, and cannot recover therefor. *O'Neill v. Keokuk & D. M. R. Co.*, 45 *Iowa* 546.—REVIEWED IN *Bucklew v. Central Iowa R. Co.*, 64 *Iowa* 603.

But this presumption may be overcome by evidence that such employé occupied such a dangerous position through no fault of his own. *Boss v. Northern Pac. R. Co.*, 2 *N. Dak.* 128, 49 *N. W. Rep.* 655.

Where a trainman recklessly puts himself in a position of danger upon a train moving with unusual speed, and is injured, he cannot recover of the company on the ground that his co-employés were negligent in running the train too fast. *Brown v. Chicago, R. I. & P. R. Co.*, 69 *Iowa* 161, 28 *N. W. Rep.* 487.

Where there are three brakemen stationed on a train, the one known as the middle brakeman is not chargeable with contributory negligence because he is injured in a collision while away from the middle portion of the train, where it appears that a few minutes before the train had stopped at a water tank, and his duties did not require him to be at the middle. *Au v. New York, L. E. & W. R. Co.*, 29 *Fed. Rep.* 72.—DISTINGUISHING *Baltimore & P. R. Co. v. Jones*, 95 *U. S.* 439.

Although a tool car may be a place of special danger in case of accident, owing to its position in the train and the fact that it is somewhat out of repair, yet it is for the jury to say whether a civil engineer, in charge of track-laying, was guilty of contributory negligence in riding to his work in such a car. *Meloy v. Chicago & N. W. R. Co.*, (*Iowa*) 33 *Am. & Eng. R. Cas.* 358, 37 *N. W. Rep.* 335.

371. Riding on the foot-board of the engine.†—The foreman of a crew of

* Contributory negligence of employés in riding on engine or other dangerous place, see note, 14 *L. R. A.* 552. See also 41 *AM. & ENG. R. CAS.* 330, *abstr.*

† Riding on engine as contributory negligence, see notes, 17 *AM. & ENG. R. CAS.* 620; 14 *L. R. A.* 552.

night switchmen cannot recover for injuries he receives while riding on a defective foot-board, where it appears that he knew of the defect, and had complained of it to the yard master, and that he might have rode in other places in safety. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 26 *Fed. Rep.* 897.

A switchman is not necessarily chargeable with contributory negligence because he is injured while riding on the foot-board of a switch engine, because the accident demonstrates that he would not have been injured if he had been on some other part of the engine, where it is his duty to ride on the engine in being transported to his work. *Lockhart v. Little Rock & M. R. Co.*, 40 *Fed. Rep.* 631.

The mere fact that a switchman, when injured by the derailling of a switch engine, was riding on the front instead of the rear foot-board of the engine is no evidence of contributory negligence. *James v. Northern Pac. R. Co.*, 46 *Minn.* 168, 48 *N. W. Rep.* 783.

372. Riding on the pilot of the engine.—A company was in the habit of carrying its construction hands to and from work, for whose accommodation a box car was provided, but sometimes the men would ride on the locomotive or tender. Plaintiff was riding on the pilot when the train collided with cars left on the track, and he was injured. It appeared that he would have escaped injury had he been in the car. *Held*, that his contributory negligence prevented a recovery, though it was negligence in the company to leave the cars on the track, and it was immaterial whether or not those in charge of the train assented to his riding on the pilot. *Baltimore & P. R. Co. v. Jones*, 95 *U. S.* 439.—APPLIED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 *Am. & Eng. R. Cas.* 62, 5 *Dak.* 523, 3 *L. R. A.* 363, 41 *N. W. Rep.* 758. APPROVED IN *Alabama G. S. R. Co. v. Hawk*, 18 *Am. & Eng. R. Cas.* 194, 72 *Ala.* 112, 47 *Am. Rep.* 403; *Warden v. Louisville & N. R. Co.*, 94 *Ala.* 277; *Dietrich v. Baltimore & H. S. R. Co.*, 11 *Am. & Eng. R. Cas.* 115, 58 *Md.* 347. APPROVED AND QUOTED IN *Richmond & D. R. Co. v. Morris*, 31 *Gratt. (Va.)* 200. DISTINGUISHED IN *Au v. New York, L. E. & W. R. Co.*, 29 *Fed. Rep.* 72; *Missouri Pac. R. Co. v. McCally*, 41 *Kan.* 639, 655, 21 *Pac. Rep.* 574. FOLLOWED IN *Griggs v. Houston*, 8 *Am. & Eng. R. Cas.* 359, 104 *U.*

S. 553; *Miles v. Atlantic, M. & O. R. Co.*, 4 *Hughes (U. S.)* 172. QUOTED IN *Chicago, B. & Q. R. Co. v. Johnson*, 8 *Am. & Eng. R. Cas.* 225, 103 *Ill.* 512; *Dun v. Seaboard & R. R. Co.*, 16 *Am. & Eng. R. Cas.* 363, 78 *Va.* 645, 49 *Am. Rep.* 388; *Atchison T. & S. F. R. Co. v. Lindley*, 41 *Am. & Eng. R. Cas.* 72, 42 *Kan.* 714, 6 *L. R. A.* 646, 22 *Pac. Rep.* 703; *St. Louis & S. F. R. Co. v. Marker*, 41 *Ark.* 542; *Bauer v. St. Louis, I. M. & S. R. Co.*, 46 *Ark.* 388; *Saldana v. Galveston, H. & S. A. R. Co.*, 43 *Fed. Rep.* 862; *Richmond & D. R. Co. v. Anderson*, 31 *Gratt. (Va.)* 812; *Case of Atlantic, M. & O. R. Co.*, 4 *Hughes (U. S.)* 157; *Chicago, B. & Q. R. Co. v. Dougherty*, 12 *Ill. App.* 181; *Darwin v. Charlotte, C. & A. R. Co.*, 23 *So. Car.* 531, 55 *Am. Rep.* 32; *Lehigh Valley R. Co. v. Greiner*, 113 *Pa. St.* 600; *Bryant v. Central Vt. R. Co.*, 56 *Vt.* 710. REVIEWED IN *Kresanowski v. Northern Pac. R. Co.*, 5 *McCrary (U. S.)* 528, 18 *Fed. Rep.* 229.

The fact that upon switch engines switchmen ride standing upon the platform provided for that purpose in front of the engine has no tendency to prove that they are justified in riding in a sitting position upon the cow-catcher of a road engine. *Glover v. Scotten*, 82 *Mich.* 369, 46 *N. W. Rep.* 936.

373. — with feet hanging over.—It is contributory negligence on the part of a switchman to ride in a sitting position upon the beam of the pilot of a road engine, with his feet hanging down over the cow-catcher. *Glover v. Scotten*, 82 *Mich.* 369, 46 *N. W. Rep.* 936.—FOLLOWED IN *Wilson v. Michigan C. R. Co.*, 94 *Mich.* 20.

A railroad laborer who is transported to and from his work on an engine furnished by the company, cannot recover for an injury received while riding on the front of an engine with his feet over the pilot, though the engine was so full that some of the men were necessarily compelled to ride in front. *Kresanowski v. Northern Pac. R. Co.*, 5 *McCrary (U. S.)* 528, 18 *Fed. Rep.* 229.—QUOTING *Hough v. Texas & P. R. Co.*, 100 *U. S.* 213. REVIEWING *Baltimore & P. R. Co. v. Jones*, 95 *U. S.* 439.—DISTINGUISHED IN *Missouri Pac. R. Co. v. McCally*, 41 *Kan.* 639, 655, 21 *Pac. Rep.* 574. REVIEWED IN *Warden v. Louisville & N. R. Co.*, 94 *Ala.* 277.

374. Riding on the tender.—Plaintiff's intestate was a railroad employé, but not engaged in running trains, and voluntarily got upon the engine to

ride, and while thus riding was killed by the engine breaking through a defective bridge. A caboose car was attached for the convenience of such persons, and it appeared that if he had been in it he would not have been injured. *Held*, that he was guilty of contributory negligence. *Doggett v. Illinois C. R. Co.*, 34 Iowa 284, 5 Am. Ry. Rep. 389. — DISTINGUISHED IN *Meloy v. Chicago & N. W. R. Co.*, 38 Am. & Eng. R. Cas. 130, 77 Iowa 743, 42 N. W. Rep. 563.

An employé of a railroad, while riding from his work on a train composed of the engine, tender, and a gondola car fitted up with plank seats, sat on the narrow platform in the rear end of the tender, with his legs and feet hanging over. He had been warned that this was a dangerous place to ride, but gave no heed to it. While he was thus sitting an engine ran into the gondola, raised it up and pushed it forward, so that its bumpers struck him, and so injured him that he died. *Held*, in an action on the case by his widow and minor children, that they could not recover, because of his contributory negligence; and that the court, upon request, should so have instructed the jury. *Lehigh Valley R. Co. v. Greiner*, 28 Am. & Eng. R. Cas. 397, 113 Pa. St. 600, 6 Atl. Rep. 246. — QUOTING *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439. — QUOTED IN *Atchison, T. & S. F. R. Co. v. Lindley*, 41 Am. & Eng. R. Cas. 72, 42 Kan. 714, 6 L. R. A. 646, 41 Alb. L. J. 92, 22 Pac. Rep. 703.

375. Riding in a perilous position upon a car.—Where an employé of a railroad company needlessly places himself in a dangerous position on one of the company's moving cars, when he is in the performance of no duty to the company, and is injured in consequence, he cannot recover for such injury from the company. *Johnson v. Chicago, R. I. & P. R. Co.*, 11 Am. & Eng. R. Cas. 233, 60 Iowa 705, 15 N. W. Rep. 569.

Contributory negligence is not a defense where the defendant is guilty of recklessness or gross negligence in not using reasonable care to avoid the injury after the peril is known. *So held*, where an employé was negligent in placing himself in a position of peril on a gravel train, but where the conductor might have avoided the injury by the exercise of ordinary care after the danger was known. *Shumacher v. St. Louis & S. F. R. Co.*, 39 Fed. Rep. 174, 17 Wash. L. Rep. 550.

376. — near the door of a "shanty car."—Plaintiff was a laborer in defendant's employment, and at the time he received the injuries for which he sued was riding in a "shanty car," having doors on each side attached to a material train, which was moving at a high rate of speed over a new and crooked roadbed. He was well acquainted with the character and location of the road. Becoming uneasy, the plaintiff left his position at the end of the car and went to the centre, where there was a stove. One of the doors was open, and, as the plaintiff attempted to pass between it and the stove, the train passed a curve and he was thrown out and injured. His purpose in approaching the door was to be in a situation to jump in case of emergency. There was evidence that he could have reached the spot safely by passing on the other side of the stove, by the closed door. *Held*, the plaintiff was guilty of contributory negligence, and was not entitled to recover. *Taylor v. Richmond & D. R. Co.*, 109 N. Car. 233, 13 S. E. Rep. 736.

377. — on the brake-wheel.—The contributory negligence of a brakeman who is injured while sitting on a brake-wheel on the platform of a car, when it was not necessary for him to be there, will defeat a recovery, where the evidence shows that persons inside of the car were not injured, and tends to show that he would not have been injured if he had been there. *Martin v. Baltimore & O. R. Co.*, 41 Fed. Rep. 125.

378. — on the side of flat car.—An employé cannot recover for injuries received while being carried to his work on a flat car, where he rides on the side of the car with his feet hanging over, by coming in contact with a cattle-guard which was properly constructed, when he might have found a safe position on the car, but where he persisted in riding where he was with knowledge of the danger, after he had been warned against it. *St. Louis & S. F. R. Co. v. Marker*, 41 Ark. 542. — QUOTING *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439.

379. — on the side ladder.—A brakeman on a freight train is not guilty of contributory negligence in riding on a ladder at the side of a car for a short distance to be ready to step off to make another switching, such being the habit, so as to prevent a recovery for an injury received by striking a car standing on a siding, too near

the main track, of which he had no knowledge. *Louisville & N. R. Co. v. Earl*, 94 Ky. 368, 22 S. W. Rep. 607.

380. — on the top of a box car.—A brakeman was killed while sitting on the side of the top of a car by striking an overhead bridge, where it appeared that he might have avoided injury if he had been sitting near the centre of the car. It was shown that his duties required him to be on top of the train, and that he violated no rule of the company by sitting at the side of the car. *Held*, that he was not guilty of contributory negligence. *Cleveland, C., C. & St. L. R. Co. v. Walter*, 45 Ill. App. 642.

In an action for the death of a brakeman who was killed while on top of a box car in daylight, by coming in contact with an overhead bridge, plaintiff's own evidence showed that he had passed under the bridge daily for three months, and always stooped to avoid it, and that the company was not charged with negligence, except in failing to maintain danger signals. *Held*, that a nonsuit was properly allowed. *Hooper v. Columbia & G. R. Co.*, 28 Am. & Eng. R. Cas. 433, 21 So. Car. 541, 53 Am. Rep. 691. —DISTINGUISHING *Lasure v. Graniteville Mfg. Co.*, 18 So. Car. 278. —QUOTED IN *Simms v. South Carolina R. Co.*, 31 Am. & Eng. R. Cas. 199, 26 So. Car. 490, 2 S. E. Rep. 486.

381. Running out of time.—An engineer cannot recover for injuries received by colliding with another train, the only negligence charged being that the other train was out of time, where it appears that his own train was out of time also. *Georgia R. & B. Co. v. McDade*, 59 Ga. 73. —REVIEWED IN *Mills v. East Tenn., V. & G. R. Co.*, 87 Ga. 102.

382. Stepping into the manhole.—Plaintiff, who was a brakeman upon a freight train, while passing from the locomotive over the tender in the discharge of his duties, stepped upon the cover to the manhole of the water tank, which, because of its being out of repair, the lining designed to hold it in place having come off, slipped one side, letting his foot down into the manhole, by reason whereof he was injured. It appeared that it was part of plaintiff's duties to supply the tender with water, which was received into the tank through the manhole, the cover being removed by plaintiff for that purpose, and defendant's evidence tended to show that he was aware

of the defect. The court was requested by defendant's counsel but refused, to charge that if the lining was off and plaintiff knew it, it was negligence on his part to step upon the cover. *Held* error. *McQuigan v. Delaware, L. & W. R. Co.*, 122 N. Y. 618, 26 N. E. Rep. 13, 34 N. Y. S. R. 618; reversing 14 N. Y. S. R. 651.

383. Attempting to board moving engine.*—A night switchman is guilty of gross negligence in attempting to get on a moving engine by stepping on the front foot-board in violation of an express rule of the company, and cannot recover for injuries received. *Lake Shore & M. S. R. Co. v. Roy*, 5 Ill. App. 82.

There is a want of ordinary care in the voluntary attempt of an employé discharging the duties of a helper to a hostler to get upon a switch engine in motion by the step at the rear right-hand side of the cab of the engine, when he had no duty to perform in the cab of the engine, and when a safer place for him to get upon the engine would be the rear foot-board, which was used for this purpose by that class to which he belonged, and when the danger of the attempt to get upon the side step is increased by the step being obscured to some extent by the escaping of steam from the cylinder cocks of the engine, and the dust blown up thereby. *Union Pac. R. Co. v. Estes*, 37 Kan. 715, 16 Pac. Rep. 131.

It is not necessarily negligent for a switchman accustomed to the work to step upon a properly constructed foot-board of a slowly moving engine, especially where there is no rule forbidding it. *O'Mellia v. Kansas City, St. J. & C. B. R. Co.*, 115 Mo. 205, 21 S. W. Rep. 503.

Though the board was slanting, the company would not be liable for the switchman's injury if he negligently got in front of the moving engine and without care attempted to get on the foot-board and slipped and fell. *O'Mellia v. Kansas City, St. J. & C. B. R. Co.*, 115 Mo. 205, 21 S. W. Rep. 503.

A brakeman cannot recover for injuries received in attempting to get on the pilot of a moving engine, by orders of his superior, by reason of his clothes catching in the splinters of a worn rail, though the company

*Contributory negligence of helper to engine hostler in attempting to board moving engine on right-hand side of cab, see 33 AM. & ENG. R. CAS. 364, *abstr.*

may have been negligent in not repairing the track. *Cornwall v. Charlotte, C. & A. R. Co.*, 97 N. Car. 11, 2 S. E. Rep. 659.

Where a flagman injured because of a defective step, testified that he knew the condition of the step and the difficulty of getting upon it beforehand, and yet attempted to board the engine when in motion, by means of such step, in the night-time, encumbered with two lanterns and knowing he had the right and power to bring the engine to a stop, it was error not to instruct the jury that he was guilty of contributory negligence, and could not recover. *New York, L. E. & W. R. Co. v. Lyons*, 119 Pa. St. 324, 11 Cent. Rep. 834, 13 Atl. Rep. 205, 21 W. N. C. 277.

384. — or a moving car.—A servant of a railroad company cannot recover in a suit against the company for injuries received while recklessly attempting to board a moving train, although it is shown that the train was improperly equipped and that some of its appliances were defective. *Dowell v. Vicksburg & M. R. Co.*, 18 Am. & Eng. R. Cas. 42, 61 Miss. 519. — FOLLOWED IN *McMurtry v. Louisville, N. O. & T. R. Co.*, 67 Miss. 601, 7 So. Rep. 401. — *Chambers v. Western N. C. R. Co.*, 91 N. Car. 471. — QUOTING *Butterfield v. Forrester*, 11 East 60. — *Timmons v. Central Ohio R. Co.*, 6 Ohio St. 105. — QUOTING *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172.

The fact that the plaintiff was in the habit of boarding moving trains, or that he had been seen to do so on previous occasions with impunity, will not avail him. *Dowell v. Vicksburg & M. R. Co.*, 18 Am. & Eng. R. Cas. 42, 61 Miss. 519.

A brakeman, acting under the orders of a conductor, and in an emergency which gave him no time for reflection, attempted to catch a fast-moving freight car. It was in the night-time and his lantern had gone out, and the ground was uneven. His foot slipped and he was injured. *Held*, that the finding of the jury that there was no contributory negligence would not be disturbed. *Fox v. Chicago, St. P. & K. C. R. Co.*, 53 Am. & Eng. R. Cas. 430, 86 Iowa 368, 53 N. W. Rep. 259.

385. Jumping from a moving engine.—When a brakeman on the pilot of an engine moving backwards and drawing cars, without any real necessity therefore, steps off in the dark at a place with which

he is unacquainted, without using his lantern, by the aid of which he might have seen a low embankment which endangered such a step, he is guilty of such contributory negligence as will bar a recovery for injuries thereby sustained. *Burgin v. Louisville & N. R. Co.*, 97 Ala. 274, 12 So. Rep. 395.

A brakeman who, for the purpose of turning a switch, deliberately goes down on the pilot of an engine, and steps on the track while the engine is moving at the rate of from four to eight miles an hour, is guilty of negligence, and cannot recover for an injury caused by his falling on the track and being run over by the engine, unless his peril is observed by the engineer in time to avoid the injury. *Gibbons v. Chicago, B. & Q. R. Co.*, 66 Iowa 231, 23 N. W. Rep. 644.

386. — or a moving car.*—Where a brakeman knew that the car was moving at the rate of two or three miles an hour, and that it was dangerous to step therefrom in the opposite direction from that in which it was moving, and as he could by looking have known the direction in which it was moving—*held*, that his failure to look before stepping from the car was negligence which would bar his recovery for injury by being thrown to the ground, although the custom had been to move the car in the direction in which he stepped. *Magee v. Chicago & N. W. R. Co.*, 82 Iowa 249, 48 N. W. Rep. 92. — DISTINGUISHING *Smith v. Humeston & S. R. Co.*, 78 Iowa 583.

A brakeman, who had been employed for two years in shifting cars in a freight yard, upon being ordered by the conductor under whom he was working to set two brakes upon a slowly moving freight train, jumped up between two platform cars and set the brake upon one car. Failing to set the other, and intending to set one elsewhere on the train, he put a hand on the sill of each car and proceeded to swing out the way the cars were going, without looking ahead or taking any other precaution to avoid obstructions near the track. When he had swung clear of the cars, he for the first time saw a pile of rails beside the track, and knew he was going to strike as he let go his hold, but it was then too late to help himself, and he struck them, and was injured. *Held*, that he could not recover against the rail-

* Contributory negligence of employé in leaving a train while in motion, see 33 AM. & ENG. R. CAS. 305, *abstr.*

road company for his injuries, either at common law or under Mass. St. 1887, ch. 270. *Thompson v. Boston & M. R. Co.*, 153 Mass. 391, 26 N. E. Rep. 1070.

The head brakeman of a freight train, after coupling cars, jumped on the rear car to climb a side ladder to the top. The train was moving when he got on the car, and it was daylight. By the side of the track, as he knew, were two piles of lumber, one of which had been there for some time, and the other for two days. The brakeman, while climbing, struck one of these piles, and was injured. *Held*, that he had no right of action against the company. *Gaffney v. New York & N. E. R. Co.*, 31 Am. & Eng. R. Cas. 265, 15 R. I. 456, 4 N. Eng. Rep. 33, 7 Atl. Rep. 284.

One who is injured by jumping from a moving train is generally barred of recovery by reason of his contributory negligence; but where a servant was ordered by his superior to do so in order to perform a duty for the company, it not appearing to the servant at the time that obedience would certainly cause injury—*held*, that there was no such contributory negligence as would prevent a recovery. *Patton v. Western N. C. R. Co.*, 31 Am. & Eng. R. Cas. 298, 96 N. Car. 455, 1 S. E. Rep. 863.

A company that invites an employé on board a train to receive his wages must exercise the same degree of care and diligence for his safety while leaving the train as if he were a passenger; and if such employé, on invitation, express or implied, attempts to leave the train while it is moving slowly, and is thereby injured, he is not *per se* guilty of contributory negligence, though he knew himself to be somewhat infirm. *Louisville & N. R. Co. v. Stacker*, 86 Tenn. 343, 6 Am. St. Rep. 840, 6 S. W. Rep. 737.—DISTINGUISHING *East Tenn., V. & G. R. Co. v. Massengill*, 15 Lea 328.

387. — to avoid impending collision.—A baggage master was not at fault in jumping from a train when he saw that a collision was inevitable, though he might not have been injured if he had remained in the car. *Georgia R. & B. Co. v. Rhodes*, 56 Ga. 645.

In respect to avoiding an injury from the collision of a freight with a passenger train, by leaping from his engine, the engineer on the freight train should remain at his post so long as his presence may be of use to prevent the catastrophe. *Central R. Co. v.*

Crosby, 74 Ga. 737.—QUOTING *Cottrill v. Chicago, M. & St. P. R. Co.*, 47 Wis. 634.

Where a collision is caused by the negligence of the conductor in failing to notice the signals displayed at a station, or by the negligence of the operator at the station in displaying improper signals, and by reason thereof a car collides with another standing on the track, where it had a right to be, with forty or fifty section hands on board, and one of them jumps from the car to avoid the effects of the collision, and in so doing receives an injury which results in his death, he cannot be considered guilty of contributory negligence. *Haney v. Pittsburgh, C., C. & St. L. R. Co.*, 38 W. Va. 570, 18 S. E. Rep. 748.

Neither the conductor of the train nor the operator at the station can be regarded as fellow-servants of said section hand. *Haney v. Pittsburgh, C., C. & St. L. R. Co.*, 38 W. Va. 570, 18 S. E. Rep. 748.

388. While loading and unloading cars.*—The plaintiff was engaged to unload cars on a side track and was cautioned not to move them; but notwithstanding he took a crowbar and ran them down the siding until the end car projected onto the main track, where it was struck by a passing train, which threw the cars back, injuring plaintiff. *Held*, that the injury resulted from plaintiff's own negligence in violating his orders, and he could not recover. *Georgia Pac. R. Co. v. Mapp*, 80 Ga. 631, 6 S. E. Rep. 24.

A servant, in removing freight from one car into another, used a common car door made of pine boards, which was laid from one car to another, and the door broke, giving him a fall and inflicting a personal injury. He had been nearly two years in the business and had frequently used such a door for a platform, and knew its defects, and that there were others in the yards of better construction, the employer not knowing that such a one was used and the servant never objecting. *Held*, that the negligence of the servant was such as to defeat a recovery. *Pennsylvania Co. v. Lynch*, 90 Ill. 333.—DISTINGUISHING *Chicago & A. R. Co. v. Shannon*, 43 Ill. 339; *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197; *Illinois C. R. Co. v. Phillips*, 49 Ill. 234; *Toledo, W.*

*Injury to "cage rider" in unloading coal cars. Contributory negligence, see 33 AM. & ENG. R. CAS. 367, *abstr.*

& W. R. Co. v. Fredericks, 71 Ill. 294; Toledo, W. & W. R. Co. v. Ingraham, 77 Ill. 309. QUOTING Priestley v. Fowler, 3 M. & W. 1.—APPLIED IN Pullman Palace Car Co. v. Laack, 143 Ill. 242; Indianapolis & St. L. R. Co. v. Watson, 33 Am. & Eng. R. Cas. 334 114 Ind. 20, 12 West. Rep. 285 14 N. E. Rep. 721. QUOTED IN Chicago, M. & St. P. R. Co. v. Standart, 16 Ill. App. 145.

Plaintiff was employed as a shoveler on a gravel train and was thrown off the car and injured by the shock produced in stopping the train to detach cars. *Held*, that he being familiar with the business, the accident resulted from his own want of care and attention for his own safety, and he could not recover. *Forey v. Syracuse, B. & N. Y. R. Co.*, 12 N. Y. S. R. 198, 46 Hun 678, *mem.*; *affirmed in* 122 N. Y. 667, *mem.*, 34 N. Y. S. R. 1015.

A laborer who was employed to load coal at the company's chutes at night, and had been employed long enough to be familiar with the surroundings and movement of cars, cannot recover for an injury suffered by being caught between a car, moved by himself and others, and the coal chute, where it seems to be properly constructed, and might have been seen by the exercise of ordinary care. *Quibell v. Union Pac. R. Co.*, 7 Utah 122, 25 Pac. Rep. 734.—FOLLOWED IN *Helfrich v. Ogden City R. Co.*, 7 Utah 186.

389. Negligence in the operation of hand-cars, generally.—A judgment in favor of a section foreman, who was injured by the derailment of a hand-car that he and his men were using, cannot be supported where it appears that the car was derailed by fish plates they were carrying falling from the front end on the track; that the car was defectively constructed; that the front end being lower than the other was the alleged cause of the accident; but it also appearing that the car could be run with the other end foremost, which was well known to the foreman, and that the accident might have been avoided had it been so run. *St. Louis, A. & T. R. Co. v. Mara*, (Ark.) 16 S. W. Rep. 196.

Plaintiff and another went on the track with a heavily loaded hand-car just ahead of a regular train going in the same direction, and when it was seen approaching, instead of leaving the track, they attempted to outrun the train and reach their destination ahead of it, but were overtaken and

injured. *Held*, that there could be no recovery. *Pittsburgh, C. & St. L. R. Co. v. Goss*, 13 Ill. App. 619.

A laborer who is injured while assisting in propelling a hand-car by means of a crow bar, used instead of a regular handle, cannot recover where he was not acting under any special orders in doing so. *Powers v. New York L. E. & W. R. Co.*, 21 Am. & Eng. R. Cas. 609, 98 N. Y. 274; *reversing* 32 Hun 415.—APPLYING *East Tenn., V. & G. R. Co. v. Smith*, 9 Lea (Tenn.) 685. DISTINGUISHING *Laning v. New York C. R. Co.*, 49 N. Y. 521.—APPLIED IN *Rogen v. Morgan*, 16 N. Y. S. R. 693; *Spencer v. New York C. & H. R. R. Co.*, 51 N. Y. S. R. 386. DISTINGUISHED IN *Myles v. New York, N. H. & H. R. Co.*, 6 N. Y. S. R. 24.

An employé who is injured while running a hand-car, by reason of the wooden handle breaking just where it entered the iron collar, is not chargeable with contributory negligence because he had not examined the handle, where it appeared safe to casual observation. *Banks v. Wabash Western R. Co.*, 40 Mo. App. 458.

Where an employé while running a hand-car was put in sudden apprehension of a dangerous collision with a locomotive approaching from an opposite direction, and the threatened collision was due alone to the negligence of the company, whether it was rash or reckless to leap from the car, or whether he should have remained upon it, or left it by means less hazardous than jumping are questions not clear enough, under the facts of the present case, to justify the granting of a nonsuit. The allowance rightfully to be made for indiscreet conduct under excitement and alarm can better be determined by a jury than by the court. *Smith v. Wrightsville & T. R. Co.*, 41 Am. & Eng. R. Cas. 320, 83 Ga. 671, 10 S. E. Rep. 361.

390. — obeying or disobeying orders of foreman.—A laborer on the track acting under the direction of a foreman is not guilty of contributory negligence in returning from his place of work on a hand-car, although at a later hour than usual. *McKune v. California Southern R. Co.*, 17 Am. & Eng. R. Cas. 589, 66 Cal. 302, 5 Pac. Rep. 482.

A section man on a hand-car under the direction of a foreman can be deemed not negligent even though the foreman was

negligent. *Slette v. Great Northern R. Co.*, 53 Minn. 341, 55 N. W. Rep. 137.

A section boss directed his men to remove a hand-car from the track to avoid a passing train, but after the effort was made and he saw that it could not be done in time to avoid a collision, he directed the men to cease their efforts and "let her go", but plaintiff, one of the hands, through excitement, or otherwise failed to heed the order and continued the effort until he was injured by the collision. *Held*, that he could not recover. *International & G. N. R. Co. v. Hester*, 72 Tex. 40, 11 S. W. Rep. 1041.—FOLLOWED IN *St. Louis. A. & T. R. Co. v. Lemon*, 83 Tex. 143.

391. — riding down grade—Rate of speed.—Where a laborer goes in a push-car to ride down a grade, knowing that it is not supplied with brakes or means for retarding its speed, he cannot recover for an injury received by reason of its not having brakes. *Miller v. Union Pac. R. Co.*, 2 McCrary (U. S.) 87, 4 Fed. Rep. 768.

Section men on a hand-car, who, without excuse and with notice that a wild train may come along at any time, go down grade around a curve wholly cutting off the view, at a rate faster than that of the train which meets them, are guilty of negligence which will prevent a recovery for injuries from collision with a wild train properly sent out and which whistles in accordance with the rules. *Shepard v. Boston & M. R. Co.*, 158 Mass. 174, 33 N. E. Rep. 508.

A section hand was killed while riding a "push-car" down a grade, caused by a switch being turned so as to run the car onto the wrong track. The evidence went to show that when it was suggested that the men should ride, one of them objected saying that it was dangerous; that, notwithstanding the warning, deceased himself gave the car a start and jumped on. The switch target was in plain view, indicating how the switch was set, but it was unnoticed. *Held*, that the accident was due to the reckless negligence of the men themselves. *York v. Kansas City, C. & S. R. Co.*, 117 Mo. 405, 22 S. W. Rep. 1081.

392. — riding with feet hanging down.—Plaintiff was employed by defendant company as a detective and was injured while being transported over the road in a hand-car. The complainant alleged that he was sitting on the hind end of the hand-car with his feet hanging down, acting on

the advice of the person in charge of the car, and without being aware of the danger of the position. *Held*, on demurrer, this did not show contributory negligence. *Pool v. Chicago, M. & St. P. R. Co.*, 3 Am. & Eng. R. Cas. 332 53 Wis 657, 11 N. W. Rep. 15.

The evidence showed that the injury resulted by reason of certain planks being between the rails, and that plaintiff would not have been injured if he had been wholly within the car. *Held*, that a verdict for plaintiff would not be disturbed. *Pool v. Chicago, M. & St. P. R. Co.*, 8 Am. & Eng. R. Cas. 360, 56 Wis. 227, 14 N. W. Rep. 46.

393. — where a collision results.—Although it is gross negligence for a railroad company to run its trains in the dark without a headlight yet one who, knowing the time for a train to pass, attempts to pass over the road in a hand-car, at a time when the train if on time, will meet and collide with him, is guilty of such negligence as will prevent a recovery. *Burling v. Illinois C. R. Co.*, 85 Ill. 18.—REVIEWED IN *Chicago & E. I. R. Co. v. McKnight*, 16 Ill. App. 596.—*Illinois C. R. Co. v. Modglin*, 85 Ill. 481. *Hawley v. Chicago, B. & Q. R. Co.*, 71 Iowa 717, 29 N. W. Rep. 787.

An employé who is injured while on a hand-car by colliding with a special train going at a high rate of speed, without notice, cannot recover where it appears that he knew that the company was in the habit of running special trains without notice. *Pennsylvania R. Co. v. Wachter*, 15 Am. & Eng. R. Cas. 187, 60 Md. 395.

A section boss and his crew took a hand-car to go from Reed's mill to a switch about one half mile east where they would go from the main track upon a second track on their way to work. A passenger train which should have passed that point one hour and a half before was behind time. It overtook the hand-car, and, running into it, killed one of the section men. The foreman did not know and had no reason to believe that the train had not passed, and did not send or go to the telegraph office, which was one mile distant, to ascertain about the passenger train. The deceased did not know of the whereabouts of the belated train, although he had the same opportunity of knowing as the foreman. There was no carelessness in the running of the train. *Held*, that the company could not be required to respond in damages to the representatives of the deceased, as he

voluntarily and without protest mounted and rode upon the hand-car. *Railway Co. v. Leech*, 41 *Ohio St.* 383.—REVIEWED IN *Criswell v. Pittsburgh, St. L. & C. R. Co.*, 30 *W. Va.* 798.

A track repairer was killed at night by the collision of a backing train with a hand-car in which he, with others, was approaching the station at which the train had been standing. *Held*, that it was error to instruct the jury that if the deceased knew that the train was at the station he was not guilty of negligence in approaching it in a hand-car, unless he knew the train was in motion. *Catawissa R. Co. v. Armstrong*, 49 *Pa. St.* 186.

304. Negligence in the operation of a railroad tricycle.—A section foreman cannot recover for a personal injury received by being struck by an extra train while he was inspecting the track upon a railroad tricycle, a conveyance other than that provided by the company for the inspection, if he failed to keep a lookout for extra trains, where he had worked for the company 13 years and was familiar with its rule that no notice would be given of the passage of such trains. *Jolly v. Detroit, L. & N. R. Co.*, 93 *Mich.* 370, 53 *N. W. Rep.* 526.

305. Negligence in the operation of street-cars.—Plaintiff had been employed as a street-car driver, and when injured was riding on the front platform for the purpose of "breaking in" a new driver. He undertook to drive over the track where an excavation had been made some twenty feet long, but the rails spread and the car fell into the excavation and injured him. *Held*, that he could not recover, though the men doing the excavating called to him to drive on. He should have unhitched and led the horses around the excavation, and then pushed the car over, and if it had fallen he would not have been in a position of danger. *Dibb v. Dry Dock, E. B. & B. R. Co.*, 16 *N. Y. S. R.* 922, 49 *Hun* 607, *mem.*, 1 *N. Y. Supp.* 640.

3. Coupling and Uncoupling Cars.

a. In General.*

306. Statement of the rule.—In order for a brakeman to recover for injuries received while coupling cars, he must show

that he was free from negligence contributing to the injury; but negligence or carelessness not contributing to the injury will not bar a recovery. *Savannah, F. & W. R. Co. v. Barber*, 71 *Ga.* 644.

307. Employee when deemed guilty of negligence, generally.*—An inexperienced brakeman will be presumed to have knowledge of such matters pertaining to the business as are of common knowledge. So where he is directed to uncouple an engine from a moving train, he will be presumed to have knowledge of the fact that the train will move on some distance after the engine is detached, and consequently that there is danger of its running over him. *Gorman v. Minneapolis & St. L. R. Co.*, 78 *Iowa* 509, 43 *N. W. Rep.* 303.

Plaintiff, who was engaged to load a car on a siding, went between cars and uncoupled the one that he was to push out and load, and continued to walk on the track and push the car, and was injured by an engine that he did not know was on the track, pushing the other cars down against him; but it appeared that he could have seen the engine if he had looked. *Held*, that he was guilty of contributory negligence and could not recover. *Burns v. Boston & L. R. Co.*, 101 *Mass.* 50.—DISTINGUISHED IN *Goodfellow v. Boston, H. & E. R. Co.*, 106 *Mass.* 461.

Plaintiff was injured while attempting to reach over the draw-heads and raise a coupling-link so as to make a coupling. The evidence showed that the cars were provided with deadwoods, or bumpers eight inches across and ten inches up and down, and projecting ten inches from the sill of the car; that the top of the draw-head was about on a level with the bottom of the deadwoods, and that it was impossible to reach over the draw-heads to raise the link without danger of being caught between the deadwoods, but that the other arm might be placed under the deadwoods, and raise the link with but little danger. *Held*, that he was guilty of contributory negligence in attempting to make the coupling as he did. *Arnold v. Delaware & H. Canal Co.*, 6 *N. Y. S. R.* 368.—DISTINGUISHING *Jones v. New York C. & H. R. R. Co.*, 28 *Hun* 364, 92 *N. Y.* 628.

* Injuries to servants in coupling cars. Contributory negligence, see note, 31 *AM. & ENG. R. CAS.* 166, 12 *Id.* 255.

* Contributory negligence of a brakeman uncoupling cars when he is aware of an approaching train, see 33 *AM. & ENG. R. CAS.* 272, *abstr.*

On the trial of an action for an injury received by a brakeman while coupling cars, the court declined to charge the jury that "if they believed that the plaintiff knew, or had reasonable grounds for believing, that the engine used by defendant prior to the time of the injury complained of was not controllable by the engineer, and that the roadbed was in a dangerous condition, and the plaintiff was injured thereby, then the plaintiff was guilty of contributory negligence and the defendant was not liable; and that this was so whether the defendant knew or was ignorant of the condition of the engine or roadbed." *Held*, to be error. *Crutchfield v. Richmond & D. R. Co.*, 78 N. Car. 300, 16 Am. Ky. Rep. 212.

A brakeman was killed by being crushed between the caboose and a foreign freight car which he was attempting to couple to such caboose, by reason of the difference in height of the coupling irons, one of which passed over the other. *Held*, that the negligence, if any, which caused the accident was that of the deceased or of his fellow-servants, and that the company is not liable. *Kelly v. Abbot*, 21 Am. & Eng. R. Cas. 633, 63 Wis. 307, 23 N. W. Rep. 890, 53 Am. Rep. 292.—*APPLYING* *Whitwam v. Wisconsin & M. R. Co.*, 58 Wis. 408; *Toledo, W. & W. R. Co. v. Black*, 88 Ill. 112. *QUOTING* *Ballou v. Chicago & N. W. R. Co.*, 54 Wis. 257. *REVIEWING* *Smith v. Potter*, 46 Mich. 258.

308. — and when not.—The fact that a brakeman undertook to couple cars under circumstances more dangerous than usual is not conclusive proof that he was guilty of contributory negligence. The question is whether an ordinarily prudent person would, under all the circumstances of the case, have made the attempt. *Baird v. Chicago, R. I. & P. R. Co.*, 8 Am. & Eng. R. Cas. 128, 61 Iowa 359, 13 N. W. Rep. 731; *adhered to in* 12 Am. & Eng. R. Cas. 75, 16 N. W. Rep. 207.

Where the evidence fails to show whether it is customary and prudent for switchmen to mount cars to uncouple them, it cannot be declared as a matter of law that the plaintiff was guilty of contributory negligence in so doing. *Rutledge v. Missouri Pac. R. Co.*, 110 Mo. 312, 19 S. W. Rep. 38.

The evidence tended to show that plaintiff acted as baggage master, car coupler, switch tender, etc., about a yard, and while not regularly employed to do coupling and tend switches, he often did it without objec-

tion from his superiors. *Held*, that it was not contributory negligence for him to exchange a duty with a fellow-yardman, and answer the order of a conductor to uncouple cars. *Hudson v. Charleston, C. & C. R. Co.*, 55 Fed. Rep. 248.

In an action for personal injuries by one who had been employed as a "wiper" in a round house for three months, and who had no other experience in railroading, it appearing that he had no instruction in the art of coupling cars nor had been advised as to signals used when couplings were about to be made, the fact that he was injured by the locomotive when attempting to couple it to a car, under the orders of the dispatcher, does not show contributory negligence. *Rahman v. Minnesota & N. W. R. Co.*, 43 Minn. 42, 44 N. W. Rep. 522.

309. Having actual or constructive notice of defective apparatus.*—A company in using in its trains an old car which is lower than the others is not guilty of such negligence as to be liable to its servants who knowingly incur the risk for an injury resulting from the coupling of such old car with another, though the danger be greater than with cars of equal height. *St. Louis, I. M. & S. R. Co. v. Higgins*, 21 Am. & Eng. R. Cas. 629, 44 Ark. 293.

Where a company has in use on its road freight cars without end ladders, steps, and handles, which are necessary in coupling or uncoupling while the cars are in motion, and a freight conductor is cognizant of this fact, it is clearly his duty, before attempting to pass from the side to the end of the car for the purpose of uncoupling it, to ascertain whether it is one of that kind, and if he finds it is, it is negligence on his part to attempt to make the uncoupling while the train is in motion. *Chicago, B. & Q. R. Co. v. Warner*, 18 Am. & Eng. R. Cas. 100, 108 Ill. 538.

A head brakeman was injured in attempting to make a coupling, through a defect in the coupling appliances, which was plainly visible. The evidence showed that it was his duty to examine the coupling appliances, and have personal control over the movements of the engineer, and consequently of the train. *Held*, that he was guilty of gross negligence in failing to see the defect, and

* Injury caused by defective coupling apparatus; contributory negligence of brakeman, see 41 AM. & ENG. R. CAS. 263, *abstr.*

could not recover. *Karrer v. Detroit, G. H. & M. R. Co.*, 41 *Am. & Eng. R. Cas.* 265, 76 *Mich.* 400, 43 *N. W. Rep.* 370.

A brakeman was killed while attempting to couple a caboose to a freight car which had been received from another company, by the want of adaptation of the coupling irons of the caboose and car, one being higher than the other, so as to allow them to overlap instead of coming together. It did not appear but that it was daylight and there was nothing to show why the brakeman could not have discovered the apparent want of adaptation of the couplings before they came together. *Held* that there could be no recovery. *Kelly v. Abbot*, 21 *Am. & Eng. R. Cas.* 633, 63 *Wis.* 307, 23 *N. W. Rep.* 890, 53 *Am. Rep.* 292.—APPLYING *Whitman v. Wisconsin & M. R. Co.* 58 *Wis.* 408; *Toledo, W. & W. R. Co. v. Black*, 88 *Ill.* 112. QUOTING *Ballou v. Chicago & N. W. R. Co.* 54 *Wis.* 257. REVIEWING *Smith v. Potter*, 46 *Mich.* 258.

400. — defective or dangerous draw-bars and draw-heads.—It is contributory negligence for an employé of a railroad company, who, shortly after he had uncoupled a car, and had an opportunity for observing any defects in the coupling apparatus, and reporting the same, as was his duty, to attempt to couple the same car to another without observing the disparity in the height of the draw-heads and using a crooked instead of a straight link; and the company will not be liable for any injury he receives thereby. *Norfolk & W. R. Co. v. Emmert*, 31 *Am. & Eng. R. Cas.* 194, 83 *Va.* 640, 3 *E. Rep.* 145.

A brakeman of experience who must have known that had the coupling-link been fast in the head of the ordinary draw-bar they could not have passed and the platforms have come together and crushed him, is guilty of gross negligence in not having the link so placed. *Toledo, W. & W. R. Co. v. Ashury*, 84 *Ill.* 429.—DISTINGUISHED IN *Russell v. Minneapolis & St. L. R. Co.*, 32 *Minn.* 230.

The plaintiff, a man of mature years, having been about cars enough to know that coupling cars was dangerous, accepting employment as a switchman, after working one week, undertook to make a dangerous coupling without looking at the draw-head. *Held*, guilty of such contributory negligence as would prevent any recovery for the injuries sustained in making such coupling. *Goulin*

v. Canada Southern Bridge Co., 64 *Mich.* 190, 31 *N. W. Rep.* 44.

A second effort on the same occasion to couple cars with a draw-bar, the first having failed because the bar had become fixed in its position and not readily movable, is not necessarily improper or inexcusable, where the bar had been shaken loose after the first effort and before the second was made although the second failed for the same reason as the first and the plaintiff was thereby injured. *Ousley v. Central R. & B. Co.*, 86 *Ga.* 538, 12 *S. E. Rep.* 938.

401. — goose-neck.—Plaintiff, in coupling cars, had his hand mashed. He went to make the coupling not expecting to find a goose-neck (from which the injury was received); made the coupling quickly, in not more than two seconds; had never known the goose neck used on freight trains, during a long service on railways, and they are not commonly so used. Upon this statement it was only necessary that the court instruct that "if the plaintiff saw the apparatus, or should have seen it by the exercise of reasonable care, in time to have avoided the injury, he could not recover." *Texas & N. O. R. Co. v. Conroy*, 83 *Tex.* 214, 18 *S. W. Rep.* 609.

402. Dangerously or improperly loaded cars.—In a suit by an employé for a personal injury received while attempting to couple a car loaded with railroad iron, on the ground of negligence in the railroad company in providing unsafe "deadwoods" and "draw-bars," and from the careless manner of loading the iron, where the proof failed to show any defect in the deadwoods and draw-bars, or that any better were ever invented or used, but it did show that plaintiff had several months' experience in such business, and had ample time to examine how the car was loaded and its mode of coupling, and it appearing the accident was the result of his own want of proper care—*held*, that a recovery could not be sustained. *Toledo, W. & W. R. Co. v. Black*, 88 *Ill.* 112, 21 *Am. Ky. Rep.* 290.—APPLIED IN *Kelly v. Abbot*, 21 *Am. & Eng. R. Cas.* 633, 63 *Wis.* 307. DISTINGUISHED IN *Russell v. Minneapolis & St. L. R. Co.*, 32 *Minn.* 230. QUOTED IN *Jacksonville, T. & K. W. R. Co. v. Galvin*, 29 *Fla.* 636; *Thomas v. Missouri Pac. R. Co.*, 109 *Mo.* 187.

A brakeman who, in shackling cars laden with lumber which projects over the ends,

attempts to shackle them from the side upon which the lumber projects, is guilty of contributory negligence in so doing, when he might by stooping down or shackling the cars from the opposite side avoid injury; and there can be no recovery for his death under the Massachusetts statute giving a right of action for the death of an employé killed through the negligence of the employer, when the employé was "in the exercise of due care and diligence at the time." *Letirop v. Fitchburg R. Co.*, 41 *Am. & Eng. R. Cas.* 327, 150 *Mass.* 423, 23 *N. E. Rep.* 227.—FOLLOWED IN *Boyle v. New York & N. E. R. Co.*, 151 *Mass.* 102, 23 *N. E. Rep.* 827.

A brakeman who voluntarily enters upon his employment, with notice from a statement in a rule of the company, and from his own observation, of a custom of the company to transport cars loaded with logs which project over the ends of the cars in such a manner as to make the service more or less dangerous, is guilty of such negligence as will bar a recovery for injuries received while attempting to couple two of the said cars, by reason, as claimed, of such manner of loading. *Brennan v. Michigan C. R. Co.*, 93 *Mich.* 156, 53 *N. W. Rep.* 358.—DISTINGUISHING *Dewey v. Detroit, G. H. & M. R. Co.*, 97 *Mich.* 329, 52 *N. W. Rep.* 942.—FOLLOWED IN *Wilson v. Michigan C. R. Co.*, 94 *Mich.* 20.

A brakeman was killed while between two cars attempting to make a coupling. It appeared that one of the cars was loaded with lumber, which projected so as to cause him to stoop, whereby he stumbled and fell under the moving train, which caused his death. There was no evidence that the conductor in charge of the train directed the brakeman to go under the lumber, and there was nothing to prevent him from observing the danger for himself. *Held*, that a nonsuit was proper. *Brice v. Louisville & N. R. Co.*, (*Ky.*) 9 *S. W. Rep.* 288.

In an action to recover for the death of a car coupler, it appeared that he was killed while coupling cars loaded with bridge irons, by being caught between the ends of projecting irons. The deceased had been warned of the danger, and was directed to stoop while coupling. The cars were loaded in the usual way for such irons. *Held*, that there was no evidence of extraordinary risk, and the company was not liable. (*A venire de novo* was afterward

5 D. R. D.—15.

ordered in this case.) *Northern C. R. Co. v. Husson*, 12 *Am. & Eng. R. Cas.* 241, 101 *Pa. St.* 1.—APPLIED IN *Jacksonville, T. & K. W. R. Co. v. Galvin*, 29 *Fla.* 636; *Kehler v. Schwenk*, 144 *Pa. St.* 348. QUOTED IN *Jackson v. Missouri Pac. R. Co.*, 104 *Mo.* 448; *Norfolk & W. R. Co. v. Cottrell*, 83 *Va.* 512, 3 *S. E. Rep.* 123. REVIEWED IN *Scott v. Oregon R. & N. Co.*, 28 *Am. & Eng. R. Cas.* 414, 14 *Oreg.* 211.

A car coupler is not guilty of contributory negligence in attempting to couple a car to a moving train, where the car is loaded with lumber which projects and strikes him, where it appears that he did not know that the car was thus loaded, and where his attention was at the time directed to other duties, preventing him from seeing it. *Louisville & N. R. Co. v. Robinson*, (*Ky.*) 16 *S. W. Rep.* 707.—DISTINGUISHING *Brice v. Louisville & N. R. Co.*, (*Ky.*) 9 *S. W. Rep.* 288.

403. Going between cars, generally.—A brakeman having experience in the coupling of cars, is guilty of extreme negligence in going between cars for that purpose, when he knew that the coupling-bars were liable to slip past each other and allow the platforms of the cars to come together. *Toledo, W. & W. R. Co. v. Asbury*, 84 *Ill.* 429.

A brakeman has a right to assume that cars which he is required to handle are in a proper state of repair; and it is therefore not contributory negligence on his part to go between them to make a coupling before first stopping to see whether the bumpers are all right. *King v. Ohio & M. R. Co.*, 8 *Am. & Eng. R. Cas.* 119, 11 *Biss. (U. S.)* 362, 14 *Fed. Rep.* 277.

Where a rule of the company provides that trains shall not be put in motion while couplers are between them, a coupler has a right to presume that the train will not be moved while he is between the cars; and he is not chargeable with contributory negligence where he is injured by the engineer backing the train under a signal given by another employé. *Central R. Co. v. Harrison*, 73 *Ga.* 744. *Hissong v. Richmond & D. R. Co.*, 91 *Ala.* 514, 8 *So. Rep.* 776.

A brakeman is not chargeable with contributory negligence in going between cars to uncouple them, where an injury results by reason of the brake being out of order, where he has no knowledge of the defect, and where it could not be seen without

stooping down and looking under the cars. *Louisville, N. A. & C. R. Co. v. Buck*, 38 *Am. & Eng. R. Cas.* 152, 116 *Ind.* 566, 19 *N. E. Rep.* 453, 2 *L. R. A.* 520, 28 *Am. L. Reg.* 148.

404. — on the inside of a curve.

—A brakeman is not chargeable with contributory negligence in going between the cars on the inside of a curve, where the signals are given him on that side, so that it is necessary for him to be there to see them. *Mahoney v. New York C. & H. R. R. Co.*, 39 *N. Y. S. R.* 911, 60 *Hun* 586, *mem.*, 15 *N. Y. Supp.* 501; *affirmed in* 131 *N. Y.* 623, *mem.*, 43 *N. Y. S. R.* 962, *mem.*

405. Failure to use crooked link.

—An experienced brakeman was injured while attempting to couple cars of unequal height, by using a straight link instead of a crooked one that was better adapted to such couplings. He had entire charge of the train, and knew that one car was higher than the other. Each car was properly constructed after its own pattern, and was in good repair. *Held*, that he could not recover. *Hulett v. St. Louis, K. C. & N. R. Co.*, 67 *Mo.* 239.—**DISTINGUISHING** *Ft. Wayne, J. & S. R. Co. v. Gildersleeve*, 33 *Mich.* 133.

406. Standing in dangerous place on engine or car.—Where a brakeman,

in uncoupling a combination car to be left on a switch, which car has a railing, instead of remaining on such car, as was his duty, gets upon a flat car next to it, and, in consequence of the jerk caused by the putting on steam to start the train, is thrown off and run over, his own carelessness and negligence will be such as to preclude him from recovering for the injury. *Chicago & A. R. Co. v. Rush*, 84 *Ill.* 570. But see *Richmond & D. R. Co. v. Jones*, 92 *Ala.* 218, 9 *So. Rep.* 276.

The track on which a coupling was made was a curved one, and plaintiff was standing on the foot-board of the engine, on the inside of the curve, at the time he was injured. There was no evidence as to the degree of the curve. *Held*, that he was not negligent, as a matter of law, in remaining there to help in making the coupling. *Bennett v. Northern Pac. R. Co.*, 3 *N. Dak.* 91, 54 *N. W. Rep.* 314.

Nor was he guilty of contributory negligence, as a matter of law, in standing in that place, notwithstanding the unusual shortness of the draw-bar of the engine and

the draw-bar of the car, the former projecting six inches beyond a rim on the rear of the engine, and the latter being, according to some of the evidence, 12 inches long, the evidence showing that the usual play to a draw-bar is from one to four inches; there being no play to the draw-bar on the engine, and it being undisputed that the engine approached the car slowly to make the coupling, so that the amount of slack taken up would be but little, if everything was in proper order. *Bennett v. Northern Pac. R. Co.*, 3 *N. Dak.* 91, 54 *N. W. Rep.* 314.

Neither was it contributory negligence, as a matter of law, for him to remain on the foot-board, instead of going ahead, and setting the pin, and then stepping outside the track before the engine and car came together. *Bennett v. Northern Pac. R. Co.*, 3 *N. Dak.* 91, 54 *N. W. Rep.* 314.

407. Making flying switch.—An employé intrusted with the pulling out of a coupling-pin in good condition in making a flying switch, who before the pin is out signals the engineer to start, by reason of which the car is derailed and the employé killed, is guilty of such contributory negligence as will prevent a recovery for his death. *Browne v. New York & N. E. R. Co.*, 158 *Mass.* 247, 33 *N. E. Rep.* 650.

408. Remaining between cars when unnecessary.—A brakeman who, knowing couplings are mismatched, places the pin in a moving car, and remains between the two cars to shake the pin into position, when he might safely have made the coupling by placing the pin in the standing car, and letting it be shaken into position by the concussion, is guilty of such negligence as to bar a recovery. *Norfolk & W. R. Co. v. McDonald*, 88 *Va.* 352, 13 *S. E. Rep.* 706.

In the absence of the conductor, a brakeman was in charge of a train engaged in switching near a switch-head, and the train was moved on his signals. After setting the cars in motion and observing their rate of speed, he made one attempt to uncouple, and desisted, and then, without ordering or signaling a slowing up, again attempted to uncouple when he knew that to do so involved the necessity of his going with the cars at their rate of speed. There was no emergency or necessity existing requiring such action. He was killed, and his body was found on one of the main rails about fifty or sixty feet from where he entered the

track. *Held*: (1) that he was guilty of contributory negligence such as to defeat a recovery by his representative, though there was evidence tending to show his foot was caught in the unblocked place between the guard and the main rail; (2) whether he could or could not readily and quickly pull the coupling-pin is immaterial, as, in either event, he was guilty of negligence in remaining between the cars going at such rate for such distance and until he reached the guard rail. *Towner v. Missouri Pac. R. Co.*, 52 Mo. App. 648.—*APPLYING Marsh v. South Carolina R. Co.*, 56 Ga. 274.

409. While the cars are in motion.

—(1) *Contributory negligence*.—The act of uncoupling cars while in motion by going in between them, though attended with more or less danger, does not necessarily constitute contributory negligence, in the absence of a rule prohibiting it; yet if the uncoupling could be effected with safety while standing on the platform of one of the cars, the act of going in between them for that purpose would constitute contributory negligence. *Memphis & C. R. Co. v. Graham*, 53 Am. & Eng. R. Cas. 396, 94 Ala. 545, 10 So. Rep. 283.

If it is more dangerous to uncouple cars in motion than when standing still, and a brakeman voluntarily undertakes the more dangerous method, he cannot recover for an injury that ensues; but whether it is more dangerous to uncouple moving cars is a question of fact for the jury. *Peoria, D. & E. R. Co. v. Puckett*, 42 Ill. App. 642.

A person who sees that a train does not stop for him to uncouple, but nevertheless rushes in and tries to uncouple while the cars are in rapid motion, is guilty of contributory negligence. *Marsh v. South Carolina R. Co.*, 56 Ga. 274. *Henry v. Sioux City & P. R. Co.*, 21 Am. & Eng. R. Cas. 644, 66 Iowa 52, 23 N. W. Rep. 260.

If the customary and usual way of uncoupling cars in a yard is negligent and wrong, although permitted by the company, a plaintiff who for the time being is in command of the train, and in part responsible for the custom, cannot recover for an injury. *Ferguson v. Central Iowa R. Co.*, 5 Am. & Eng. R. Cas. 614, 58 Iowa 293, 12 N. W. Rep. 293.

There can be no recovery for the death of an employé who was killed while attempting to uncouple moving cars by being caught between the bumpers, where it ap-

pears that there was no necessity to go between the bumpers, or to uncouple the cars while they were in motion. *Osborne v. Knox & L. R. Co.*, 68 Me. 49, 19 Am. Ry. Rep. 7.

(2) — *illustrations*.—A brakeman went between cars for the purpose of uncoupling, but not getting the pin out at once the cars moved forward, he walking with them until he fell in a cattle-guard and was killed. The train was at a standstill when he went between the cars, and it appeared that he had a right to hold the train until he signaled it to go forward. The ground was icy, therefore unusually dangerous. *Held*, he was guilty of contributory negligence which would defeat a recovery. *Henderson v. Coons*, 31 Ill. App. 75.

A brakeman went between moving cars to uncouple them, and tripped and fell, receiving the injuries complained of. He charged the company with negligence in not having a smooth roadbed, and in not having a hand-hold on the car; but it appeared that he knew that the car had no hand-hold, and testified at the trial that to attempt to uncouple under such circumstances was attended with unusual and great danger. He had control of the train and the right to stop it, when the uncoupling could have been done with safety. *Held*, that he could not recover. *Ohio & M. R. Co. v. Bass*, 36 Ill. App. 126.

A brakeman, while proceeding to couple cars in motion, was warned by the bystanders that the attempt would be perilous to his safety, and, disregarding the warning, received injuries for which his administrator sought to recover. *Held*, that a disregard of the warning, where circumstances showed that the duty would be one of imminent danger from causes apparent in the exercise of ordinary care, would constitute contributory negligence and defeat a recovery. *Muldoney v. Illinois C. R. Co.*, 39 Iowa 615, 8 Am. Ry. Rep. 487.—*FOLLOWED IN Kitteringham v. Sioux City & P. R. Co.*, 18 Am. & Eng. R. Cas. 14, 62 Iowa 285.

Plaintiff's intestate was guilty of contributory negligence in undertaking to uncouple defendant's cars while in motion, and while passing over a "split switch" in use on its road, and which, as he must have known, could not be blocked at the place where his foot was caught. *Grand v. Michigan C. R. Co.*, 48 Am. & Eng. R. Cas. 383, 83 Mich. 564, 47 N. W. Rep. 837.

Plaintiff went between the cars of a train to uncouple them and was injured while they were slowly moving backward to relieve the pressure on the pin. Plaintiff was a yard master and there were a disengaged switchman and a coupler subject to his orders. *Held*, that he was guilty of contributory negligence in trying to uncouple them while the cars were in motion, and in not stationing one of the idle employés so that his signals could have been better communicated to the engineer while he was between the cars in a position of danger. *Rajus v. Syracuse, B. & N. Y. R. Co.*, 5 N. Y. Supp. 804, 51 Hun 638, mem.; affirmed in 119 N. Y. 951, mem., 23 N. E. Rep. 1149, 29 N. Y. S. R. 993.

(3) *Not contributory negligence*.—It is not necessarily contributory negligence for a brakeman to attempt to couple cars while they are in motion. It is a question of fact for the jury. *Baird v. Chicago, R. I. & P. R. Co.*, 8 Am. & Eng. R. Cas. 128, 12 Am. & Eng. R. Cas. 75, 61 Iowa 359, 13 N. W. Rep. 731, 16 N. W. Rep. 207.

Though attempting to couple cars when the engine is running at a speed of fifteen miles an hour is apparently not only dangerous but reckless, yet if it be true in the experience of engineers and railroad men that it is safe provided the engine is properly managed, and if the failure in question resulted solely from the fault of the engineer in manipulating the engine, the high speed will be no obstacle to a recovery by the car coupler for a personal injury sustained by him in making the attempt. Though to non-experts its truth would seem in a high degree improbable, if not impossible, yet, there being direct and positive evidence tending to support the theory of safety, the court erred in granting a nonsuit. *Rebb v. East Tenn., V. & G. R. Co.*, 87 Ga. 631, 13 S. E. Rep. 566.

(4) — *illustrations*. — A switchman, ordered to couple cars, stepped in front of one of the cars while it was moving at the rate of four miles an hour, and took hold of the link while eight feet away from the stationary car to which it was to be coupled. Before he had set the pin in the stationary car he was enveloped and blinded by clouds of steam issuing from a defective locomotive, and in consequence his arm was caught between the deadwoods and crushed. *Held*, that his contributory negligence was a question for the jury, and the court did not

err in refusing to direct a verdict for the defendant. *Northern Pac. R. Co. v. Nickels*, 53 Am. & Eng. R. Cas. 388, 50 Fed. Rep. 718, 4 U. S. App. 369, 1 C. C. A. 625.

A brakeman was injured while attempting to couple cars. The evidence showed that the speed of the cars was increased by the wind. It also showed that the track was in a defective condition, and it being in the night-time he stepped into a hole and stumbled. *Held*, that he was not guilty of contributory negligence. *Baird v. Chicago, R. I. & P. R. Co.*, 8 Am. & Eng. R. Cas. 128, 12 Am. & Eng. R. Cas. 75, 61 Iowa 359, 13 N. W. Rep. 731, 16 N. W. Rep. 207.

Plaintiff, a brakeman, was directed by his conductor to mount the front of a train which was backing at the rate of about four miles an hour, and to go to the rear and couple on a standing car. It was the custom in such cases for the conductor to immediately follow and slacken the speed of the train, so that the coupling might be done with safety. As plaintiff dismounted from the rear of the car to make the coupling, by looking back he might have seen that the conductor had not entered the train, but he testified that he was intent upon his work, and relied on the conductor doing his duty, and did not look. *Held*, that he was not guilty of contributory negligence, as a matter of law, but it was a question of fact. *Henry v. Sioux City & P. R. Co.*, 75 Iowa 84, 39 N. W. Rep. 193.

410. Where signal has been misunderstood or disobeyed.—Where a brakeman, about to couple cars, has given a signal for the moving cars to stop, he has a right to presume that it will be obeyed, and in acting upon such presumption he will not be guilty of negligence, unless he knows, or by the exercise of ordinary care might know, that his signal has been misunderstood or is being disobeyed, in which case he will not be justified in acting upon the presumption. *Nichols v. Chicago, R. I. & P. R. Co.*, 69 Iowa 154, 28 N. W. Rep. 571. —FOLLOWING *Beems v. Chicago, R. I. & P. R. Co.*, 58 Iowa 150; *Bucklew v. Central Iowa R. Co.*, 64 Iowa 603. —DISTINGUISHED IN *Henry v. Sioux City & P. R. Co.*, 75 Iowa 84, 39 N. W. Rep. 193. —*Beems v. Chicago, R. I. & P. R. Co.*, 6 Am. & Eng. R. Cas. 222, 10 Am. & Eng. R. Cas. 658, 58 Iowa 150, 12 N. W. Rep. 222. —FOLLOWED IN *Bucklew v. Central Iowa R. Co.*, 64 Iowa 603; *Nichols v. Chicago, R. I. & P. R. Co.*,

69 Iowa 154. REVIEWED IN *Stafford v. Oskaloosa*, 64 Iowa 251.—*Norfolk & W. R. Co. v. Cottrell*, 31 Am. & Eng. R. Cas. 235, 83 Va. 512, 3 S. E. Rep. 123.—QUOTING *Northern C. R. Co. v. Husson*, 12 Am. & Eng. R. Cas. 241, 101 Pa. St. 1.

411. Catching foot between rails.*

—A conductor, who had formerly been a brakeman with considerable experience, having seen a brakeman fail to make a coupling, placed himself in a position to attempt it, and in doing so put his foot into an unblocked frog, but was warned by the brakeman of the danger. For a moment he took his foot out; but soon replaced it, and in attempting to make the coupling, he was caught and killed. *Held*, such contributory negligence as to justify a peremptory instruction to find for the company. *Southwestern Pac. Co. v. Siley*, 152 U. S. 145, 14 Sup. Ct. Rep. 530.—QUOTING *Schroeder v. Michigan Car Co.*, 56 Mich. 132; *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478; *Washington & G. R. Co. v. McDaide*, 135 U. S. 534; *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S. 189; *Appel v. Buffalo, N. Y. & P. R. Co.*, 111 N. Y. 550.

The plaintiff, a switchman, was coupling cars, and whilst so doing his foot slipped into the space between the track rail and the guard rail, and being unable to extricate it, lost his leg. The proof showed that this guard rail, which was upon the shorter side of a curve, was the means best calculated to keep trains rounding the curve from jumping the track; a guard rail must be so placed as to allow some play for the flange of the car wheel between it and the track rail, and the track in this case was a compromise track to accommodate cars whose trucks varied in width, and which it was claimed required more space between the track rail and the guard rail, the space in question being from three to three and five eighths inches in width. The plaintiff could, with a comparative degree of safety, have coupled the cars from the outside of the curve. Upon this evidence the court held that the defendant was not guilty of negligence in the construction of its track, but that the plaintiff's injury was properly attributable to his own negligence, he being

a railroad man of considerable experience, who must have known the dangers to which he was exposed. *Foster v. Chicago & A. R. Co.*, 84 Ill. 164, 16 Am. Ry. Rep. 452.

412. — or between cross-ties.*—

A brakeman while attempting to change a link attached to an engine, when it was in motion over an unballasted side track, the ties being above the ground, caught his foot, and was thrown down and run over, in daylight, so that he must have seen the condition of the side track. He did not have the engine stop before going upon the track, as he might have done, and the proof failed to show that common prudence required the ballasting of such a side track. *Held*, that he could not recover. *Pennsylvania Co. v. Hankey*, 93 Ill. 580.—DISTINGUISHED IN *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57; *Bucklew v. Central Iowa R. Co.*, 64 Iowa 603. FOLLOWED IN *Finnell v. Delaware, L. & W. R. Co.*, 129 N. Y. 669.

The plaintiff, an experienced brakeman, jumped from the tender where he was riding, to couple a car, and was injured by catching his feet between ties on an unballasted track. It was daylight; he was familiar with the condition of the track and had the engine entirely under his control at such times. *Held*, that he was guilty of contributory negligence in trying to walk on such a track to make a coupling while the engine was in motion. *Finnell v. Delaware, L. & W. R. Co.*, 42 N. Y. S. R. 354, 129 N. Y. 669, *mem.*, 29 N. E. Rep. 825, 3 *Silo. App.* 643; *reversing* 36 N. Y. S. R. 1020, *mem.*—APPLYING *Pennsylvania Co. v. Hankey*, 93 Ill. 580; *Appel v. Buffalo, N. Y. & P. R. Co.*, 111 N. Y. 550, 20 N. Y. S. R. 90. DISTINGUISHING *Plank v. New York C. & H. R. R. Co.*, 60 N. Y. 607.

413. Stepping into ditch.—A newly employed switchman is not necessarily chargeable with contributory negligence in stepping into a ditch under a track in the yard, which was unknown to him, while he is attempting to couple cars. *Brown v. Atchison, T. & S. F. R. Co.*, 15 Am. & Eng. R. Cas. 271, 31 Kan. 1, 1 *Pac. Rep.* 605; *former appeals* 26 Kan. 443, 29 Kan. 186.

A car coupler is not chargeable with con-

* Statutory liability of railroad companies. Failure to guard frogs and tracks. Contributory negligence of employé, see 48 AM. & ENG. R. CAS. 391, *abstr.*

* When contributory negligence of employé in violating company's rules will prevent a recovery for an injury caused by catching foot in hole negligently left between ties, see 44 AM. & ENG. R. CAS. 540, *abstr.*

tributary negligence because he falls in a ditch near the track in the night-time, and is injured by a passing train, where he is ignorant of the existence of the ditch, unless his employment is such as to charge him with notice of its existence. *Harr v. New York C. & H. R. R. Co.*, 114 N. Y. 623, mem., 2 *Silv. App.* 260, 21 N. E. Rep. 425, 23 N. Y. S. R. 187; *affirming* 47 Hun 632, mem., 13 N. Y. S. R. 227.

414. Outside of scope of employment.—A company is not liable to an employé engaged in clearing away a wreck, who is injured while coupling cars under orders of his superior, although such work is outside the scope of his employment, where it does not appear that he made any objection to the performance of this duty or that his superior made any threats to discharge him unless he performed it. *Hogin v. Northern Pac. R. Co.*, 53 Am. & Eng. R. Cas. 384, 53 Fed. Rep. 519.—DISAPPROVING *Jones v. Lake Shore & M. S. R. Co.*, 49 Mich. 579, 14 N. W. Rep. 551. DISTINGUISHING *Miller v. Union Pac. R. Co.*, 17 Fed. Rep. 67; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205. DISTINGUISHING AND COMMENTING ON *Gilmore v. Northern Pac. R. Co.*, 18 Fed. Rep. 866. FOLLOWING *Cole v. Chicago & N. W. R. Co.*, 71 Wis. 114, 37 N. W. Rep. 84.

A conductor is guilty of negligence in endeavoring to uncouple cars, this being no part of his duty unless necessitated by a pressing emergency. *Sears v. Central R. & B. Co.*, 53 Ga. 630. *Central R. & B. Co. v. Sears*, 59 Ga. 436.

If the conductor believed, in good faith, that such an emergency was upon him, and the jury so find, and that he had good reasons so to believe, then the mere act of coupling and uncoupling, or attempting it, will not be outside of his duty and make him to blame; but even if it should appear that he thought, and had reason to think, that the emergency was upon him, he would be at fault if he acted recklessly or imprudently; and whether he did so or not is for the jury to say, under all the facts of the transaction. *Central R. & B. Co. v. Sears*, 59 Ga. 436.

δ. While Infringing Rules or Orders.

415. Generally.*—A brakeman at-

* Contributory negligence of employé coupling cars in disregard of rules of company, see note, 48 AM. & ENG. R. CAS. 392.

tempting to couple cars in a manner contrary to the rules of the company is guilty of contributory negligence. *Louisville & N. R. Co. v. Watson*, 90 Ala. 68, 8 So. Rep. 249.

There is no error in granting a new trial, in an action by a freight conductor to recover from his company for a personal injury, where the verdict is for the plaintiff, and the evidence shows that he was injured while coupling, which was not his duty, and contrary to the rules of the company, and there was no pressing emergency for him to couple the cars at that time. *Kane v. Savannah, F. & W. R. Co.*, 85 Ga. 858, 11 S. E. Rep. 493.

For an injury received by a brakeman while engaged in making a coupling, under order of the engineer, between his own and another section of a freight train, the company is not responsible, where it appears that the conductor was in charge of the train on which the brakeman was employed and by which he was struck and injured, and that the brakeman knew that it "was dangerous and reckless, and against the rules and orders of the company" to make such coupling; and it further appearing that the injury was not attributable to defects in the company's roadbed or machinery, nor to incompetent servants. *East Tenn., V. & G. R. Co. v. Smith*, 89 Tenn. 114, 14 S. W. Rep. 1077.

Where a brakeman was injured by being thrown from a moving train while uncoupling the engine and tender, and it appears that he was not required to attempt such uncoupling while the train was in motion, but that the rules of the company forbade such attempt, this is such evidence of contributory negligence on his part as justified a compulsory nonsuit in an action for the injury. *Lockwood v. Chicago & N. W. R. Co.*, 6 Am. & Eng. R. Cas. 151, 55 Wis. 50, 12 N. W. Rep. 401.

416. Rule requiring inspection of coupling apparatus—Draw-heads.—A switchman is chargeable with contributory negligence which defeats a recovery for injuries received by the cars coming too close together while making a coupling, by reason of the difference in the styles of the draw-heads, where a rule of the company, which is made a part of his contract of service, requires him to inspect and take notice of the different styles of draw-heads, and where he has entire control of the movement of the engine and cars while making

the coupling. *Brooks v. Northern Pac. R. Co.*, 47 Fed. Rep. 637.

Where a rule of a company provides that employes shall not attempt to make couplings "unless the draw-heads and other coupling appliances are known to be in good order," a yard man who has had 12 years' experience cannot recover for injuries received in attempting to make a coupling, where one of the draw-heads is so twisted and out of position that the link cannot be raised far enough to enter it without using extra force. *St. Louis, I. M. & S. R. Co. v. Rice*, 51 Ark. 467, 4 L. R. A. 173, 11 S. W. Rep. 699.—APPROVED IN *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112.—*Bennett v. Northern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 182, 2 N. Dak. 112, 49 N. W. Rep. 408.—QUOTING *Smith v. Potter*, 46 Mich. 258, 9 N. W. Rep. 273; *Karrer v. Detroit, G. H. & M. R. Co.*, 76 Mich. 400, 43 N. W. Rep. 370; *Darracott v. Chesapeake & O. R. Co.*, 83 Va. 288, 2 S. E. Rep. 511; *Michigan C. R. Co. v. Smithson*, 45 Mich. 212, 7 N. W. Rep. 791; *Hathaway v. Michigan C. R. Co.*, 51 Mich. 253, 16 N. W. Rep. 634.

In an action to recover for the death of a brakeman, caused by an injury received in attempting to couple a freight car, in consequence of a defect in the brake, the court instructed the jury that if they believed from the evidence "that the printed rule of the company requiring trainmen to examine their trains was habitually disregarded by the company itself—that is, if the officers of the company having charge of the freight trains habitually caused such trains to be made up, and sent out * * * after being made up, without offering brakemen an opportunity to examine the train—such fact, if proven, would cause the rule to lose its authority over the brakemen; in other words, the rule must be obeyed by the master as well as by the servant, or it ceases to be operative as to both." *Held*, that the instruction did not have any proper application to the case, the rule being intended only for conductors and trainmen. *Chicago & A. R. Co. v. Bragonier*, 119 Ill. 51, 7 N. E. Rep. 688; *reversing* 11 Ill. App. 516.

417. Rule prohibiting going between cars.—A brakeman on a railroad, who, in violation of a known rule of the company, goes on the track in front of a moving car, intending to couple it with another, stumbles and falls, and is run over

by the moving car, is guilty of culpable negligence, which bars a recovery of damages on account of the personal injuries sustained. *Pryor v. Louisville & N. R. Co.*, 90 Ala. 32, 8 So. Rep. 55.—APPLYING *Georgia Pac. R. Co. v. Propst*, 83 Ala. 518.

Although a rule of the railroad company forbade switchmen to go between cars for the purpose of coupling or uncoupling them, plaintiff cannot be charged with contributory negligence because, when injured, he was standing on the foot-board of the tender, "which was put there for switchmen to ride on." *Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 So. Rep. 276.

A brakeman, knowing the rules of the company forbidding coupling or uncoupling cars except with a stick, and going in between the cars with an engine attached, went between them to uncouple cars with a stick, which was inefficient for that purpose because the coupling was tight and short. Another brakeman, without plaintiff's knowledge, signaled the engineer to reverse the engine enough to relieve the pressure on the pin. Plaintiff's hand, being between the bumpers coming together, was caught and mashed. *Held*, that he could not recover, because his injury was the proximate result of his own disregard of the rules. *Richmond & D. R. Co. v. Pannill*, 89 Va. 552, 16 S. E. Rep. 748.

418. — cars in motion.—A brakeman who is injured while violating a known rule of the company prohibiting him from going between cars in motion to uncouple them, cannot recover of the company for such injury, in the absence of all evidence showing that the company knowingly permitted the violation of its rule. *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74, 16 S. W. Rep. 924.—FOLLOWED IN *Northern Pac. R. Co. v. Nickels*, 53 Am. & Eng. R. Cas. 388, 50 Fed. Rep. 718, 4 U. S. App. 360, 1 C. C. A. 625.—*Johnson v. Chesapeake & O. R. Co.*, 38 W. Va. 206, 18 S. E. Rep. 573.

But the rule must be taken with the qualification that the company must provide some safe method or means of performing that service; and if the sticks provided for that purpose are too short to effect a necessary coupling, the rule is no protection to the company against liability for damages on account of injuries sustained while performing the service in violation of it. *Memphis & C. R. Co. v.*

Graham, 53 *Am. & Eng. R. Cas.* 396, 94 *Ala.* 545, 10 *So. Rep.* 283.

Where it is the duty of an employé to uncouple cars, and he has agreed to observe a rule of the company strictly forbidding all attempts to uncouple cars while in motion, and he goes between standing cars for the purpose of uncoupling them, but is unable to do so at once because the pin is tight, and while he is making the effort the cars are put in motion without a signal, and he, thinking that the motion of the cars may loosen the pin, remains between them and continues his efforts, in violation of the rule, and, moving along with the cars, he falls into a cattle-guard of which he has knowledge, but at the time does not think of, and thus is injured, he is guilty, as matter of law, of contributory negligence, and he cannot recover of the company for its negligence in moving the cars without a signal. *Sedgwick v. Illinois C. R. Co.*, 76 *Iowa* 340, 41 *N. W. Rep.* 35.—DISTINGUISHING *Greenleaf v. Illinois C. R. Co.*, 29 *Iowa* 47; *Greenleaf v. Dubuque & S. C. R. Co.*, 33 *Iowa* 56.—APPROVED IN *Bennett v. Northern Pac. R. Co.*, 2 *N. Dak.* 112.

A switchman, who had been strictly cautioned against having anything to do with coupling cars, tried to uncouple some while the train was moving, and had his foot caught where the planking had been for some time slightly broken, though the defect had not been seen by him as yard man and the railroad company had no notice of it. *Held*, that he could not recover. *Gardner v. Michigan C. R. Co.*, 24 *Am. & Eng. R. Cas.* 435, 58 *Mich.* 584, 26 *N. W. Rep.* 301.

419. Rule requiring use of coupling-stick.—A company is not liable for the death of a brakeman who is killed while violating a rule of the company providing that brakemen must not go between freight cars to couple them, but that the coupling must be done with a stick, where such rule is recognized in the written contract of service and the brakeman waives all liability for injuries that may result from the violation of the rule, and where it appears that such contract was knowingly signed, and that he had been provided with a coupling-stick. *Russell v. Richmond & D. R. Co.*, 47 *Fed. Rep.* 204.

If a brakeman, in violation of such rule, with which he is familiar, is injured while between cars attempting to couple them

without a stick, he is guilty of such contributory negligence as will bar a recovery by him of damages for such injury. *Richmond & D. R. Co. v. Free*, 97 *Ala.* 231, 12 *So. Rep.* 294.

Where a brakeman is injured while coupling cars with what is called a "short shackle," instead of using a stick, as the rules of the company required, he cannot recover for the injury, where it appears that the accident would not have happened if the coupling-stick had been used. *Norfolk & W. R. Co. v. Briggs*, (Va.) 14 *S. E. Rep.* 753.

420. — attempting to make coupling with hand.—A brakeman cannot hold the company liable for an injury received while coupling cars by hand, when the rules of the company require him to use a stick. *Wolsey v. Lake Shore & M. S. R. Co.*, 33 *Ohio St.* 227.—REVIEWED IN *Buckle v. Central Iowa R. Co.*, 64 *Iowa* 603.—*Sloan v. Georgia Pac. R. Co.*, 44 *Am. & Eng. R. Cas.* 553, 86 *Ga.* 15, 12 *S. E. Rep.* 179.—APPROVED IN *Bennett v. Northern Pac. R. Co.*, 2 *N. Dak.* 112. FOLLOWED IN *Rome & C. Constr. Co. v. Dempsey*, 86 *Ga.* 499.—*Rome & C. Constr. Co. v. Dempsey*, 86 *Ga.* 499, 12 *S. E. Rep.* 883.—FOLLOWING *Sloan v. Georgia Pac. R. Co.*, 86 *Ga.* 15.

Where the company furnished said sticks, especially where it appears that the injury would have been avoided by properly using a stick. *Georgia Pac. R. Co. v. Propst*, 83 *Ala.* 518, 3 *So. Rep.* 764.—APPLIED IN *Pryor v. Louisville & N. R. Co.*, 90 *Ala.* 32.

Where a rule of a railroad company requires that cars shall be coupled by the use of coupling-sticks, and this rule is brought to the knowledge of one employed as brakeman, and assented to by him, it constitutes a part of his contract of service, and for an injury received by him in endeavoring to make a coupling by hand, the company is not liable, unless it be shown that the act could not have been safely performed even by the use of the appliance provided, or that obedience to the rule was not practicable under the circumstances of the particular case. *Pennsylvania Co. v. Whitcomb*, 31 *Am. & Eng. R. Cas.* 149, 111 *Ind.* 212, 9 *West. Rep.* 823, 12 *N. E. Rep.* 380.

A failure on the part of a brakeman to use a coupling-stick is not such contributory negligence as will prevent a recovery for an injury while coupling by hand, where it appears that the danger of carrying the

stick about the person was greater than the security afforded by its use, and further, that he was told when the stick was delivered to him, and he agreed to use it, that it was required only as a matter of form. *Louisville & N. R. Co. v. Foley*, 94 Ky. 220, 21 S. W. Rep. 866.

An employé is not bound by a rule of the company which has not been properly published or brought to his attention, and which it has habitually neglected to enforce. *So held*, where a brakeman was injured while coupling by hand, where a rule of the company directed that a stick should be used, but the attention of the brakeman had never been called to the rule. *Fay v. Minneapolis & St. L. R. Co.*, 11 Am. & Eng. R. Cas. 193, 30 Minn. 231, 15 N. W. Rep. 241.

421. — after going between the cars.—A brakeman who, in attempting to couple cars, goes in between them, and uses his hands instead of a coupling-stick, in violation of a rule of the company, of which he has notice, is guilty of such contributory negligence as will defeat a recovery of damages on account of injuries sustained, unless the defense is avoided by proof of gross negligence on the part of the employés in charge of the moving cars; that is, their failure to use ordinary care when knowing his danger, whereby the injury might have been averted, or such negligence as is the legal equivalent of recklessness, wantonness, or intentional wrong. *Louisville & N. R. Co. v. Watson*, 90 Ala. 68, 8 So. Rep. 249. *Hissong v. Richmond & D. R. Co.*, 91 Ala. 514, 8 So. Rep. 776. *Louisville & N. R. Co. v. Watson*, 90 Ala. 68, 8 So. Rep. 249.

When a rule of a railroad company forbade employés entering between cars, when in motion, to uncouple them, "and all such imprudences," and another rule required that when possible a stick should be used in coupling cars, it is contributory negligence for a brakeman having knowledge of such rules, to stand before a stationary car while another is moving toward him, and, observing that the approaching car was provided with a "three-link coupling," to attempt to make the coupling by hand. *Darracott v. Chesapeake & O. R. Co.*, 31 Am. & Eng. R. Cas. 157, 83 Va. 288, 2 S. E. Rep. 511. — QUOTING *Michigan C. R. Co. v. Smithson*, 45 Mich. 212; *Cunningham v. Chicago, M. & St. P. R. Co.*, 5 McCrary (U. S.) 465; —

QUOTED IN *Alcorn v. Chicago & A. R. Co.*, 108 Mo. 81; *Moore v. Norfolk & W. R. Co.*, 87 Va. 489; *Harris v. Norfolk & W. R. Co.*, 88 Va. 560.

422. Infringement of orders and instructions. — A car coupler is not chargeable with contributory negligence if he attempts to make a coupling in obedience to the orders of his conductor, where, under the rules of the company, he is subject to the conductor's orders; but he is chargeable with such negligence if he acts in violation of the conductor's orders and without any necessity for placing himself in danger. *Rome & D. R. Co. v. Chasteen*, 40 Am. & Eng. R. Cas. 559, 88 Ala. 591, 7 So. Rep. 94.

A company was charged with negligence in injuring an inexperienced brakeman while making a coupling; but it appeared that he had been cautioned by the engineer to be careful, and not give a signal to move the engine until he was in a safe place, and not pull the coupling-pin until he had taken hold of the handle of the car, but that he was injured while neglecting these precautions. *Held*, that he could not recover. *Gorman v. Minneapolis & St. L. R. Co.*, 78 Iowa 509, 43 N. W. Rep. 303.

On the night of the accident the yard master ordered the plaintiff, a yard brakeman, to uncouple cars which were standing still and then ride them back on a switch. Instead of obeying orders the plaintiff signaled the engineer to back, and stepping between the moving cars to uncouple them, got his foot fastened in an open frog and was run over and killed. *Held*, that the plaintiff's disobedience of orders was contributory negligence and the proximate cause of the injury, and his administrator cannot recover. *Richmond & D. R. Co. v. Risdon*, 48 Am. & Eng. R. Cas. 244, 87 Va. 335, 12 S. E. Rep. 786.

There was evidence that before the accident the defendant's yard master had told the plaintiff not to go between the rails in uncoupling cars, but there was no evidence of the yard master's having any authority over the plaintiff, or of any rule of the company forbidding the going upon the track in uncoupling cars. *Held*, that a ruling that the plaintiff could not recover if he went upon the track after being thus directed by the yard master was properly refused. *Hannah v. Connecticut River R. Co.*, 154 Mass. 529, 28 N. E. Rep. 682.

4. Obedience or Disobedience of Rules and Orders.

a. In General.

423. Duty to obey rules.—An employer may adopt reasonable rules for the government of his employés, and when brought to the knowledge of the latter, who thereafter continue in the master's service, the rules and an implied undertaking to obey them enter into the contract of service. *Pennsylvania Co. v. Whitcomb*, 31 *Am. & Eng. R. Cas.* 149, 111 *Ind.* 212, 9 *West. Rep.* 823, 12 *N. E. Rep.* 380.—APPROVED IN *Bennett v. Northern Pac. R. Co.*, 2 *N. Dak.* 112.—*Crew v. St. Louis, K. & N. W. R. Co.*, 20 *Fed. Rep.* 87.

Employés should observe rules made for their protection as well as for the safety of their fellow-workmen, and, failing in this, the fault must be considered their own. *Wilson v. Michigan C. R. Co.*, 94 *Mich.* 20, 53 *N. W. Rep.* 797.—FOLLOWING *Brennan v. Michigan C. R. Co.*, 93 *Mich.* 156.—*International & G. N. R. Co. v. Gray*, 27 *Am. & Eng. R. Cas.* 318, 65 *Tex.* 32.

An employé when he enters the service of his employer and accepts the book of rules prescribing his duties and the manner of performing them, obligates himself to observe and conform to such rules, according to the plain terms thereof, and not according to what may have been a customary practice among other employés regardless of the express requirements of the rules. *Gordy v. New York, P. & N. R. Co.*, 75 *Md.* 297, 23 *Atl. Rep.* 607.

If an employé enters into or remains in the service of a railroad company, with a knowledge of its rules and regulations, he must be held as undertaking to acquiesce therein; and if he is afterward injured by reason of his violation of such rules and regulations, he cannot claim that their reasonableness is a question to be decided by a jury in an action by him to recover damages for the injury thus occasioned. *Wolsey v. Lake Shore & M. S. R. Co.*, 33 *Ohio St.* 227.—APPROVED IN *Bennett v. Northern Pac. R. Co.*, 2 *N. Dak.* 112.

424. Rules not brought to employe's notice.—The plaintiff is not chargeable with negligence upon the mere fact that his conduct at the time of the infliction of the injury, and contributing to it, was violative of a rule of the employer,

unless knowledge of the rule is brought home to him. *Standard L. & A. Ins. Co. v. Jones*, 94 *Ala.* 434, 10 *So. Rep.* 530. *Gregory v. Ohio River R. Co.*, 37 *W. Va.* 606, 16 *S. E. Rep.* 819.

And a plea which sets up such violation as contributory negligence, but does not aver knowledge, is demurrable. *Memphis & C. R. Co. v. Graham*, 53 *Am. & Eng. R. Cas.* 396, 94 *Ala.* 545, 10 *So. Rep.* 283.—FOLLOWING *Louisville & N. R. Co. v. Hawkins*, 92 *Ala.* 241.

If the rule is known only to one having in charge a gang of men, his negligence is not that of a fellow-servant with the others, which will be imputed to them and prevent recovery upon that ground. *Covey v. Hannibal & St. J. R. Co.*, 27 *Mo. App.* 170.

An employé of a company is not bound by a rule of the company which is not brought to his attention, or which is habitually disregarded with the knowledge of his superior officers, and without any effort on their part to enforce it, or when the usage and practice of the company tend to mislead him in the violation of the rule. *Little Rock, M. R. & T. R. Co. v. Leverett*, 28 *Am. & Eng. R. Cas.* 459, 48 *Ark.* 333, 3 *S. W. Rep.* 50.

An employé of a corporation, though obligated in writing, as terms of his employment, to "study the rules governing employés, carefully keep posted, and obey orders," is not bound by rules, as such, of which he is ignorant, and which have never been promulgated to him by the company. *Carroll v. East Tenn., V. & G. R. Co.*, 41 *Am. & Eng. R. Cas.* 307, 82 *Ga.* 452, 10 *S. E. Rep.* 163.

425. Rules not properly published.—A company cannot avail itself of a rule which it has not properly published, and which it has uniformly neglected to enforce. *International & G. N. R. Co. v. Hinzie*, 82 *Tex.* 623, 18 *S. W. Rep.* 681.

An employé who was injured in taking a train over a mountain, was charged with contributory negligence in violating a rule of the company as to the manner of handling the train. The evidence showed that such rule had never been entered in the company's book of rules, but had been posted on the bulletin; but whether it was there at any time after plaintiff was employed was doubtful. *Held*, that it could not be taken as a conclusive fact that he had knowledge of the rule. *Wooden v.*

Western N. Y. & P. R. Co., 46 *N. Y. S. R.* 77; see 43 *N. Y. S. R.* 218.

An employé cannot claim compensation for injuries, where his own negligence in violating a known rule of the company contributes to the injury; nor can he, even in the absence of printed instructions, recover compensation for injuries which would not have been sustained if he and his co-employés had observed reasonable care and caution. *La Croy v. New York, L. E. & W. R. Co.*, 4 *Silo. App.* 123, 132 *N. Y.* 570, 30 *N. E. Rep.* 391; reversing 57 *Hun* 67.

420. Rules not required to be obeyed.—Rules adopted by the employers which are not regularly prescribed by the company, and obedience to which is not required by it, will not excuse the company for the non-performance of its duty. *Rutledge v. Missouri Pac. R. Co.*, 110 *Mo.* 312, 19 *S. W. Rep.* 38.

427. Disobeying rules, generally.*—Before an employé can recover from a railroad company, he must be free from fault; and if he is killed while in disobedience of a rule of the company, or an order of the conductor given him while he is under the command of that officer, his widow cannot recover unless it appear that such disobedience did not, directly or indirectly, contribute in any degree to the injury. *Prather v. Richmond & D. R. Co.*, 80 *Ga.* 427, 9 *S. E. Rep.* 530. *Francis v. Kansas City, St. J. & C. B. R. Co.*, 53 *Am. & Eng. R. Cas.* 410, 110 *Mo.* 387, 19 *S. W. Rep.* 935.

Where an injured employé is charged with contributory negligence in disobeying a rule of the company, it is no answer that the rule has been disobeyed by another employé. *Central R. & B. Co. v. Kitchens*, 83 *Ga.* 83, 9 *S. E. Rep.* 827.

It will be presumed, in the absence of evidence to the contrary, that in such case the employé knew of the general rules made to govern him in the employment. *Pilkinton v. Gulf, C. & S. F. R. Co.*, 70 *Tex.* 226, 7 *S. W. Rep.* 805—QUOTED IN *International & G. N. R. Co. v. Smith*, 44 *Am. & Eng. R. Cas.* 324, 14 *S. W. Rep.* 642.

An engineer who, in running a train, is injured, while he is disregarding the instructions which the company has issued for his guidance, and is therein guilty of gross neg-

ligence contributory to the injury, cannot recover damages of the company. *Lyon v. Detroit, L. & L. M. R. Co.*, 31 *Mich.* 429. *Sutherland v. Troy & B. R. Co.*, 4 *Silo. App.* 596, 125 *N. Y.* 737, 26 *N. E. Rep.* 609; reversing 54 *Hun* 639, *mem.*

428. Rules intended to promote safety of employé.*—Where an employé of a railroad company receives an injury which is caused by his acting in direct violation of a reasonable rule made by said company for the safety of its servants, of which rule he has notice and has promised to obey, he must be deemed guilty of contributory negligence, and cannot recover damages from the company for such injury. *Overby v. Chesapeake & O. R. Co.*, 53 *Am. & Eng. R. Cas.* 417, 37 *W. Va.* 524, 16 *S. E. Rep.* 813. *Louisville & N. R. Co. v. Watson*, 90 *Ala.* 68, 8 *So. Rep.* 249. *Cincinnati, I., St. L. & C. R. Co. v. Lang*, 38 *Am. & Eng. R. Cas.* 25, 118 *Ind.* 579, 21 *N. E. Rep.* 317. *Keenan v. New York, L. E. & W. R. Co.*, 21 *N. Y. Supp.* 445. *Francis v. Kansas City, St. J. & C. B. R. Co.*, 53 *Am. & Eng. R. Cas.* 410, 110 *Mo.* 387, 19 *S. W. Rep.* 935. *Zumwalt v. Chicago & A. R. Co.*, 35 *Mo. App.* 661.

429. Disobedience as the proximate cause of injury.—The mere fact alone that the injuries received by an employé of a railroad company were inflicted while such employé was acting in disobedience of known rules, will not relieve the master of liability; but if the violation in whole or in part of such rules is the cause of the injury, it will prevent a recovery by the employé. *San Antonio & A. P. R. Co. v. Wallace*, 44 *Am. & Eng. R. Cas.* 564, 76 *Tex.* 636, 13 *S. W. Rep.* 565. *La Croy v. New York, L. E. & W. R. Co.*, 4 *Silo. App.* 123, 132 *N. Y.* 570, 30 *N. E. Rep.* 391; reversing 57 *Hun* 67. — **DISTINGUISHING** *Byrnes v. New York, L. E. & W. R. Co.*, 113 *N. Y.* 251, 22 *N. Y. S. R.* 936.

Unless the act is done under the influence of fear produced by the appearance of sudden danger. *Gulf, W. T. & P. R. Co. v. Ryan*, 33 *Am. & Eng. R. Cas.* 289, 69 *Tex.* 665, 7 *S. W. Rep.* 83.

Where it appears that an employé is injured in consequence of his failure to obey

* Liability of company for injuries to employés caused by violating company's rules, or orders of superiors, see 38 *AM. & ENG. R. CAS.* 221, *abstr.*

* When contributory negligence of employé in violating company's rules will prevent a recovery for an injury caused by catching his foot in a hole negligently left between ties, see 44 *AM. & ENG. R. CAS.* 540, *abstr.*

a rule of the company requiring him to examine and know the kind and condition of coupling apparatus, he cannot recover where he was allowed sufficient time to make the examination. *Bennett v. Northern Pac. R. Co.*, 48 *Am. & Eng. R. Cas.* 182, 2 *N. Dak.* 112, 49 *N. W. Rep.* 408.—APPROVING *Sloan v. Georgia Pac. R. Co.*, 86 *Ga.* 15, 12 *S. E. Rep.* 179; *Karrer v. Detroit, G. H. & M. R. Co.*, 76 *Mich.* 400, 43 *N. W. Rep.* 370; *San Antonio & A. P. R. Co. v. Wallace*, 76 *Tex.* 636, 13 *S. W. Rep.* 565; *Memphis & C. R. Co. v. Thomas*, 51 *Miss.* 640; *Deeds v. Chicago, R. I. & P. R. Co.*, 74 *Iowa* 154, 37 *N. W. Rep.* 124; *St. Louis, I. M. & S. R. Co. v. Rice*, 51 *Ark.* 467, 11 *S. W. Rep.* 699; *Sedgwick v. Illinois C. R. Co.*, 76 *Iowa* 340, 41 *N. W. Rep.* 35; *Wolsey v. Lake Shore & M. S. R. Co.*, 33 *Ohio St.* 227; *Pennsylvania Co. v. Whitcomb*, 31 *Am. & Eng. R. Cas.* 149, 111 *Ind.* 212.

A brakeman who wilfully and unnecessarily violates a reasonable precautionary rule known to him, or which he must be taken to have known, cannot recover for an injury of which such violation of the rule is the direct efficient cause. *Johnson v. Chesapeake & O. R. Co.*, 38 *W. Va.* 206, 18 *S. E. Rep.* 573.

The fact that a brakeman in coupling cars violates one of the rules of the company in the manner of doing his work will not defeat a recovery for an injury caused by a defect in the cars, where it appears that the injury would not have been avoided by an observance of the rules. *Reed v. Burlington, C. R. & N. R. Co.*, 31 *Am. & Eng. R. Cas.* 190, 72 *Iowa* 166, 33 *N. W. Rep.* 451.

430. Modification, rescission, or waiver of rules.*—An injured employé is not chargeable with contributory negligence in violating a rule of the company, where it appears that such rule was wholly and habitually disregarded by employés with the knowledge and consent of the company. *Atkyn v. Wabash R. Co.*, 41 *Fed. Rep.* 193, 23 *Ohio L. J.* 151.

It makes no difference that other employés frequently or customarily disregarded the rule, unless the company, with knowledge of their practice, acquiesced in it in a way to sanction it, or practically to abrogate the rule. Nothing less would relieve the

plaintiff from abiding by his uniform orders. *Sloan v. Georgia Pac. R. Co.*, 44 *Am. & Eng. R. Cas.* 553, 86 *Ga.* 15, 12 *S. E. Rep.* 179.

It must be shown that a knowledge of the custom was known to the officer charged with the enforcement of the rule. *O'Neill v. Keokuk & D. M. R. Co.*, 45 *Iowa* 546.

The fact that the employé has signed an agreement to comply with a rule, and that he would take upon himself all risk of its violation, does not preclude him from showing that the company had waived or abandoned it. *Northern Pac. R. Co. v. Nickels*, 53 *Am. & Eng. R. Cas.* 388, 50 *Fed. Rep.* 718, 4 *U. S. App.* 369, 1 *C. C. A.* 625.—FOLLOWING *Barry v. Hannibal & St. J. R. Co.*, 98 *Mo.* 62, 11 *S. W. Rep.* 308; *Smith v. Memphis & L. R. R. Co.*, 18 *Fed. Rep.* 304; *Schaub v. Hannibal & St. J. R. Co.*, 106 *Mo.* 74, 16 *S. W. Rep.* 924.—DISTINGUISHED IN *Towner v. Missouri Pac. R. Co.*, 52 *Mo. App.* 648.

The conductor's assent to the violation of a known rule by the brakeman does not relieve him of the charge of negligence. *Georgia Pac. R. Co. v. Davis*, 92 *Ala.* 300, 9 *So. Rep.* 252.

Contributory negligence cannot be imputed to the plaintiff on account of a violation of the rules in leaving his post of duty, when it appears that by the general practice on the defendant's trains, without objection from the conductor, brakemen went into the caboose where he was, during inclement weather, when their duties did not require their presence on the top of the cars, and remained until he gave them orders to go to their cars; and that the plaintiff, on the occasion when he was injured, had thus been in the caboose with the conductor, and was injured while attempting to get on top of his car in obedience to the order of the conductor. *Georgia Pac. R. Co. v. Davis*, 92 *Ala.* 300, 9 *So. Rep.* 252.

If a brakeman, under the directions of the conductor of his train, and in the presence and with the knowledge of the division superintendent of the road, who has charge of its management and directs the employés of the company in the performance of their duties, opens and adjusts a switch for a long time in a different manner from that prescribed by the established rules, such rules are deemed changed or modified as to the brakeman. *Kansas City, Ft. S. & G. R. Co. v. Kier*, 38 *Am. & Eng. R. Cas.* 119, 41 *Kan.* 661, 671, 21 *Pac. Rep.* 770.

*Evidence to show custom of employés to disregard rules, see 53 *AM. & ENG. R. CAS.* 416, *abstr.*

If the servant is improperly absent without leave, but is received on another train of the company than the one to which he belongs, without objection by the conductor, who is intrusted with the duty of excluding all persons not lawfully entitled to be on the train, the liability of the company is not affected thereby. *Washburn v. Nashville & C. R. Co.*, 3 Head (Tenn.) 638.

A brakeman on a freight train, who was killed while coupling cars, was charged with contributory negligence in violating a rule of the company in making the coupling by hand instead of with a stick. To avoid this, plaintiff introduced evidence that the brakemen and others habitually coupled and uncoupled cars without the use of a stick, within the knowledge of the conductors. *Held*, that the disregard of their duty by the conductors could not render obsolete a regulation of the company; and a conductor on a freight train does not so far represent the company as to authorize him to rescind the rules of the company. *Russell v. Richmond & D. R. Co.*, 47 Fed. Rep. 204.

431. Disobeying rules by complying with special inconsistent orders.—If compliance with a general rule is rendered impossible by other and inconsistent orders given by the master to his servant, negligence cannot be imputed to the servant for not following the general rule. *Hall v. Chicago, B. & N. R. Co.*, 46 Minn. 439, 49 N. W. Rep. 239.

The orders of a proper superior, and customary obedience thereto, inconsistent with general printed rules for his government which have been furnished to a locomotive engineer, may be obeyed without constituting contributory negligence. *Pennsylvania Co. v. Roney*, 12 Am. & Eng. R. Cas. 223, 89 Ind. 453, 46 Am. Rep. 173.

A direction to a locomotive engineer to run his train to a certain station within a given time does not release him from the duty of obeying a standing rule of the company as to the care that he must observe in bringing his train to stations. *Illinois C. R. Co. v. Neer*, 26 Ill. App. 356. *Illinois C. R. Co. v. Neer*, 31 Ill. App. 126.

Where a company orders a section hand to go to a designated place, it is liable if he is injured while proceeding to the place, without fault on his part, by his hand-car

colliding with a wild train, while passing a short curve, of which he is not notified. The risk is not one assumed by him, nor is he chargeable with contributory negligence. *Cincinnati, I., St. L. & C. R. Co. v. Lang*, 38 Am. & Eng. R. Cas. 25, 118 Ind. 579, 21 V. E. Rep. 317.

But where the company has adopted and published a rule requiring section hands to be prepared at all times for special or wild trains, and where the injury occurs at a place beyond that to which the special order directed the plaintiff to go, the company is not liable. *Cincinnati, I., St. L. & C. R. Co. v. Lang*, 38 Am. & Eng. R. Cas. 25, 118 Ind. 579, 21 V. E. Rep. 317.

In an action by an employé to recover for personal injuries caused by a collision between trains, the issue was whether the collision occurred by the negligence of the train dispatcher or the conductor, who was a fellow-servant with plaintiff. Upon the trial there was evidence tending to show negligence on the part of the conductor in disregarding the signals carried by a train he was to meet, and that his train collided with the second section of another train on account of his misunderstanding the words of a conductor as his train was passing. *Held*, that the company was entitled to an instruction that the conductor had no right to disregard his orders and the directions conveyed by the signals on account of information he supposed he was receiving from the conductor on the other train. *Hannibal & St. J. R. Co. v. Kanaley*, 39 Kan. 1, 17 Pac. Rep. 324.

432. Criminal responsibility for disobeying rule.—Under the Pa. Act of March 22, 1869, any refusal or neglect by an employé of a railroad to obey the rules of the company is punishable. *Commonwealth v. Griffin*, 7 Phila. (Pa.) 679.

433. Obeying orders, generally.—Whether it be the fault of an employé to obey an order of his superior depends upon whether it would be rash and dangerous to do so, and where there was no apparent danger in so doing, it would not be fault on his part. *Central R. Co. v. De Bray*, 71 Ga. 406.

An employé cannot recover for an injury caused by the negligence of another employé, if there has been fault or negligence on his part, even though he was acting under the order of a superior servant when injured. *Western & A. R. Co. v. Adams*, 55

* As to how far employé can rebut charge of contributory negligence by showing that he acted in obedience to orders, see note, 17 L. R. A. 602.

Ga. 279.—QUOTED IN *Baker v. Western & A. R. Co.*, 68 Ga. 699.—*Cornwall v. Charlotte, C. & A. R. Co.*, 97 N. Car. 11, 2 S. E. Rep. 659.

434. When obeying order constitutes negligence.—A railroad corporation is not liable to an employé (in this case an engineer) for an injury happening to him in executing an errand of danger, upon which he is sent by the superintendent of the corporation, unless the superintendent be guilty of negligence in ordering the dangerous act to be performed. *Lasky v. Canadian Pac. R. Co.*, 83 Me. 461, 22 Atl. Rep. 367.

An instruction that plaintiff need not exercise ordinary care if obeying orders given by the section boss is properly refused in a suit by a section hand against a company for injuries sustained while removing a hand-car from the track. *Smith v. St. Paul & D. R. Co.*, 51 Minn. 86, 52 N. W. Rep. 1068.

435. — and when it does not.—If a master or another servant standing toward the servant injured in the relation of superior or vice-principal, orders the latter into a situation of danger, and he obeys and is thereby injured, the law will not charge him with contributory negligence, unless the danger was so glaring that no prudent man would have entered into it even under orders from one having authority over him. *Miller v. Union Pac. R. Co.*, 4 McCrary (U. S.) 115, 12 Fed. Rep. 600. *Thompson v. Chicago, M. & St. P. R. Co.*, 4 McCrary (U. S.) 629, 14 Fed. Rep. 564. *Colorado Midland R. Co. v. O'Brien*, 48 Am. & Eng. R. Cas. 235, 16 Colo. 219, 27 Pac. Rep. 701. *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205.—QUOTED IN *Richmond & D. R. Co. v. Rudd*, 88 Va. 648.—*Davis v. Louisville, N. O. & T. R. Co.*, 69 Miss. 136, 10 So. Rep. 450. *Herriman v. Chicago & A. R. Co.*, 27 Mo. App. 435.—APPLIED IN *Ballard v. Chicago, R. I. & P. R. Co.*, 51 Mo. App. 453.—*Fogus v. Chicago & A. R. Co.*, 50 Mo. App. 250.—QUOTING *Keegan v. Kavanaugh*, 62 Mo. 230; *Stephens v. Hannibal & St. J. R. Co.*, 96 Mo. 207; *Shortell v. St. Joseph*, 104 Mo. 114.—*Lofrano v. New York & Mt. V. Water Co.*, 29 N. Y. S. R. 557, 8 N. Y. Supp. 717.

A servant is not, at the peril of being discharged, bound to set up his judgment against that of his master about things over which there can be a difference of opinion

in the minds of reasonably prudent persons. *Stephens v. Hannibal & St. J. R. Co.*, 38 Am. & Eng. R. Cas. 110, 96 Mo. 207, 9 S. W. Rep. 589. *Higgins v. Missouri Pac. R. Co.*, 43 Mo. App. 547.

An employé who does what he is ordered to do is not in fault, but is protected to a reasonable extent by the order while engaged in performing the special duty enjoined upon him. *Pennsylvania Co. v. O'Shaughnessy*, 41 Am. & Eng. R. Cas. 479, 122 Ind. 588, 23 N. E. Rep. 675.

The bare fact that an employé is directed by his superior in charge to perform an act at a time and under such circumstances as that a person would reasonably apprehend danger therefrom, would not justify his disobedience of such orders; hence to assume such position of danger, in obedience to such direction, is not, of itself, negligence. *Frandsen v. Chicago, R. I. & P. R. Co.*, 36 Iowa 372.

Where an employé is injured in the performance of extra-perilous work under the order of the company, he may maintain an action where the company was negligent in not providing a safe place in which he might work and in failing to warn him of the extra danger. *Stackman v. Chicago & N. W. R. Co.*, 80 Wis. 428, 50 N. W. Rep. 404.

436. Obeying unauthorized order.—A master is estopped from insisting that his servant is in the wrong in not refusing to obey an unwarranted order. *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205.

The employé of a railroad company is in fault when he knowingly exposes himself to extraordinary danger at night, by assisting to carry a train over the unsafe track of another railroad. The corporation does not insure his safety against reckless locomotion which he assists to conduct, with knowledge that it lies outside of his regular employment; and it cannot be rightfully presumed that the corporation has authorized, or will sanction, the order of any officer or agent who directs business to proceed under circumstances which place both life and property in obvious and unusual peril. *Galloway v. Western & A. R. Co.*, 57 Ga. 512.

Where an employé gets under a car to repair it while standing on a track which he knows, under a rule of the company, is used exclusively for switching cars, and is injured, it is no answer to a charge of contributory negligence that his foreman told

him to go there, in the absence of evidence that the foreman had authority to change the rules of the company and direct where the work should be done. *Keenan v. New York, L. E. & W. R. Co.*, 49 N. Y. S. R. 513, 21 N. Y. Supp. 445, 2 Misc. 34.

437. Obedience to order through fear of discharge.—A command accompanied by a threat is a command to which a servant is not bound to submit. *Capper v. Louisville, E. & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 525, 103 Ind. 305, 2 N. E. Rep. 749.

A section hand injured while using a defective hammer may recover where the danger is not so glaring that a man of ordinary prudence would refuse to take the risk, and where he is directed by his boss to use it or be discharged. *East Tenn., V. & G. R. Co. v. Duffield*, 18 Am. & Eng. R. Cas. 35, 12 Lea (Tenn.) 63, 47 Am. Rep. 319. —REVIEWING *Louisville & N. R. Co. v. Bowler*, 9 Heisk. (Tenn.) 866.—FOLLOWED IN *East Tenn., V. & G. R. Co. v. Stewart*, 21 Am. & Eng. R. Cas. 614, 13 Lea 432.

If the conductor of an east-bound train standing at a station on a single-track railroad, acting under orders from his superior, issued under a misapprehension and temporary forgetfulness of rules equally known to both, which gave the right of way to an overdue west-bound train, starts his train without a protest other than to say that he would not take the responsibility, and then goes about his duties thereon, he is not in the exercise of due care, such as will enable him to maintain an action against the company for personal injuries resulting from a subsequent collision of the trains; and if, knowing that the service was dangerous, he undertook it through fear of losing his position if he disobeyed, he will be taken to have assumed the risk. *Wescott v. New York & N. E. R. Co.*, 153 Mass. 460, 27 N. E. Rep. 10.

438. Disobeying orders, generally.—A servant cannot recover if his injury was the direct result of his own disobedience of orders. *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. Rep. 999.

It is the right and duty of the conductor in charge of the train and representing the company to give all necessary orders for the protection of the interest of the company and the safety of its servants; and if he gave an order not to sit with legs hanging over the side of the car, and it was a rea-

sonable order and the servant disobeyed it and was injured, he could not afterwards say it was not an order, but simply advice or warning against danger; nor could he say that, while he was riding from one point on the road to another, and had nothing to do with the running of the train, it was not such an order as he was bound to obey. *Prather v. Richmond & D. R. Co.*, 80 Ga. 427, 9 S. E. Rep. 530.

Plaintiff's intestate was an old miner and was killed while making an excavation, by the earth falling on him. They were in the habit of digging under the clay or earth at the bottom, and then prying it down from the top, which was regarded as dangerous, and they had been so told by their superintendent and cautioned against it by their foreman, and some of the men had gone at other work rather than to continue; and it seemed that the intestate might have had other work. *Held*, that a verdict for the defendant was properly directed. (Walker, Scott, and Dickey, JJ., dissenting.) *Simmons v. Chicago & T. R. Co.*, 18 Am. & Eng. R. Cas. 50, 110 Ill. 340.—APPLIED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758.

Where there is evidence that the manager of the railway had directed the conductor of the train and the engine driver on the day of the accident, not to cross the bridge until it was examined, which order they disobeyed—*held*, that as the conductor and the engine driver were the fellow-servants of the deceased, it should have been left to the jury to find whether their disobedience of the order was the proximate cause of his death. *Carney v. Caraque R. Co.*, 29 New Brun. 425.

439. Disobeying unauthorized order.—It is no defense to a suit for personal injury sustained in a collision by a baggage master, that he acted in disobedience of an order of the conductor, he having no authority to give an order pertaining to the protection of the life of the plaintiff. *Georgia R. & B. Co. v. Rhodes*, 56 Ga. 645.

Where a brakeman, on going into the employment of a railroad company, signs a contract binding him to obey all orders, rules, and regulations, but in which the general language applies equally to all classes of employes, the agreement to obey all orders must be construed to apply to all which are issued to him in the line of duty

in which he is employed; and it does not empower the company to assign him to other duties wholly disconnected therewith and differing therefrom. And while the clause binding him to use care and caution applies to anything he may undertake to do, it is for the jury to decide whether he has violated it. *Jones v. Lake Shore & M. S. R. Co.*, 8 Am. & Eng. R. Cas. 221, 49 Mich. 573, 14 N. W. Rep. 551.—FOLLOWING *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 235.—DISAPPROVED IN *Hogan v. Northern Pac. R. Co.*, 53 Am. & Eng. R. Cas. 384, 53 Fed. Rep. 519.

b. Particular Rules and Orders.

440. Illustrations of violations of particular rules, generally.—An engineer will be presumed to have assumed the risk of injury in running his train into a station, where one rule of the company requires him to approach stations "with great care," and another provides that he is not entitled to notice that a preceding train is late. *Illinois C. R. Co. v. Neer*, 26 Ill. App. 356.

A rule of a railroad company in these words—"In all cases of doubt, take the safe side and run no risks," implies that an employé must exercise judgment and discretion in determining whether there is danger in doing a thing in a certain way or at a certain time; and in case he does in fact incur danger and is injured, he is not necessarily guilty of contributory negligence, but it is a question for the jury whether he failed properly to exercise the discretion with which he was vested. *Bucklew v. Central Iowa R. Co.*, 64 Iowa 603, 21 N. W. Rep. 103.—REVIEWING *Illinois C. R. Co. v. Houck*, 72 Ill. 285; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Wolsey v. Lake Shore & M. S. R. Co.*, 33 Ohio St. 227; *O'Neill v. Keokuk & D. M. R. Co.*, 45 Iowa 546.

A person in the employ of a railway company as van-guard, who knows of a rule of the company that no van-guard under the age of fifteen is ever to drive a van, is guilty of contributory negligence in attempting to do so, and if he is injured while driving he cannot recover. *Bunker v. Midland R. Co.*, 47 L. T. 476, 31 W. R. 231.

441. Illustrations of obedience to particular orders.—(1) *Contributory*

negligence.—Where a servant obeyed the order of a superior servant to mount a locomotive running at from six to twelve miles per hour—*held*, that the company was not liable for the injury thereby sustained. *Roul v. East Tenn., V. & G. R. Co.*, 85 Ga. 197, 11 S. E. Rep. 558.

Where an employé was ordered to move a certain car the machinery of which was out of order, and in attempting to move it by such machinery, which was the means provided for that purpose, sustained an injury, and where it is averred in defense that such injury was due to plaintiff's own negligence, he knowing that the machinery was out of order, the only facts in issue are (1) whether plaintiff was or was not ignorant of the unsafe condition of the machinery, and (2) what damage he suffered from the injury. *Conlin v. San Francisco & S. J. R. Co.*, 36 Cal. 404.

Where the plaintiff, in obedience to the orders of his superior, attempted to get upon the pilot of a moving locomotive, and in doing so his clothes were caught in the splinters on a worn rail—*held*, that even if the master was negligent in not repairing the rail, yet it was the duty of the servant to use reasonable care, and it was error in the trial judge to charge the jury that if the plaintiff was ignorant of the condition of the rail, and got on the engine in obedience to the order, he was entitled to recover. *Cornwall v. Charlotte, C. & A. R. Co.*, 97 N. Car. 11, 2 S. E. Rep. 659.—QUOTING *Doggett v. Richmond & D. R. Co.*, 78 N. Car. 395.

(2) *Not contributory negligence.*—A yard master ordered to bring out cars immediately is not chargeable with contributory negligence where he is injured in going between cars, one of which is loaded with lumber projecting over the end, whereby he is injured, because he did not make a prior examination before attempting to couple it. He had a right to presume that it was safely loaded for transportation. *Haugh v. Chicago, R. I. & P. R. Co.*, 31 Am. & Eng. R. Cas. 173, 73 Iowa 66, 35 N. W. Rep. 116.—NOT FOLLOWED IN *Jacksonville, T. & K. W. R. Co. v. Galvin*, 29 Fla. 636.

An engineer discovered defects in his engine in the morning and immediately reported it for repairs, but found in the evening that the repairs had not been made, and objected to running it further. He was then told by the foreman to run it to a cer-

tain station, where he would have it fixed, if there was time; if not, he would have it fixed on their return. While running to the station named, the engineer was injured by reason of the defects. *Held*, that he was not chargeable with contributory negligence. *Greene v. Minneapolis & St. L. R. Co.*, 15 Am. & Eng. R. Cas. 214, 31 Minn. 248, 47 Am. Rep. 785, 17 N. W. Rep. 378.—REVIEWED IN Indianapolis & St. L. R. Co. v. Watson, 33 Am. & Eng. R. Cas. 334, 114 Ind. 20, 12 West. Rep. 285, 14 N. E. Rep. 721.

It appeared that the foreman of a gang of section hands directed his men to clear the track for an approaching train. Plaintiff left the track, but called the foreman's attention to some stones upon it, and the foreman thereupon said, "It is time you were getting them off." Plaintiff understood this remark as an order, and undertook to remove the stones when the train was about 100 yards away. He was struck by the engine and injured. *Held*, that the danger was not so open and obvious to the plaintiff that he ought to have disobeyed the order, and that a demurrer to the evidence was properly overruled. *Stephens v. Hannibal & St. J. R. Co.*, 38 Am. & Eng. R. Cas. 110, 96 Mo. 207, 9 S. W. Rep. 589.—DISTINGUISHED IN Ring v. Missouri Pac. R. Co., 112 Mo. 220. QUOTED IN Fogus v. Chicago & A. R. Co., 50 Mo. App. 250.

If a servant jump from the master's moving train in obedience to the order of the boss, and in doing so is hurt, this will not bar his right of recovery unless the danger in obeying was so glaring that a reasonably prudent man would not have undertaken it; and whether it is prudent or rash must be determined by all the attendant circumstances, and the instructions should so state. *Ballard v. Chicago, R. I. & P. R. Co.*, 51 Mo. App. 453.—APPLYING *Herriman v. Chicago & A. R. Co.*, 27 Mo. App. 435; *Stephens v. Hannibal & St. J. R. Co.*, 86 Mo. 221; *Ischer v. St. Louis Bridge Co.*, 95 Mo. 261.

442. Rule respecting the running and starting of trains.—Obedience to the regulations of a company in regard to the running of its trains, with a view to their safety, is matter of executive detail which neither the corporation nor any general agent of it can personally oversee, but as to which employées must be relied upon; and in the absence of any proof of a dis-

tinction between the duty of the company in starting trains and in subsequently running them, it will not be assumed. For negligence, therefore, in the observance, or for disobedience of regulations as to the running or starting of trains to the injury of an employé, in the absence of other proof of negligence, the corporation is not liable. *Rose v. Boston & A. R. Co.*, 58 N. Y. 217, 9 Am. Ry. Rep. 515.—APPLYING *Wright v. New York C. R. Co.*, 25 N. Y. 568.—DISTINGUISHED IN *Potter v. New York C. & H. R. R. Co.*, 136 N. Y. 77. FOLLOWED IN *Slater v. Jewett*, 5 Am. & Eng. R. Cas. 515, 85 N. Y. 61, 39 Am. Rep. 627. QUOTED IN *Hankins v. New York, L. E. & W. R. Co.*, 55 Hun 51, 28 N. Y. S. R. 59, 8 N. Y. Supp. 272.—*Slater v. Jewett*, 5 Am. & Eng. R. Cas. 515, 85 N. Y. 61, 39 Am. Rep. 627.

443. Rule limiting the head of steam to be carried.—If the boiler of an engine has an apparent defect, and the engineer continues running it with a head of steam higher than he was instructed to carry, he cannot recover damages for any injury he might sustain from the explosion of the boiler, nor can his widow or his heirs recover damages for his death under such circumstances. *Hugh v. New Orleans & C. R. Co.*, 6 La. Ann. 495.—APPROVED IN *Palfrey v. Portland, S. & P. R. Co.*, 4 Allen (Mass.) 55. FOLLOWED IN *Herman v. New Orleans & C. R. Co.*, 11 La. Ann. 5.

444. Rule forbidding certain employes from operating engine.—Where the engineer of a locomotive places it in the hands of a fireman incompetent to manage it, contrary to the rules of the company in whose employ he is, he is guilty of negligence. *Ohio & M. R. Co. v. Collarn*, 5 Am. & Eng. R. Cas. 554, 73 Ind. 261, 38 Am. Rep. 134.

Where there was an established usage on the part of the engineers of the company, known and acquiesced in by the superior officers, to allow firemen to make short moves when the engineer was not on the engine, but near enough to give directions, the engineer, under the circumstances of this case, should not be held guilty of contributory negligence for violating a rule not to permit firemen to operate the engine when the engineer was not upon it. Knowledge of such usage need not be shown by direct evidence that the officers saw it practised, but it may be inferred from circumstances,

as from its notoriety, long standing, and that it was known to the company's employes. *Barry v. Hannibal & St. J. R. Co.*, 98 Mo. 62, 11 S. W. Rep. 308.—FOLLOWED IN *Northern Pac. R. Co. v. Nickels*, 53 Am. & Eng. R. Cas. 388, 50 Fed. Rep. 718, 4 U. S. App. 369, 1 C. C. A. 625.

Plaintiff, who was employed about an engine and a pile-driver, took the place of a train engineer who was sick, and ran a train conveying the engine and the pile-driver out to where they were to be used, and after getting there, went to the rear of the train, and was injured by an explosion of the engine which accompanied the pile-driver. He was charged with contributory negligence in taking charge of the engine in violation of a rule of the company; but it appeared that it was the general usage for other employes to take charge of the engine where the regular engineer was sick or disabled. *Held*, that he was not prevented from recovering by thus going on the train. *East Line & R. R. Co. v. Scott*, 38 Am. & Eng. R. Cas. 16, 72 Tex. 70, 10 S. W. Rep. 298.

445. Rule forbidding riding on engine.*—A company is not responsible for the death of one of a crew operating a train, caused by a collision, where it appears that the deceased had voluntarily left his post of duty and gone to ride on the engine in violation of a rule of the company, and that he would not have been injured if he had remained at his post of duty. *Louisville & N. R. Co. v. Wilson*, 88 Tenn. 316, 12 S. W. Rep. 720. *Abend v. Terre Haute & I. R. Co.*, 17 Am. & Eng. R. Cas. 614, 111 Ill. 202. *Shenandoah Valley R. Co. v. Lucado*, 86 Va. 390, 10 S. E. Rep. 422.—FOLLOWING *Virginia Midland R. Co. v. Roach*, 83 Va. 375.—REVIEWED IN *Alcorn v. Chicago & A. R. Co.*, 108 Mo. 81.—*Stoker v. Welland R. Co.*, 13 U. C. C. P. 386.

Where an engineer was injured solely by the falling of an embankment, he is not prohibited from recovering by the fact that he was violating a rule of the company at the time by allowing a brother engineer to ride with him on the engine, where it appears that the presence of the other engineer in no way contributed to the injury. (Warner, C.J., dissenting.) *Central R. Co.*

* When track watchman cannot recover for injury resulting from getting on engine in violation of company's orders, see 41 AM. & ENG. R. CAS. 315, *abstr.*

v. Mitchell, 1 Am. & Eng. R. Cas. 145, 63 Ga. 173.—FOLLOWING *Rowland v. Cannon*, 35 Ga. 105.

The mere fact that a brakeman who was injured was at the time in the engineer's cab instead of at the brakes is not such contributory negligence as to defeat a recovery, where it does not appear that his absence from the brakes contributed to the injury, nor that he exposed himself to any greater danger by going into the cab than if he had remained at the brakes. *Connors v. Burlington, C. R. & N. R. Co.*, 71 Iowa 490, 32 N. W. Rep. 465.—DISTINGUISHING *Player v. Burlington, C. R. & N. R. Co.*, 62 Iowa 723.

Plaintiff, a switchman, was ordered by the yard master to go with the switch locomotive to a transfer boat and bring away certain passengers. There was no conductor, and the order was given to the engineer and switchman, but there was some conflict of evidence as to which was to be considered in charge. A flat car was attached to the locomotive, used in place of a tender, and there was evidence on the part of the defendant that the switchman's place was on it; but he went in the cab of the locomotive, where a notice was posted that no one was allowed to ride there except the engineer and fireman. During the trip he was injured. *Held*, that he could not recover if he knew of the regulation and was there in violation of it, unless the jury should find from the evidence that such regulation did not apply to him, or had been waived by non-enforcement. *Smith v. Memphis & L. R. R. Co.*, 18 Fed. Rep. 304.

446. Rule forbidding riding on top of car.—A conductor of a freight train, in violation of a known rule of the company, boarded a train while it was moving and was knocked down and injured by coming in contact with an overhead bridge while standing on the top of a box car. There was evidence that it was customary and sometimes the duty of the conductors, although forbidden by a rule, to be on the top of box cars, and that the conductor could not board the train while going back to the caboose on account of obstructions along the track. *Held*, that he was guilty of contributory negligence, and there could be no recovery. *San Antonio & A. P. R. Co. v. Wallace*, 44 Am. & Eng. R. Cas. 564, 76 Tex. 636, 13 S. W. Rep. 565.

Plaintiff, a brakeman on a freight train,

Cas. 145, 63
v. Cannon,

an who was
engineer's
t such con-
a recovery,
his absence
the injury,
any greater
an if he had
ers v. Bur-
tova 490, 32
ING Player
Co., 62 Iowa

ordered by
switch loco-
bring away
no conduc-
the engineer
ome conflict
e considered
ched to the
tender, and
t of the de-
place was on
locomotive,
no one was
the engineer
he was in-
t recover if
was there in
should find
gulation did
waived by
mpphis & L.

ing on top
ght train, in
he company,
moving and
by coming
bridge while
car. There
tomary and
ductors, al-
e on the top
uctor could
back to the
ctions along
ilty of con-
could be no
P. R. Co. v.
Cas. 564, 76

freight train,

was injured by coming in contact with an overhead bridge while on top of a high car, on a dark night, when he could not see the bridge. It appeared, according to one rule of the company, that the proximity of the train to a station required him to be on top of the cars, while another rule forbade employés to be on top of the cars when approaching bridges. *Held*, that the jury should have been instructed to determine from all the facts in evidence whether, under a fair and reasonable construction of all the rules, plaintiff was in the line of duty when injured; and if he failed to observe one of the rules, whether it was under such circumstances as was justifiable. *Chicago & A. R. Co. v. Matthews, 39 Ill. App. 541.*

447. Rule forbidding use of ladder on one side of car.—Where a rule of a company advises the brakemen of the dangers resulting from using the ladder of cars on the side next to water tanks and coal chutes, and the evidence shows fully that deceased was killed by being struck by a water tank, and that he was acting in violation of the rule, a verdict in favor of his administratrix will be reversed. *Chicago & A. R. Co. v. Crowder, 49 Ill. App. 154.*

448. Rule requiring employe to remain in middle of train.—The rules of a company required freight conductors to remain in the middle of their trains while descending a grade, but in all emergencies or doubtful cases they were required to "take the safe side"—that is, to exercise their judgment. G., a conductor, left the middle of his train, while descending a grade, to go forward and tell the engineer to look out for engines of another company which had been known to exceed their limits and get upon the track. *Held*, that this was a reasonable errand; that he was not guilty of contributory negligence in going forward, and could recover if injured while so doing. *Somerset & C. R. Co. v. Galbraith, 23 Am. & Eng. R. Cas. 375, 109 Pa. St. 32, 1 Atl. Rep. 371.*

449. Rule requiring stops near crossing of another railroad.—The engineer was required, by a rule of the company in whose employ both he and the plaintiff were engaged, to stop the engine at a "stop-board," 400 feet from the crossing. *Held*, that in an action for an injury caused by the alleged negligence of the defendant, the failure to stop in strict obedience to such

rule was not conclusive evidence of negligence on the part of such employés. *Hanson v. Minneapolis & St. L. R. Co., 32 Am. & Eng. R. Cas. 13, 37 Minn. 355, 34 N. W. Rep. 223.*

450. Rule or order respecting getting on or off cars or engines.—A switchman who is injured while violating an express rule of the railroad company, which forbids jumping on a switch engine while it is in motion, by standing in the middle of the track and stepping on the foot-board, is guilty of contributory negligence. *Francis v. Kansas City, St. J. & C. B. R. Co., 53 Am. & Eng. R. Cas. 410, 110 Mo. 387, 19 S. W. Rep. 935.*

Such a rule is not rendered nugatory by the fact that the employés violated it at will, where the evidence shows that it was enforced by the company, and the rule itself stated that the yard men were in the habit of jumping on engines in the manner forbidden, and that its express purpose was to put an end to the practice. *Francis v. Kansas City, St. J. & C. B. R. Co., 53 Am. & Eng. R. Cas. 410, 110 Mo. 387, 19 S. W. Rep. 935.*

Whether or not the switchman had knowledge of the existence of the rule was, under the facts and circumstances in evidence in the case, a question for the determination of the jury. *Francis v. Kansas City, St. J. & C. B. R. Co., 53 Am. & Eng. R. Cas. 410, 110 Mo. 387, 19 S. W. Rep. 935.*

If a fireman, contrary to the orders of his company, attempts to mount a tender at the end approaching him, without waiting until the cab step comes opposite him, where he might with safety enter at the proper place, he cannot recover for injuries received by reason of a hand-hold upon the tender giving way. *Murray v. Gulf, C. & S. F. R. Co., 38 Am. & Eng. R. Cas. 177, 73 Tex. 2, 11 S. W. Rep. 125.*

The conductor had given express instructions to brakemen "not to get on or off the work side of cars, or get down or climb up while they were moving—that is, around elevators, stock yards, and so on." In this case it was not regarded that the brakeman violated this order, as there was no impediment between him and the telegraph pole when he attempted to get down. Nor was the brakeman chargeable with negligence in not looking and seeing the pole in time to save himself. *Chicago & I. R. Co. v. Russell, 91 Ill. 298.*

451. Rule respecting rate of speed.*—Where the undisputed evidence shows that an engineer violated a rule of the company in the manner of passing switches and turn-outs, and in respect to the speed of his train, and the precaution to be used to prevent collisions, and that an injury occurred in a collision, at least in part, through his failure to observe these rules, there can be no recovery, though the company may have been somewhat negligent. *Savannah, F. & W. R. Co. v. Folks*, 76 Ga. 527.

Notwithstanding an error by a telegraph operator, where the injury to an engineer was directly contributed to by his violation of the rules as to speed, he cannot recover. *Sutherland v. Troy & B. R. Co.*, 125 N. Y. 737, *mem.*, 26 N. E. Rep. 609, 35 N. Y. S. R. 853; *reversing* 54 Hun 639, *mem.*, 28 N. Y. S. R. 201, 8 N. Y. Supp. 83.—QUOTED IN *Burke v. Syracuse, B. & N. Y. R. Co.*, 52 N. Y. S. R. 813, 23 N. Y. Supp. 458.

Plaintiff's intestate, an engineer on a freight train, was killed in a collision with a passenger train. It appeared that at the time he was violating two rules of the company, one limiting the rate of speed at which he should run, and the other, that freight trains must in all cases keep ten minutes out of the way of passenger trains; and if the latter rule had been obeyed he would have stopped at a station until the colliding train had passed. *He'd*, that he was guilty of contributory negligence and there could be no recovery, though the train dispatcher may have also been negligent in not giving proper orders. *Sutherland v. Troy & B. R. Co.*, 35 N. Y. S. R. 853, 125 N. Y. 737, *mem.*, 26 N. E. Rep. 609; *reversing* 54 Hun 639, *mem.*, 28 N. Y. S. R. 201, 8 N. Y. Supp. 83.

A railroad engineer cannot recover from the company for an injury which is the result of his own negligence in running at a prohibited rate of speed, and that of another engineer in disobeying the orders of the train dispatcher. So far as the injury was the result of the negligence of the other engineer they must be regarded as fellow-servants. *Norfolk & W. R. Co. v. Lindamood*, (Va.) 14 S. E. Rep. 694.—FOLLOWING

* Liability of company for injury to engineer; contributory negligence in running train at a prohibited rate of speed, see 41 AM. & ENG. R. CAS. 346, *abstr.*

Norfolk & W. R. Co. v. Donnelly, 88 Va. 853, 14 S. E. Rep. 692.

452. Orders respecting rate of speed.—Where an engineer was injured by his gross negligence in running the train at much greater speed than his instructions required, over a part of the road known by him to be in bad condition, when his duty was to slacken the speed, no recovery could be had of the company, even if it was also guilty of negligence. *Illinois C. R. Co. v. Patterson*, 93 Ill. 290.

An order by the general superintendent to engineers "not to run faster than card time" between certain stations, "and to modify the speed as much as necessary for safety until the track can be got in better condition," does not in effect convey information that, in the opinion of the superintendent, the track is not in good condition, and an engineer cannot be said to be guilty of contributory negligence in running over it when hurt. *Flynn v. Kansas City, St. J. & C. B. R. Co.*, 18 Am. & Eng. R. Cas. 23, 78 Mo. 195.—QUOTING *Patterson v. Pittsburgh & C. R. Co.*, 76 Pa. St. 394; *Hawley v. Northern C. R. Co.*, 82 N. Y. 370.

453. Abandonment of post of duty contrary to rules.—Where a brakeman on a freight train receives an injury by reason of a collision with another train, and it is manifest from the evidence that by his own failure to comply with the duties required of him by the train rules, with which he was familiar, and by abandoning his post and going to sleep, he directly contributed to the injury he received, no damages can be recovered by said brakeman from the company for said injury. *Eastburn v. Norfolk & W. R. Co.*, 34 W. Va. 681, 12 S. E. Rep. 819.

A brakeman on a freight train is not chargeable with contributory negligence because at the time he is injured he is below, while a rule of the company required him to be on top of the cars, where it appears that there was a dense fog at the time and he could not have seen so as to avoid the accident if he had been on top of the cars. *Phillips v. Chicago, M. & St. P. R. Co.*, 23 Am. & Eng. R. Cas. 453, 64 Wis. 475, 25 N. W. Rep. 544.

454. Rule requiring examination and inspection of cars.—Where a company has a rule requiring its employes to frequently examine the brakes, couplings, and running gear of cars in their train and

lv, 88 Va.

rate of
s injured
y the train
structions
known by
his duty
very could
t was also
R. Co. v.

rintendent
than card
"and to
necessary for
t in better
vey infor-
e superin-
condition,
to be guilty
ning over
City, St. J.
R. Cas. 23,
n v. Pitts-
Hawley v.

t of duty
brakeman
ury by rea-
train, and it
that by his
duties re-
with which
ng his post
contributed
mages can
from the
rn v. Nor-
t, 12 S. E.

ain is not
ligence be-
is below,
quired him
it appears
time and
avoid the
f the cars.
R. Co., 23
is. 475, 25

mination
re a com-
ployés to
couplings,
train and

to know that they are in good order, a failure to comply with such rule, if known to the employés, will constitute negligence on their part. *Louisville, E. & St. L. Con. R. Co. v. Utz*, 133 Ind. 265, 32 N. E. Rep. 881. *La Croy v. New York, L. E. & W. R. Co.*, 53 Am. & Eng. R. Cas. 405, 132 N. Y. 570, mem., 30 N. E. Rep. 391, 43 N. Y. S. R. 711; reversing 57 Hun 67, 31 N. Y. S. R. 753, 10 N. Y. Supp. 382.—DISTINGUISHING *Byrnes v. New York, L. E. & W. R. Co.*, 113 N. Y. 251.—EXPLAINED IN *O'Malley v. New York, L. E. & W. R. Co.*, 51 N. Y. S. R. 366.—*Badgerow v. Grand Trunk R. Co.*, 19 Ont. 191.—REVIEWING *Hanson v. Lancashire & Y. R. Co.*, 20 W. R. 297.

The printed rules of the company required each conductor, before moving a train, to inform himself of the condition of the cars composing it. The conductor failed to do so, and was injured by reason of defective brakes. *Held*, that he could not recover. *Alexander v. Louisville & N. R. Co.*, 25 Am. & Eng. R. Cas. 458, 83 Ky. 589.

A brakeman is not chargeable with contributory negligence because he fails to examine the brake-shafts and attachments before using them, as he was required by a rule of the company, where sufficient time or opportunity was not offered him in which to do so. *O'Malley v. New York, L. E. & W. R. Co.*, 51 N. Y. S. R. 366, 67 Hun 130, 22 N. Y. Supp. 48.

455. Rule respecting the adjustment of switches.—Where a company establishes rules concerning the duties of conductors and others in opening and adjusting switches along its road, and notifies the officers, conductors, and other employés thereof, such rules must govern until abrogated or changed. *Kansas City, Ft. S. & G. R. Co. v. Kier*, 38 Am. & Eng. R. Cas. 119, 41 Kan. 661, 671, 21 Pac. Rep. 770.

456. Rule respecting danger flags and signals.—The failure of the foreman in charge of a squad of laborers to put out flags, or danger signals, as required by the known rules of a railroad company, to warn approaching trains of their presence on the track, is such negligence as renders the company liable under the statute (Ala. Code, § 2590, subd. 2, 5), for personal injuries to one of the laborers, who, while returning in the evening to the station, on a hand-car with the others, under the charge of the foreman, seeing an inevitable collision with a train approaching on a curve,

attempted to leap from the car, but was run over and killed. *Richmond & D. R. Co. v. Hammond*, 93 Ala. 181, 9 So. Rep. 577.

Where the plaintiff sought to recover damages against a railroad company for the alleged negligent killing of his decedent, who was ordered by the company's general foreman to perform a service outside of his regular line of duty and subjecting him to additional danger, and which killing was averred to be due to the failure of the company to display proper signals, an instruction to the jury correctly stated the law, which informed them, in substance, that in the absence of any rules on the subject of signals or previous direction to the decedent on that subject, it would have been the duty of the foreman to have displayed the signals, if by so doing the place where the decedent worked would have been rendered safe, and his failure to do so would be the failure of the company, but if the decedent knew that it was his duty to display the signals, and he neglected to do so, and by reason of such failure he was injured and killed, the company would not be liable. *Louisville, E. & St. L. Con. R. Co. v. Hanning*, 53 Am. & Eng. R. Cas. 452, 131 Ind. 528, 31 N. E. Rep. 187.

Where one employed by a railroad company as a carpenter is engaged in the repair of a car in the yard of the company adjoining its repair shops, and is injured by a shifting engine running in upon the track and bumping the car under which he was at work, and it appears that he knew the engine was liable to run in, and had failed to put a red flag on the car he was repairing, the customary signal of warning, his recovery is barred by contributory negligence. *Cypher v. Huntingdon & B. T. M. R. & C. Co.*, 149 Pa. St. 359, 24 Atl. Rep. 225.

An employé was engaged in making repairs under a car on the track. A rule of the company required that when such repairs were being made, flags should be set up as signals not to move the car, which was not done. The injury in question was caused by an engine running against another car with such force as to propel it against the car being repaired, and which was due to the engine being out of repair. *Held*, that plaintiff was not guilty of contributory negligence, as it appeared that the flags would have done no good if they had been set up. *Texas & N. O. R. Co. v.*

Wynne, (Tex. Civ. App.) 22 S. W. Rep. 1064.

IV. INJURIES TO INFANT EMPLOYEES.*

457. Power of infant to enter into contract of employment.—A minor come to years of discretion may contract with a railroad company without his father's consent to enter into its employ. In such case the relation of master and servant is constituted, and in case of the minor's injury or death the right of the father to recover from the company depends upon the duties subsisting by reason of this relation. *Texas & P. R. Co. v. Carlton, 15 Am. & Eng. R. Cas. 350, 60 Tex. 397.*—FOLLOWED IN *Texas & N. O. R. Co. v. Crowder, 61 Tex. 262.*—*Texas & N. O. R. Co. v. Crowder, 61 Tex. 262.*—FOLLOWING *Texas & P. R. Co. v. Carlton, 60 Tex. 397, 3 Tex. Law Rev. 40.*

A railroad was accustomed to receive minors into its service to work in its shops, for wages, under certain general rules and regulations, and a minor on being so received signed in duplicate an agreement to be subject to said rules for four years, the company holding one copy and the minor the other, and said employé, after arriving of age, ratified said agreement by claiming under it. *Held*, that said agreement was a valid contract, binding upon both parties, though signed by the employé alone. *Pennsylvania R. Co. v. Bost, 104 Pa. St. 26.*

458. Notice or knowledge of employé's minority.—If the employer had knowledge of the minority, it was his duty to ascertain whether the infant had a parent, and if so, to obtain the consent of the parent before making the employment; and the father was under no obligation, even where he had consented that his son should follow railroading for a living, to notify the employer that he could not consent to his employment as a brakeman. *Gulf, C. & S. F. R. Co. v. Redeker, 41 Am. & Eng. R. Cas. 296, 75 Tex. 310, 12 S. W. Rep. 855.*

In an action for the death of a minor who was employed as a brakeman by the company, and was killed while coupling cars in its yards, proof of knowledge on the part of the acting yard master and of the yard foreman who put him to work therein, of his

minority and inexperience, is sufficient to charge the company with notice thereof. *Missouri Pac. R. Co. v. King, 2 Tex. Civ. App. 122, 20 S. W. Rep. 1014, 23 S. W. Rep. 917.*

459. Validity and effect of employment without consent of parent.—The contract of a minor, made without the consent of his parent, for employment in a legitimate business, by means of which necessities could be obtained, is not void. *Houston & G. N. R. Co. v. Miller, 51 Tex. 270.*

The contract of a boy 15 years old for his services as a brakeman on the railway, without the consent of his mother (his only living parent), is a wrong done to her, and unless the boy had sufficient discretion to comprehend and guard against the dangers of the employment, when fully explained to him, as they should have been, the contract with him would not place him in a position of an employé and preclude a recovery for injuries suffered from the negligence of the co-employés. *Hamilton v. Galveston, H. & S. A. R. Co., 4 Am. & Eng. R. Cas. 528, 54 Tex. 556.*

460. Duty of company toward infant employes, generally.—Where a company engages the service of an infant in a dangerous occupation, or when the service performed is safe in itself, but the surroundings are dangerous, an active, affirmative duty rests upon the employer to provide safeguards, and to give to the infant such instruction as will enable him to understand and appreciate the danger by which he is surrounded, such safeguards and instructions to be measured by the danger to be apprehended and the capacity of the infant. *Flynn v. Erie Preserving Co., 12 N. Y. S. R. 88.*

In the case of young persons it is the duty of the employer to take notice of their age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they should not be exposed. *Kehler v. Schwenk, 151 Pa. St. 505, 25 Atl. Rep. 130.* *Fisher v. Delaware & H. Canal Co., 153 Pa. St. 379, 26 Atl. Rep. 18.*

Plaintiff was employed as a brakeman when he was 17 years and 10 months old, and was injured after he had been in the service seven months. There was no evidence that the company had any knowledge of his nonage, or that his appearance was

* Infant employés, rights of, and duty of employer toward, see note, 1 AM. ST. REP. 28.

such as to put it upon inquiry as to his age. *Held*, the company was not chargeable with negligence in employing him, and could not be charged with any greater obligation to protect him than if he had been of full age. *Youll v. Sioux City & P. R. Co.*, 21 *Am. & Eng. R. Cas.* 589, 66 *Iowa* 346, 23 *N. W. Rep.* 736. — *APPROVING* *Curran v. Merchants' Mfg. Co.*, 130 *Mass.* 374; *Houston & G. N. R. Co. v. Miller*, 51 *Tex.* 270; *McGinnis v. Canada Southern Bridge Co.*, 49 *Mich.* 466.

461. Duty to warn and instruct infant employes.—The rule that it is a presumption that an employé has sufficient discretion to appreciate the dangers incident to his work, does not apply to young and inexperienced persons. In such case it is the duty of the employer not only to warn the child, but to instruct him as to the dangers of the employment and the means to avoid the injury, though the dangers are such that they might be obvious to a person of experience. *Fisk v. Central Pac. R. Co.*, 72 *Cal.* 38, 13 *Pac. Rep.* 144. *New Albany F. & R. Mill v. Cooper*, 131 *Ind.* 363, 30 *N. E. Rep.* 294. — *QUOTING* *Thall v. Carnie*, 5 *N. Y. Supp.* 244.

In all cases the master is bound to disclose to the servant the latent defects and dangers of which he has knowledge, or of which he ought to have knowledge by giving proper attention to the business, and of which the servant has no knowledge, and which he would not be likely to discover with reasonable care; and this is especially so where a child, without experience and of immature judgment, is employed for hazardous and dangerous work. *Pittsburgh, C. & St. L. R. Co. v. Adams*, 23 *Am. & Eng. R. Cas.* 408, 105 *Ind.* 151, 5 *N. E. Rep.* 187.

Before engaging very young persons by their own contract in a hazardous employment, the employer should know that they have the necessary capacity and experience to do the work in safety, or be prepared to take such measures by way of instruction as will secure the same end. *Gulf, C. & S. F. R. Co. v. Jones*, 76 *Tex.* 350, 13 *S. W. Rep.* 374.

Whether the minor knew his employment was dangerous, and the extent of it, and had discretion enough to understand it before undertaking the employment, are ques-

tions of fact for the jury. *Texas & P. R. Co. v. Brick*, 83 *Tex.* 598, 20 *S. W. Rep.* 511.

For two persons of competent strength to load an open flat car with lumber of uniform length, breadth, and thickness, by piling the same in parallel tiers one after another, is to do work which common laborers can perform without more hazard to their own security than appertains to ordinary manual labor. It requires no special skill nor antecedent training, and therefore a youth seventeen years of age, who engages in it as part of the business for which he was employed by the railway company, is not unduly exposed by reason merely of being left uninstructed in the mode of doing the work and unwarned beforehand of any danger attending it. *Sims v. East & W. R. Co.*, 84 *Ga.* 152, 10 *S. E. Rep.* 543. — *FOLLOWING* *East & W. R. Co. v. Sims*, 80 *Ga.* 807.

After a father had worked some time in handling lumber which was loaded on cars for shipment, and had been assisted by his son, he hired the son to engage in the same business. *Held*, that the company had a right to assume that the father had given the son all necessary instructions to enable him to safely do the work, and was under no obligation to warn him of the danger, where there was no extra hazard connected with it. *East & W. R. Co. v. Sims*, 80 *Ga.* 807, 6 *S. E. Rep.* 595. — *FOLLOWED IN* *Sims v. East & W. R. Co.*, 84 *Ga.* 152.

462. — with reference to place of work.—Where an employer places an employé of tender years at work in a dangerous place, the former is bound to give to the latter due caution and instruction. And if the employé, whilst so employed, be injured, the fact that he could, by the use of his eyesight, have seen that such place was dangerous is not sufficient evidence to hold such employé accountable for contributory negligence in causing such injury, the question of negligence being one for the jury to determine from all the facts. *Hill v. Gust*, 55 *Ind.* 45. *Thall v. Carme*, 24 *N. Y. S. R.* 270, 5 *N. Y. Supp.* 244.

463. — with respect to tools and machinery.—It is the duty of the master to furnish his employé with suitable tools for the performance of the duties to which he may be assigned, and to give such instructions to a youthful and inexperienced employé as would enable him, with the exercise of ordinary care, to perform the duties

* Master must inform servant of extraordinary risks. Rule applies with stronger force to minors and inexperienced employés, see notes, 4 *L. R.* 850; 8 *Id.* 490.

of his employment with safety to himself. *Whitelaw v. Memphis & C. R. Co.*, 16 *Lea* (Tenn.) 391, 1 *S. W. Rep.* 37. *Ross v. Walker*, 139 *Pa. St.* 42, 21 *Atl. Rep.* 157.

In rare instances, such as that presented by *Rummel v. Dilworth*, 131 *Pa. St.* 509, it has been held that the employment of young and inexperienced persons to work amidst dangerous machinery imposes upon the master the duty of warning such employes of the latent dangers involved in their work. But this kind of liability is a very refined one at best, and the essential fact of the existence of the alleged latent danger as the source of a consequent duty as to information, must necessarily be established clearly before any charge of negligence in that respect can be sustained. *Melchert v. Smith Brewing Co.*, 140 *Pa. St.* 448, 21 *Atl. Rep.* 755.

464. Company's liability for injuries to infant employes, generally.*—(1) Action by infant.—The infancy of an employe does not of itself give him a cause of action against his employer for setting him at dangerous work, if it appears that he was of average intelligence, that his duties were explained to him when he entered upon the employment, and that he had in mind its dangers and the purpose to avoid them. *McGinnis v. Canada Southern Bridge Co.*, 8 *Am. & Eng. R. Cas.* 135, 49 *Mich.* 466, 13 *N. W. Rep.* 819.—APPROVED IN *Youll v. Sioux City & P. R. Co.*, 66 *Iowa* 346.

(2) — *by father.*—The general rule is, that a person hires a minor at his peril; and where a railroad company employs a minor to do dangerous work, whereby he is injured, an action by the father is not defeated by the fact that he had been permitting the boy to receive his own wages. *Soldanels v. Missouri Pac. R. Co.*, 23 *Mo. App.* 516.

The duty of a father to educate and maintain his minor son entitles him to the son's services, and creates the relation of master and servant between them; the father is entitled to recover of a railroad company for an injury received by his minor son while rendering the company service as brakeman on a train, under the direction of

the conductor, though the son was not employed by the company for wages. *Louisville & N. R. Co. v. Willis*, 83 *Ky.* 57.—APPROVED IN *Texas & P. R. Co. v. Brick*, 83 *Tex.* 526.

A youth of ordinary intelligence was killed while coupling freight cars. He was fully aware of the danger and not entirely inexperienced, and the death was not caused by any negligence or carelessness on the part of those in charge of the train. *Held*, that the company was not liable. *Viets v. Toledo, A. A. & G. T. R. Co.*, 18 *Am. & Eng. R. Cas.* 11, 55 *Mich.* 120, 20 *N. W. Rep.* 818.

465. Where infant was employed without consent of parent.—If a company employs a minor without the consent of his parents, and knowing that he was too young to have the experience necessary for the work and to appreciate its dangers, it is liable for any injuries which he receives; but if the company believed he was of age at the time he was employed, the mere fact of his minority will not render the company liable. *Goff v. Norfolk & W. R. Co.*, 36 *Fed. Rep.* 209. *Grand Rapids & I. R. Co. v. Showers*, 2 *Am. & Eng. R. Cas.* 9, 71 *Ind.* 451. *Gulf, C. & S. F. R. Co. v. Redeker*, 41 *Am. & Eng. R. Cas.* 296, 75 *Tex.* 310, 12 *S. W. Rep.* 855.

This rule excludes the consideration of contributory negligences, and of the risk assumed in the contract of employment. The parent is no party to such contract, and is in no way bound thereby. *Texas & P. R. Co. v. Brick*, 83 *Tex.* 526, 18 *S. W. Rep.* 947.—APPROVING *Louisville & N. R. Co. v. Willis*, 83 *Ky.* 57. *FOLLOWING* *Gulf, C. & S. F. R. Co. v. Redeker*, 67 *Tex.* 190.

In an action by a parent against a company to recover damages for causing the death of the plaintiff's minor son employed by defendant in a dangerous occupation the plaintiff may recover if the employment was without his consent, even though it was not against his known will. *Pennsylvania Co. v. Long*, 15 *Am. & Eng. R. Cas.* 345, 94 *Ind.* 250.

The bare fact that a minor was employed as a brakeman without the consent of his parent will not of itself authorize a recovery for damages resulting from injuries inflicted by the company in the course of his employment. *Texas & N. O. R. Co. v. Crowder*, 61 *Tex.* 262.

Where the parents of a minor are living

* Duty and liability to minor servants, see note, 18 *AM. & ENG. R. CAS.* 14.

Liability of master for injuries to young and inexperienced servants, see note, 77 *AM. DEC.* 224.

together, the consent of the mother is not sufficient to relieve the employer from liability for the loss; the consent of the father must be obtained. *Gulf, C. & S. F. R. Co. v. Redeker*, 41 Am. & Eng. R. Cas. 296, 75 Tex. 310, 12 S. W. Rep. 855.

Although the father of a minor had given him a general permission to follow railroad-ing for a living, and had consented to his employment by another company as fire-man, the right of the father to recover for loss of services for injuries sustained by his son while employed without his actual consent as a brakeman, is not thereby affected. *Gulf, C. & S. F. R. Co. v. Redeker*, 41 Am. & Eng. R. Cas. 296, 75 Tex. 310, 12 S. W. Rep. 855.

The defendant company employed a boy 16 years of age, without the consent of his parent, to act as a brakeman, when he was injured. *Held*, that the burden was on the company to show that he possessed the necessary capacity and experience for the work, and if he did not, the company was liable for any injury which he received by reason of inexperience. *Gulf, C. & S. F. R. Co. v. Jones*, 76 Tex. 350, 13 S. W. Rep. 374.

466. Where infant was obeying orders of a superior.—Where a minor, of immature judgment and without experience, is employed as a brakeman on a freight train, and being ignorant of the difference between double and single deadwoods, and of the hazard attending the act of coupling cars constructed with the former, of which facts the railroad company knows, or might have known, is, without instruction, ordered by the conductor to couple cars furnished with double deadwoods, instead of single deadwoods ordinarily in use by the company, and in attempting to do so is injured, the company is liable. *Louisville, N. A. & C. R. Co. v. Frawley*, 28 Am. & Eng. R. Cas. 308, 110 Ind. 18, 9 N. E. Rep. 594.—**DISTINGUISHING** *Atlas Engine Works v. Randall*, 100 Ind. 293, 50 Am. Rep. 798; *Michigan C. R. Co. v. Smithson*, 1 Am. & Eng. R. Cas. 101, 45 Mich. 212. **QUOTING** *Grizzle v. Frost*, 3 F. & F. 622.

A railroad company employed a young man between 17 and 18 years of age, who was a little lame, and not strong intellectually, who was set to work as a common laborer, and while only receiving the wages of a common laborer was asked to do work as a brakeman, in attempting to do which he was killed. *Held*, that the company was

liable. *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205.—**DISTINGUISHED IN** *Hogan v. Northern Pac. R. Co.*, 53 Am. & Eng. R. Cas. 384, 53 Fed. Rep. 519; *Capper v. Louisville, E. & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 525, 103 Ind. 305; *Cole v. Chicago & N. W. R. Co.*, 33 Am. & Eng. R. Cas. 274, 71 Wis. 114. **FOLLOWED IN** *Jones v. Lake Shore & M. S. R. Co.*, 8 Am. & Eng. R. Cas. 221, 49 Mich. 573.

In such case the employé could not be said to have assumed the risk of the services, and he was not chargeable with contributory negligence in attempting to do the braking, when the order came from the superintendent of the work. *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205.

In a suit by a minor for personal injuries suffered while obeying the orders of the superintendent in work outside of plaintiff's regular employment, the court properly charged the jury "that the plaintiff would be entitled to recover if the superintendent ordered plaintiff to perform a service which was dangerous, not within the purview of his employment, if in this the superintendent did not use due care, provided plaintiff was injured while attempting, in the exercise of due care, to obey the command." *Galveston Oil Co. v. Thompson*, 76 Tex. 235, 13 S. W. Rep. 60.

467. Liability under particular statutes.—Where a father was employed to load defendant's cars at a specified price per car, and under directions of defendant's superintendent his minor son assisted him in the work, which was being done under the supervision of the superintendent, although the father received the pay for the work, and the son's name was not borne on the pay-roll of the defendant, the son was a servant of the defendant within the meaning of section 2590 of the Ala. Code. *Tennessee C. I. & R. Co. v. Hayes*, 97 Ala. 201, 12 So. Rep. 98.

The mere act of a railroad company employing a person less than twenty-one years of age, with the father's consent, to perform a given kind of labor, and afterward, the minor consenting, placing him in a different position and employment, will not constitute such negligence as will sustain an action for damages under the Texas statute. *Texas & P. R. Co. v. Carlton*, 15 Am. & Eng. R. Cas. 350, 60 Tex. 397.—**REVIEWED IN** *Texas & P. R. Co. v. Brick*, 83 Tex. 526.

468. False representations by infant as to his age.—Where an employé misleads his employer as to his age, the employer is not liable for an injury to which his nonage is the contributory cause. *McDermott v. Iowa Falls & S. C. R. Co.*, (Iowa) 47 N. W. Rep. 1037.

469. Parent's release of claims for damages.—The release by a parent to an employer, upon a minor son being hired, of all claims for damages for injuries the minor may receive in the employment, extends to such damages as the parent would have been entitled to recover, but for the release, up to the majority. Such release does not affect the right to damages by the minor, save to the extent his parent might claim. *International & G. N. R. Co. v. Hinsie*, 82 Tex. 623, 18 S. W. Rep. 681.

470. What risks are assumed by infant.*—The fact that an employé is a minor does not affect the duty or liability of the company, if the employé is of age sufficient, and is competent for the service in which he is employed. The risks are an element of the employment, and the employé cannot claim on account of infancy to be relieved from the consequence of such risks. *De Graff v. New York C. & H. R. R. Co.*, 76 N. Y. 125; *affirming* 3 T. & C. 255.—**APPLYING** *King v. Boston & W. R. Corp.*, 9 Cush. (Mass.) 112.—*Goff v. Norfolk & W. R. Co.*, 36 Fed. Rep. 299. *Evans v. Lake Shore & M. S. R. Co.*, 12 Hun (N. Y.) 289.

This rule should not be enforced against a child of tender years. *Houston & G. N. R. Co. v. Miller*, 51 Tex. 270.

Where an employé, not too young and too ignorant to appreciate the dangers of the situation, is aware that proper precautions have not been taken for his safety, and he continues the service notwithstanding the risk, he will be considered as having assumed the responsibility for his own safety. *Tillotson v. Texas & P. R. Co.*, 53 Am. & Eng. R. Cas. 104, 44 La. Ann. 95, 10 So. Rep. 400.—**QUOTING** *Smith v. Sellers*, 40 La. Ann. 530.

A railroad company is not liable to a boy of 17 who is employed in its machine shops and is injured by being caught in the cogs of a wheel, which might have been avoided by boxing the wheel, where the danger was

obvious, and it appeared that the boxing in such cases was not usual. *Saunborn v. Atchison, T. & S. F. R. Co.*, 35 Kan. 292, 10 Pac. Rep. 860.

471. — and what are not.—The rule that servants generally assume the ordinary risks incident to the work in which they engage does not apply to young and inexperienced persons. Where such persons are employed it is the duty of the employer to warn and instruct them as to the dangers and the means of avoiding them. *Fisk v. Central Pac. R. Co.*, 72 Cal. 38, 13 Pac. Rep. 144.

Where a minor employé is injured while using defective coupling appliances, he can only recover by showing that he did not know of the danger, and that his ignorance was due to his age and inexperience; and if the parent sues for the injury the same rule applies. *Goins v. Chicago, R. I. & P. R. Co.*, 37 Mo. App. 676.

A railroad passenger depot was partially destroyed by fire, and a boy 19 years of age, who had been employed on the track in shoveling and spiking rails, was sent to the second story of the depot, and while he was at work there the floor fell, injuring him. *Held*, that this was not a risk incident to his employment which he had assumed. *Cook v. St. Paul, M. & M. R. Co.*, 34 Minn. 45, 24 N. W. Rep. 311.—**FOLLOWED IN** *Wuotilla v. Duluth Lumber Co.*, 37 Minn. 153, 33 N. W. Rep. 551, 5 Am. St. Rep. 832.

472. Contributory negligence of infant.*—In an action against a railroad company for damages occasioned by an injury to an employé who was a minor, while in the performance of his duties as a servant of the defendant, such employé can be held to no higher degree of intelligence and capacity than his youth, inexperience, and want of judgment, as known to his employer, would warrant. *St. Louis & S. E. R. Co. v. Valirius*, 56 Ind. 511, 18 Am. Ry. Rep. 116.—**CRITICISED IN** *Lake Shore & M. S. R. Co. v. McCormick*, 74 Ind. 440; *Umbach v. Lake Shore & M. S. R. Co.*, 8 Am. & Eng. R. Cas. 98, 83 Ind. 191.

Negligence upon the part of an infant servant contributing to the injury is as effectual by way of defense as though he were an adult. What constitutes negli-

* Minor runs risk of employment, see note, 15 AM. & ENG. R. CAS. 355.

* Contributory negligence of minor employé defeats recovery, see note, 8 L. R. A. 491.

gence, however, upon his part is to be determined by the evidence and the inferences which arise therefrom, measured and graduated by his age and capacity to appreciate his surroundings. *Flynn v. Erie Preserving Co.*, 12 N. Y. S. R. 88.

Youth and inexperience are matters of fact to be taken by the jury, when alleged and proved, with all the other facts in determining whether contributory negligence was shown on the part of an employé injured by the negligence of the master. The duty of the master increases with the youth and inexperience of the employé. *International & G. N. R. Co. v. Hinsie*, 82 Tex. 623, 18 S. W. Rep. 681.

473. — as affecting parent's right to recover.—When the father sues to recover damages for the death of his minor son, killed while in the employment of the defendant company as a brakeman, without his consent, the contributory negligence of the minor is no defense to the action, though it might be available as a defense to an action by the minor himself, if death had not ensued from the injuries; but if the father consented, expressly or by implication, to the employment of the minor in the service, the contributory negligence of the minor is imputed to the father, and defeats his right of action. *Williams v. South & N. Ala. R. Co.*, 91 Ala. 635, 9 So. Rep. 77.

Whether, after notice from a parent to a railroad company not to employ her minor son, it does so, and the minor is injured while in such employment, the company can plead his negligence in defense to an action for the injury brought by the parent, becomes immaterial if the parent allege that the minor was injured through no fault of his own, and the cause be tried upon this issue mainly. *Hunnicutt v. Georgia Pac. R. Co.*, 85 Ga. 195, 11 S. E. Rep. 580.

In an action by the parent for loss of services of a minor son, by reason of injuries occasioned by the defendant's negligence in supplying a defective coupling appliance (the link and pin being bent, misshapen, and fast in the draw-head), the son's knowledge of the defective appliance will not defeat a recovery, if by reason of his youth and inexperience he did not know of the increased danger of making the coupling. *Goins v. Chicago, R. I. & P. R. Co.*, 47 Mo. App. 173; see 37 Mo. App. 676.

474. Procedure—Pleading.—When a father sues in tort for enticing away or harboring his minor child, he must, in order to recover, aver and prove that the defendant knew of the minority. The same rule applies when the father sues for damages resulting from the employment of his son in a dangerous business and without his consent. *Gulf, C. & S. F. R. Co. v. Reeder*, 67 Tex. 190, 2 S. W. Rep. 527.

A declaration would be good on demurrer which averred that the plaintiff, a youth of about nineteen years of age, had never in fact been employed in the particular work in the doing of which the injury sued for was incurred, and was ignorant of the proper tools to perform the work with safety, was not instructed by the defendant as to the danger of the work, nor furnished with suitable tools to do the work. *Whitclaw v. Memphis & C. R. Co.*, 16 Lea (Tenn.) 391, 1 S. W. Rep. 37.

In an action by a father to recover damages for the loss of services of his minor son, alleged to have been killed by the carelessness of defendant company, in that he was set at work at a hazardous engagement without being given sufficient warning and instructions to enable him to avoid the injury, the complaint did not aver that the deceased had no means of informing himself of the dangerous condition of the boiler which he was ordered to work upon before the accident occurred, but did aver the youth, inexperience, and ignorance of the decedent, and that the injury occurred without his fault. *Held*, that the complaint was sufficient after verdict, and that an averment that the plaintiff was free from fault negatived contributory negligence. *Louisville, E. & St. L. R. Co. v. Berry*, 2 Ind. App. 427, 28 N. E. Rep. 714.

In an action by an employé to recover damages for injuries suffered, one paragraph of the complaint alleged that the defendant, being a contractor engaged in the construction of a railroad, employed the plaintiff, a minor of the age of but fifteen years, to assist in certain non-hazardous work, but that the defendant, without giving to the plaintiff sufficient caution, warning, or instruction, placed the latter in control of a wild, fractious, and ungovernable horse, in a narrow, unsafe, and dangerous place between two trains of cars moved by steam power in opposite directions, upon a high embankment; and that plaintiff, while exercising due care

and engaged in such hazardous employment, was thrown beneath and injured by one of said trains of cars. *Held*, on demurrer for want of sufficient facts, that the paragraph was sufficient. *Hill v. Gust*, 55 Ind. 45.—FOLLOWING *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572.

475. — evidence.—A minor suing for personal injuries suffered while in the employ of a railroad company, was properly permitted to testify "that no one ever explained to him the danger of the employment." This was a material issue, for had the plaintiff been properly instructed as to such danger and its extent he would have assumed the risk of the employment and could not have recovered. *Texas & P. R. Co. v. Brick*, 83 Tex. 598, 20 S. W. Rep. 511.

In an action by a father to recover damages for the loss of the services of his minor son, alleged to have been killed through the carelessness of the defendant company, a declaration of the deceased, made substantially at the place of the injury, and within from two to five minutes after the accident, to the effect that nobody was to blame but himself, etc., is not admissible as an admission. The services of the deceased during his minority belonged to the plaintiff as his lawful right, and it was not within the power of the deceased to have legally defeated this right. His admission could not, therefore, bind the plaintiff. Such declaration is admissible, however, as a part of the *res gesta*. *Louisville, E. & St. L. R. Co. v. Berry*, 2 Ind. App. 427, 28 N. E. Rep. 714.

Plaintiff sued the railroad company for damages for personal injuries received while in the employ of the receiver, etc., alleging that he was a minor, etc. The father, as a witness, having testified that plaintiff at the time of the injury was about 19 years of age, over objection was allowed to testify further that "he looked like he was about 16 years of age." As the testimony might have been relevant to impose upon the servants of the railway the duty of instructing the plaintiff in the details of his business and its dangers, the admission of the evidence is not ground for reversal. *Texas & P. R. Co. v. Brick*, 83 Tex. 598, 20 S. W. Rep. 511.

476. — damages.—Where a child is employed by a person or corporation against the will of his father, and while in such employment is killed, the father is entitled to recover the value of the child's services up to the time of his death. *Fl. Wayne, C.*

& L. R. Co. v. Beyerle, 28 Am. & Eng. R. Cas. 306, 110 Ind. 100, 11 N. E. Rep. 6.

If injury results to a minor from the negligence of his employer, the parent is entitled to a judgment against the employer for damages for the loss of the minor's services caused by such negligence, and incidental expenses resulting from the injury. *Gulf, C. & S. F. R. Co. v. Redeker*, 67 Tex. 190, 2 S. W. Rep. 527.

If the employment was for a service in its character dangerous, and the minor was employed without the father's consent, his minority being known to the employer, and injury results to the minor in the course of his employment, the father may recover, as damages, the value of the son's services to him which were lost by reason of the injury. *Gulf, C. & S. F. R. Co. v. Redeker*, 67 Tex. 190, 2 S. W. Rep. 527.—APPROVING *Louisville & N. R. Co. v. Willis*, 83 Ky. 57, 21 Cent. L. J. 57.—FOLLOWED IN *Texas & P. R. Co. v. Brick*, 83 Tex. 526.

The measure of damages to a parent for loss of his son's services caused by his employment by a railroad company is the aggregate of the earnings of the son until his majority. It is not proper that expenses for boarding, etc., should be deducted. *Texas & P. R. Co. v. Brick*, 83 Tex. 526, 18 S. W. Rep. 947.—REVIEWING *Texas & P. R. Co. v. Carlton*, 60 Tex. 397.

An employé aged 19 years was injured while in the employ as brakeman, under circumstances entitling him to compensation. One leg had to be amputated below the knee. The strength and efficiency of his right hand were impaired. *Held*, that a verdict for \$900 was not excessive. *Texas & P. R. Co. v. Brick*, 83 Tex. 598, 20 S. W. Rep. 511.

477. — questions of fact for jury.—Though a minor may be of sufficient age and discretion to justify his employment as a brakeman, whether he could be thus properly employed or not is a question for the jury. *Hamilton v. Galveston, H. & S. A. R. Co.*, 4 Am. & Eng. R. Cas. 528, 54 Tex. 556.

If a servant be under the age of 21 years and he has not been instructed by the master as to the dangers of his employment, it is a question for the jury whether he has acquired sufficient knowledge of the dangers to exempt the master from liability in case of injury. *Texas & P. R. Co. v. Brick*, 83 Tex. 598, 20 S. W. Rep. 511.

Eng. R. Rep. 6.
from the neg-
parent is en-
the employer
minor's ser-
vice, and inci-
in the injury.
Kehler, 67 Tex.

service in its
minor was em-
scent, his mi-
loyer, and in-
course of his
recover, as
's services to
of the injury.
Kehler, 67 Tex.
MOVING Louis-
3 Ky. 57, 21
Texas & P.

a parent for
by his em-
ny is the ag-
son until his
at expenses
be deducted.
Tex. 526, 18
Texas & P.

was injured
an, under cir-
compensation.
d below the
ency of his
d, that a ver-
Tex. 526, 18
8, 20 S. W.

et for jury.
ufficient age
ployment as
e thus prop-
tion for the
H. & S. A.
328, 54 Tex.

of 21 years
ted by the
employment,
ether he has
the dangers
ility in case
v. Brick. 83

Where an inexperienced minor was employed to couple cars, and was set to couple two passenger cars, one with an ordinary draw-bar and one with a Miller draw-bar—no special instructions being given him—and while so doing the said minor was killed—held, that the company was not guilty of culpable negligence *per se*, but that the question of negligence was for the jury. *Pennsylvania Co. v. Long, 15 Am. & Eng. R. Cas. 345, 94 Ind. 250.*

The plaintiff being between 14 and 15 years old, and the evidence as to whether or not the employment, with the appliances used, was manifestly dangerous and unsuitable for boys of the plaintiff's age being contradictory, it was not error to leave the question of the defendant's negligence to the jury, under proper instructions. *Kehler v. Schwenk, 144 Pa. St. 348, 22 Atl. Rep. 910.*

V. INJURIES TO EMPLOYEES OF ONE COMPANY BY NEGLIGENCE OF ANOTHER.

478. Liability for injury to employee of another company, generally.*—In the absence of any express contract as to risk, a railroad company, sued by a servant not its own for injuries received on the train, has no concern with risks which the servant took as between himself and his master. As between the plaintiff and the railroad company, the plaintiff took all risks whatsoever not occasioned by negligence imputable to the defendant, but none that arose from such negligence. *Coggin v. Central R. Co., 62 Ga. 685.*—DISTINGUISHED IN Georgia *R. & B. Co. v. Friddell, 79 Ga. 489.*—*St. Louis & S. F. R. Co. v. Trawick, 84 Tex. 65, 19 S. W. Rep. 370.* *Brewer v. New York, L. E. & W. R. Co., 47 Am. & Eng. R. Cas. 485, 124 N. Y. 59, 26 N. E. Rep. 324, 35 N. Y. S. R. 60; affirming 45 Hun 595, mem.*

If one engages the servant of another in an obviously dangerous business he renders himself responsible for any injury the servant may sustain while so engaged, and which can rationally be attributed to the undertaking; and this is so, even if the injury results immediately from the neglect or unskillfulness of the servant; nor is it necessary to authorize the recovery that the servant should have been employed by

* Injury to servants where one company is running trains over track of another, see notes, 10 AM. & ENG. R. CAS. 814; 17 *Id.* 654.

the defendant for wages when the injury was received. *Louisville & N. R. Co. v. Willis, 83 Ky. 57.*

Where two railroad companies jointly maintain a switch for the purpose of transferring cars from one road to the other, a switch tender, though paid entirely by one company, renders service of a beneficial character to the other, and it owes him the same duty as to his personal safety that it owes one of its own employees engaged in the same kind of service. *O'Sullivan v. Chicago, M. & St. P. R. Co., 23 Ill. App. 646.*

479. Injury caused by defective track.—Where a railroad company allows another company to run its trains over a section of its road, the former is liable to a brakeman of the latter who receives a personal injury by reason of a station house being negligently constructed too near the track. *Nugent v. Boston, C. & M. R. Co., 38 Am. & Eng. R. Cas. 52, 80 Me. 62, 12 Atl. Rep. 797.*—NOT FOLLOWING *Murch v. Concord R. Co., 29 N. H. 35; Pierce v. Concord R. Co., 51 N. H. 593.*

The plaintiff being employed upon the train of another company which was making trips over the defendant's road, was entitled to presume that the duty of keeping the track in safe condition would be performed; and having been injured by reason of the failure to perform it, he is entitled to recover of defendant damages for his injury. *Trinity & S. R. Co. v. Lane, 79 Tex. 643, 15 S. W. Rep. 477.*—QUOTING *East Line & R. R. Co. v. Culberson, 72 Tex. 375.*

Where a train loaded with wood was transported over one railroad to a city, and at the instance of the shipper, permission was obtained from the superintendent of the road for the train to proceed over the track of two other roads to a third, and over it to the point of destination, the train being manned by the employees of the first road, and a person, by direction of the superintendent of that road, accompanied the train for the purpose of seeing that it was unloaded promptly and returned to the road to which it belonged, and where an arrangement was made with the superintendent of the third road for the train to proceed over its track, and he directed an employee to go upon the engine and act as pilot and inform the engineer of the curves and "tight places" in the track, the only duty or obligation owed by the third railroad

company to the employés of the first company upon such train was to have a reasonably safe track over which the cars were to be transported. *Killian v. Augusta & K. R. Co.*, 79 Ga. 234, 4 S. E. Rep. 165.—DISTINGUISHING *Macon & A. R. Co. v. Mayes*, 49 Ga. 355.

480. — defective brake-bar.—A canal company contracted with a railroad company to haul coal at a stipulated price per ton, and for a certain portion of the net proceeds of the coal when sold. The canal company delivered to the railroad company certain loaded cars, which the former operated and controlled, and while passing over the railroad, plaintiff, a brakeman, was injured through defects in a brake-bar. *Held*, that the contract did not make the railroad company and the canal company partners so as to render the latter liable for the injury to the brakeman. *Wright v. Delaware & H. Canal Co.*, 40 Hun (N. Y.) 343.

481. — defective depot.—A railroad company, over a section of whose track another company, by virtue of a contract, runs its trains, is liable in tort to the latter's brakeman, who, without fault of himself or of his co-employés, receives a personal injury while in the performance of his duty on his employer's train, solely by reason of the negligent construction of the former's depot. *Nugent v. Boston, C. & M. R. Co.*, 38 Am. & Eng. R. Cas. 52, 80 Me. 62, 12 Atl. Rep. 797.—NOT FOLLOWING *Murch v. Concord R. Co.*, 29 N. H. 35; *Pierce v. Concord R. Co.*, 51 N. H. 593.

482. Employe injured in a collision.—Where several connecting lines of road maintain jointly certain yard tracks, switches, and crossings, and an engineer in charge of a train is injured by reason of a collision with another train, and by reason of an insecure or insufficient crossing, the companies jointly owning the crossing are liable. *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399, 13 West. Rep. 425, 16 N. E. Rep. 121.

In such case it appeared that the injury occurred where a switch and a main track crossed, and that the crossing was badly out of repair. *Held*, that each company was interested in maintaining the crossing, and the different companies owning it were liable for the injury. *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399, 13 West. Rep. 425, 16 N. E. Rep. 121.

In an action by the fireman of one railway

company against another company, to recover for a personal injury caused by a collision, if there is no evidence of want of care or skill on the part of the defendant, and nothing wrong is shown on its part, but it appears that the injury was the result of the reckless conduct of the engineer of the other company, the bad condition of its engine, and of running at a rate of speed prohibited by ordinance, a judgment against the defendant cannot be sustained. *Chicago, R. I. & P. R. Co. v. McKiltrick*, 78 Ill. 619.

483. Employe shot and wounded.—Where a railroad company takes forcible possession of the property of another road through a body of armed employés, the company will be liable to an employe of the latter company who is injured, while in the discharge of his duties on a car, by being fired upon and wounded. The company cannot set up the defense that the act was *ultra vires*, nor that it was the act of individual employés. *Denver & R. G. R. Co. v. Harris*, 15 Am. & Eng. R. Cas. 142, 3 N. Mex. 109, 2 Pac. Rep. 369; *affirmed in* 122 U. S. 597, 7 Sup. Ct. Rep. 1286.—QUOTING *State v. Morris & E. R. Co.*, 23 N. J. L. 368.

484. Employe of connecting line.—Where, as between connecting lines, the corporations controlling them are mutually bound to transport loaded freight cars over their respective roads, such duty is necessarily subject to proper rules and regulations, and involves mutual obligations, among which is that of due diligence to provide safe cars for delivery to the servants of the company operating the connecting line to which they are transferred, and who would be exposed to danger from their defective or unsafe condition. *Moon v. Northern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 195, 46 Minn. 106, 48 N. W. Rep. 679.

The corporation receiving such cars is also subject to liabilities and duties to its servants, growing out of the acceptance, possession, and subsequent use thereof. But the negligence of the latter does not relieve the former from liability for injuries resulting from its own negligence. *Moon v. Northern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 195, 46 Minn. 106, 48 N. W. Rep. 679.

Where a brake upon a freight car transferred by the corporation owning it was out of repair and unsafe for use, and the same had not been inspected with due care before

company, to re-
sued by a col-
e of want of
ne defendant,
n its part, but
the result of
ngineer of the
tion of its en-
of speed prom-
ment against
tained. *Chi-*
McKiltrick, 78

l wounded.
akes forcible
another road
employés, the
mployé of the
, while in the
car, by being
The company
the act was
e act of indi-
R. G. R. Co.
R. Cas. 142, 3
; affirmed in
286.—*QUOT-*
Co., 23 N. J.

ecting line.
ng lines, the
are mutually
ght cars over
uty is neces-
and regula-
obligations,
diligence to
o the servants
e connecting
red, and who
om their de-
toon v. North-
R. Cas. 195,
79.

such cars is
duties to its
ceptance, pos-
thereof. But
es not relieve
injuries result-
Moon v.
& Eng. R.
W. Rep. 679.
ht car trans-
ng it was out
and the same
e care before

delivery to the servants of a connecting company, and in consequence of such defect a brakeman was injured without fault on his part—*held*, that an action would lie for the injury against the first-named company. *Moon v. Northern Pac. R. Co.*, 48 *Am. & Eng. R. Cas.* 195, 46 *Minn.* 106, 48 *N. W. Rep.* 679.—*DISTINGUISHING* *Bartlett v. Boston Gas Light Co.*, 117 *Mass.* 533; *Burt v. Boston*, 122 *Mass.* 223; *Child v. Hearn*, L. R. 9 *Ex.* 176; *Sawyer v. Minneapolis & St. L. R. Co.*, 38 *Minn.* 103.

Plaintiff was injured in consequence of a defective step-ladder on one of defendant's freight cars. He was not at the time in the service of the defendant, but of another company, which was then using the car in its own business. The car had been sent over the road of the latter company, which connects with that of the defendant, consigned to a point in another state; but on its return, it was transferred beyond the point of junction at which it should have been returned to defendant, and was loaded with freight consigned to a distant point on such connecting road. *Held*, that the defendant owed no duty to the plaintiff in respect to the condition of the car, growing out of contract or otherwise, and that this action cannot be maintained. *Sawyer v. Minneapolis & St. L. R. Co.*, 33 *Am. & Eng. R. Cas.* 394, 38 *Minn.* 103, 35 *N. W. Rep.* 671, 8 *Am. St. Rep.* 648.—*DISTINGUISHING* *Smith v. New York & H. R. Co.*, 19 *N. Y.* 127, 75 *Am. Dec.* 305.—*DISTINGUISHING* *Moon v. Northern Pac. R. Co.*, 46 *Minn.* 106.

The defendant and a steamboat company were operating under an arrangement by which defendant was to carry passengers and freight between St. Paul and Belle Plaine, and the steamboat company was to carry them between Belle Plaine and Mankato, the two connecting at Belle Plaine as to time of arrival and departure at that point of trains and boats. Each sold tickets over the route of the other. The prices for such routes were distinct, each receiving a certain portion of the moneys received for fares and charges upon through passengers and freights. *Held*, that the servants of one of the companies were not fellow-servants with those of the other company, so as to prevent the servants of one recovering from the other for injuries caused by the negligence of its servants. *Carroll v. Minnesota Valley R. Co.*, 13 *Minn.* 30 (*Gil.* 18).

485. Liability of lessor company.*

—Where two companies use a portion of the same track, one as owner and the other as lessee, under proper rules and regulations as to the joint use, so as to secure care and safety, the lessor company in the employment of servants does not impliedly contract with them that the servants of the lessee company will observe strictly the rules adopted to secure care and safety, and it will not be liable to one of its servants for an injury caused by the negligence of the servants of the lessee company. *Clark v. Chicago, B. & Q. R. Co.*, 92 *Ill.* 43.—*DISTINGUISHED* in *Phillips v. Chicago, M. & St. P. R. Co.*, 64 *Wis.* 475. *QUOTED* IN *Bauer v. St. Louis, I. M. & S. R. Co.*, 46 *Ark.* 388.

The lessor of a railroad is not liable for an injury to an employé of the lessee company for negligently erecting a platform too near the track, where it is shown that the proximate cause of the injury was the moving of cars which were in the control of the lessee. *Evans v. Sabine & E. T. R. Co.*, (*Tex.*) 18 *S. W. Rep.* 493.

486. Employee of car company.—

A car company owned certain cars which were run by a railroad company, the car company agreeing to keep them clean and in order. An employé of the latter was injured while crossing a track for the purpose of cleaning a car, by the negligence of an employé of the railroad company in suddenly moving the cars. *Held*, that such person could not be regarded as an employé of the railroad company, and might recover against the latter for the injury. *Harold v. New York C. & H. R. R. Co.*, 13 *Daly (N. Y.)* 89.

In such case it appeared that plaintiff was acting under orders from the car company, and could not reach the car to be cleaned without crossing the track. *Held*, that she could not be regarded as a mere licensee on the track, but being engaged in a business that concerned the business of the railroad company, she must be regarded as being on the track by its express permission, and that it owed her the duty of moving its cars with common prudence. *Harold v. New York C. & H. R. R. Co.*, 13 *Daly (N. Y.)* 89. See also *Miller v. Cornwall R. Co.*, 154 *Pa. St.* 473, 26 *Atl. Rep.* 779.

* Liability of lessor for negligence of lessee causing injury to servants, see note, 38 *AM. & ENG. R. CAS.* 62.

487. Employee of coal company.—

A railroad company is not liable to one in the employment of coal dealers, who had been sent to unload a car, and who was injured by another car being run down against the one to be unloaded while he was standing on it, where it does not appear that the car was run down with unnecessary violence. *Murphy v. New York, L. E. & W. R. Co.*, 42 N. Y. S. R. 580, 62 Hun 587, 17 N. Y. Supp. 302. — DISTINGUISHING *Barton v. New York C. & H. R. R. Co.*, 1 T. & C. 297; *Newson v. New York C. R. Co.*, 29 N. Y. 383; *Stinson v. New York C. R. Co.*, 32 N. Y. 333.

A coal mining company maintained a track between its mine and a regular railroad track, but the cars of the railroad company were used in shipping coal, and the railroad company took them to and from the mine with its own employés. *Held*, that only the relation of shipper and carrier existed between the two companies, and that the coal company was not liable to an employé of the railroad company who was injured while operating a train on the branch track. *Coal Run Coal Co. v. Strawn*, 15 Ill. App. 347. See also *Cummings v. Pittsburgh, C. & St. L. R. Co.*, 4 Am. & Eng. R. Cas. 524, 92 Pa. St. 82.

488. Employee of independent contractor.*—

A company owes the duty of giving warning of the approach of its trains to the employés of a contractor working on the track. *Erickson v. St. Paul & D. R. Co.*, 41 Minn. 500, 5 L. R. A. 786, 43 N.W. Rep. 332.

An agreement between a railroad company and one who contracts to repair its track, to the effect that the company should not be liable for injuries to the contractor's workmen, will not relieve the company from liability for an injury negligently inflicted upon a workman who has not assented to such agreement. *Ominger v. New York C. & H. R. R. Co.*, 4 Hun (N. Y.) 159, 6 T. & C. 498.

A railroad company that negligently injures a workman employed by one who has a contract with a company to repair its track, cannot avoid liability on the ground that the workman was but a mere licensee on the company's right of way. *Ominger v. New York C. & H. R. R. Co.*, 4 Hun (N. Y.) 159, 6 T. & C. 498.

* Liability to servants of a contractor, see note, 39 AM. & ENG. R. CAS. 325.

Where a company enters into a written contract for the entire construction of its road, and immediately thereafter such contract is by the contractor assigned to the president of the company, who proceeds to construct the road, and the fact of this contract is not made public, and the employés have no notice of its existence, but are simply employed to do work, and in the course of such work one is injured through negligence for which the employer is responsible, such employé can recover from the corporation for such injuries. *Solomon R. Co. v. Jones*, 15 Am. & Eng. R. Cas. 201, 30 Kan. 601, 2 Pac. Rep. 657.

Defendant company let a contract for the construction of a wall under or along its track, and plaintiff, who was a workman engaged by the contractor, was injured while assisting in operating a derrick for the handling of stone. The work required the men at times to be on one of the company's tracks, and just after a train had passed, and when the men were busily at work, and when their utmost attention was directed to their work, the engine was detached and backed without signal, and injured plaintiff. It was a custom of the company to ring a bell or sound a whistle whenever an engine was approaching workmen on the track, of which custom plaintiff knew and on which he relied. *Held*, that the facts justified a finding that plaintiff was rightfully on the track, and was not in fault in failing to observe the approaching engine. *Goodfellow v. Boston, H. & E. R. Co.*, 106 Mass. 461, 8 Am. Ry. Rep. 45. — DISTINGUISHING *Burns v. Boston & L. R. Co.*, 101 Mass. 51. — APPROVED IN *Ominger v. New York C. & H. R. R. Co.*, 4 Hun (N. Y.) 159. DISTINGUISHED IN *Holland v. Chicago, M. & St. P. R. Co.*, 5 McCrary (U. S.) 549, 18 Fed. Rep. 243. QUOTED IN *Crowley v. Burlington, C. R. & N. R. Co.*, 18 Am. & Eng. R. Cas. 56, 65 Iowa 658.

Plaintiff was employed, with others, under a contractor, to build a station at the terminus of defendant's elevated railroad, and the work had to be done at intervals between running trains. Trains were run upon the track and the engine detached, when another engine would come up and pull the cars out, after which the engine bringing them in would back down the track to where it went on a siding and was turned. Just after the cars had been pulled out, plaintiff's boss directed him to go un-

der a platform for material, and just as he was stooping to do so, he was struck by the backing engine, which moved without warning. The engineer could have seen plaintiff by looking out of the cab. *Held*, that a recovery was proper. *Germann v. Suburban Rapid Transit Co.*, 37 N. Y. S. R. 360, 13 N. Y. Supp. 897; *affirmed in* 128 N. Y. 681, *mem.*, 29 N. E. Rep. 149, 40 N. Y. S. R. 980.

Plaintiff, in the employ of a contractor with the company owning the road, fastened upon the railroad a machine for sawing wood, and while there he was injured by a train of another company having a right by contract to use the track. *Held*, that though he was upon the track by authority of the superintendent of the company owning the road, he could not recover against the other company for the injury sustained, even though the conductor of the train previously knew of the machine being on the track, and was guilty of negligence on the occasion. *Little Schuylkill N. R. & C. Co. v. Norton*, 24 Pa. St. 465.—FOLLOWED IN *Pittsburgh, Ft. W. & C. R. Co. v. Collins*, 87 Pa. St. 405. QUOTED IN *St. Louis, I. M. & S. R. Co. v. Monday*, 31 Am. & Eng. R. Cas. 424, 49 Ark. 257, 4 S. W. Rep. 782.

A railway company is not liable in damages for the death of a workman employed by a contractor, who was killed while on a construction train furnished by the company under contract, when it was not in the scope of his employment, nor had he any authority to be in such train. *Sheerman v. Toronto, G. & B. R. Co.*, 34 U. C. Q. B. 451.—REVIEWING *Great Northern R. Co. v. Harrison*, 10 Ex. 376; *Austin v. Great Western R. Co.*, L. R. 2 Q. B. 442; *Collett v. London & N. W. R. Co.*, 16 Q. B. 984.

489. Employee of iron company.—An employé of an iron company was engaged in carrying to its mill a lot of bar iron, unloaded the day before from a railroad car, and piled up between the two tracks of a private siding on the iron company's grounds. The siding was connected with two railroads, by each one of which freight was shipped to and from the mill. In an action by the employé against one of the railroad companies for personal injuries caused by negligence in shifting its cars, and received by the plaintiff while so carrying the iron, the question whether the siding was the "premises" of the defendant, within the meaning of section 1, Pa. Act of 5 D. R. D.—17.

April 4, 1868, P. L. p. 58, was immaterial; for as the plaintiff was not employed in any business connected with the railroad, and his work had no connection with the prior unloading of the iron, he was not within the provisions of said act. *Christman v. Philadelphia & R. R. Co.*, 141 Pa. St. 604, 21 Atl. Rep. 738.—DISTINGUISHING *Cummings v. Pittsburgh, C. & St. L. R. Co.*, 92 Pa. St. 82; *Baltimore & O. R. Co. v. Colvin*, 118 Pa. St. 230; *Stone v. Pennsylvania R. Co.*, 132 Pa. St. 206. FOLLOWING *Richter v. Pennsylvania Co.*, 104 Pa. St. 511.

The court could not declare the plaintiff guilty of contributory negligence as a matter of law; how long he might prudently continue at work after seeing the shifting engine pass, and what degree of observation was incumbent upon him, depended upon too many elements to enable the court to apply a fixed standard of duty. *Christman v. Philadelphia & R. R. Co.*, 141 Pa. St. 604, 21 Atl. Rep. 738.

490. Employee of mill company.—One employed by a mill company to assist in moving and unloading grain from cars, who is injured while so doing, is not the servant of the railroad company within the rule that the servant assumes the ordinary risks of his employment. *Pennsylvania Co. v. Backes*, 133 Ill. 255, 24 N. E. Rep. 563; *affirming* 35 Ill. App. 375.—FOLLOWED IN *Chicago & E. I. R. Co. v. Roberts*, 44 Ill. App. 179.

The railway company owes such servants, while moving the cars on such track and unloading the same, the duty to exercise ordinary care to prevent injury to them. *Pennsylvania Co. v. Backes*, 133 Ill. 255, 24 N. E. Rep. 563.

491. Employee of telegraph company.—An engineer running a train loaded with telegraph poles remains the employé of the railroad company, though he is temporarily subject to the orders of the telegraph company, which will render the railroad company liable to an employé of the telegraph company who is rightfully on the train for the purpose of handling the poles, who is injured by the negligence of the engineer. *Coggin v. Central R. Co.*, 62 Ga. 685.—REVIEWED IN *Chesapeake, O. & S. R. Co. v. Gries*, 30 Am. & Eng. R. Cas. 149, 85 Ky. 619.

492. Volunteer working for another company.—Where an employé of a railroad company, rightfully engaged in

the repair of a freight car belonging to his employer, calls upon his son, a minor under eleven years of age, to render him necessary temporary assistance in the work, and the son, while so assisting, without any negligence on his part or on the part of his father, is injured through the negligence of the agents and servants of another railroad company, in backing a train of cars upon a side track where the car is being repaired, the latter company is liable in an action by the son for damages for the injury by him so received. *Pennsylvania Co. v. Gallagher*, 15 *Am. & Eng. R. Cas.* 341, 40 *Ohio St.* 637, 48 *Am. Rep.* 689.

403. Liability to employe injured by negligence of another company.

—A railway company permitting, by contract or otherwise, another railway company to use a section of its main line, not at a terminal point but to reach such point, is liable to one of its own employes for a personal injury resulting to him from the negligence of the latter company in running its train over and upon the section used in common by both companies, it not appearing that the negligent company had any legislative authority to adopt and use as its own any part of the main line of the other company. In such case both companies should be considered as using the franchise of the one owning the line. *Central R. & B. Co. v. Passmore*, 90 *Ga.* 203, 15 *S. E. Rep.* 760. — **APPLYING** *Macon & A. R. Co. v. Mayes*, 49 *Ga.* 355.

A laborer at a furnace, who, while unloading a railroad car in the course of his employment, was injured in consequence of a defective brake thereon, the car being owned by a railroad company and having been delivered by it at the furnace in the defective condition, cannot recover damages for such injury from his employer. *Anderson v. Oliver*, 138 *Pa. St.* 156, 20 *Atl. Rep.* 981.

404. — defective track of another company.* — The occasional use by each of two railroad companies of the track of the other in delivering and taking cars in the course of business will not to that extent make the track of each company part of the ways, works, or machinery of the other, within the meaning of Mass. St. of 1887, ch. 270, and it would be unrea-

sonable to hold that each company was bound to leave and take cars at the precise point of connection, at the peril, if it did not do so, of becoming liable for injuries resulting from any defect in the track of the other. *Trask v. Old Colony R. Co.*, 156 *Mass.* 298, 31 *N. E. Rep.* 6.

405. — defective brake-wheel on car of another company. — If a freight car, which is hauled empty by a railroad company to the terminus of its road for transfer to another road where it belongs, while being shifted there to another train upon a connecting line, causes an injury to a brakeman employed by such company, by reason of a defect in the brake-wheel, such car is not a part of the "ways, works, or machinery connected with or used in the business of the employer," within Mass. St. of 1887, ch. 270, § 1, cl. 1, such as will give a right of action against the company. *Coff v. New York, N. H. & H. R. Co.*, 48 *Am. & Eng. R. Cas.* 370, 155 *Mass.* 21, 28 *N. E. Rep.* 1128.

406. Respective liability of companies jointly using same tracks.

—Where companies owning connecting lines have a traffic arrangement by which cars are pushed from the track of one to the other, it is gross negligence to push cars onto the main track, without notice or danger signals, which will render both companies liable to an employe who is injured thereby, though the cars were pushed onto the track at night at an unauthorized time. *Lockhart v. Little Rock & M. R. Co.*, 40 *Fed. Rep.* 631.

The fact that two companies used a portion of a track, where their lines connect, in common, will not make the company owning the track liable to one of its employes for an injury received through the negligence of employes of the other company. The company whose employes caused the injury alone is liable. *Georgia R. & B. Co. v. Friddell*, 79 *Ga.* 489, 7 *S. E. Rep.* 214. — **DISTINGUISHING** *Macon & A. R. Co. v. Mayes*, 49 *Ga.* 355; *Central R. & B. Co. v. Perry*, 58 *Ga.* 461; *Perry v. Central R. Co.*, 66 *Ga.* 746; *Coggin v. Central R. Co.*, 62 *Ga.* 685.

Where two companies, each under its own franchise, use the track of one of them in common at a terminal point, the one owning the track is responsible for the consequences of its negligence in failing to render harmless to the employes of the other

* Liability of company to employe for injury received while in discharge of duty, caused by defect in track owned by another company, see note, 22 *L. R. A.* 283.

company was the precise rail, if it did for injuries the track of R. Co., 156

-wheel on If a freight y a railroad its road for it belongs, mother train an injury to a company, by -wheel, such ys, works, or used in the ain Mass. St. as will give e company. H. R. Co., 48 ss. 21, 28 A.

ty of com- e tracks.— necting lines y which cars of one to the to push cars notice or dan- er both com- ho is injured pushed onto uthorized time. R. Co., 40 Fed.

es used a por- lines connect, the company one of its em- through the e other com- ose employés ble. Georgia a. 489, 7 S. E. Macon & A. R. ntral R. & B. rry v. Central v. Central R.

under its own ne of them in the one own- for the conse- failing to ren- s of the other

company a low bridge spanning the track, if the duty of taking proper precautions for that purpose was upon it and it alone. *Ellison v. Georgia R. & B. Co.*, 87 Ga. 691, 13 S. E. Rep. 809.

Where the servants of two railroad companies occupying the same depot grounds with their respective tracks are required, in the performance of their duties, to pass over the tracks of both companies, a sign erected upon the grounds warning all persons to keep off the tracks, and informing them if they went upon them it would be at their peril, would not be regarded as applying to the servants of either company. *Illinois C. R. Co. v. Frelka*, 18 Am. & Eng. R. Cas. 7, 110 Ill. 498.

A joint occupancy of ground for railroad tracks by two or more companies will impose on each the duty to the employés of the other necessarily using the tracks which it owes to its own employés. *McMarshall v. Chicago, R. I. & P. R. Co.*, 80 Iowa 757, 45 N. W. Rep. 1065.

Where two companies jointly use a portion of the same track, an employé of one has a right to presume that the employés of the other will conform to the rules of his company as to signals and stops. *Roll v. Northern C. R. Co.*, 15 Hun (N. Y.) 496; affirmed in 80 N. Y. 647, mem. *Cincinnati, I., St. L. & C. R. Co. v. Long*, 31 Am. & Eng. R. Cas. 138, 112 Ind. 166, 11 West. Rep. 322, 13 N. E. Rep. 659.

A railroad company using one of the union tracks is not liable for an injury to a switchman employed by another company, sustained by being struck by a slowly backing train, with bell ringing, while walking upon or near such track to reach a switch standard to be operated by him, where, by the exercise of the same degree of vigilance for his own safety as would be required of a traveler or other person rightfully at the same place, he could have avoided the injury. *Cincinnati, I., St. L. & C. R. Co. v. Long*, 31 Am. & Eng. R. Cas. 138, 112 Ind. 166, 11 West. Rep. 322, 13 N. E. Rep. 659.

The fact that two companies jointly maintain a track for the purpose of transferring cars from one road to the other does not make an employé of one who is at work on the track a fellow-servant with persons in charge of a train belonging to the other company, so as to prevent the trackman from recovering for an injury caused by the negligence of the men in charge of the

train. *Noonan v. New York C. & H. R. R. Co.*, 16 N. Y. Supp. 678.

An arrangement existed between three railroad companies that each one should employ and pay certain persons employed about a junction of the three roads, the employés, however, to look after the trains and business of all of the companies. Plaintiff's son was employed by the defendant company, but was injured while coupling cars on one of the other two roads. *Held*, that he could not recover against the defendant for the injury which occurred while in the service of another company; and the fact that he was employed and paid by defendant would not make him any the less the servant of the other two companies. *Gulf, C. & S. F. R. Co. v. Dorsey*, 2 Tex. Unrep. Cas. 247.

497. — Jointly using yards or grounds.—Where two companies have by agreement a joint occupancy of depot grounds, in which their respective tracks are so situated and used that the servants of the two companies must necessarily, in the proper discharge of their duties, pass over each other's tracks, each company will owe the same duty to the servants of the other company in the matter of observing proper care for their safety when crossing its tracks in the regular discharge of their duties, that it does to its own servants when crossing the same tracks. *Illinois C. R. Co. v. Frelka*, 18 Am. & Eng. R. Cas. 7, 110 Ill. 498. *McMarshall v. Chicago, R. I. & P. R. Co.*, 80 Iowa 757, 45 N. W. Rep. 1065. *Missouri Pac. R. Co. v. Jones*, 41 Am. & Eng. R. Cas. 363, 75 Tex. 151, 12 S. W. Rep. 972.

A servant in pay of one company and employed about the yard and track of another company, under some agreement between them, is entitled to the protection of the law for injuries received from the want of proper care on the part of the company owning the yard and train in working on which the injury was caused, although paid by the other company. *Missouri Pac. R. Co. v. Jones*, 41 Am. & Eng. R. Cas. 363, 75 Tex. 151, 12 S. W. Rep. 972.—**DISTINGUISHED IN** *Texas & P. R. Co. v. Easton*, 2 Tex. Civ. App. 378.

One of three companies employed a switchman to work in their union yard. *Held*, that all were jointly and severally liable to him for the negligence of one of the companies, and that the company which employed him could not deny the relation

of master and servant. *Gulf, C. & S. F. R. Co. v. Dorsey*, 25 *Am. & Eng. R. Cas.* 446, 66 *Tex.* 148.—REVIEWING *Railroad Co. v. McClanahan*, 3 *Tex. Law Rev.* 324; *Vary v. Burlington, C. R. & M. R. Co.*, 42 *Iowa* 246; *Railroad Co. v. Dorsey*, 4 *Tex. Law Rev.* 115.—DISTINGUISHED IN *Texas & P. R. Co. v. Easton*, 2 *Tex. Civ. App.* 378.

498. — jointly operating a line of road.—Where several railroad companies form an association and share the expense of operating a line of road, whether interested in the profits or not, if they used a defective track for their joint benefit and in their joint service, they will be jointly liable for any injury to their employés, resulting from the use of such track, for the use of which they were jointly responsible, and they will also be severally liable. *Wisconsin C. R. Co. v. Ross*, 53 *Am. & Eng. R. Cas.* 73, 142 *Ill.* 9, 31 *N. E. Rep.* 412; *affirming* 43 *Ill. App.* 454.

Where two or more persons or corporations are operating a railroad, their liability to an employé for an injury resulting from defective machinery furnished by them for use in the course of his employment is several as well as joint, and an action is maintainable against one of them. *Kain v. Smith*, 2 *Am. & Eng. R. Cas.* 545, 80 *N. Y.* 458; *reversing* 11 *Hun* 552.

VI. REMEDIES; PROCEDURE.

1. In General.

499. Enforcement of cause of action accruing in another state.—There can be no recovery in Alabama for injuries to the person sustained in another state, unless actionable by the law of the state where received; and this rule is not varied because the negligence which produced the casualty transpired in Alabama, where the common law liability of the master is modified, nor by the facts that both master and employé reside in this state and services were required of the employé in both states. *Alabama G. S. R. Co. v. Carroll*, 53 *Am. & Eng. R. Cas.* 556, 97 *Ala.* 126, 11 *So. Rep.* 803.

Where a railroad employé is injured in another state and suit is brought in Illinois, the law of the latter governs as to the remedy and the law of the state where the injury occurred governs as to the rights of the parties. *Chicago & N. W. R. Co. v. Tuile*, 44 *Ill. App.* 535.

Where an employé is injured in Iowa, where a statute exists changing the common law liability of the master where one servant is injured through the negligence of a fellow-servant, the right of action may be enforced in Minnesota, though no similar statute there exists. *Herrick v. Minneapolis & St. L. R. Co.*, 11 *Am. & Eng. R. Cas.* 256, 31 *Minn.* 11, 47 *Am. Rep.* 771, 16 *N. W. Rep.* 413.—DISAPPROVING *Anderson v. Milwaukee & St. P. R. Co.*, 37 *Wis.* 321. DISTINGUISHING *Bettys v. Milwaukee & St. P. R. Co.*, 37 *Wis.* 323.—ADHERED TO IN *Herrick v. Minneapolis & St. L. R. Co.*, 32 *Minn.* 435. FOLLOWED IN *Illinois C. R. Co. v. Crudup*, 63 *Miss.* 291. QUOTED IN *Hanna v. Grand Trunk R. Co.*, 41 *Ill. App.* 116. REVIEWED IN *Lavallee v. St. Paul, M. & M. R. Co.*, 38 *Am. & Eng. R. Cas.* 115, 40 *Minn.* 249, 41 *N. W. Rep.* 974.

In suits brought in Tennessee to recover for personal injuries inflicted in another state, the law affecting the merits of the controversy, as declared in the courts of the latter state, controls when in conflict with the decisions of the Tennessee courts. *East Tenn., V. & G. R. Co. v. Lewis*, 89 *Tenn.* 235, 14 *S. W. Rep.* 603.

Thus in a suit against a railway company by its employé for personal injuries inflicted in Georgia, where there was proof tending to show plaintiff guilty of contributory negligence, the court should charge in conformity to the Georgia decisions on this point, which differ materially from those of Tennessee. *East Tenn., V. & G. R. Co. v. Lewis*, 89 *Tenn.* 235, 14 *S. W. Rep.* 603.

500. Limitation of time in which to sue.—Injury sustained by a workman, employed in the construction of a railway, while being moved on a gravel train, is injury sustained "by reason of the railway," and the action for indemnity is prescribed by six months under 42 *Vict. c. 9, § 27*; 2 *R. S. Can. c. 109, § 27*. *Marcheterre v. Ontario & Q. R. Co.*, 4 *Montr. Super.* 397.

501. Notice of time, place, and cause of injury.—*Mass. St. 1887.*—A notice to a railroad company that a brakeman on a certain day was injured on the railroad within "one hundred yards northerly" of a station named, by being caught between a car and a locomotive engine "by reason of a broken draw-bar" upon the car, which permitted the tender of the engine to run up against the end of the car and crush his leg, is sufficient notice of the time, place,

and cause of the injury within St. 1887, ch. 270, § 3. *Donahoe v. Old Colony R. Co.*, 153 Mass. 356, 26 N. E. Rep. 868.

502. Who may be sued—Party defendant.—It is no defense to an action by a servant of a railroad company to recover for a personal injury growing out of use of a defective track, that at the time of the accident the road was operated by certain trustees for the bondholders, where there is no evidence that such trustees, if in possession, gave notice of any kind to third parties, or to the employés of the company, that they were operating the road or that they were operating it in their own names as trustees, but it appears, if they operated the road at all, it was in the corporate name of the company. *Wisconsin C. R. Co. v. Ross*, 53 Am. & Eng. R. Cas. 73, 142 Ill. 9, 31 N. E. Rep. 412; affirming 43 Ill. App. 454.

Where two companies use a common track and jointly employ a switchman and each contributes to his wages, either or both companies may be sued, if he is injured while employed in the joint service; but if he be injured while discharging a duty for only one of the companies, in which the other is not concerned, only the company that he is serving is liable. *Vary v. Burlington, C. R. & M. R. Co.*, 42 Iowa 246.—**DISTINGUISHING** *Winterbottom v. Wright*, 10 M. & W. 109.—**APPROVED IN** *Powell v. Virginia Constr. Co.*, 88 Tenn. 692, 13 S. W. Rep. 691. **REVIEWED IN** *Gulf, C. & S. F. R. Co. v. Dorsey*, 66 Tex. 148.

The plaintiff brought suit against the defendant company to recover damages on account of personal injuries received while in the employ of a company to which the defendant is the successor, the old company having been dissolved by sale. *Held*, that the plaintiff cannot maintain his action against the new company. His only right of action remaining is against the stockholders of the old company, who received the purchase money. *Chesapeake, O. & S. R. Co. v. Griest*, 30 Am. & Eng. R. Cas. 149, 85 Ky. 619, 4 S. W. Rep. 323.

2. Pleading; Defenses.

a. Complaint; Declaration; Petition.

503. Interpretation.—In construing a complaint against a railroad company for injury received by the plaintiff while in the employment of the defendant and engaged

in coupling cars, a general introductory statement that the cars were unfit for the transportation of rails was held to be controlled by specific statements of facts showing that the injury was caused by the manner in which the cars were loaded with rails. *Indianapolis & St. L. R. Co. v. Johnson*, 102 Ind. 352, 26 N. E. Rep. 200.

In an action by an employé for injuries caused by his employer's negligence, a complaint stating that the injury was "caused by the negligence of the defendant in failing to provide good and safe brakes," etc., followed by another averment, "and by the defendant negligently and carelessly omitting to keep its brakes on said train in good repair, and knowingly allowing the same to remain out of repair"—states several grounds distributively, and the word "knowingly" qualifies only the second clause. *Louisville & N. R. Co. v. Coulton*, 86 Ala. 129, 5 So. Rep. 458.

504. Improper joinder of causes of action.—A count which alleged by distinct averments that the injuries complained of were caused, first, by a defect in a derrick; second, by the negligence of defendant's superintendent, who had charge of the derrick, and third, by the negligence of a person in the employ of defendant to whose orders plaintiff was bound to and did conform, is subject to demurrer for improper joinder of causes of action. *Richmond & D. R. Co. v. Weems*, 97 Ala. 270, 12 So. Rep. 186.

505. Several counts for the same cause of action.—A complaint for an injury caused by derailment of a car, which sets forth in one count that the injury was caused by a defect in the track and machinery of defendant; in a second, that it was caused by the negligence of an employé of defendant in charge of an engine on its railway, and in a third, that it was caused by the negligence of an employé in the service of defendant having superintendence of its yard and train, states but one cause of action. *Louisville & N. R. Co. v. Mothershed*, 97 Ala. 261, 12 So. Rep. 714.—**EXPLAINING** *Highland Ave. & B. R. Co. v. Dusenberry*, 94 Ala. 413, 10 So. Rep. 274.

It is not necessary to set up the negligence of the company in putting the plaintiff in peril in one count, and its negligence in not taking proper steps to protect him against the peril after it was discovered, in another count. *Hammer v. Chicago, R. I.*

& *P. R. Co., 10 Am. & Eng. R. Cas. 772, 61 Iowa 56, 15 N. W. Rep. 597.*

506. Alternative allegations.—In an action for injuries to an employé knocked from a car by another car placed dangerously near on another track, plaintiff charged that his injuries resulted from the negligence of defendant's engineer in the rate of speed and manner of running the train, and from the negligence of defendant's foreman as to the placing of the car on the side track. *Held*, that the complaint could not be considered as containing alternative allegations. *Kansas City, M. & B. R. Co. v. Burton, 53 Am. & Eng. R. Cas. 115, 97 Ala. 240, 12 So. Rep. 88.*

507. Inconsistent allegations.—A count in a complaint charging negligence, in that the hand-hold on a car was in a defective condition, and that the ways, works, and machinery of defendant were in a defective condition, is not obnoxious to a demurrer on the ground of inconsistency. *Louisville & N. R. Co. v. Pearson, 97 Ala. 211, 12 So. Rep. 176.*

508. Sufficiency of the complaint, generally.*—When plaintiff claims that he was injured by obedience to the orders of a superior whom he was bound to obey, he must prove special orders or directions in the matter complained of; but if the special order was to uncouple the cars, it is not necessary to aver and prove that, in doing so, he was instructed to go in between the cars, whereby he was injured. *Mobile & O. R. Co. v. George, 94 Ala. 199, 10 So. Rep. 145.*

Where a complaint alleges that the obstruction on the track, which caused the injury to a fireman complained of, was on the track by negligence of the company, and that deceased was, at the time, in the discharge of his duty, exercising due care and skill, a demurrer will not lie. *Wilson v. Denver, S. P. & P. R. Co., 15 Am. & Eng. R. Cas. 192, 7 Colo. 101, 2 Pac. Rep. 1.*—*QUOTING Hildebrand v. Toledo, W. & W. R. Co., 47 Ind. 406; Toledo, P. & W. R. Co. v. Conroy, 68 Ill. 569.*

In an action for the alleged negligent killing of an employé, a complaint is not objectionable on the ground that its specific averments show the decedent to have been

guilty of contributory negligence, when it avers that the decedent was required to perform a service outside of the line of his employment, and at a place other than that provided for the performance of his regular and ordinary duties; that its performance would subject him to great danger unless certain precautions were observed in the placing of signal flags, and that he believed the proper precaution had been observed, but which does not aver that the decedent made a personal investigation to ascertain if the proper signals were in fact displayed and the place in which he was directed to work thereby made safe. *Louisville, E. & St. L. Con. R. Co. v. Hanning, 53 Am. & Eng. R. Cas. 452, 131 Ind. 528, 31 N. E. Rep. 187.*—*FOLLOWED IN Lake Erie & W. R. Co. v. Mugg, 132 Ind. 168.*

Plaintiff was in defendant's employ as a carpenter, and while upon the framing of the roof of a station building in the course of erection he stepped upon a tie beam which gave way, and he fell and was injured. The cause of the break was a knot in the tie beam, and plaintiff assisted in hoisting up the tie beam that broke. The complaint was demurred to on the ground that there was no evidence of negligence upon the part of defendant, and that the accident was the result of negligence on the part of plaintiff and his fellow-workmen. *Held*, that the nonsuit was right and that a new trial should be denied. *Griffiths v. New Jersey & N. Y. R. Co., 5 Misc. 320, 25 N. Y. Supp. 812.*

509. Sufficiency in statutory actions.—In a statutory action for injuries suffered by an employé from defects in the machinery (Ala. Code, § 2590), while facts must be averred showing that the defect causing the injury was within the statutory limitations, the facts to be averred are but little more than the mere conclusions of the pleader, and no greater particularity of statement is required than in other cases founded on negligence; and where it is averred that the defect arose from the defendant's negligence, it is not necessary to aver also how long it had existed, nor that it had not been discovered and remedied owing to defendant's negligence. *Louisville & N. R. Co. v. Hawkins, 92 Ala. 241, 9 So. Rep. 271.*—*LIMITING Columbus & W. R. Co. v. Bradford, 86 Ala. 574.*

If the complaint alleges that the injuries were caused by a defect in the machinery

* Injury to employé by defective appliances. Sufficiency of complaint, see 53 AM. & ENG. R. CAS. 279, *abstr.*

ence, when it is required to the line of his other than that of his regular performance danger unless served in the that he believed been observed, the decedent to ascertain fact displayed is directed to *Quisville, E. & Co., 53 Am. & Eng. R. Cas. 28, 31 N. E. & Erie & W.*

employ as a framing of in the course a tie beam and was in a knot assisted in broke. The on the ground of negligence and that the negligence on fellow-work was right and denied. *Griff. R. Co., 5 Misc.*

statutory action for injuries defects in the (), while facts at the defect the statutory negligence are but conclusions of particularity of other cases where it is from the de- necessary to ted, nor that and remedied e. *Louisville Ala. 241, 9 So. & W. R.*

t the injuries the machinery

used, it must also allege that such defect arose from the negligence of the employer or of some person in the service who was intrusted by him with the duty of seeing that the machinery was in safe and proper condition, or had not been discovered or remedied on account of negligence on the part of one or the other of them; and an averment that they knew of the defect, or might have known by the exercise of reasonable diligence, without more, is not sufficient. *Seaboard Mfg. Co. v. Woodson, 94 Ala. 143, 10 So. Rep. 87.*

When a recovery is sought under the third subdivision of the statute (Ala. Code, § 2590), for an injury caused by reason of the negligence of any person in the service of the master or employer, "to whose orders or directions plaintiff was bound to conform, did conform, and was thereby injured," and these facts are averred, it is not necessary to state in what particular or respect the orders or directions were negligent; but good pleading, it seems, requires that the name of the person giving the orders or directions should be stated, though the point is not decided. *Mobile & O. R. Co. v. George, 94 Ala. 199, 10 So. Rep. 145.*

If a recovery is sought under the fifth subdivision of the statute, on the ground that the injury was caused by the negligence of the engineer in charge of the train, while plaintiff was on the track attempting to couple cars, it is not necessary to aver that the engineer knew, or by the exercise of reasonable diligence might have known, that plaintiff was between the cars, nor any other particular acts or omission constituting the negligence complained of; nor is it necessary to negative contributory negligence on the part of the plaintiff. *Mobile & O. R. Co. v. George, 94 Ala. 199, 10 So. Rep. 145.*

If a recovery is sought under the first subdivision of the statute, on the ground that the injury "was caused by reason of a defect in the ways, works, machinery, etc.," used in the business of the employer, it must be averred in the words of the statute, or in substance, that the defect arose from, or was not discovered and remedied owing to, the negligence of the defendant or of some other person intrusted by him with the duty of seeing that the ways, works, etc., were in proper condition; and an averment that the defendant "negligently used in its business a steam engine which was

out of order, so that it could not be stopped promptly," followed by an averment that plaintiff was injured "on account of the neglectively defective condition of the engine," is not sufficient. *Mobile & O. R. Co. v. George, 94 Ala. 199, 10 So. Rep. 145.*—QUOTING *Columbus & W. R. Co. v. Bradford, 86 Ala. 574.*

Whether a plea charging a railroad company with negligence can be supported by evidence of the negligence of a co-employee, *quere*; but common fairness requires that if the negligence of an employé is relied upon under the statute making the company liable for the negligence of co-employees, it should be stated in the pleading. *Earns v. Chicago, M. & St. P. R. Co., 28 Am. & Eng. R. Cas. 409, 69 Iowa 450, 30 N. W. Rep. 25.*

510. Sufficiency as showing relation of master and servant.—A complaint which alleges that the defendant was a railroad company, and engaged at the time and place of the casualty complained of in the operation of a railroad; that the plaintiff was then in its service as a switchman, and while in the actual discharge of his duties as such received the injuries complained of, sufficiently sets forth the relation of master and servant. *Kansas City, M. & B. R. Co. v. Burton, 53 Am. & Eng. R. Cas. 115, 97 Ala. 240, 12 So. Rep. 88.*—FOLLOWING *Ensley R. Co. v. Chewning, 93 Ala. 24.*

A petition for personal injuries caused by the company's negligence in running over plaintiff's leg when he was in a known exposed position in its yards is not fatally defective because it does not aver whether plaintiff's relation to the company was that of trespasser or servant. *Reardon v. Missouri Pac. R. Co., 114 Mo. 384, 21 S. W. Rep. 731.*

In an action for the death of an employé, the complaint alleged that defendant was a corporation and owned and operated a railroad, and while operating the road the deceased was in its employ as an engineer, and was injured while on a locomotive which was in the use and service of the company. *Held*, that this was sufficient to show the existence of the relation of master and servant, but no special contract between the parties could be inferred from such allegations. *McMillan v. Saratoga & W. R. Co., 20 Barb. (N. Y.) 449.*

511. What need not be alleged—Evidential facts.—A complaint charging

the negligence by which plaintiff was injured directly upon the defendant, and not merely upon its employés, is sufficient on demurrer; and proof may be given thereunder of any acts or circumstances of negligence on the part of such defendant in the running of the locomotive causing the injury. *Ohio & M. R. Co. v. Collarn*, 5 *Am. & Eng. R. Cas.* 554, 73 *Ind.* 261, 38 *Am. Rep.* 134.

It is not necessary to allege that, though plaintiff was negligent, yet the defendant might have avoided the injury by the exercise of reasonable care, in order to justify the admission of evidence and an instruction based on that theory. *Crowley v. Burlington, C. R. & N. R. Co.*, 18 *Am. & Eng. R. Cas.* 56, 65 *Iowa* 658, 20 *N. W. Rep.* 467, 22 *N. W. Rep.* 918.—FOLLOWED IN *Rayburn v. Central Iowa R. Co.*, 74 *Iowa* 637, 38 *N. W. Rep.* 520.

It is not necessary to plead rules of the company, or any usage as to the manner of performing a duty, in order to authorize their introduction in evidence, for such rules and usages are mere evidence bearing upon the question of negligence of the defendant or its employés and the care and diligence of the plaintiff. *Henry v. Sioux City & P. R. Co.*, 21 *Am. & Eng. R. Cas.* 644, 66 *Iowa* 52, 23 *N. W. Rep.* 260.

512. — facts that will be presumed.—Where a brakeman sues in Kansas for an injury negligently inflicted upon him while in the Indian Territory, it is not necessary to allege that his company had a license to run trains through the territory, or that there was a law in force in the territory furnishing a remedy for such injury. The court will take judicial notice of the fact that the laws of the United States reserve the right to the United States to license railroads within the territory, and the court will presume that such has been done and that the common law, which affords a remedy for such injuries, was in force there. *Sheer v. Missouri, K. & T. R. Co.*, 23 *Kan.* 571.

513. — inferences to be drawn.—It was averred in a petition that the plaintiff was 16 years of age; that he had been in the employ of the defendant company for two months in the paint shop. This was a sufficient allegation of his youth and inexperience. It was not necessary that plaintiff should, in express terms, claim the benefit of these facts. The pleader is not required

to allege the inferences to be drawn from facts stated. *International & G. N. R. Co. v. Hinzle*, 82 *Tex.* 623, 18 *S. W. Rep.* 681.

514. — the place of the accident.—In an action by an employé for an injury it is not necessary to aver the place where the accident was sustained. *Mobile & O. R. Co. v. Thomas*, 42 *Ala.* 672.—REVIEWING *Mobile & O. R. Co. v. Jarboe*, 41 *Ala.* 644; *Steel v. Townsend*, 37 *Ala.* 247; *Keegan v. Western R. Co.*, 8 *N. Y.* 175; *Wright v. New York C. R. Co.*, 25 *N. Y.* 562.

515. Variance.—A count in a complaint by a brakeman alleging a defect in the coupler and appliances used for coupling cars is not supported by proof that the coupling appliances on some of the cars were different from those on other cars used on the road. *East Tenn., V. & G. R. Co. v. Turbaville*, 97 *Ala.* 122, 12 *So. Rep.* 63.

516. Alleging that plaintiff "duly" gave notice of time, place, and cause of injury.—An averment that the plaintiff "duly" gave notice of the time, place, and cause of the injury is sufficient. *Steffe v. Old Colony R. Co.*, 156 *Mass.* 262, 30 *N. E. Rep.* 1137.

517. Alleging company's negligence, generally.—In an action by an engineer in running a train upon the road, to recover for injuries sustained in such service, the plaintiff must allege and prove negligence on the part of the company, by means whereof the injury was caused. *Indianapolis & C. R. Co. v. Love*, 10 *Ind.* 554.—APPROVED IN *Indianapolis & C. R. Co. v. Klein*, 11 *Ind.* 38.

An allegation that charges the negligence to be that of the defendant is sufficient. *Cramer v. Union Pac. R. Co.*, 3 *Utah* 504, 24 *Pac. Rep.* 911.

Where the petition states that a company's engine moved rapidly through the company's yard, without any lookout upon it, whereby injury resulted to plaintiff, a servant of the company, such an allegation does not necessarily impute negligence to the company. *Texas & P. R. Co. v. Harrington*, 21 *Am. & Eng. R. Cas.* 571, 62 *Tex.* 597.

518. Negligence in subjecting employe to extraordinary risk.—A declaration, in an action for the death of an employé, alleging that the company did not use its trains and provide service so as to avoid the extraordinary risks to its employés, is sufficiently specific where it is

averred in the same count that "by reason of the careless and negligent use of its cars, engines, etc., and by failure to employ a sufficient number of servants, etc.," the extraordinary risk was not avoided by the company. *Harper v. Norfolk & W. R. Co.*, 36 Fed. Rep. 102.

519. Negligence in failing to provide safe working place.—In an action for the death of a car coupler, plaintiff introduced evidence, without objection until after verdict, tending to show that the company had not provided the deceased with a safe place to work, and had not properly protected him against the negligence of fellow-servants. The complaint only charged the company with negligence in the management of the train. *Held*, that the objection could not be made after a verdict. *St. Louis, A. & T. R. Co. v. Triplett*, 54 Ark. 289, 16 S. W. Rep. 266.

An employé was injured by reason of the failure of the company to place a suitable railing around an elevated platform on which he stood while in the discharge of his duties. The petition, after alleging these facts, showed that he had been in the employ of the company but three or four days; that he had given notice of the dangerous condition of the platform, and that the company had promised to make it safe in a reasonable time. *Held*, that such complaint was not demurrable for not alleging that the company had failed to make the platform safe in a reasonable time, it not appearing that the danger was so imminent that a person of ordinary prudence would have discontinued work until the repairs were made. *McDowell v. Chesapeake, O. & S. W. R. Co.*, (Ky.) 8 S. W. Rep. 871; reversing 5 S. W. Rep. 413.

520. Negligence in failing to adopt proper rules.—Plaintiff was engaged with a gang of track repairers who were carried over the track in cars, and was thrown down and injured while putting tools out, by the engine suddenly backing against the cars. A complaint charged the company with negligence in failing and omitting to provide any rules, signals, or system to be observed in such cases. *Held*, that such rules and regulations are perfectly proper, and often necessary, and the complaint therefore stated a good cause of action. Whether they are necessary in a particular case is a question for the jury. *Reagan v. St. Louis,*

K. & N. W. R. Co., 93 Mo. 348, 12 West. Rep. 367, 6 S. W. Rep. 371.

521. Negligence in failing to keep track and roadbed in safe condition.—In an action by a brakeman for personal injuries, an averment in the complaint that defendant, "by its neglect and want of care, allowed its roadway to be and become greatly out of repair, unsafe, and dangerous, and by reason thereof plaintiff, while in the performance of his duties as such brakeman, was violently struck against a projecting rock" and injured, is sufficiently definite and certain in its description of the defect which caused the injury. *Georgia Pac. R. Co. v. Davis*, 92 Ala. 300, 9 So. Rep. 252.

A complaint is not demurrable on the ground that it shows the deceased to have been guilty of contributory negligence, when it avers that his death was occasioned by a defective rail, the defects consisting of a sliver which extended outward and along the outside of the rail; that while going to couple two cars, one of which was in motion, he stepped on the sliver and was held fast until run over by the moving car; that the injury was caused by the fault and negligence of the defendant, and that the deceased had no knowledge of the defective condition of the rail or existence of the sliver, and that the injury was caused without any fault or negligence on his part; nor, as against the averment of want of knowledge on his part, can it be determined that he must have known, or should have known, of the defective condition of the track. *Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. Rep. 564.—FOLLOWING OHIO & M. R. Co. v. Pearcy, 128 Ind. 197; Pennsylvania Co. v. Horton, 132 Ind. 189; Louisville, E. & St. L. Con. R. Co. v. Hanning, 131 Ind. 528.

A car coupler sued for an injury, and alleged that he stepped between cars of a train that was slowly backing, to make a coupling, and caught his foot either between the ties or the rails, and was injured by the wheels of the train; that the ties were placed too close together and the spaces between them not properly filled in, and that the rails were old and worn, with splinters projecting from them, of which plaintiff was ignorant. It did not affirmatively appear that by the use of ordinary diligence he could have known of the defects. *Held*,

that the complaint set out a good cause of action. *Preston v. Central R. & B. Co.*, 84 Ga. 588, 11 S. E. Rep. 143.

522. — In maintaining defective overhead bridge.—A brakeman suing to recover for injuries received by coming in contact with an overhead bridge must allege that it was erected or maintained by the company. *Louisville & N. R. Co. v. Hall*, 30 Am. & Eng. R. Cas. 298, 87 Ala. 703, 4 L. R. A. 710, 6 So. Rep. 277.

523. Negligence in allowing obstructions and structures near track.—If a count contains a sufficient averment of negligence on the part of the company, in allowing a stone in the side of a cut to project in dangerous proximity to the track, whereby plaintiff was struck and injured while ascending to the top of a car by a ladder on the outside, an additional averment of negligence on the part of the conductor, in ordering him to ascend at that time and place, though defective, does not destroy the legal sufficiency of the count. *Georgia Pac. R. Co. v. Davis*, 92 Ala. 300, 9 So. Rep. 252.

A complaint alleging that a car was negligently left in dangerous proximity to the main line, by which plaintiff, a switchman on a passing train, ignorant of such proximity, was hurt, is not subject to demurrer on the ground that it showed that the plaintiff was guilty of contributory negligence. *Kansas City, M. & B. R. Co. v. Burton*, 53 Am. & Eng. R. Cas. 115, 97 Ala. 240, 12 So. Rep. 88.

A complaint shows a cause of action which sets out that plaintiff was injured while sitting on the edge of a flat car, as was his duty, by coming in contact with a beam which had been negligently left in close proximity to the track, of which he had no knowledge or means of knowledge, but of which the company's agent, under whose orders he was acting, did know, though it appeared that he took his seat on the edge of the car without protest. Sitting on the edge of the car was not an assumption of the risk due to the extraordinary proximity of the beam to the track, of which he had no knowledge. *Arabelle v. San Antonio & A. P. R. Co.*, (Tex.) 11 S. W. Rep. 913.

A complaint alleging that the defendant negligently caused and permitted a freight car to stand upon the main track near a station causing a collision, whereby plaintiff, an engineer, was injured, is sufficient, as im-

porting that the act charged was the act of an agent whose negligence was the negligence of the principal. *Lesard v. Northern Pac. R. Co.*, 81 Wis. 189, 51 N. W. Rep. 321.

A complaint by a baggage master averred that it was his duty to look after the condition of cars, and to do whatever was necessary for the safety of passengers and the trains; and on the day of the accident he had been notified that new wheels had been put under one of the cars, and that he must keep a lookout; that soon after starting the wheels became hot and noisy, and he went to the side of the baggage car to examine them, and while leaning out for that purpose was injured by striking a tank of the company, which he did not know was there; and further charged negligence on the part of the company in the erection of the tank, and that he was himself in the discharge of duty and without fault. Held, that the complaint was good on general demurrer. *Atlanta & C. A. L. R. Co. v. Woodruff*, 66 Ga. 707.

524. Negligence in furnishing defective machinery, tools, or appliances, generally.—The complaint in an action for failure to provide safe and proper appliances must charge negligence in reference to the particular matter producing the injury. *Knahla v. Oregon S. L. & U. N. R. Co.*, 21 Oreg. 136, 27 Pac. Rep. 91.

An allegation that the defendant negligently furnished an appliance which was defective and unsafe is equivalent to an averment that defendant knew, or ought to have known, of the danger, and is sufficient. *Crane v. Missouri Pac. R. Co.*, 25 Am. & Eng. R. Cas. 440, 87 Mo. 588.—REVIEWED IN *Johnson v. Missouri Pac. R. Co.*, 96 Mo. 340, 9 S. W. Rep. 790.—*Johnson v. Missouri Pac. R. Co.*, 96 Mo. 340, 9 S. W. Rep. 790.

It is not material that the petition allege whether the defect was in the construction of the appliance or arose from want of repair, where the alleged defect is pointed out with particularity. *Gutridge v. Missouri Pac. R. Co.*, 94 Mo. 458, 13 West. Rep. 644, 7 S. W. Rep. 476.

The petition averred that the hammer which caused the injury had been repaired at defendant's shops, and that it was owing to the imperfect and brittle condition and flaws in the hammer negligently furnished him that plaintiff was injured. Under these averments the evidence of two blacksmiths,

as to the hammer not having been repaired with reasonable skill, was admissible. Such evidence also had a bearing upon the question of defendant's knowledge of the defective condition of the hammer. *Johnson v. Missouri Pac. R. Co.*, 96 Mo. 340, 9 S. W. Rep. 790. — **DISTINGUISHING** *Gutridge v. Missouri Pac. R. Co.*, 94 Mo. 468.

A complaint is not sufficient which simply charges that plaintiff was employed in defendant's shops and was injured while working on an engine, with a chisel, by a fragment of steel flying in his eye, without anything to show that he was wrongfully set at the work, or that cutting steel in that manner was not such work as plaintiff, considering his age and experience, should have been set at. *Whitelaw v. Memphis & C. R. Co.*, 16 Lea (Tenn.) 391, 1 S. W. Rep. 37.

Where an employé sues for an injury through defects in the machinery, which are perfectly obvious, and sets out a promise by the company to remedy them, and a failure to do so, the complaint is defective if it does not allege that plaintiff was injured within such time after the promise as would be reasonable under the circumstances to allow for its performance. *Stephenson v. Duncan*, 73 W's. 404, 41 N. W. Rep. 337.

525. — defective engine. — The complaint alleged that decedent had been in the employ of defendant as fireman on a freight engine for about two months, when, on a day mentioned, he was ordered by defendant to serve as fireman on a particular engine attached to an express passenger train, then running on said road between certain points named; that said engine "was old and rickety, with a weak, defective, patched up, and leaky boiler," which was not strong enough to endure a high pressure of steam, and could not be used with safety in drawing a train of any kind, and that its use on an express train, in its weak and unsound condition, involved great peril to the lives of passengers and employés; that the deceased did not know, and had no means of knowing, the weak and unsafe condition of said engine when he was placed upon it as fireman; that defendant, with full knowledge of the defective and unsafe condition thereof, carelessly and negligently caused the same to be used in drawing said express train; that on the same day the boiler exploded, by reason of its defective and unsound condition, and caused the death of the decedent, without any negligence or

fault on his part. *Held*, that the complaint was good on demurrer. *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174. — **NOT FOLLOWING** *Gillenwater v. Madison & I. R. Co.*, 5 Ind. 339; *Fitzpatrick v. New Albany & S. R. Co.*, 7 Ind. 436.

526. — defective cars. — In order to recover for injuries to an employé while using a car of another company, which is defectively constructed, the complaint must allege that the injury was caused by receiving and using such car. *O'Neill v. St. Louis, I. M. & S. R. Co.*, 3 *McCrary* (U. S.) 423, 9 *Fed. Rep.* 337. — **DISTINGUISHING** *Leduke v. St. Louis & I. M. R. Co.*, 4 Mo. App. 491.

Where a yard master sues for an injury caused by a defective car the complaint must aver that the car was defective when placed upon the road, or if it subsequently became defective, that notice of the defect was brought home to the company. *Kiddell v. Houston & G. N. R. Co.*, 3 *Woods* (U. S.) 313.

A declaration alleging that defendant company unsafely and negligently loaded a certain car with railroad iron so that the bars projected a considerable distance over the end of said car, and that it was negligently accepted by defendant company for transportation when in an unsafe condition and *used* for the purpose of coupling, which was known to the defendant, but of which plaintiff, a brakeman employed on defendant's train to couple cars, was ignorant, and by due care could not have known, and by means whereof said plaintiff was injured while attempting to couple said car, is not amenable to a demurrer on the ground that the injury was caused by the acts of fellow-servants of plaintiff. *Jacksonville, T. & K. W. R. Co. v. Galvin*, 53 *Am. & Eng. R. Cas.* 341, 29 *Fla.* 636, 11 *So. Rep.* 231. — **APPLYING** *Northern C. R. Co. v. Husson*, 101 Pa. St. 1. — **NOT FOLLOWING** *Haugh v. Chicago, R. I. & P. R. Co.*, 73 *Iowa* 66, *Quoting* *Toledo, W. & W. R. Co. v. Black*, 88 *Ill.* 112; *Louisville & N. R. Co. v. Gower*, 85 *Tenn.* 465.

The action being for negligence of the defendant in furnishing its servant with unsuitable cars, a general allegation that the cars were improperly loaded is sufficient without specifying the particulars. *Preston v. St. Johnsbury & L. C. R. Co.*, 64 *Vt.* 280, 25 *Atl. Rep.* 486.

527. — defective hand-hold. — A petition for personal injuries received in

falling from a freight car stated that the hand-hold on the car "was not safe and sufficient, and by reason of said defectiveness and insufficiency said hand-hold broke." *Held*, that this amounted to an averment that there was a weakness in the fastenings of the hand-hold, in consequence of which it broke, and was a sufficiently specific statement of the negligence intended to be charged. *Condon v. Missouri Pac. R. Co.*, 17 Am. & Eng. R. Cas. 583, 78 Mo. 567.—DISTINGUISHING *Waldhier v. Hannibal & St. J. R. Co.*, 71 Mo. 516; *Harrison v. Missouri Pac. R. Co.*, 74 Mo. 369.—REVIEWED IN *Flynn v. Union Bridge Co.*, 42 Mo. App. 529.

528. — defective ladder.—In an action by a brakeman for injuries sustained by reason of the breaking of a ladder on a freight car, an allegation of the complaint that such ladder "was so negligently and improperly constructed, and had become so old, loose, worn, and out of repair that when said plaintiff, in ascending the same, took hold of one of the steps or rungs thereof, the same immediately gave way, came off, and was wholly detached from the car"—shows with sufficient definiteness and certainty in what respect the ladder was negligently and improperly constructed. *Carey v. Chicago & N. W. R. Co.*, 67 Wis. 608, 31 N. W. Rep. 163.

529. — defective brakes or brake apparatus.—A complaint by an express messenger for injuries received by a detached car running off the track of its own momentum, charging negligence in not providing the cars with sufficient air brakes, and that the employés in charge of the train negligently left it without setting the brakes after the engine was detached, which caused the injury, states a good cause of action. *Lyon v. Union Pac. R. Co.*, 35 Fed. Rep. 111.

In an action for injuries resulting in the death of a brakeman, which it is averred in the complaint were caused by the defective condition of a brake-staff, it is essential, to authorize a recovery, that the plaintiff should allege and prove that the defect which caused the injury was known to the defendant, or was such as with reasonable diligence should have been discovered. *Chicago, St. L. & P. R. Co. v. Fry*, 131 Ind. 319, 28 N. E. Rep. 989.

A complaint by a brakeman for personal injuries shows a good cause of action where it charges that the accident was the result

of the derailment of a train caused by an old and worn-out brake-beam, which was constructed of improper material and in an improper manner, falling from its place; that the defects in the beam were known or might have been known to the company; that the engineer also was incompetent, as the company knew or might have known by due diligence, and that such incompetency contributed to the injury by reason of the engineer running the train too fast at the time of the accident. *Houston & T. C. R. Co. v. Lowe, (Tex.)* 11 S. W. Rep. 1065.

Where an employé sues for an injury and charges the corporation with negligence in furnishing a defective brake, the averment is sufficient, though it appear that the brake was furnished by certain agents of the company. As a corporation can only act through its officers or agents the negligence of its agents is the negligence of the corporation. *Minter v. Union Pac. R. Co.*, 3 Utah 500, 24 Pac. Rep. 911.

A declaration which alleges that it was the duty of defendants to have kept the brakes, etc., in sufficient repair, is demurrable as charging a higher duty than the law imposes. *Richmond & D. R. Co. v. Burnett*, 88 Va. 538, 14 S. E. Rep. 372.

A brakeman on a freight train sued for personal injuries received while coupling cars, and charged the company with negligence in leaving "a large and long bolt out of place, which unnecessarily, carelessly, and unskillfully projected beyond the frame, beam, or brake-head" of the car, in the way of brakemen when uncoupling, whereby he was tripped and thrown down and thus injured; that it was negligently permitted to remain there without informing plaintiff. *Held*, that the complaint stated a good cause of action. *Wedgwood v. Chicago & N. W. R. Co.*, 41 Wis. 478.—DISTINGUISHED IN *Ballou v. Chicago & N. W. R. Co.*, 5 Am. & Eng. R. Cas. 480, 54 Wis. 257, 41 Am. Rep. 31. FOLLOWED IN *Bessex v. Chicago & N. W. R. Co.*, 45 Wis. 477. REVIEWED IN *Goltz v. Milwaukee, L. S. & W. R. Co.*, 41 Am. & Eng. R. Cas. 282, 76 Wis. 136.

530. — defective couplings or coupling apparatus.—A complaint by a brakeman for personal injuries averred in the first count that the injury was caused by a defect in the couplings and appliances used for connecting cars; in the second count, by a failure to have a sufficient number of brakemen and servants to operate

and manage the train; and in the third, by the negligence of the conductor, to whose orders plaintiff was bound to conform, and did conform, and that the injury resulted from having so conformed. *Held*, that each count was sufficiently specific as to the cause of action charged. *Georgia Pac. R. Co. v. Propst*, 38 Am. & Eng. R. Cas. 11, 85 Ala. 203, 4 So. Rep. 711.

A paragraph of complaint, which alleges that the plaintiff, a brakeman, was injured by the negligence of the defendant in supplying the train on which he was brakeman with an insufficient coupling-pin, such defendant knowing of such defect, and continuing the use of such pin after knowledge of its dangerous character, is insufficient, without an averment that the plaintiff did not know or have the means of knowing, equally with defendant, of such defective coupling-pin, and of the danger to defendant's employés in the use thereof. *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75, 10 N. E. Rep. 631.—QUOTED IN *Pittsburg, C. & St. L. R. Co. v. Hixon*, 32 Am. & Eng. R. Cas. 374, 110 Ind. 225.

An allegation that defendant's officers and agents negligently directed plaintiff to make a coupling between cars of a different height, which required for the purpose a crooked link, without providing such link as he had requested them to do for the proper discharge of his duties, set out, in connection with an averment of plaintiff's own care and diligence, a cause of action against the defendant. *Conway v. Illinois C. R. Co.*, 50 Iowa 465.

531. — defective hand-cars.—An employé suing for injuries received while riding on a push-car, or hand-car, the complaint is not sufficient that merely charges the injury as being so received by reason of the car having no brakes, without alleging that such cars were usually supplied with brakes. *Miller v. Union Pac. R. Co.*, 2 McCrary (U. S.) 87, 4 Fed. Rep. 768.

In a suit by the foreman of a certain section of a railroad to recover damages for personal injuries, the complaint averred that the injuries in question were caused by the negligence of the defendant in failing to furnish plaintiff a safe hand-car. *Held*, not demurrable on the ground that it was the duty of the plaintiff himself to look to the repairs of hand-cars on his own section. *Texas & P. R. Co. v. Kane*, 15 Am. & Eng. R. Cas. 218, 2 Tex. App. (Civ. Cas.) 24.

An allegation that the defect in the hand-car consisted of a hole in the bottom, of specific dimensions, stated the defect complained of with sufficient accuracy. *Texas & P. R. Co. v. Kane*, 15 Am. & Eng. R. Cas. 218, 2 Tex. App. (Civ. Cas.) 24.

Said complaint alleged that defendant, through its agent, had promised to furnish plaintiff with a safe hand-car and to have the defective one repaired, but that it had neglected and failed so to do, by reason whereof the injury had occurred. *Held*, that the complaint sufficiently alleged an obligation and duty on the part of the defendant to furnish plaintiff with a safe hand-car. *Texas & P. R. Co. v. Kane*, 15 Am. & Eng. R. Cas. 218, 2 Tex. App. (Civ. Cas.) 24.

In an action for damages for injuries resulting from a defective hand-car, a petition is sufficient which alleges that the car was "wholly unfit for use, with its boxes in the wheels loose, permitting said wheels to slip in and out of said axles, and with the joints of the lever of said car and all of the other joints loose"; that the defects rendered its use very dangerous, and that defendant knew such danger, and that plaintiff was wholly ignorant of that fact. *Gulf, C. & S. F. R. Co. v. Johnson*, 83 Tex. 628, 19 S. W. Rep. 151.

532. Negligence in the management and operation of trains.—A declaration to the effect that plaintiff, while acting under a foreman or boss, was ordered by him to pull the coupling-pin and jump across to the other car, and, without any notice to plaintiff, the foreman let off the brake, which suddenly accelerated the speed of the car and widened the distance which plaintiff was to jump, and plaintiff had no knowledge or information that the brake was to be let off, and by that means plaintiff was injured, without any fault or negligence on his part, states a cause of action. *Erickson v. Milwaukee, L. S. & W. R. Co.*, 83 Mich. 281, 47 N. W. Rep. 237.

An employé sued for injuries received while uncoupling cars from a moving engine, and charged that upon being caught by the cars he gave directions to the engineer to stop the train, which were unheeded until it was too late to prevent the injury; that with due care on the part of the other employés the injury might have been prevented; that it was the duty of those in charge of the engine to be watch

ful and promptly obey any signal which plaintiff might give while between the cars, which they failed to do. *Held*, that a failure on the part of the engineer or fireman to observe that plaintiff was between the cars was negligence within the meaning of the complaint. *Neville v. Chicago & N. W. R. Co.*, 79 Iowa 232, 44 N. W. Rep. 367.

533. Negligence in the operation of engines.—A complaint for personal injuries to a watchman, which alleges that it was the duty of the defendant, as a common carrier, to have and use safe cars, engines, and machinery, and to use suitable switch engines in the city in which the injury occurred, and to employ competent and prudent employes; that in disregard of this duty, on, etc., defendant did, by its servants and agents, negligently and carelessly use a road engine instead of a switch engine for the purpose of switching its cars in said city, and did negligently and carelessly use a box car in front of said engine, so as to intercept the light from the headlight of said engine; that while so using said engine on the night the injury occurred, and while plaintiff was carefully performing his duties as watchman at the crossing of a public street, he saw said engine standing near said crossing, and saw it move off southward from said crossing; that he then walked along the street until he came to defendant's roadbed, keeping a careful lookout; that defendant's servants in charge of said engine negligently and carelessly reversed it, without ringing the bell, blowing the whistle, placing any light or brakeman on said box car, or giving other signal of its approach, and propelled it against plaintiff while still on the track, whereby he was injured, etc.; and that said injury was caused by defendant's negligence in failing to keep and use suitable switch engines, with a headlight upon the tender attached thereto, and a headlight in front thereof, and failing to ring the bell, or give other signal of its approach, and using a road engine instead of a switch engine—shows a substantial cause of action. *Louisville & N. R. Co. v. Crawford*, 44 Am. & Eng. R. Cas. 568, 89 Ala. 240, 8 So. Rep. 243.

In an action for personal injuries sustained by plaintiff while on the track, a count which avers that he was on the track "at the instance and request of defendant, and it was defendant's duty so to manage

and operate its engines and trains on said track as not to injure him, but, disregarding this duty, defendant negligently ran over and injured plaintiff with one of its engines," shows a good cause of action at common law, without regard to statutory provisions giving an action to the employe against his employer for injuries received while in the service. *Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 So. Rep. 145.—FOLLOWED IN *Louisville & N. R. Co. v. Orr*, 94 Ala. 602.

An allegation which directly imputes negligence and carelessness to the defendant in causing a locomotive to run against a car on which plaintiff was at work, causing it to move and himself to be thrown down, whereby he was injured, is a charge of negligence made directly upon the defendant itself, and not merely upon its servants. The negligence of a co-servant with the plaintiff, engaged in a common service, cannot be said to be the negligence of the defendant. *Weld v. Oregon S. L. & U. N. R. Co.*, 21 Oreg. 159, 27 Pac. Rep. 934.

534. Failure to use signals or to warn employe.—Plaintiff, who was employed to watch a bridge, sued for a personal injury received by being struck by a passing train, and charged that it was the duty of all engineers in approaching the bridge to sound a whistle or ring a bell, which the engineer negligently failed to do at the time of the accident, which caused the injury. *Held*, the complaint showed a violation of the common law duty of the company, and a demurrer was properly overruled. *Pike v. Chicago & A. R. Co.*, 39 Fed. Rep. 754. *Louisville & N. R. Co. v. Hall*, 48 Am. & Eng. R. Cas. 170, 91 Ala. 112, 8 So. Rep. 371.

535. Alleging company's notice or knowledge of defects, generally.—If the servant claim damages from the master for injuries received on account of defective premises, buildings, machinery, or appliances he must allege and prove that the defect or the unfitness which caused the injury was known to the master or was such as with reasonable diligence and attention to his business he ought to have known. *Pittsburgh, C. & St. L. R. Co. v. Adams*, 23 Am. & Eng. R. Cas. 408, 105 Ind. 151, 5 N. E. Rep. 187.

536. Knowledge of defective track or premises.—In an action for a personal injury to a servant from failure to fill the

spaces between the ties of defendant's road in its yard with cinders or other substance, it is sufficient to allege that it was the duty of the defendant to have filled such spaces. It is not necessary to allege that the defendant knew of such defects in the construction of the tracks, switches, etc. *Chicago & E. I. R. Co. v. Hines*, 132 Ill. 161, 23 N. E. Rep. 1021; *affirming* 33 Ill. App. 271.

A petition which alleges that defendant negligently and carelessly permitted a loose iron rail to remain upon the path alongside the track used by switchmen in the necessary discharge of their duties is not defective by reason of the omission to allege that defendant had knowledge, or by ordinary attention to its duties would have known, that the rail lay upon the path. The omitted statement is substantially contained in the allegation made. *Hall v. Missouri Pac. R. Co.*, 8 Am. & Eng. R. Cas. 106, 74 Mo. 298. —RECONCILING *Price v. St. Louis, K. C. & N. R. Co.*, 72 Mo. 414.

537. Knowledge of defective machinery or appliances.—In an action by a servant against his master to recover damages for personal injury caused by the defective state of machinery or premises or materials provided by the master for the purposes of the work, it is necessary for the plaintiff to allege and prove that the danger or defect was known to the defendant and not known to the plaintiff. *Bogenschutz v. Smith*, 84 Ky. 330, 1 S. W. Rep. 578. *Norfolk & W. R. Co. v. Jackson*, 85 Va. 489, 8 S. E. Rep. 370. —QUOTING *Dynen v. Leach*, 40 Eng. L. & Eq. 491; *Michigan C. R. Co. v. Smithson*, 45 Mich. 212. REVIEWING *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S. 189; *Clark v. Richmond & D. R. Co.*, 78 Va. 709.

The petition must allege that the master knew its condition, or by the exercise of due care might have known it. *Current v. Missouri Pac. R. Co.*, 86 Mo. 62. —QUALIFIED IN *Wills v. Cape Girardeau S. W. R. Co.*, 44 Mo. App. 51.

Or it must contain an equivalent averment. *Crane v. Missouri Pac. R. Co.*, 25 Am. & Eng. R. Cas. 440, 87 Mo. 588. *Johnson v. Missouri Pac. R. Co.*, 96 Mo. 340, 9 S. W. Rep. 790. —REVIEWING *Crane v. Missouri Pac. R. Co.*, 87 Mo. 588.

To entitle an employé to recover for an injury happening in the course of his employment, through defects in the machinery which he must use, he must allege and

prove actual notice to the company of the defects therein which caused the injury. *McMillan v. Saratoga & W. R. Co.*, 20 Barb. (N. Y.) 449.

Where the complaint alleges that the defendant carelessly and negligently furnished a defective machine, in the furnishing of which the law holds the defendant to care and diligence, the legal implication is that the defendant knew, or by reasonable diligence might have known, of the defect. It is unnecessary to formally allege notice of such defect in the complaint, when facts are stated from which the law will imply notice. *Warner v. Western N. C. R. Co.*, 25 Am. & Eng. R. Cas. 432, 94 N. Car. 250. —COMMENTED ON IN *Hudson v. Charleston, C. & C. R. Co.*, 41 Am. & Eng. R. Cas. 348, 104 N. Car. 491, 10 S. E. Rep. 669.

The complaint alleged that the employé was killed by reason of a defect in the machinery provided by the defendant. *Held*, that it was unnecessary that the complaint should further allege that the defect which caused the injury was known to defendant. *Branch v. Port Royal & W. C. R. Co.*, 53 Am. & Eng. R. Cas. 276, 35 So. Car. 405, 14 S. E. Rep. 808.

538. Knowledge of defective engine or car.—Where an engineer seeks to recover for injuries received through alleged defects in the engine, he must allege and prove actual notice to the company of the defects which caused the injuries, or some of them. *McMillan v. Saratoga & W. R. Co.*, 20 Barb. (N. Y.) 449. —QUOTING *Keegan v. Western R. Co.*, 8 N. Y. 175. —APPROVED IN *Elliott v. St. Louis & I. M. R. Co.*, 67 Mo. 272.

In an action by an employé for injuries sustained in being thrown from a freight car defectively constructed, an allegation that the plaintiff's injury was caused wholly by the defendant negligently permitting the car defectively constructed to be used, sufficiently charges negligence on the part of the defendant, although such negligence could only be proven by showing that the defendant had either actual or constructive knowledge of the defect. *O'Connor v. Illinois C. R. Co.*, 83 Iowa 105, 48 N. W. Rep. 1002.

539. Notice of incompetency of co-employee.—Where an employé seeks to recover for injuries received through the negligence of a co-employé, the complaint is sufficient which charges that the company

had notice of the negligent habits of such co-employé, and that plaintiff had not notice thereof. *Lake Shore & M. S. R. Co. v. Stupak*, 41 Am. & Eng. R. Cas. 382, 123 Ind. 210, 23 N. E. Rep. 246.

It is not necessary to set out the names of the particular officers having such notice. *Lake Shore & M. S. R. Co. v. Stupak*, 41 Am. & Eng. R. Cas. 382, 123 Ind. 210, 23 N. E. Rep. 246.

540. Negating negligence of co-employee.—A declaration, in an action by an employé, is not sufficient, even after verdict, where it seeks to charge the company with the negligence of other servants, resulting in the injury, where it does not allege that such other servants were not fellow-servants with the plaintiff. *East St. Louis Connecting R. Co. v. Dwyer*, 41 Ill. App. 522.—FOLLOWING *Joliet Steel Co. v. Shields*, 134 Ill. 209, 25 N. E. Rep. 569.—*Joliet Steel Co. v. Shields*, 134 Ill. 209, 25 N. E. Rep. 569.—FOLLOWED IN *East St. Louis Connecting R. Co. v. Dwyer*, 41 Ill. App. 522.

The allegations of a complaint that the injury occurred on defendant's road, on which it was at the time operating hand-cars; that plaintiff's intestate was engaged as an employé thereon; that H. was the foreman in charge of the hand-car upon which plaintiff's intestate was hurt—are sufficient to show that H. was at the time the foreman and not a mere fellow-servant. *Highland Ave. & B. R. Co. v. Dusenberry*, 98 Ala. 239, 13 So. Rep. 308.

In an action to recover for a personal injury resulting from the negligence of the engineer, the declaration averred that the plaintiff was a fence builder, and that he was injured by the sudden starting of the train while he was attempting to get on a freight car to unload fence posts, and that the employé who carelessly injured him was a locomotive engineer. *Held*, that the declaration stated facts showing that the negligence of the servant who caused the accident was not the negligence of a fellow-servant. *Louisville, E. & St. L. Con. R. Co. v. Hawthorn*, 147 Ill. 226, 35 N. E. Rep. 534.

541. Alleging incompetency of co-employee.—Where a brakeman seeks to charge a railroad company with an injury resulting from the known incompetency of his conductor, the complaint need not set out particulars constituting such incom-

petency. *Johnston v. Canadian Pac. R. Co.*, 50 Fed. Rep. 886.

The complaint stated, in substance, that A. was brakeman on a freight train of defendant, and was killed by the cars being thrown off the track by the breaking of a switch-pin, which the company and its servants, knowing it was insecure, had carelessly left out of repair for twelve days previous. There was no switch tender, and the whole care of the switch, and everything pertaining to its security, was under the control of the section boss and his hands, who had nothing to do with running the trains. *Held*, that in the absence of an averment that the company was negligent in employing an incompetent section boss, the complaint did not sufficiently state a case of negligence against the company. *Slattery v. Toledo & W. R. Co.*, 23 Ind. 81.—FOLLOWING *Thayer v. St. Louis, A. & T. H. R. Co.*, 22 Ind. 26.

542. Negating contributory negligence of plaintiff.*—In an action for an injury to an employé, it must appear from the complaint, either by express averment or by a particular showing of the facts, that the injury complained of occurred without the fault or negligence of the plaintiff. *Evansville & C. R. Co. v. Dexter*, 24 Ind. 411.—FOLLOWING *Indianapolis, P. & C. R. Co. v. Keely*, 23 Ind. 133.—DISTINGUISHED IN *Cincinnati, H. & I. R. Co. v. Carper*, 31 Am. & Eng. R. Cas. 36, 112 Ind. 26, 11 West. Rep. 223, 13 N. E. Rep. 122.

A count in a complaint in an action to recover damages for injuries to a brakeman caused by being knocked from a train by an overhead bridge, is insufficient if it fails to allege that the brakeman was on the top of the cars in the performance of his duty. *Louisville & N. R. Co. v. Hall*, 39 Am. & Eng. R. Cas. 298, 87 Ala. 708, 4 L. R. A. 710, 6 So. Rep. 277.

The allegation in the declaration that the servant used due care negatives negligence on his part, and, by implication, that he had knowledge of the defects or omissions of duty by reason of which he was injured. It is a matter of defense that the servant knew of the defects or omissions of duty which caused his injury. *Chicago & E. I. R. Co.*

*When absence of contributory negligence must be averred, see 38 AM. & ENG. R. CAS. 183, *abstr.*

Pac. R. Co.,

stance, that
train of de-
cars being
breaking of a
and its ser-
e, had care-
ve days pre-
tender, and
and every-
y, was under
boss and his
with running
presence of an
as negligent
section boss,
ntly state a
e company.
23 Ind. 81.—
s, A. & T. H.

utory neg-
n action for
must appear
express aver-
of the facts,
of occurred
ence of the
Co. v. Dexter,
anapolis, P.
133.—Dis-
& I. R. Co.
Cas. 36, 112
N. E. Rep.

an action to
a brakeman
n a train by
ent if it fails
is on the top
of his duty.
39 Am. &
4 L. R. A.

tion that the
s negligence
that he had
missions of
injured. It
ervant knew
duty which
E. I. R. Co.

y negligence
ENG. R. CAS.

v. Hines, 132 Ill. 161, 23 N. E. Rep. 1021;
affirming 33 Ill. App. 271.

In order for a conductor of a freight train to recover for personal injuries received through defects, he must aver in the petition, in addition to the allegation that he had not knowledge of the defects which were the cause of the injury, that he exercised due care and diligence in the use and inspection of the cars, machinery, etc., while the same were in his charge. *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541.—FOLLOWED IN *Street R. Co. v. Nolthenius*, 19 Am. & Eng. R. Cas. 191, 40 Ohio St. 376.

In an action by a servant for an injury resulting from negligence in furnishing appliances or in caring for the premises where the work is to be done, the plaintiff must aver want of knowledge on his part of the defects causing the injury; or that, having such knowledge, he informed the master, and continued in his employment upon a promise, expressed or implied, to remedy the defects; an averment that the injury occurred without fault on his part is not sufficient. *Chicago & O. C. & C. Co. v. Norman*, 49 Ohio St. 598, 32 N. E. Rep. 857.

Contributory negligence is a defense, and an employé suing for a personal injury need not allege that his own negligence did not contribute to the result. *Conroy v. Oregon Constr. Co.*, 10 Sawy. (U. S.) 630, 23 Fed. Rep. 71.—REVIEWING *Holmes v. Oregon & C. R. Co.*, 6 Sawy. 289; *Washington & G. R. Co. v. Gladmon*, 15 Wall. (U. S.) 401.—*Mary Lee C. & R. Co. v. Chambliss*, 53 Am. & Eng. R. Cas. 254, 97 Ala. 171, 11 So. Rep. 897. *Missouri Pac. R. Co. v. McCally*, 41 Kan. 639, 555, 21 Pac. Rep. 574.—FOLLOWING *Kansas City, L. & S. R. Co. v. Phillibert*, 25 Kan. 582.

Where a railroad company is sued on account of personal injuries to an employé, occasioned by the negligent construction of its road, if it desires to avail itself of the fact that the employé waived the company's negligence by remaining in its service with knowledge of the defects in the road, without objection on his part and without any promise of having the defects remedied, it must plead such facts as a defense, and establish them affirmatively by evidence, and that it is not incumbent upon the plaintiff to negative such defense in the first instance. *Mayes v. Chicago, R. I. & P. R. Co.*, 8 Am. & Eng. R. Cas. 527, 63 Iowa 562, 14 N. W. Rep. 340, 19 N. W. Rep. 680.

5 D. R. D.—18.

And the rule is not changed in this case by the fact that the petition alleged the inexperience of the injured employé, for the purpose of showing that he did not know the dangerous character of the defects in the road, and was, therefore, not himself negligent. *Mayes v. Chicago, R. I. & P. R. Co.*, 8 Am. & Eng. R. Cas. 527, 63 Iowa 562, 14 N. W. Rep. 340, 19 N. W. Rep. 680.

543. Alleging plaintiff's ignorance of or want of notice of defects, etc.*

—A complaint in an action by a servant for injury resulting from the unsafe condition of the company's premises must allege that the company knew and that the servant was ignorant of the danger. *Griffiths v. London & St. K. Dock Co.*, L. R. 13 Q. B. D. 259, 53 L. J. Q. B. D. 504, 51 L. T. 533, 33 W. R. 35, 49 J. P. 100; affirming L. R. 12 Q. B. D. 493, 50 L. T. 755, 32 W. R. 831, 48 J. P. 328.

A complaint seeking to recover for the death of an employé, caused by the fall of a bridge beneath the train on which he was employed, which it is alleged the defendant had permitted to become unsafe, is bad unless it is averred that the intestate was ignorant of the unsafe condition of the bridge. *Louisville, N. A. & C. R. Co. v. Sanford*, 117 Ind. 265, 19 N. E. Rep. 770.—FOLLOWING *Lake Shore & M. S. R. Co. v. Stupak*, 108 Ind. 1; *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75.—Contra, see *Donahue v. Enterprise R. Co.*, 32 So. Car. 299, 11 S. E. Rep. 95.

Where an employé seeks to recover for personal injuries received while using defective appliances, the complaint need not negative knowledge of the defects by the plaintiff. If such knowledge existed it is a matter of defense. *Indianapolis & C. R. Co. v. Klein*, 11 Ind. 38.—APPROVING *Indianapolis & C. R. Co. v. Love*, 10 Ind. 554.—*Magee v. North Pac. Coast R. Co.*, 78 Cal. 430, 20 Pac. Rep. 709, 21 Pac. Rep. 114.—NOT FOLLOWING *McGlynn v. Brodie*, 31 Cal. 376.—*Crane v. Missouri Pac. R. Co.*, 25 Am. & Eng. R. Cas. 440, 87 Mo. 588.—APPROVING *Thompson v. North Mo. R. Co.*, 51 Mo. 191; *Stephens v. Macon*, 83 Mo. 345; *Mack v. St. Louis, K. C. & N. R. Co.*, 77 Mo. 233.—RECONCILED IN *Dickson v. Missouri Pac. R. Co.*, 104 Mo. 491.—*Cole v. Chicago & N. W. R. Co.*, 67 Wis. 272, 30 N. W. Rep. 600.

* Injury to employé caused by defects in machinery or appliances. Complaint must aver lack of knowledge by plaintiff of defects, see 38 AM. & ENG. R. CAS. 222, *abstr.*

δ. Answer; Plea.

544. Averment of facts admissible under general denial.—In an action for an injury occasioned by a defective "crab" which plaintiff was using while employed in building a bridge, defendant filed an answer containing a general denial and also allegations that the machine was defective and that the defects could have been ascertained on slight examination, which examination plaintiff had failed to make; also allegations to the effect that plaintiff had been employed upon his representation that he was skilled in the use of the "crab," whereas he was not skilled, in consequence of which he had been injured. *Held*, that the facts averred in the various clauses of the answer were admissible in evidence under the general denial, and that therefore demurrers to the paragraphs setting forth those facts were properly sustained. *Louisville & N. R. Co. v. Orr*, 8 Am. & Eng. R. Cas. 94, 84 Ind. 50.

545. Averment of facts constituting affirmative defense.—Where in addition to the general denial the answer contains a paragraph setting out that plaintiff had been engaged in and about the use of the "crab" in question for two months before the occurrence of the alleged injury, and was a long time prior thereto acquainted with its alleged condition and defects and the danger attendant on its use, and that long after he acquired such knowledge he continued to work about said machine voluntarily and without any coercion on the part of defendant—*held*, that the facts thus set up amounted to an affirmative defense and that a demurrer thereto was improperly sustained. *Louisville & N. R. Co. v. Orr*, 8 Am. & Eng. R. Cas. 94, 84 Ind. 50.—APPROVED IN *Burlington & C. R. Co. v. Liehe*, 17 Colo. 280.

546. Necessity and sufficiency of averment of employe's negligence.—The statute (N. C. Laws 1887, ch. 33) which requires that, when contributory negligence is relied on as a defense, it shall be set up in the answer, applies to actions brought by an employe against his employer. *Hudson v. Charleston, C. & C. R. Co.*, 41 Am. & Eng. R. Cas. 348, 104 N. Car. 491, 10 S. E. Rep. 669.

The mere averment in the answer to the servant's action for damages on account of the master's negligence, that the injury was

caused by the plaintiff's own negligence, is not sufficient to let in the defense that the injury was caused by the negligence of a fellow servant. *Higgins v. Missouri Pac. R. Co.*, 43 Mo. App. 547.

A plea which sets up contributory negligence on the part of plaintiff, averring that he was injured while acting in violation of a "rule which the defendant had adopted and promulgated," is subject to demurrer, unless it also avers that the plaintiff had knowledge or notice of such rule. *Louisville & N. R. Co. v. Hawkins*, 92 Ala. 241, 9 So. Rep. 271.—CONTRADICTING *Alexander v. Louisville & N. R. Co.*, 83 Ky. 590. FOLLOWING *Louisville & N. R. Co. v. Perry*, 87 Ala. 392.—FOLLOWED IN *Memphis & C. R. Co. v. Graham*, 94 Ala. 545.

547. Averment that employe had knowledge of defects.*—A plea which avers that the plaintiff "knew, or by the use of ordinary care could have known, of said defect," is demurrable, when the employe was not chargeable with the duty of examining the machinery. *Louisville & N. R. Co. v. Hawkins*, 92 Ala. 241, 9 So. Rep. 271.

548. Averment of inability to discover defect.—A paragraph of answer is good as a special denial to the complaint, which avers that the car with the defective brake was a foreign car, etc., and that the defendant had no knowledge of the defect before the happening of the accident and could not have discovered it by careful examination. *Chicago, St. L. & P. R. Co. v. Fry*, 131 Ind. 319, 28 N. E. Rep. 989.

549. Averment that an order was unauthorized.—In order to set up the defense that an order to move a car was not given by the defendant, but by the foreman of its blacksmith shop, a person unauthorized to give such order, the company must make such averments in its answer. *Conlin v. San Francisco & S. J. R. Co.*, 36 Cal. 404.

c. Defenses.

550. Generally.—There is a clear distinction between the defenses of contributory negligence and the assumption of risks. *Alcorn v. Chicago & A. R. Co.*, 53 Am. & Eng. R. Cas. 87, 108 Mo. 81, 18 S. W. Rep. 188.

Where a servant, whose duty it is at any time during working hours when upon the

* Knowledge on part of employe of defects which cause an injury are matters of defense only, see 38 AM. & ENG. R. CAS. 176, *abstr.*

whilst the deceased was acting in violation of the Sunday law. *Louisville, N. A. & C. R. Co. v. Buck*, 38 *Am. & Eng. R. Cas.* 152, 116 *Ind.* 566, 19 *N. E. Rep.* 453, 2 *L. R. A.* 520, 28 *Am. Law Reg.* 148.—FOLLOWING *Louisville, N. A. & C. R. Co. v. Frawley*, 110 *Ind.* 18.

Where a company finds it necessary to run its trains on Sunday, and also finds it necessary to keep other employés at work on the track to keep it in repair, and an employé is injured, the fact that he was working on Sunday will not exonerate the company from liability. *Johnson v. Missouri Pac. R. Co.*, 18 *Neb.* 690, 26 *N. W. Rep.* 347.

A conductor on a street-car cannot recover for injuries received while running the car for ordinary purposes on Sunday. *Day v. Highland St. R. Co.*, 135 *Mass.* 113.

A railroad engineer performing his ordinary duties on Sunday is doing an unlawful thing, and cannot recover for injuries received through the negligence of the company, unless he can make it appear that he was engaged at the time in a work of necessity or charity. *Read v. Boston & A. R. Co.*, 140 *Mass.* 199, 4 *N. E. Rep.* 227.

550. Contract to which employe is not a party.—Where a brakeman is in the employ of a railway company, its liability to him is not affected by a contract, to which he is not a party, between such company and a firm employed by the railway company to construct its road. *Gulf, C. & S. F. R. Co. v. Shearer*, 1 *Tex. Civ. App.* 343, 21 *S. W. Rep.* 133.

3. Evidence.

a. Admissibility.

560. Statute prescribing rule of evidence—Conflict of laws.—The law of another state where the injury to plaintiff (an employé of defendant) occurred, prescribing a rule of evidence for the enforcement of the cause of action, which is in opposition to the rule prevailing in Alabama, will not be applied in a suit brought in Alabama. *Helton v. Alabama Midland R. Co.*, 97 *Ala.* 275, 12 *So. Rep.* 276.

561. To show company's negligence, generally.—By statutory provision, railroad engineers are required to be licensed only when they "operate or drive an engine upon the main line or roadbed of any railroad in this state" (*Ala. Sess. Acts*, 1886-7, p. 100); and when the action is

brought to recover damages for personal injuries sustained by the alleged negligence of an engineer in charge of an engine employed only in the railroad yard, and while so employed, the fact that he had no license cannot be looked to as tending to show negligence on the part of the railroad company. *Memphis & C. R. Co. v. Askew*, 90 *Ala.* 5, 7 *So. Rep.* 823.

Where a company is sued for an injury to an employé, and charged with negligence in allowing its track to be in a defective condition, evidence cannot be introduced to show negligence on the part of a fellow-servant of the plaintiff. *Chicago & N. W. R. Co. v. Sweet*, 45 *Ill.* 197.—DISTINGUISHED IN *Chicago & N. W. R. Co. v. Ward*, 61 *Ill.* 130; *Pennsylvania Co. v. Lynch*, 90 *Ill.* 333. QUOTED IN *Toledo, W. & W. R. Co. v. Moore*, 77 *Ill.* 217; *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 *Kan.* 701, 16 *Pac. Rep.* 146.

It was error to refuse to permit plaintiff to show how many of the section men employed had had no experience in that particular kind of work, the severity of the work, whether any of the men gave out before the accident to plaintiff, whether plaintiff could see the rail before it hit him, and that loading the rails onto moving cars was more dangerous than upon stationary cars. *Palmer v. Michigan C. R. Co.*, 87 *Mich.* 281, 49 *N. W. Rep.* 613.

562. Failure to provide safe working place.—Where an employé is injured while shoveling coal in a bin, which is caused by one side giving way, the negligence charged being a failure to use proper lumber in its construction, and a failure to strengthen the bin after it showed signs of weakness, and the company admits the construction of the bin, and alleges that it furnished suitable material, and intrusted the work to competent persons, it is not competent for it to prove that the bin was built by another company. *Gerbig v. New York, L. E. & W. R. Co.*, 75 *Hun* 605, 27 *N. Y. Supp.* 594.

563. Failure to provide safe roadbed and track.—In a suit against a company for negligence in not keeping in good order its road and roadbed on an embankment through which ran a culvert, testimony to the effect that a certain point before reaching the place of the disaster, and where trouble had previously occurred from the track's rising from quicksand pressure

in wet weather, was found on arrival to be in good condition and being watched by section forces, and that after passing that point the company's servants apprehended no further danger, "having passed the only point at which there was any particular reason to apprehend danger," should not have been excluded. *Central R. & B. Co. v. Kent*, 84 Ga. 351, 10 S. E. Rep. 965; further appeal 87 Ga. 402, 13 S. E. Rep. 502.

The rules of the company, placed in evidence by the plaintiff, requiring the road master to go or send to any point on the road at which he had reason to apprehend there might be danger, it being his business to examine the road and know its condition, and he having testified that about three hours before the accident he went down into the water and examined the culvert under the embankment, and found everything as he thought safe, it was error to exclude his testimony that he "apprehended no danger there," and that he "thought there might be danger" at another place to which he had sent the road hands. *Central R. & B. Co. v. Kent*, 84 Ga. 351, 10 S. E. Rep. 965.

In an action for injuries to a brakeman there was evidence that the accident, which occurred after dark, was caused by a loose board on a platform beside the track. *Held*, that evidence was admissible to show the presence of such a board at or near any place where, on the evidence, the jury would have been warranted in finding that the accident took place. *Sweet v. Boston & A. R. Co.*, 156 Mass. 284, 31 N. E. Rep. 296.

564. Failure to block frogs.—It was competent for the plaintiff to prove a general order of the defendant to block all frogs, and a neglect of such order in the case of the frog in question, although such facts were not specially averred in his complaint. *Coates v. Burlington, C. R. & N. R. Co.*, 15 Am. & Eng. R. Cas. 265, 62 Iowa 486, 17 N. W. Rep. 760.

In an action brought in Texas to recover damages for injuries sustained through the plaintiff's foot being caught in the unblocked frog of a switch upon a public street, testimony that railroads in the northwestern states had adopted a device consisting of a block of wood fastened between the rails at the frogs of switches and had used the same for four or five years, and that without some similar contrivance the switches were not safe for pedestrians, is

admissible for the purpose of showing negligence on the part of the company. *Gulf, C. & S. F. R. Co. v. Walker*, 37 Am. & Eng. R. Cas. 342, 70 Tex. 126, 7 S. W. Rep. 831.

In such an action it is not error for the court to refuse to charge that railroad companies are not required to discard reasonably safe appliances in order to introduce new inventions, the question in issue being the adoption of a safeguard against a known danger in addition to the appliances already in use. *Gulf, C. & S. F. R. Co. v. Walker*, 37 Am. & Eng. R. Cas. 342, 70 Tex. 126, 7 S. W. Rep. 831.

565. Unsafe of bridge.—It is not error to exclude evidence about the unsafe condition of the bridge upon which plaintiff was injured, when the bridge had remained in the same condition for two years prior to the injury, and plaintiff had crossed it nearly every day during that time, and knew its condition, and had the day before the injury occurred, told the engineer in charge of the engine on which he was employed that it was unsafe, and that he would thereafter get off the engine at the west end of it, and would not get off the engine on the bridge any more. *Weld v. Missouri Pac. R. Co.*, 39 Kan. 63, 17 Pac. Rep. 306.

566. Failure to furnish safe appliances and machinery.—Where an employé is injured through the alleged imperfect construction of a pile-driver, evidence is admissible to show that it was not properly constructed, where the company in its answer alleges that it was, though complainant's petition does not aver that it was not properly constructed. *St. Louis, A. & T. R. Co. v. Jones*, (Tex.) 14 S. W. Rep. 309.

567. — handles and hand-holds.—In an action for injuries resulting from a defective hand-hold on a car, it is competent for the plaintiff to show the manner in which the hand-hold was fastened to the car and the condition of the screws and wood immediately after the accident. *Gutridge v. Missouri Pac. R. Co.*, 105 Mo. 520, 16 S. W. Rep. 943.

The failure of a railroad company to furnish handles on a tank car for a brakeman to take hold of in drawing a coupling-pin, when there is evidence that they would be convenient and useful, and that other similar cars belonging to the company have them, is proper for the jury in considering

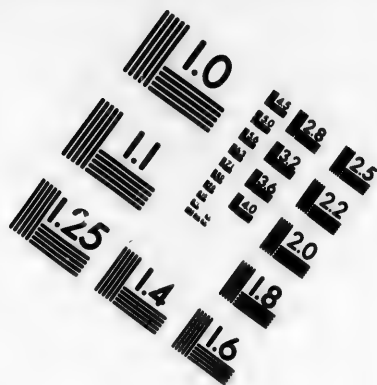
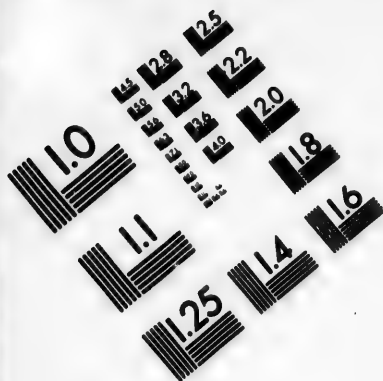
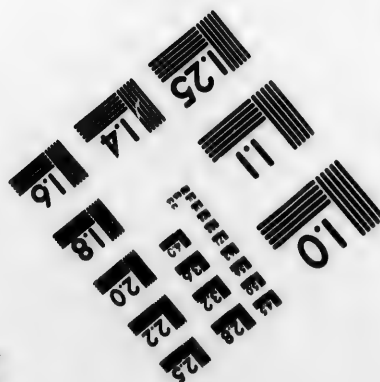
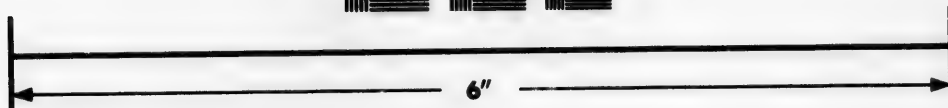
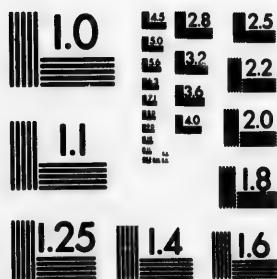


IMAGE EVALUATION TEST TARGET (MT-3)



Photographic Sciences Corporation

**23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503**

1.8
2.0
2.2
2.5
2.8
3.2
3.6
4.0
4.5
5.0
5.6
6.3
7.1
8.0
9.0
10.0
11.2
12.5
14.0
16.0
18.0
20.0
22.4
25.0
28.0
31.5
36.0
40.0
45.0
50.0
56.0
63.0
71.0
80.0
90.0
100.0

10
20
30
40
50
60
70
80
90
100

the company's negligence. *Graham v. Boston & A. R. Co.*, 156 Mass. 4, 30 N. E. Rep. 359.

568. — hand-car.—Where an employé sues for a personal injury received while riding on a hand-car, and charges negligence only in a water keg being placed on the car so as to interfere with his operating it, evidence is not admissible to show negligence in other respects, as by improperly placing tools on the car. *Harty v. St. Louis, I. M. & S. R. Co.*, 140 Mo. 368, 14 West. Rep. 760, 8 S. W. Rep. 562.

569. Use of the same kind of appliances by other companies.—As bearing on the question of negligence in the use of particular machinery or appliances, the master may show that they are used by the owners of other similar works, well regulated and prudently managed; and the principle extends to the character of the workmen employed in the performance of any particular duty, as regards the question whether any special skill or experience is necessary to constitute reasonable competency. *Holland v. Tennessee C., I. & R. Co.*, 91 Ala. 444, 8 So. Rep. 524.

570. Increased precaution after the accident.*—Where an employé sues for an injury caused by a defective machine, evidence is not admissible to show that the company made changes in the machine after the injury, for the purpose of showing negligence. *Columbia & P. S. R. Co. v. Hawthorne*, 53 Am. & Eng. R. Cas. 289, 144 U. S. 202, 12 Sup. Ct. Rep. 591; *reversing* 3 Wash. T. 353, 19 Pac. Rep. 25.—DISAPPROVING *McKee v. Bidwell*, 74 Pa. St. 218; *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412. DISTINGUISHING *Readman v. Conway*, 126 Mass. 374. QUOTING *Hart v. Lancashire & Y. R. Co.*, 21 L. T. 261. QUOTING AND FOLLOWING *Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465.—FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Parker*, 55 Fed. Rep. 595.

It is incompetent to prove that shortly after the accident the employer substituted a safer appliance. The employer is chargeable with negligence only upon proof that before the accident he knew or had notice that the appliance was unsafe or unsuitable to its purpose; and the adoption of a safer

appliance after knowledge of an unexpected accident is not an admission of prior negligence. *Sappenfield v. Main St. & A. P. R. Co.*, 91 Cal. 48, 27 Pac. Rep. 590.—QUOTING *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47.

If an accident happens through the alleged negligence of an employer, his subsequent acts in taking additional precautions to prevent other accidents are not admissible in evidence in an action against him for the injuries occasioned either at common law or under the employers' liability act (Mass. St. 1887, ch. 270, § 2), for the purpose of showing that such precautions were needed at the time of the accident. *Shinners v. Prop'rs of Locks & Canals*, 154 Mass. 168, 28 N. E. Rep. 10.—APPROVING *Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465. DISTINGUISHING *Readman v. Conway*, 126 Mass. 374. OVERRULING *O'Leary v. Mankato*, 21 Minn. 65; *Phelps v. Mankato*, 23 Minn. 276; *Kelly v. Southern Minn. R. Co.*, 28 Minn. 98. REVIEWING *Menard v. Boston & M. R. Co.*, 150 Mass. 386.—FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Parker*, 55 Fed. Rep. 595.

571. Subsequent repairs.—In an action for injuries sustained by reason of defective machinery, evidence on behalf of the plaintiff that the defects complained of were repaired after the accident, is inadmissible. *Lang v. Sanger*, 76 Wis. 71, 44 N. W. Rep. 1095.—APPROVING *Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465.—*Weld v. Missouri Pac. R. Co.*, 39 Kan. 63, 17 Pac. Rep. 306.

In an action against a company, by an employé who claimed to have been hurt through a defect in the roadbed, he was permitted to prove that the road was repaired at the point soon after the accident. But the court instructed the jury not to consider the evidence at all. *Held*, that its admission was no ground for reversal. *New York, L. E. & W. R. Co. v. Madison*, 123 U. S. 524, 8 Sup. Ct. Rep. 246.

572. To show or rebut employe's negligence, generally.—Where an employé of one railroad company sues another company for personal injuries received while unloading a car, by being thrown down by the running of an engine against the car, and the defense of contributory negligence is set up, the testimony of another workman to the effect that they were busy at their work and did not think of the

* Evidence of substitution of new appliance after the accident, see 48 AM. & ENG. R. CAS. 218, *abstr.*

approach of the engine until it struck the car, is competent, though perhaps not important, evidence upon the issue of contributory negligence. *Texas & P. R. Co. v. Volk*, 151 *U. S.* 73, 14 *Sup. Ct. Rep.* 239.

In an action by a brakeman for negligence in running an engine upon him while between the rails in the performance of his duty, evidence that the condition of the track was such that he could not have alighted outside of the rails was competent for the purpose of showing that he was not negligent in alighting between them. *Pringle v. Chicago, R. I. & P. R. Co.*, 18 *Am. & Eng. R. Cas.* 91, 64 *Iowa* 613, 21 *N. W. Rep.* 108.

573. Nature of his employment.—

In a suit to recover for the killing of a person through negligence, while engaged as a switchman, the nature of his employment is material on the question whether he was exercising due care. *Pennsylvania Co. v. Coulan*, 6 *Am. & Eng. R. Cas.* 243, 101 *Ill.* 93.

If specific instructions are given to an employé, they will control him; but if none are given, he will be governed by the general duties of his position. Where the testimony as to the existence of specific instructions was conflicting, the general duties of the position could be proved, as bearing on the case, in the event the jury believed no specific instructions existed. *Augusta & S. R. Co. v. Dorsey*, 68 *Ga.* 228.

574. His knowledge or ignorance of dangers and defects.—Testimony of the plaintiff that up to the time he received the injury complained of he had not observed that cars or engines were constructed with double deadwoods, is admissible. *Louisville, N. A. & C. R. Co. v. Frawley*, 28 *Am. & Eng. R. Cas.* 308, 110 *Ind.* 18, 9 *N. E. Rep.* 594.

The method of moving cars by "staking" is not a matter that the general public have knowledge of, and it is competent for the plaintiff in a negligence case, who was injured by the moving of a car in that manner, to show that he was ignorant of such a practice as bearing upon his own exercise of care. *Helbig v. Michigan C. R. Co.*, 85 *Mich.* 359, 48 *N. W. Rep.* 589.

On the question whether the engineer was guilty of contributory negligence in not taking care of himself and in unnecessarily exposing himself to danger of injury while operating the engine, it is competent to

show that he knew that another train was running in the same direction three quarters of a mile behind him, and that he was expected to meet a third train at a station five or six miles away. *Murphy v. Wabash R. Co.*, 115 *Mo.* 111, 21 *S. W. Rep.* 862.

The plaintiff, as witness, testified that he did not know of the defects in the hand-car when he was injured; that a week or ten days afterward he examined the car and found it in the condition alleged. This was relevant, there being no reason to believe that the car was not in the same condition. *Gulf, C. & S. F. R. Co. v. Johnson*, 83 *Tex.* 628, 19 *S. W. Rep.* 151.

575. Carelessness on former occasions.—In a suit by an employé against his employer for damages done by a co-employé, the question whether he himself was free from negligence refers to negligence operating at the time of the injury. That he might have been negligent at some other time would not affect the issue. *Atlanta & W. P. R. Co. v. Johnson*, 66 *Ga.* 259. *Kailen v. Northwestern Bedding Co.*, 46 *Minn.* 187, 48 *N. W. Rep.* 779.

The negligence of a servant in a particular instance cannot well be shown by testimony of his incompetency or carelessness on other occasions; but if it is also shown that the master knew of the cases or that they were of such a character and so frequent that he must have known of them, he, the master, may be chargeable with negligence in retaining such servant. *Michigan C. R. Co. v. Gilbert*, 2 *Am. & Eng. R. Cas.* 230, 46 *Mich.* 176, 9 *N. W. Rep.* 243.

576. To rebut inference suggested by failure of employe to complain of defect.—It appearing that the plaintiff remained in the defendant's service more than a year after the alleged accident and injury, without disclosing the fact or making complaint to the defendant, it was not error to receive from him testimony showing, as the reason of such conduct, that he was afraid of losing his position in the defendant's service. It was admissible for the purpose of rebutting the inference suggested by his conduct. *Macy v. St. Paul & D. R. Co.*, 35 *Minn.* 200, 28 *N. W. Rep.* 249.

577. Admissibility of statements of employes, generally.—Declarations by an agent, made immediately after an accident, as to his opinion of the defects in the machinery causing the accident, are not evidence against the owner of the machinery.

Baker v. Allegheny Valley R. Co., 8 Am. & Eng. R. Cas. 141, 95 Pa. St. 211.

578. Statements of injured employe.—In an action by a brakeman for an injury received while doing dangerous work for which he had not been hired, he can show what he said on being ordered to perform it, and that he protested against the requirement. *Jones v. Lake Shore & M. S. R. Co.*, 8 Am. & Eng. R. Cas. 221, 49 Mich. 573, 14 N. W. Rep. 551. — **DISTINGUISHED** IN *Leary v. Boston & A. R. Co.*, 23 Am. & Eng. R. Cas. 383, 139 Mass. 580, 52 Am. Rep. 733; *Cole v. Chicago & N. W. R. Co.*, 33 Am. & Eng. R. Cas. 274, 71 Wis. 114.

A train ran off the track at a switch and killed the engineer, and the company was charged with negligence in that it had removed a patent switch and substituted a common switch therefor. *Held*, that declarations made by the engineer that the patent switch was unsafe and that he wanted it removed and a common one put in were admissible, both as tending to show contributory negligence on his part, and for the purpose of showing prudence and care on the part of the company. *Piper v. New York C. & H. R. R. Co.*, 1 T. & C. (N. Y.) 290; *affirmed in* 56 N. Y. 630, *mem.*

579. Statements of the foreman.—Where it appears that an inexperienced section hand has notified the foreman that a hand-car with which he works is defective, and the foreman has replied that the defect does not render the car dangerous, the reply of the foreman may be proven as tending to show negligence of the company, in an action by the employe for an injury received by the continued use of the car. *Gulf, C. & S. F. R. Co. v. Wells*, (Tex.) 16 S. W. Rep. 1025.

580. — or boss.—Plaintiff was engaged with others as laborers, and they were usually conveyed from their work over a bridge, to where they were lodged, by an engine; but on the evening of the accident they were told by their boss to walk over, and plaintiff testified that the boss told them that they could safely walk across, as no engine would pass for two hours, but that an engine overtook them on the bridge and he was injured. *Held*, that it was proper to instruct the jury that they could consider the statement of the boss that the men could cross in safety and that no train would pass for two hours. *Amato v. Northern Pac. R. Co.*, 46 Fed. Rep. 561; *affirmed in* 49 Fed. Rep.

881; *which is affirmed in* 144 U. S. 465, 12 Sup. Ct. Rep. 740.

581. — or assistant supervisor.—On the trial of a suit by an employe, for damages caused by the negligence of his co employes, it was error to permit the plaintiff to testify that an assistant supervisor had told him, after the injury was done, that the company felt itself under obligations to support him and his family during his life. *East Tenn., V. & G. R. Co. v. Duggan*, 51 Ga. 212, 6 Am. Ry. Rep. 195.

582. Admissibility of customary and usual practices.—Plaintiff's evidence tending to show that, before he went on between the cars, he had attempted to couple them with a stick, signaled the engineer to stop the train, and went in after the cars had stopped, and evidence that this was in accordance with the custom and practice, when a coupling cannot be made with a stick, is relevant and admissible, as showing that the rule was not imperative, or was sometimes waived; but evidence of the fact that it was the custom and duty of engineers not to move their trains when stopped until a signal is given, not being shown to apply to the coupling of cars in a yard, is not admissible. *Hissong v. Richmond & D. R. Co.*, 91 Ala. 514, 8 So. Rep. 776.

Evidence that it was customary for brakemen on the railroad, and especially in that yard, to get on over the side, was admissible to show that the order of the conductor also fairly implied that the plaintiff should get on in the usual way, as he tried to do. *Coates v. Boston & M. R. Co.*, 153 Mass. 297, 26 N. E. Rep. 864.

Where a brakeman on a freight train, whose duty it was to go forward and open a switch, jumped from the first car to the engine tender—*held*, that the testimony of brakemen was admissible to show such to be the usual custom, and that it was easier to jump on the tender, and go from it to the engine steps, which were nearer the ground, than to go down the ladder on the side of the car. But a witness testifying to such custom cannot be permitted to testify also that in going from the top of the box car in the rear of the tender to the engine he would jump down on the same place in the tender on which plaintiff testified he jumped. *Whitsett v. Chicago, R. I. & P. R. Co.*, 22 Am. & Eng. R. Cas. 336, 67 Iowa 150, 25 N. W. Rep. 104.

An objection was properly sustained to a question which had for its purpose to prove "that the general method employed by the defendant in the prosecution of this kind of business was that on occasions when the plow was being used * * * the men got out of the way." If the proposition had been to prove that the plaintiff had previously been warned not to occupy a position similar to that occupied by him when injured, and that he was acting in disregard of such warning when the injury befell him, the evidence would have been competent. *Cincinnati, L. & St. L. & C. R. Co. v. Roesch*, 126 Ind. 445, 26 N. E. Rep. 171.

Evidence of the practice and usage of others in climbing the ladder of a box car when the train is in motion, such as the deceased fell from, is inadmissible to prove due care on his part at the time of the accident. *Southern Kan. R. Co. v. Robbins*, 41 Am. & Eng. R. Cas. 316, 43 Kan. 145, 23 Pac. Rep. 113.

In an action by a rear brakeman or flagman of a freight train to recover for injuries he sustained in going from the inside of the car to the top by ladder strips, evidence to show that it was customary for the rear brakeman or flagman to ride inside of the rear car is inadmissible, the rules of the company, with which he was furnished, requiring that the brakeman must not leave his brakes while the train is in motion, nor take any other position on the train than that assigned him by the conductor, and declaring that the post of the rear brakeman or flagman is on the last car in the train, which he must not leave except to protect the train. *Gordy v. New York, P. & N. R. Co.*, 75 Md. 297, 23 Atl. Rep. 607.

In an action to recover for personal injuries to a brakeman while jumping from a moving freight train, an offer to prove that in so doing, without looking or being able to see where he would alight or what obstructions he would meet, he was doing only what was ordinarily done by the railroad employes engaged in like employment and under similar circumstances, with the knowledge and the approval of the defendants' superintendent, was properly excluded. *Thompson v. Boston & M. R. Co.*, 153 Mass. 391, 26 N. E. Rep. 1070.—**DISTINGUISHING** *Babcock v. Old Colony R. Co.*, 150 Mass. 467.

583. — of unusual practices.—Plaintiff may show that the uncoupling of

cars while in motion was unusual. *Jeffrey v. Keokuk & D. M. R. Co.*, 5 Am. & Eng. R. Cas. 568, 56 Iowa 546, 9 N. W. Rep. 884.

In a suit by a brakeman to recover damages for a personal injury occasioned by a want of ballast in a side track, the company offered to prove that it was not unusual for companies to have unballasted side tracks. *Held*, that the evidence was competent on the question of what vigilance was required in a brakeman under such circumstances. *Pennsylvania Co. v. Hankey*, 93 Ill. 580.

Suit by a switchman for injuries received in attempting to couple cars furnished with antiquated and dangerous deadwoods. It was proved that in entering the service of defendants he was furnished with a coupling-knife for use in coupling. *Held*, it was admissible to prove by the plaintiff and other witnesses that "it was not customary for employes to use the coupling-knife furnished by defendants; that they were never used in coupling cars, and that they were dangerous." *Bonner v. Bean*, 80 Tex. 152, 15 S. W. Rep. 798.

584. Admissibility of occurrence of similar accidents.—Where, in an action for injuries sustained by plaintiff when engaged in coupling two cars, occasioned by the overlapping of the deadwoods of the cars, the defendant claimed that plaintiff had full knowledge and took the chances of the danger, and gave evidence to the effect that it used on its road different kinds of cars, some without any deadwoods, and that switchmen in its employ had frequently to make couplings of cars the deadwoods of which overlapped—*held*, that the admission of testimony showing that similar accidents had occurred on defendant's road was error. *Dye v. Delaware, L. & W. R. Co.*, 53 Am. & Eng. R. Cas. 286, 130 N. Y. 671, mem., 29 N. E. Rep. 320, 41 N. Y. S. R. 690, 3 Silt. App. 610.

585. Opinions, generally.*—The opinions of witnesses as to whether certain acts of the plaintiff were negligent, or as to what he ought to have done under certain circumstances, are not competent. Evidence to establish contributory negligence should be confined to showing the custom of employes, or the danger attending a certain course of action. *McKean v. Burlington, C.*

* Opinion evidence as to safety of appliances. Competency of witness, see 48 AM. & ENG. R. CAS. 219, *abstr.*

R. & N. R. Co., 55 Iowa 192, 7 N. W. Rep. 505.

A belt broke in a machine shop, and an employé was injured, and at the trial the fasteners that were used to connect the ends of the belt were exhibited in evidence. *Held*, that it was proper to ask a witness whether that kind of a fastener was sufficient or proper for the purpose. *Harley v. Buffalo Car Mfg. Co.*, 20 N. Y. Supp. 354, 48 N. Y. S. R. 58, 65 Hun 624, *mem.*

586. Expert testimony.—The relative manner of coupling cars equipped with single and double deadwoods, and the increased danger attending the coupling of cars constructed with the latter, are proper subjects for expert testimony. *Louisville, N. A. & C. R. Co. v. Frawley*, 28 Am. & Eng. R. Cas. 308, 110 Ind. 18, 9 N. E. Rep. 594.—**DISTINGUISHED IN** *Seese v. Northern Pac. R. Co.*, 39 Fed. Rep. 487.

587. Documentary evidence—Photographs.*—In an action for personal injuries occasioned to an employé of another railroad by having his foot caught in an unblocked frog in the track of the defendant corporation while in the performance of his duties in delivering a car upon its tracks, a photograph taken the next morning after the accident, which occurred in the evening, showing the condition of other frogs near by, having been put in evidence without objection, is competent to be used to show that the other frogs were unblocked, the defendant's section master having testified, in substance, that he kept all the frogs blocked, including the one which caused the accident. *Turner v. Boston & M. R. Co.*, 158 Mass. 261, 33 N. E. Rep. 520.

588. — reports of company's employes.†—The report of an agent of a railroad, whose custom it is to make the same after accidents, to the division superintendent, is admissible in evidence against the company, in an action for personal injuries, where it tends to show the occurrence of the collision which caused the injury, and that the engineer of one of the engines permitted it to be run by a non-employé of the company, who was incompetent and unable to manage it, thereby causing the collision. *O'Hare v. Chicago & A. R. Co.*, 95 Mo. 662, 15 West. Rep. 427, 9 S. W. Rep. 23.

A report made to a railway company by

one of its servants, of the facts and circumstances of an injury received by him in its employment, is not admissible in his favor in a suit by him against the company for damages, and calls for no response by the company. *Howard v. Savannah, F. & W. R. Co.*, 84 Ga. 711, 11 S. E. Rep. 452.

589. Admissibility of rules of the company.—In an action for an injury, a printed rule of the company providing that all train employés shall be under the charge of the conductor is admissible in evidence to show that the plaintiff was in the discharge of his duty and acting under the authority of the defendant at the time of the injury. *Louisville, N. A. & C. R. Co. v. Frawley*, 28 Am. & Eng. R. Cas. 308, 110 Ind. 18, 9 N. E. Rep. 594.

Rules of a railroad introduced by the company as evidence, and which an injured employé referred to as evidence, were not rendered irrelevant so as to require them to be ruled out, by the mere fact that none of them were referred to in the declaration, and that the employé testified that he was ignorant of them. *Chattanooga, R. & C. R. Co. v. Owen*, 90 Ga. 265, 15 S. E. Rep. 853.

Rules of the railroad company requiring brakemen to be "constantly on the alert, carefully observe the engineer's signals, never sleep at their posts, and not leave their brakes while the train is in motion, nor take any other position on the train than that assigned them by the conductor," being two out of a series of five hundred rules contained in a printed book of 129 pages, and intended for the regulation of all branches of the defendant's business, are not relevant to the question of contributory negligence on the part of the plaintiff, who was injured while ascending a ladder on the outside of his car, especially when it is not shown that he had any notice or knowledge of such rules. *Georgia Pac. R. Co. v. Davis*, 92 Ala. 300, 9 So. Rep. 252.

In an action by a laborer employed by defendant, to recover for an injury caused by the collision of other cars being switched with the one on which he was unloading brick, without any signal or warning, the court sustained an objection to this question asked by the defendant of a witness, who was a switchman: "What, if anything, was the rule or custom as to laborers unloading and loading cars, and switchmen, with reference to the laborers looking out for the movement of their car while being loaded or

* See EVIDENCE, 49, 236.

† See EVIDENCE, 243.

unloaded?" *Held*, that the ruling was correct, as it was not shown that there was any rule or custom in this respect. If the men were enjoined to keep a lookout constantly for the approach of trains while at work, that fact was susceptible of proof. *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57, 29 I. E. Rep. 186.

It was not error for the court to refuse to permit the defendant to introduce in evidence certain rules and regulations of the company for the guidance of its employés in the discharge of their duties, no offer being made by the defendant to show a violation by the deceased of any of such rules. *Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. Rep. 564.

b. Burden of Proof.*

590. On plaintiff to show defendant's negligence, generally.—Where a railroad employé sues to recover for personal injuries, claimed to have resulted from negligence of the company, the burden is on him to prove such negligence. *Crew v. St. Louis, K. & N. W. R. Co.*, 20 Fed. Rep. 87. *Mobile & M. R. Co. v. Smith*, 59 Ala. 245.—*QUOTING* *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672.—*Chattanooga, R. & C. R. Co. v. Owen*, 90 Ga. 265, 15 S. E. Rep. 853. *Way v. Illinois C. R. Co.*, 40 Iowa 341, 8 Am. Ry. Rep. 400. *Muirhead v. Hannibal & St. J. R. Co.*, 19 Mo. App. 634. *Texas & N. O. R. Co. v. Crowder*, 63 Tex. 502. *International & G. N. R. Co. v. Hester*, 72 Tex. 40, 11 S. W. Rep. 1041. *Texas & N. O. R. Co. v. Crowder*, 76 Tex. 499, 13 S. W. Rep. 381.

The burden of proof is upon the employé to show both the negligence of the company and his own care. But he is not bound to do more than raise a reasonable presumption of negligence on the part of the company. *Greenleaf v. Illinois C. R. Co.*, 29 Iowa 14.—*REVIEWING* *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa 281.—*APPLIED IN* *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112. *DISTINGUISHED IN* *Perigo v. Chicago, R. I. & P. R. Co.*, 55 Iowa 326. *FOLLOWED IN* *Patterson v. Burlington & M. R. Co.*, 38 Iowa 279; *Murphy v. Chicago, R. I. & P. R. Co.*, 45 Iowa 661; *Reynolds v. Keokuk*, 72 Iowa 371.—*Cooper*

* As between master and servant burden of proof is with party alleging want of due care, see note, 13 L. R. A. 375.

† Burden of proof is on injured servant to show negligence, see note, 8 L. R. A. 636.

v. Pittsburgh, C. & St. L. R. Co., 24 W. Va. 37.

An instruction that the burden is on plaintiff to show that he was injured through the company's negligence, and not through any fault of his own, in which case the burden of proof is shifted to the company; and that if it can then show that plaintiff contributed to the injury or that it exercised ordinary care, plaintiff cannot recover; and that if the company shows that plaintiff was at fault, that the injury was not caused by its negligence, or that plaintiff could have avoided the injury by exercising ordinary care, plaintiff cannot recover, is, taken as a whole, substantially correct. *Chattanooga, R. & C. R. Co. v. Owen*, 90 Ga. 265, 15 S. E. Rep. 853.

591. — in statutory actions.—In an action under section 2590, Ala. Code of 1886, by an employé against the company for personal injury received in his duty of moving cars, the burden of proving negligence on the part of the company lies on the plaintiff. *Mobile & B. R. Co. v. Holborn*, 84 Ala. 133, 4 So. Rep. 146.—*FOLLOWING* *Louisville & N. R. Co. v. Allen*, 78 Ala. 494.

Where an action for damages is brought by an employé, under section 2590 of the Ala. Code, for injuries received on account of defects in the brake of a railroad car, the burden is on the plaintiff to satisfy the jury of the existence of such defects at the time the train was made up, or at the station where it could have been inspected; that such defects were known to the railroad employés, whose duty it was to look after them, or would have been discovered by the exercise of proper diligence, and that such defects directly caused the injuries complained of. *Louisville & N. R. Co. v. Binion*, 98 Ala. 570, 14 So. Rep. 619.

592. To show company's negligence with respect to machinery, etc.*—Where an employé seeks to recover for an injury received through defective machinery, the burden is upon him to show negligence upon the part of the company. *Louisville & N. R. Co. v. Orr*, 8 Am. & Eng. R. Cas. 94, 84 Ind. 50. *Chicago & A. R. Co. v. Few*, 15 Ill. App. 125. *Chicago & A. R. Co. v. Pratt*, 14 Ill. App. 346. *St.*

* Injury to employé from defective appliances. Burden of establishing negligence, see 53 AM. & ENG. R. CAS. 225, *abstr.*

Louis, I. M. & S. R. Co. v. Harper, 44 Ark. 524.

The burden is on the servant to show that the appliance was radically faulty, or so generally obsolete that its adoption or retention would indicate negligence, and that the master knew or had notice that it was defective; and no presumption of negligence can arise from the mere fact of the injury or accident. *Safflenfield v. Main St. & A. P. R. Co.*, 91 Cal. 48, 27 Pac. Rep. 590. *East Tenn., V. & G. R. Co. v. Stewart*, 21 Am. & Eng. R. Cas. 614, 13 Lea (Tenn.) 432.—FOLLOWING *East Tenn., V. & G. R. Co. v. Duffield*, 12 Lea 63.—*Humphreys v. Newport News & M. V. Co.*, 39 Am. & Eng. R. Cas. 363, 33 W. Va. 135, 10 S. E. Rep. 39.

Where a recovery is sought for injuries caused by an alleged defect in a brake, the *onus* is on the plaintiff to show that the "defect arose from, or had not been discovered or remedied owing to, the negligence of the master or employer," etc. (Ala. Code, § 2590); and without this proof a recovery cannot be had. *Louisville & N. R. Co. v. Davis*, 91 Ala. 487, 8 So. Rep. 552.

An employé cannot recover for injuries caused by a steam hammer, although the injuries were caused by the negligence of the agents of the company, or that combined with the defective condition of the hammer itself, without showing that the company did not use reasonable care in procuring safe machinery and competent employés. *Hanrath v. Northern C. R. Co.*, 46 Md. 280, 18 Am. Ry. Rep. 188.

Where the passengers on a railroad are injured in consequence of a defect in any instrument employed by the railroad, it is a presumption, disputable, but not conclusive, that the injury resulted from negligence. But the same principle does not prevail in reference to servants of a railroad; in the latter case, the *onus* of proving negligence is upon the injured servant. *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672.—REVIEWING *Murray v. South Carolina R. Co.*, 1 McMull. (So. Car.) 386.—QUOTED IN *Mobile & M. R. Co. v. Smith*, 59 Ala. 245.

593. To overcome presumption that company discharged its duty.—The law never presumes negligence, but the opposite; therefore, where an employé sues to recover for an injury, the burden is on him to overcome presumption that the company has exercised due care and fully discharged its duty. *Murray v. Denver &*

R. G. R. Co., 11 Colo. 124, 17 Pac. Rep. 484. *Johnson v. Chesapeake & O. R. Co.*, 36 W. Va. 73, 14 S. E. Rep. 432.

594. To overcome presumption that injury was within risks assumed.—The burden rests upon the servant claiming to be injured in performing a duty as to which he has assumed the risk, to show that the injury is the result of the master's default or negligence in respect to some duty belonging to him as master. *Fraker v. St. Paul, M. & M. R. Co.*, 15 Am. & Eng. R. Cas. 256, 32 Minn. 54, 19 N. W. Rep. 349.

Such servant takes upon himself the burden of showing that the master had notice of the defect complained of, or that, by the exercise of the ordinary care which he is bound to observe, he would have known of it, and that the servant was ignorant of such defect and had not equal means of knowledge. *Johnson v. Chesapeake & O. R. Co.*, 36 W. Va. 73, 14 S. E. Rep. 432.

595. To show absence of negligence on employé's part.—To entitle an employé to recover damages for injuries arising out of the culpable fault or negligence of his employer, the burden of proof is upon the plaintiff to show that he used ordinary care, such as a prudent person similarly situated would have used, to avoid the injury. *International & G. N. R. Co. v. Hester*, 72 Tex. 40, 11 S. W. Rep. 1041. *Campbell v. Atlanta & R. A. L. R. Co.*, 53 Ga. 488.

An injured employé must prove either that he was wholly free from fault himself, or that there was negligence on the part of his fellow-servants. *Atlanta & R. A. L. R. Co. v. Campbell*, 56 Ga. 586.

The presumption of law that the plaintiff, being an employé, is without fault, arises only when he is wholly disconnected with duties about the particular business in which he was hurt; when he is personally engaged in the duty in discharging which he is hurt, the *onus* is upon him to show himself without fault; so soon as he does that, the presumption arises that the other employés engaged with him in the duty were at fault or negligent, and the burden is shifted upon the company to show them without negligence. *Central R. & B. Co. v. Kelly*, 58 Ga. 107, 16 Am. Ry. Rep. 114.—FOLLOWED IN *Central R. & B. Co. v. Sears*, 59 Ga. 436. QUOTED IN *Western & A. R. Co. v. Vandiver*, 85 Ga. 470.

Where suit is brought to recover for the death of a conductor who was killed while coupling cars, and it is claimed that the train was behind time, and that an emergency existed which made it necessary for him to do the coupling, the burden is on the plaintiff to show that the train was not behind time by reason of the fault of the conductor, and that he did not cause the emergency. *Central R. Co. v. Sears*, 61 Ga. 279.

In New York the burden of showing due care on the part of an injured employé is on the plaintiff; and where a laborer seeks to recover for injuries received by rock falling from the roof of a tunnel where he was at work, and the company is charged with negligence, this burden of proof is not sufficiently met by the plaintiff testifying that he could not say whether or not, prior to the accident, he had noticed the peculiar and dangerous condition of the roof which fell. *Eades v. Clark*, 23 J. & S. 132, 11 N. Y. S. R. 725.—**DISTINGUISHING** *Plank v. New York C. & H. R. R. Co.*, 60 N. Y. 607; *Williams v. Delaware, L. & W. R. Co.*, 39 Hun (N. Y.) 430; *Pantzar v. Tilly Foster Iron Min. Co.*, 99 N. Y. 368.

Where a fireman on a locomotive was injured by a jet of steam from an oil-cup, which he was in the act of filling, and the proof left it doubtful whether the accident was the result of his own negligence or occasioned by a defect in the cup or its appliances, the case would be within the general rule, not the exception, and the burden of proof would rest on the plaintiff. *East Tenn. V. & G. R. Co. v. Stewart*, 21 Am. & Eng. R. Cas. 614, 13 Lea (Tenn.) 432.

596. To rebut the inference raised of employe's negligence.—After the defendant has shown that the plaintiff knew of the dangerous condition of the road or machinery which he aided to operate, it is then incumbent on the plaintiff to show that he was in some manner justifiable in exposing himself to the danger, before he can recover. And the rule is not different when the injury results in death and the action is brought by the administrator. *Coates v. Burlington, C. R. & N. R. Co.*, 15 Am. & Eng. R. Cas. 265, 62 Iowa 486, 17 N. W. Rep. 750.—**FOLLOWING** *Wells v. Burlington, C. R. & N. R. Co.*, 56 Iowa 520.

In an action for the death of a freight conductor, it appeared that he was killed by

running his train at an immoderate rate of speed over a bridge which he knew was being repaired. *Held*, that the burden of proof was on the plaintiff to rebut the presumption of contributory negligence, by showing that the engineer in charge of the train was running contrary to the orders of the conductor. *St. Louis, I. M. & S. R. Co. v. Morgart*, (Ark.) 8 S. W. Rep. 179.

Where a company is sued for the death of an engineer, caused by an obstruction on the track, if the place of the accident was dangerous in wet weather, which was known, or ought to have been known, by the engineer, and he had been cautioned to run with care, and where the facts show that by the use of proper care he might have seen the obstruction and avoided it, but that he did not keep a careful lookout, or, having seen the obstruction, did not make an effort to check the train, the burden of explaining or excusing his apparent neglect is on the plaintiff. *Little Rock & Ft. S. R. Co. v. Voss*, (Ark.) 18 S. W. Rep. 172.

Where the duties of a flagman require him to be on a particular part of the train, and he is injured while on another part of the train, the burden is on him to show that some duty called him where he was injured. *Atlanta & C. A. L. R. Co. v. Ray*, 22 Am. & Eng. R. Cas. 281, 70 Ga. 674.

597. To show ignorance of established usage.—One accepting employment from a railway company to assist in operating trains is bound by an established usage or custom of the company in regard to the duties required of him. If the usage in a particular case imposes on him a duty extra hazardous, and in its performance he sustains injury, the burden is on him to show that the existence of the established usage had been concealed from him by the company. *Watson v. Houston & T. C. R. Co.*, 11 Am. & Eng. R. Cas. 213, 58 Tex. 434.—**FOLLOWED IN** *Missouri Pac. R. Co. v. Callbreath*, 66 Tex. 526.

598. To show disobedience of order was not proximate cause.—Where suit is brought for injuries to an employé, and it is shown that at the time of the injury he was acting in violation of a rule of the company, and an order of his superior, the burden is on him to show that such disobedience did not contribute to the injury. *Prather v. Richmond & D. R. Co.*, 80 Ga. 427, 9 S. E. Rep. 530.—**QUOTED IN** *Mills v. East Tenn. V. & G. R. Co.*, 87 Ga. 102.

599. On defendant, generally.

Proof by an employé of an injury, and that his own negligence did not contribute thereto, makes a *prima facie* case, and shifts the burden of proof to the defendant to show the exercise of ordinary care and diligence. *Georgia R. Co. v. Bryans*, 77 Ga. 429. *Savannah, F. & W. R. Co. v. Barber*, 71 Ga. 644.—QUOTING *Central R. Co. v. Sears*, 59 Ga. 436.

The court charged that while the "burden of proof is on the plaintiff to show negligence of the defendant, yet it is sufficient for that purpose, *prima facie*, if he show he suffered injury without his fault, while lawfully traveling in the car of defendant, and that the cause of that injury was probably the negligence of the defendant" (*held*, to be error); "and that whether it is so or not is in the knowledge of the defendant, and the defendant must then show what the real cause of the injury was; and if the defendant does not choose to give the explanation, the jury will be authorized to find that the real cause of injury was the negligence of the defendant in the particular case specified in the complaint." *Held*, that this was also error. *Minty v. Union Pac. R. Co.*, 2 Idaho 437, 21 Pac. Rep. 660.

600. To show that defects were latent.—The burden is upon the plaintiff to show that the defect in an engine was latent, and not open to ordinary observation, where he has been constantly employed upon it for several days. *Stoeckman v. Terre Haute & I. R. Co.*, 15 Mo. App. 503.

The burden is upon the servant who sues his master for damages resulting from the use of defective machinery furnished by the latter, to establish *prima facie* (1) that the machinery was defective; (2) that the defects were the proximate cause of the injuries; and (3) that the master had knowledge of them, or might, by the proper exercise of care and diligence, have acquired such knowledge. *Hudson v. Charleston, C. & C. R. Co.*, 41 Am. & Eng. R. Cas. 348, 104 N. Car. 491, 10 S. E. Rep. 669.

601. To establish negligence on part of employe.—Contributory negligence is matter of defense to be affirmatively proved, as it will be presumed that an injured party was in the exercise of due care until the contrary is made to appear. And where a brakeman sues for an injury it is not sufficient to establish contributory neg-

ligence to prove that he exchanged places with a fellow-brakeman without orders from the conductor, though the evidence tends to show that he would not have been injured if the change had not been made, but where it does not appear that he was in a more dangerous place at the time of the injury than he would otherwise have been. *Little Rock & Ft. S. R. Co. v. Eubanks*, 31 Am. & Eng. R. Cas. 176, 48 Ark. 460, 3 S. W. Rep. 808.

Where the evidence for plaintiff, the servant, showed negligence on the part of the defendant, the master, and contributory negligence on the part of the servant does not appear affirmatively from the testimony of plaintiff, contributory negligence is an affirmative defense, and the burden of showing it is upon the defendant. *Keddon v. Union Pac. R. Co.*, 5 Utah 344, 15 Pac. Rep. 262.

The plaintiff was a track hand, wholly disconnected with the running of the engine which injured him. He had the right to prove the negligence of the company and rest his case upon it, even if he were connected with the engine, without going into the question of his own negligence; to which the company could reply by showing either that it was not negligent, or that the plaintiff was. *Central R. & B. Co. v. Small*, 80 Ga. 519, 5 S. E. Rep. 794.

602. — in remaining in service after knowledge of defects or danger.—The burden is upon the company to show that a brakeman assumed the risks growing out of certain obstructions on the track, by remaining in its employ after knowledge thereof. *Hulehan v. Green Bay, W. & St. P. R. Co.*, 31 Am. & Eng. R. Cas. 322, 68 Wis. 520, 32 N. W. Rep. 529.—DISTINGUISHED IN *Toner v. Chicago, M. & St. P. R. Co.*, 28 Am. & Eng. R. Cas. 449, 31 Am. & Eng. R. Cas. 320, 69 Wis. 188, 33 N. W. Rep. 433.—*Hudson v. Charleston, C. & C. R. Co.*, 41 Am. & Eng. R. Cas. 348, 104 N. Car. 491, 10 S. E. Rep. 669.—COMMENTING ON *Warner v. Western N. C. R. Co.*, 94 N. Car. 250; *Cowles v. Richmond & D. R. Co.*, 84 N. Car. 309.

c. Sufficiency.

603. Generally.—While a passenger may recover damages from a railroad company on a presumption of negligence, whenever injuries are received because of unfit

instrumentalities employed in his transportation, a servant or employé of the company cannot recover without proof of negligence, either in the selection of instrumentalities originally defective and unsafe, or in the use of unsafe instrumentalities after knowledge of their defective condition; and such knowledge on the part of a fellow-servant is not sufficient to charge the company with notice of the defect. *Smoot v. Mobile & M. R. Co.*, 67 Ala. 13.—FOLLOWING *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672.—NOT FOLLOWED IN *Tierney v. Minneapolis & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 545, 33 Minn. 311, 53 Am. Rep. 35.

In an action for the death of a brakeman, resulting from his falling between the cars of a running train, if the circumstances and cause of his falling are unknown, plaintiff cannot recover. In such case section 193, Miss. Const. 1890, does not aid the plaintiff, since under it there can be no recovery without evidence that the injury resulted from the negligence of a "superior agent or officer, or of a person having the right to control or direct the services" of deceased, or of a "fellow-servant engaged in another department of labor." In any event, the plaintiff must show negligence. *Short v. New Orleans & N. E. R. Co.*, 69 Miss. 848, 13 So. Rep. 826.

The plaintiff is required to show the facts surrounding and leading to the injury, and if from them a jury can reasonably infer negligence in the employer contributing to the injury, and the exercise of due care by the plaintiff, then he is entitled to recover. If he does not show how the accident occurred by which he was injured, by showing his own relation to it, and other surrounding facts, some or all of which may appear from the character of the accident itself, he has not gone as far as the law requires him to go to entitle him to recover. *Texas & N. O. R. Co. v. Crowder*, 63 Tex. 502.—QUOTING *Hinckley v. Cape Cod R. Co.*, 120 Mass. 262.—QUOTED IN *Murray v. Gulf, C. & S. F. R. Co.*, 38 Am. & Eng. R. Cas. 177, 73 Tex. 2, 11 S. W. Rep. 125. REVIEWED IN *Galveston R. & T. Co. v. Burkett*, 2 Tex. Civ. App. 308.

So far as liability of a company is concerned for injury to an employé, proof that a round house is controlled by the company is sufficient to establish the fact that the person who has charge of the round house is in the employ of the company. *Missouri*

Pac. R. Co. v. Sasse, (Tex. Civ. App.) 22 S. W. Rep. 187.

604. To show negligence on part of the company.—In an action by an employé to recover for personal injuries alleged to have been occasioned through the negligence of other employés who were not his fellow-servants, where plaintiff is his only witness as to the manner in which the accident happened, and as the testimony of many others contradicts him in many particulars, and as his own is subject to much criticism, the judgment cannot stand. *Chicago & E. I. R. Co. v. Gill*, 37 Ill. App. 61.

In an action against a railroad for the killing of a negro hired by the company, to entitle the owner to a recovery it must be shown that his death was caused by some negligence on the part of the company. Nor will it be sufficient that verbal orders were given to a storekeeper to supply the negro with liquor, where it does not appear that any liquor was furnished him. *Mann v. Macon & W. R. Co.*, 32 Ga. 345.

To entitle a brakeman to recover from a company damages for an injury sustained by him while in its employ, he is not bound to do more than to raise a reasonable presumption of negligence on the part of the company. *Cooper v. Pittsburgh, C. & St. L. R. Co.*, 24 W. Va. 37. *Greenleaf v. Illinois C. R. Co.*, 29 Iowa 14.

Where suit is brought for negligently killing an employé, in the absence of proof of circumstances from which a legitimate inference of negligence can be made, and in the absence of evidence exonerating the deceased from a charge of contributory negligence, no case is made for submission to a jury. *Borden v. Delaware, L. & W. R. Co.*, 4 Silv. App. 151, 43 N. Y. S. R. 935.

The mere fact that an employé met a violent death while in the discharge of duty is not sufficient in itself to authorize an inference of negligence on the part of the company, without anything to show that the company failed to exercise the duty which the law required for the protection of the employé. *Borden v. Delaware, L. & W. R. Co.*, 4 Silv. App. 151, 43 N. Y. S. R. 935.

The cases in which proof of the injury and that it was caused by the defendant will entitle the plaintiff to recover in the absence of countervailing testimony, are cases in which the evidence that establishes the injury establishes also facts and circumstances from which negligence on the part

of the defendant may be fairly implied. *East Tenn., V. & G. R. Co. v. Stewart*, 21 *Am. & Eng. R. Cas.* 614, 13 *Lea (Tenn.)* 432.

The inference of negligence which the jury may draw must be from facts which establish such a neglect of duty, or such an omission of care, on the employer's part as to have rendered the accident a possible one to the employés while in performance of their duty. *Borden v. Delaware, L. & W. R. Co.*, 4 *Sibb. App.* 151, 43 *N. Y. S. R.* 935.

In an action by an employé for personal injuries, not of a serious nature, plaintiff's own evidence was unquestionably sufficient to justify a verdict for him, if worthy of credit. There were circumstances tending to discredit his evidence, but it was not opposed by any direct evidence, and there were some circumstances not disputed, tending to confirm his statement of the case. *Held*, sufficient evidence to justify a verdict for plaintiff. *Macy v. St. Paul & D. R. Co.*, 35 *Minn.* 200, 28 *N. W. Rep.* 249.

605. — Illustrations.—A brakeman over six feet high was standing erect upon a moving freight car some inches higher than the average. In passing under telegraph wires his head came in contact with a wire which, from an unexplained cause, had become slackened, the blow breaking the insulator and causing the wire to fall. It coiled around a man at work upon a flat car twenty-five feet from the main track, and, catching upon a brake-handle of the moving train, dragged him from the flat car and inflicted injuries resulting in death. The tall brakeman and others had daily passed under the wires without thought of contact therewith, and apprehended no danger from that cause. *Held*, that the accident was one which the railroad company was not bound to anticipate, and it is not liable. *Wabash, St. L. & P. R. Co. v. Locke*, 112 *Ind.* 404, 11 *West. Rep.* 877, 14 *N. E. Rep.* 391.—**DISTINGUISHING** *Cleveland, C. & I. R. Co. v. Newell*, 104 *Ind.* 264, 54 *Am. Rep.* 312. **REVIEWING** *Baltimore & O. R. Co. v. Rowan*, 104 *Ind.* 88; *Crafter v. Metropolitan R. Co.*, 1 *L. R. i C. P.* 300.

A brakeman, who was riding on the engine with the conductor, was ordered by the latter to look back and see if the train was broken. He stepped to the side of the engine, fell out, and was killed. No one saw him fall or knew how the accident hap-

pened. There were high banks of snow on either side of the track, in the condition in which they had been left by the snow-plow. The evidence was contradictory as to how near these banks were to the engine. At the place where the accident occurred there was no indication that decedent had been struck by the bank, but only that he had fallen against it. In an action to recover for his death—*held*, that there was no evidence of negligence on the part of the railroad company to sustain a verdict for the plaintiff. *Dowell v. Burlington, C. R. & N. R. Co.*, 15 *Am. & Eng. R. Cas.* 153, 62 *Iowa* 629, 17 *N. W. Rep.* 901. — **FOLLOWED IN** *Brown v. Chicago, R. I. & P. R. Co.*, 64 *Iowa* 652, 69 *Iowa* 161.

Plaintiff was one of a gang of laborers engaged in removing a timber from a railroad bridge by means of a pile-driver. While suspended from the pile-driver the lower end of the timber rested on a car, while the upper end became caught in the driver-frame. Plaintiff was trying to push the foot of the timber from the car, when, by direction of the foreman, other laborers loosened it from the driver, causing it to slip and strike plaintiff. The question being whether he was so engaged by the foreman's orders, plaintiff testified that on account of the noise the foreman's orders could not be heard and that he was directing the men by motions; that plaintiff was standing out of the way of the timber when the foreman "motioned at him, and shook his head"; that he "could not say what he said," and did not know what he motioned for, but went ahead, because the motion gave him orders to shove it off. *Held*: (1) insufficient to warrant a finding that the foreman ordered plaintiff to move the timber, or saw that he was attempting to do so; (2) that under the circumstances, it was not the foreman's duty to know that plaintiff was in a dangerous position, so as to charge him with negligence in causing the timber to be loosened. *McCarthy v. Chicago, R. I. & P. R. Co.*, 83 *Iowa* 485, 50 *N. W. Rep.* 21.

A section hand was killed by a passing train while standing a few feet from the track, leaning on his crowbar, but there was no direct evidence as to what struck him. The case was tried on the theory that a car door had become unfastened, swung out, and struck the crowbar, and knocked it against the deceased with such force as to cause his death. The door of one car in

the
at a
acci
stati
jury
dece
sary
all d
they
tion
plai
v. C
Eng
Rep
B. &
Pl
stru
car,
grav
der
pern
cide
negl
plow
that
the
Van
Co.,
N. A
27 N
Pl
nam
was
jury
part
stru
shou
lyn
Supp
29 N
A
trip,
whe
the
fecti
The
engi
no b
orde
the
dece
to r
war
negl
Uta
6
pro

the train had been open, but was fastened at a station before reaching the place of the accident, and was found fastened at the next station beyond. The court instructed the jury that to justify them in finding that the deceased was killed as alleged, it was necessary not only that the circumstances should all concur that he was so killed, but that they were inconsistent with any other rational conclusion. *Held*, that a verdict for plaintiff could not be supported. *Wheeler v. Chicago, M. & St. P. R. Co.*, 49 *Am. & Eng. R. Cas.* 693, 85 *Iowa* 167, 52 *N. W. Rep.* 119.—REVIEWING ASBACH v. Chicago, B. & Q. R. Co., 74 *Iowa* 230.

Plaintiff, an employé of defendant, was struck by a dirt-plow which fell from a car, one of a train from which dirt and gravel were being removed by its use. Under the charge of the court, the jury were permitted to find, from the fact that the accident occurred, without any evidence of negligent or unskilful construction of the plow, or of a failure to keep it in repair, that the falling of the plow was owing to the fault of defendant. *Held*, error. *De Van v. Pennsylvania & N. Y. C. & R. Co.*, 130 *N. Y.* 632, *mem.*, 3 *Silo. App.* 562, 28 *N. E. Rep.* 532, 40 *N. Y. S. R.* 487; *reversing* 27 *N. Y. S. R.* 573, 7 *N. Y. Supp.* 692.

Plaintiff was riding in a car when an ornamental panel of a stove, in which there was fire, fell on his foot, causing severe injury. *Held*, that it was a fair inference that part of a stove would not fall if fairly constructed, and a judgment for the plaintiff should not be disturbed. *Wilson v. Brooklyn El. R. Co.*, 30 *N. Y. S. R.* 240, 9 *N. Y. Supp.* 277; *affirmed in* 130 *N. Y.* 675, *mem.*, 29 *N. E. Rep.* 1034, 41 *N. Y. S. R.* 952.

An inexperienced engineer, on his first trip, started a train down a five-mile grade where the descent was 210 feet to the mile; the train left the track on account of a defective frog, and a brakeman was killed. The evidence showed that the valves of the engine were out of repair; that one car had no brakes and on another they were out of order, and all the cars were loaded, and the brakes failed to act, and the engineer deemed it safer to let the train run than try to reverse the engine. *Held*, sufficient to warrant a finding that the company was negligent. *Chilton v. Union Pac. R. Co.*, 8 *Utah* 47, 29 *Pac. Rep.* 963.

606. — negligence in failing to provide safe working place.—In an ac-

tion for the death of plaintiff's husband, employed in defendant's tunnel through which it operated locomotives and cars, the petition charged that the tunnel, because the fan that ventilated it was out of repair, was in a dangerous condition, being filled with steam, smoke, and poisonous gases; and that the defendant, well knowing this fact, which was unknown to the deceased, negligently ordered him to go into the tunnel, whereby he was choked, strangled, and killed. *Held*, that as there was total failure of the evidence to show that the smoke in the tunnel when decedent entered was dangerous to human life, or to show that defendant could have anticipated a condition of the tunnel dangerous to human life, the plaintiff could not recover. *O'Malley v. Missouri Pac. R. Co.*, 53 *Am. & Eng. R. Cas.* 280, 113 *Mo.* 319, 20 *S. W. Rep.* 1079.

Where a company has employed a competent and reliable person to erect a building where grain is stored, and it was apparently properly constructed and safe a few minutes before the accident, and the capacity of each floor was supposed to be greater than the weight placed upon it, an employé who is injured by the falling of one of the floors, cannot recover without showing that there was some defect which caused the injury the existence of which the company had notice, or which, by the exercise of ordinary care, could have been discovered, or else that the use of the building was so unreasonable as to evince negligence. *Dillon v. Sixth Ave. R. Co.*, 16 *J. & S. (N. Y.)* 283; *affirmed in* 97 *N. Y.* 627, *mem.*—DISTINGUISHED IN *Flynn v. Harlow*, 29 *J. & S.* 293, 19 *N. Y. Supp.* 705.

A hidden and internal defect in the building, of which the company had no notice, and which could not be discovered by the exercise of ordinary care, would not render the company liable. *Dillon v. Sixth Ave. R. Co.*, 16 *J. & S. (N. Y.)* 283; *affirmed in* 97 *N. Y.* 627, *mem.*

607. — negligence in failing to provide safe track.—An injured employé charged the company with negligence in allowing a rail to remain in the track after a lip had formed in one end, which caused a train to jump the track and cause the injury. *Held*, that even if the lip existed which made the track dangerous, the company was not liable without proof that it had notice of the defect. *Chicago & A. R. Co. v. Stiles*, 26 *Ill. App.* 430.

608. — negligence in allowing water tank too near track.—The bottom fell out of a brakeman's lantern at night when he was required to be on top of the cars. He descended to the cab, got another, and as he was ascending a ladder on the outside of a car, his only way of getting to the top, he was killed by coming in contact with a tank. The company was charged with negligence in providing him with a defective lantern and in maintaining the tank too close to the track; but there was no evidence as to the defect in the lantern, except of one witness, who simply said that it was "no account," but it seemed that there were other good lanterns that might have been taken. The evidence showed that the tank was an old-time one, about eighteen inches closer to the track than later ones were constructed, but there was space enough for a man to ascend the ladder on the car without striking it, if he would hold his body close to the car. *Held*, not sufficient to show negligence, and a nonsuit was properly allowed. (McGowan, J., dissenting.) *Davis v. Columbia & G. R. Co.*, 28 Am. & Eng. R. Cas. 440, 21 So. Car. 93.

609. — negligence in furnishing defective machinery, etc.—The fact that the accident occurred and that it was possible to prevent it is not the legal test of liability for negligence on the part of the employer. *Augerstein v. Jones*, 139 Pa. St. 183, 21 Atl. Rep. 24.

The mere fact that a defect exists is not sufficient to entitle an employé who has been injured to recover. It must be such defect as the duty of the company toward the person injured required it to repair or prevent. *Costello v. Philadelphia & R. R. Co.*, 2 Pa. Dist. 453.

Proof that another machine was safer than the one used by the railroad company, or that another means or manner of using it was safer, is not evidence of negligence. *Conway v. Hannibal & St. J. R. Co.*, 24 Mo. App. 235. *Muirhead v. Hannibal & St. J. R. Co.*, 19 Mo. App. 634.—FOLLOWING *Smith v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 37.

No inference of negligence can arise where the evidence shows that an implement used by a servant in the performance of his work was such as is ordinarily used for like purposes by persons engaged in the same kind of business. *Bohn v. Chicago, R. I. & P. R. Co.*, 106 Mo. 429, 17 S. W. Rep. 580.

Where a timber used as a lever was new,

sound, and suitable for all the purposes for which it was used, and there was no evidence showing or tending to show that it had any inherent defects whatever, no inference of negligence can be drawn from the fact that it broke and thereby injured the servant using it. *Bohn v. Chicago, R. I. & P. R. Co.*, 106 Mo. 429, 17 S. W. Rep. 580.

Where the accident occurred from the breaking of the cable attached to a plow used in unloading the gravel train, and the evidence shows that it was being subjected to an unusual strain at the time it broke, although it may have been sufficient when used in the usual method, and the jury find that this unusual strain was put upon it on account of the neglect of the company to furnish sufficient appliances to do the work properly in the situation in which the gravel train stood at the time, a verdict against the company will not be disturbed on the evidence. *Cincinnati, I., St. L. & C. R. Co. v. Roesch*, 126 Ind. 445, 26 N. E. Rep. 171.

Defendant company maintained a force-pump which was used in applying white-wash, and plaintiff, who was a machinist, was told that it had become clogged, and was directed to remove the cap, which he did, and the compressed air blew the white-wash into his face, causing great injury to his eyes. The pump had been purchased by an experienced person, and no defects therein were visible, and there was no evidence that the removal of the cap would ordinarily be attended by danger. *Held*, not sufficient to show negligence. *Kelly v. Forty-second St., M. & St. N. A. R. Co.*, 33 N. Y. S. R. 816, 58 Hun 93, 11 N. Y. Supp. 344.

610. — negligence in failing to provide safe engine.—The mere fact that a servant is injured by the breaking of an engine does not impose liability on the master, unless it is shown that the master employed incompetent persons to construct the machine. *Potts v. Port Carlisle D. & R. Co.*, 8 W. R. 524, 2 L. T. 283.

Where the negligence alleged in the complaint was the want of reasonable care by having an engine which was defective and unsafe on account of the throttle and other appliances about the engine being worn, defective, inadequate, and unsafe, and the evidence tends to show that the engine moved while the throttle was closed, and was an old engine much worn and had been

frequently repaired, and was required to be blocked when standing with the brake and lever properly set, and had moved on a number of occasions before when lever and brake were properly set, even after being repaired, and no contributory negligence was claimed or shown, a verdict for the plaintiff for damages caused to him by the engine moving, when it had been left standing with the throttle closed and the brake set, would not be disturbed by failure to show some specific act of negligence. *Hurd v. Union Pac. R. Co.*, 8 Utah 241, 30 Pac. Rep. 982.

Plaintiff was injured while attempting to uncouple cars while being slowly backed, and charged the company with negligence in using a defective engine, which prevented the engineer from stopping it promptly on a signal being given. There was evidence that the valve leaked enough to move the engine, when not attached to cars, four or five lengths in ten or fifteen minutes. The fireman testified that the engine did not move more than five feet after plaintiff gave the signal to stop. *Held*, not sufficient to show that the accident was caused by a defective engine. *Bayus v. Syracuse, B. & N. Y. R. Co.*, 5 N. Y. Supp. 804; *affirmed* in 119 N. Y. 651, *mem.*, 23 N. E. Rep. 1149, 29 N. Y. S. R. 993.

611. — negligence in failing to provide safe cars.—(1) *General rules.*—Where a brakeman is injured and claims that the injury was caused by defective appliances on the cars, proof that one of the company's car inspectors sometimes got drunk when not on duty, and that a sufficient force of inspectors was not employed by the company, is not sufficient to show negligence on the part of the company, where it does not appear that the particular car causing the injury had been inspected. *St. Louis, I. M. & S. R. Co. v. Gaines*, (Ark.) 13 S. W. Rep. 740; *affirming* 46 Ark. 555.

A yard switchman cannot recover for injuries received by reason of a defect in a draw-bar by merely showing the defect and that the injury was caused thereby, without showing that the defect was obvious, or that the company had knowledge thereof, or that it had existed so long that the company ought to have had knowledge. *Atchison, T. & S. F. R. Co. v. Ledbetter*, 21 Am. & Eng. R. Cas. 555, 34 Kan. 326, 8 Pac. Rep. 411.—**DISTINGUISHED** IN *Atchison, T. & S. F. R. Co. v. Sly*, 41 Kan. 729.

It is not necessarily negligence on the

part of the company, as between it and the brakeman, when a freight car is found on its track in such crippled condition as to expose the brakeman to more than ordinary risk while managing it. *Judkins v. Maine C. R. Co.*, 80 Me. 417, 6 N. Eng. Rep. 715, 14 Atl. Rep. 735.

Assuming that the trial judge was right in his refusal to dismiss the complaint and in holding that the plaintiff was not guilty of contributory negligence, and that the proximate cause of plaintiff's injury was the breaking of the coupling-link between the tender and the car next to it of defendant's train, it does not follow that the breaking of the coupling-link constituted negligence *per se* in the defendant. *Sweeney v. New York, N. H. & H. R. Co.*, 26 J. & S. 223, 32 N. Y. S. R. 416, 10 N. Y. Supp. 305.

To warrant an inference of negligence on the part of the employer, there must be proof of the existence of the defect at some time prior to the accident or of a failure to properly inspect. Where the evidence showed that, about a week before the accident, the car was taken out of a yard where there was a thorough system of inspection, and none of the train hands afterwards saw the defect prior to the accident, the jury cannot be permitted to find that defendant ought to have had knowledge of the defect. *Mensch v. Pennsylvania R. Co.*, 53 Am. & Eng. R. Cas. 198, 150 Pa. St. 598, 25 Atl. Rep. 31, 30 W. N. C. 548.

(2) *Illustrations.*—A brakeman was told by the conductor to go on a freight train, and after it had moved his body was found some distance from the point, but no one saw him killed; but a broken rung was found about where the cars stood, which was bent or dented, and a portion of the break was rusted and seemed to be old, and the circumstances tended to prove that he had taken hold of the rung to ascend the car, when it gave way, and he was caught under the wheels and dragged some distance to where the body was found. *Held*, that a verdict finding the company guilty of negligence would not be disturbed. *Jones v. New York C. & H. R. R. Co.*, 28 Hun (N. Y.) 364, 62 How. Pr. 450, 10 Abb. N. Cas. 200; *affirmed* in 92 N. Y. 628, *mem.*—**DISTINGUISHED** IN *Arnold v. Delaware & H. Canal Co.*, 6 N. Y. S. R. 368. **REVIEWED** IN *Gottlieb v. New York, L. E. & W. R. Co.*, 24 Am. & Eng. R. Cas. 421, 170 N. Y. 462, 3

N. E. Rep. 344; *Hotis v. New York C. & H. R. R. Co.*, 25 N. Y. S. R. 525.

Evidence of negligence on the part of a railroad company, in failing to inspect cars and remedy defects dangerous to brakemen, in consequence of which failure a brakeman was crushed in attempting to couple two cars—*held*, sufficient to warrant a verdict for damages in favor of the brakeman. *Gottlieb v. New York, L. E. & W. R. Co.*, 24 Am. & Eng. R. Cas. 421, 100 N. Y. 462, 3 N. E. Rep. 344; *affirming* 29 Hun 637. —DISTINGUISHED IN *Cregan v. Marston*, 126 N. Y. 568.

Plaintiff, a yard man, was injured while uncoupling moving cars, and charged the company with negligence in the manner of coupling the cars, and was the only witness on his own behalf, but testified to enough, if believed, to show negligence; but he was contradicted by nine witnesses for the defendant. *Held*, that the question whether the jury would believe him, as against the nine witnesses, rested with them, and a verdict for plaintiff should not be disturbed. *Millott v. New York & N. E. R. Co.*, 46 N. Y. S. R. 145, 64 Hun 634, 19 N. Y. Supp. 122.

Plaintiff, a brakeman, went to the roof of a car to unfasten the brakes and stepped upon the foot-rest of the brake-step, which gave way and allowed him to fall on the bumper, by which he was injured. From exposure the foot-rest had cracked through the middle on the under side, which could have been seen from below, but was not visible on top, and had existed for some time. *Held*, that the jury were justified in finding the company negligent. *Van Tassell v. New York, L. E. & W. R. Co.*, 1 Misc. 299, 48 N. Y. S. R. 767, 20 N. Y. Supp. 708; *reargument denied in* 2 Misc. 592.

The only evidence that the car was defective was, that while the same was being moved by pushing the car ahead of an engine over the defendant's track it was derailed on a curve. On the other hand, it appeared that the car was carefully examined by the car inspector the day before, and by the car inspector and foreman of the engine house the day after the accident, and found each time to be in perfect order. It further appeared that the truck used with the car in question was in general used in six states, and is used by many of the leading railroads of the country acceptably.

Held, that a verdict for the plaintiff was not supported by the evidence. *O'Connor v. Illinois C. R. Co.*, 83 Iowa 105, 48 N. W. Rep. 1002.

Plaintiff, a yard brakeman, climbed on the top of a car just as it started, as was his duty, and took hold of the brake-wheel to test the brakes, and the brake-shaft went to one side, which threw him to the ground, causing the injury complained of. The next day an iron brace, which was fastened to the car to hold the shaft steady, was found on the foot-board, but there was no evidence that it was off when plaintiff mounted the car, or that it had been loose before that time, or that there was anything about its condition to attract attention. *Held*, not sufficient to show negligence. *Hotis v. New York C. & H. R. R. Co.*, 25 N. Y. S. R. 525, 53 Hun 634, 2 Silv. Supp. Ct. 598, 6 N. Y. Supp. 605. —APPLYING *Bailey v. Rome, W. & O. R. Co.*, 49 Hun 377, 19 N. Y. S. R. 656. REVIEWING *Jones v. New York C. & H. R. R. Co.*, 29 Hun 364.

In such case plaintiff charged that the car was not properly inspected in the yard before he got on it. *Held*, that whether the inspection was thorough or not does not determine the question of defendant's negligence, nothing being shown as to how often reasonable care requires the brace of a brake-shaft to be inspected. *Hotis v. New York C. & H. R. R. Co.*, 25 N. Y. S. R. 525, 53 Hun 634, 2 Silv. Supp. Ct. 598, 6 N. Y. Supp. 605.

In an action by a brakeman, in which the company was charged with negligence in providing a defective brake-rod or shaft, it appeared that the rod broke just below the platform by reason of an old flaw or latent defect. Uncontradicted evidence for the company tended to show that it had exercised very great care in selecting the materials and in testing them. *Held*, that a special finding that the company had not applied proper and sufficient tests was not supported by the evidence, and a judgment based thereon should be reversed. *Smith v. Chicago, M. & St. P. R. Co.*, 42 Wis. 520, 15 Am. Ry. Rep. 168. —DISTINGUISHED IN *Peschel v. Chicago, M. & St. P. R. Co.*, 17 Am. & Eng. R. Cas. 545, 62 Wis. 338; *Missouri Pac. R. Co. v. Dwyer*, 36 Kan. 58. FOLLOWED IN *Wedgwood v. Chicago & N. W. R. Co.*, 44 Wis. 44. QUOTED IN *Bessex v. Chicago & N. W. R. Co.*, 45 Wis. 477. REVIEWED IN *Flannagan v. Chicago & N.*

W. R. Co., 2 Am. & Eng. R. Cas. 150, 50 Wis. 462; *Ballou v. Chicago & N. W. R. Co.*, 5 Am. & Eng. R. Cas. 480, 54 Wis. 257, 41 Am. Rep. 31.

612. — negligence in management and operation of trains, cars, etc.—Where there is evidence that a newly laid track was uneven, that it contained short curves caused by the sliding of the track on the wet clay, that, in places, one side of the track was raised while the other had sunk, and that the cars swayed from side to side in such a manner as to induce those upon them to believe that there was danger that the train would be ditched, the jury are warranted in finding that the train was run at a dangerous rate of speed, although no witness testified specifically that the speed was too great to be safe. *Meloy v. Chicago & N. W. R. Co.*, 38 Am. & Eng. R. Cas. 130, 77 Iowa 743, 42 N. W. Rep. 563.

Evidence that the plaintiff was working under a certain car standing upon defendant's track, and was so situated that he could not see an engine approaching on that track from either direction, and that while so working he was injured by the car being suddenly moved over him by a train backing against it, will not support the essential averment of the complaint, "that the defendant carelessly and negligently and without any notice or warning to plaintiff backed or ran an engine against said car so as to set the same in motion"; and in such case the denial of a motion for a new trial, based upon the insufficiency of the evidence to support the verdict, is error. *Sweeney v. Great Falls & C. R. Co.*, 11 Mont. 523, 29 Pac. Rep. 15.

Plaintiff was employed in repairing a railroad bridge. As a passenger train passed at a speed of about 30 miles an hour, an iron coupling-pin was thrown by the wheel of a car and struck plaintiff. The workmen repairing the bridge testified that the pin could not have been thrown from the bridge, as the repairs required them to make a close examination of it. The pin was similar to that used on the cars in the train causing the accident. *Held*, that although a trainman who helped to make up the train testified that he looked for a loose pin just

before the train started and found none, the evidence was sufficient to justify a finding that the pin was upon the platform of a car, and that in falling from the platform it was struck or taken up by the car wheel and thrown against the plaintiff. *Doyle v. Chicago, St. P. & K. C. R. Co.*, 39 Am. & Eng. R. Cas. 314, 77 Iowa 607, 42 N. W. Rep. 555.

Cars were detached for the purpose of weighing them, and were then "kicked" down the track where they were coupled into a train, and plaintiff, who was engaged in doing the coupling, was injured by one that was running faster than usual. Plaintiff testified that he turned to get out of the way, but was caught on account of the excessive speed, and that the cars could have been moved slower. *Held*, not sufficient to show negligence on the part of the company, especially where plaintiff admitted that twice before cars had been run as fast, and that he had refused to make the coupling and kept out of the way. *Woods v. St. Paul & D. R. Co.*, 39 Minn. 435, 40 N. W. Rep. 510.

Plaintiff was engaged in running slag from defendant's works on cars to where it was dumped. Before reaching the dump, the body of the car on which plaintiff was seated became unhooked from the truck, causing the injury complained of. The body was a movable one, and was so constructed as to allow it to be turned so as to dump the slag by unfastening the hooks. The plaintiff claimed that the accident was caused by other employés not properly fastening the hooks before the car was started, which was supported by some evidence. *Held*, that a verdict in his favor would not be disturbed. *Soderman v. Troy S. & I. Co.*, 53 N. Y. S. R. 678.

A judgment against a railroad, for an injury to one temporarily acting as conductor of a freight train, in being thrown to the ground by a sudden jerk, reversed as against the weight of evidence. *Columbus, C. & I. C. R. Co. v. Troesch*, 57 Ill. 155, 10 Am. Ry. Rep. 451.

Evidence held not to show that the whistle was not sounded or that the bell was not rung on the approach of an engine which ran over and killed a section man working on the track. *Bengtson v. Chicago, St. P., M. & O. R. Co.*, 47 Minn. 486, 50 N. W. Rep. 531.

613. — negligence in not properly manning hand-car.—An employé

* Injury to employé. Derailment alone not sufficient to show negligence, see 48 AM. & ENG. R. CAS. 224, *abstr.*

who sues for injuries received in operating a hand-car, will not be permitted to recover on the ground that the company failed to furnish a sufficient number of men to operate the car, where he testified on the trial that the injury was occasioned by the improper location of a keg of water on a hand-car. *Harty v. St. Louis, I. M. & S. R. Co.*, 95 Mo. 368, 14 West. Rep. 760, 8 S. W. Rep. 562.

614. — negligence in selecting incompetent employes.—An engineer in charge of a train was running at some speed into a railroad yard, his train being behind time, when the engine ran into a misplaced switch negligently left open by the engineer or men in charge of another train. The fireman, seeing the danger, jumped off; but the engineer, looking ahead, did not perceive the danger, and was killed in the collision which ensued. It appeared that the train was moving faster than the rules of the company allowed; but the same was behind schedule time, and in that case a moderate increase in speed was permitted. It appeared, further, that it was impossible for decedent to keep to schedule time, and that the officers of the railroad company knew this fact, and that in consequence trains came in often more swiftly than was allowed by rule. Decedent on approaching the switch could not have seen that it was open. There was also evidence to show that those whose duty it was to make the switch safe were not competent to discharge the duties assigned them, and that the company did not use ordinary care in selecting them, and had notice of their incompetency. In an action by the administratrix of decedent to recover damages for his death—*held*: (1) that plaintiff's decedent was not guilty of contributory negligence; (2) that there was such evidence of negligence on the part of the defendant as would warrant the court in supporting a verdict for the plaintiff. *Pennsylvania Co. v. Roney*, 12 Am. & Eng. R. Cas. 223, 89 Ind. 453, 46 Am. Rep. 173.

615. — wilful negligence.—A brakeman was killed by the sudden starting of the train, while proceeding to open a switch. It appeared that it was not the duty of the brakeman to open the switch, unless told to do so by the conductor; that on this occasion when three miles out the conductor had said that he would switch at the place of the accident, but before reaching the point

changed his mind; that the decedent did not hear this. *Held*, not sufficient evidence to establish the fact that the conductor ordered decedent to switch, and not sufficient to support a charge of wilful killing. *Kentucky C. R. Co. v. Jameson*, (Ky.) 20 S. W. Rep. 258.

616. To show company's negligence was proximate cause.—While the conductor on a street-car was applying a defective brake it yielded suddenly, throwing his breast violently against the handle, which was followed by hemorrhages and inflammation of the lungs; one of his lungs was diseased, but the evidence as to whether he had so suffered before was conflicting, and tended to show that the ills he actually suffered were due to the accident. *Held*, that a verdict in his favor would not be disturbed. *Newhart v. St. Paul City R. Co.*, 51 Minn. 42, 52 N. W. Rep. 983.

617. To make out a prima facie case of negligence.—(1) *When sufficient.*—To make a *prima facie* case for recovery, a railroad employé suing the company for a physical injury resulting from an act in which he participated, must prove either that he was not to blame, or that the company was. The latter, in reply, may defend successfully by disproving either proposition; that is, by showing that the plaintiff was to blame or that the company was not. If both were to blame, or if neither was, the plaintiff cannot recover. *Central R. & B. Co. v. Kenney*, 58 Ga. 485, 16 Am. Ry. Rep. 131.

Where a company orders a section man to go to a designated place on the road, it is *prima facie* liable for an injury caused to him, without his fault, while proceeding to the place on a hand-car, by coming in collision, at a short curve, with a wild train of which he had not been notified, and where no rule existed requiring section hands to keep a lookout for irregular trains. *Cincinnati, I., St. L. & C. R. Co. v. Lang*, 38 Am. & Eng. R. Cas. 25, 118 Ind. 579, 21 N. E. Rep. 317.

The proof makes out a *prima facie* case of negligence, where it is shown that plaintiff's intestate, while in the employ of the defendant company working as a track hand under the immediate orders and supervision of a foreman or section boss, sustained injuries by reason of being thrown against the lever of a moving hand-car, in consequence of a collision between a box

negligently arranged on the hand-car by the foreman, and the platform of a depot; and the burden is upon the defendant company to rebut the inference of negligence fairly deducible from these facts. *Louisville & N. R. Co. v. Northington*, 53 Am. & Eng. R. Cas. 262, 91 Tenn. 56, 17 S. W. Rep. 880, 16 L. R. A. 268.—APPROVING *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181.

Plaintiff's intestate was employed about a yard as a night watchman, and started to cross a track after he supposed a train had passed, but was struck and killed by the rear portion, which had become detached and was moving of its own momentum. The evidence showed that the train had separated by reason of the spreading of the coupling-link, and that the lights in the yard were poor, and there was much other noise. *Held*, that it was enough to show *prima facie* evidence of negligence and to entitle plaintiff to a submission to the jury. *Griffin v. Boston & A. R. Co.*, 38 Am. & Eng. R. Cas. 184, 148 Mass. 143, 19 N. E. Rep. 166, 1 L. R. A. 698.

Plaintiff was engaged as a helper in defendant's machine shop and was injured while taking down shafting at night. The evidence showed that he was directed to do the work by his foreman, and that the tackling furnished was insufficient, and the shop but poorly lighted. *Held*, sufficient to *prima facie* show negligence on the part of the company. *Harrison v. Denver & R. G. W. R. Co.*, 7 Utah 523, 27 Pac. Rep. 728.

(2) *When insufficient*.—The mere fact that an appliance proves to be defective and the servant is injured does not make out, as between master and servant, for the latter, a *prima facie* case of negligence on the part of the master. *Bowen v. Chicago, B. & K. C. R. Co.*, 95 Mo. 268, 14 West. Rep. 744, 8 S. W. Rep. 230.

As between the owner of machinery and a stranger, an explosion of the machinery will raise a *prima facie* presumption of negligence on the part of the owner, so as to throw on him the burden of rebutting such presumption; but this rule does not extend to cases where a servant, who is operating the machinery, or his fellow-servant, is the injured party. *Kranz v. White*, 8 Ill. App. 583.—FOLLOWING *Toledo, W. & W. R. Co. v. Moore*, 77 Ill. 217; *Illinois C. R. Co. v. Phillips*, 55 Ill. 194; *Illinois C. R. Co. v. Phillips*, 49 Ill. 234.

While a railroad company is bound to

furnish its employés with ordinarily safe tools and machinery, the mere fact that a car which was the cause of the employé's injury was in an unsafe and dangerous condition is not *prima facie* evidence of negligence on the part of the employer. To warrant a jury in finding negligence the evidence should show that the employer had previous knowledge of the condition of the car, or ought to have had such knowledge, and failed to repair the defect within a reasonable time. *Mensch v. Pennsylvania R. Co.*, 53 Am. & Eng. R. Cas. 198, 150 Pa. St. 598, 25 Atl. Rep. 31, 30 W. N. C. 548.—DISTINGUISHING *Philadelphia & R. R. Co. v. Huber*, 128 Pa. St. 63. QUOTING *Payne v. Reese*, 100 Pa. St. 306; *Philadelphia & R. R. Co. v. Hughes*, 119 Pa. St. 301.—FOLLOWED IN *Bradbury v. Kingston Coal Co.*, 157 Pa. St. 231.

Plaintiff was at work on a trestle some twenty feet high "lining" the track, using therefor a pinch-bar and gauge to make the width uniform. It was near train time and his boss ordered him to hurry. Seeing an irregular place in the track which should be uniform in order to make the track safe, plaintiff used the pinch-bar as a lever to push the track into position, but failing to move it by the first and second efforts, he stooped so as to throw extra weight on the bar, when the wood of the stringer on which the bar rested split off, and he was thrown to the ground and injured. *Held*, not sufficient to show a *prima facie* case of negligence, and a nonsuit was properly allowed. *Gassaway v. Georgia Southern R. Co.*, 69 Ga. 347.

618. To show contributory negligence of employe.—In certain cases proof of custom is evidence as to whether it is negligence in a brakeman to ascend or descend a ladder on moving freight cars. *Flanders v. Chicago, St. P., M. & O. R. Co.*, 51 Minn. 193, 53 N. W. Rep. 544.—APPLIED IN *Chicago, M. & St. P. R. Co. v. Carpenter*, 56 Fed. Rep. 451.

When the evidence shows that plaintiff, a brakeman, ascended a freight car in answer to a signal for brakes, but before reaching the top of the car was caught by the awning of a station which projected within 18 inches of the top of the car, and was thrown to the ground, there is no evidence of contributory negligence justifying the court in withdrawing the case from the jury, even though the engine might have controlled the train under

steam, if, at the time of the accident, plaintiff's opportunities of acquiring knowledge of the awning were so few that he might reasonably be presumed to be ignorant of its proximity. *Nugent v. Boston, C. & M. R. Co.*, 38 *Am. & Eng. R. Cas.* 52, 80 *Me. 62*, 12 *Atl. Rep.* 797.

Plaintiff was engaged in defendant's shops and was injured by the explosion of an emery wheel which he operated, by reason of internal defects. *Held*, that the mere fact that he continued to run the wheel after he discovered it was untrue would not necessarily prevent a recovery, but was a circumstance to be considered by the jury, touching the question of contributory negligence. *Murtaugh v. New York C. & H. R. R. Co.*, 23 *N. Y. S. R.* 636, 3 *N. Y. Supp.* 483.

It appearing that workmen habitually rode on the elevator, there being no evidence that plaintiff had been warned not to do so, and it not appearing that the defects in the chain were manifest, or the defects in the ratchets—*held*, that the court could not, for plaintiff's alleged contributory negligence, set aside a verdict rendered in his favor. *Mulvey v. Rhode Island Locomotive Works*, 14 *R. I.* 204.

619. To show absence of employee's contributory negligence.*—It is not necessary for plaintiff to show by direct and positive evidence that the injured employé was at the time of the injury in the line of his duty and exercising proper care, but it is sufficient if such is the reasonable inference from the facts proved. Such inference cannot be drawn, however, where the facts are simply not inconsistent with it. *Perigo v. Chicago, R. I. & P. R. Co.*, 55 *Iowa* 326, 7 *N. W. Rep.* 627.

So where an engineer upon a railroad, who was killed by defects in a foot-board, was shown to be a competent and careful servant in his employment, and he was seen a few minutes before his death in the observance of due care—*held*, that it could not properly be said there was an entire want of evidence on this branch of the case. *Missouri Furnace Co. v. Abend*, 107 *Ill.* 44; *affirming* 9 *Ill. App.* 319.

The jury may, in determining plaintiff's contributory negligence, consider whether

* As to how far employé can rebut charge of contributory negligence by showing that he acted in obedience to orders, see note, 17 *L. R. A.* 602.

the service he undertook to perform was required by a superior to be done with rapidity and promptness in an emergency which demanded his exclusive attention. *St. Louis, I. M. & S. R. Co. v. Higgins*, 44 *Am. & Eng. R. Cas.* 541, 53 *Ark.* 458, 14 *S. W. Rep.* 653.

The evidence tended to show that it was customary to examine trains in motion, and that the plaintiff was inspecting such a train; that another train came upon him unexpectedly and rapidly, without such warning and signal as he might well expect to have; that his duty called upon him to work in dangerous places, where it would be careless for ordinary persons to go, and that there was a brakeman upon the coming train who, according to the usual custom, and in the proper discharge of his duty, would either slacken the speed of the train or give sufficient warning to enable the plaintiff to get out of the way. *Held*, that there was sufficient evidence for the jury that the plaintiff was in the exercise of due care. *Steffe v. Old Colony R. Co.*, 156 *Mass.* 262, 30 *N. E. Rep.* 1137.

620. To show what risks were assumed.—The fact that a brakeman had general knowledge of the neglect of the company to keep its track clear about its wood yards does not conclusively show that he assumed all the risks arising therefrom, especially if he did not know of the obstructions on the track at the place where he was injured; and it is a question for the jury in such a case whether he was guilty of negligence in remaining in the employ of the company. *Hulehan v. Green Bay, W. & St. P. R. Co.*, 31 *Am. & Eng. R. Cas.* 322, 68 *Wis.* 520, 32 *N. W. Rep.* 529.

621. Preponderance of evidence.—The ground of an employer's liability for injuries received by an employé while operating machinery is not danger, but negligence; and the employé must show, by at least a fair preponderance of the evidence, that the injury was caused by the negligence alleged. *Ford v. Anderson*, 139 *Pa. St.* 261, 21 *Atl. Rep.* 18.

In an action based upon negligence in failing to keep the cars in repair, the plaintiff, an employé, must not only establish, by a preponderance of evidence, that his own negligence did not contribute to the injury, but also that he was ignorant of the defects which resulted in the injury. *Belair v. Chicago & N. W. R. Co.*, 43 *Iowa* 662, 14

Am. Ry. Rep. 575.—APPLIED IN *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112.

Where an employé seeks to recover damages on the grounds that the company was guilty of culpable negligence in furnishing for use an engine so unmanageable and so ill constructed as to be unfit for business, and in employing and retaining in its service an engine driver who was unskilful, imprudent, and reckless, alleging that these facts were known to the company, or could have been by the exercise of diligence, but of which the plaintiff was totally ignorant, and by reason of one or the other of the negligent acts charged he was injured while in the exercise of due care, he is bound to show the negligent acts charged by a preponderance of evidence, and that the company knew the facts, or could have known them by the exercise of diligence. *Columbus, C. & I. C. R. Co. v. Truesch*, 68 Ill. 545.—APPLIED IN *Pullman Palace Car Co. v. Laack*, 143 Ill. 242. QUOTED IN *Chicago & N. W. R. Co. v. Scheuring*, 4 Ill. App. 533.

622. Weight to be given to circumstantial evidence.—In determining whether ordinary care was exercised by the injured party, the jury may be instructed that the hazardous nature of the employment may be considered, and that they should give due weight to the instincts and presumptions which naturally lead men to avoid injury and preserve their own lives. *Way v. Illinois C. R. Co.*, 40 Iowa 341, 8 Am. Ry. Rep. 400.—DISTINGUISHED IN *Whitsett v. Chicago, R. I. & P. R. Co.*, 22 Am. & Eng. R. Cas. 336, 67 Iowa 150; *Dunlavy v. Chicago, R. I. & P. R. Co.*, 66 Iowa 435. FOLLOWED IN *Kitteringham v. Sioux City & P. R. Co.*, 18 Am. & Eng. R. Cas. 14, 62 Iowa 285; *Reynolds v. Keokuk*, 72 Iowa 371.

Where there is evidence that a switchman could easily and more safely have uncoupled the cars before the engine started or after it stopped, the jury should be specifically instructed that they should consider this fact in connection with the condition of the track, the absence of run-boards, and all the other circumstances throwing light on the question, in determining whether or not the switchman was guilty of contributory negligence. *Pieart v. Chicago, R. I. & P. R. Co.*, 82 Iowa 148, 47 N. W. Rep. 1017.

The jury may judge from the appearance and conduct of a witness whether he is com-

petent to perform the duties of car inspector. *Keith v. New Haven & N. Co.*, 23 Am. & Eng. R. Cas. 421, 140 Mass. 175, 3 N. E. Rep. 28.

In determining the question of the contributory negligence of an operator whose duty lies in the line of danger, all of the circumstances must be considered, and particularly those exigencies which render the prompt performance of his duty necessary. *Irvine v. Flint & P. M. R. Co.*, 53 Am. & Eng. R. Cas. 210, 89 Mich. 416, 50 N. W. Rep. 1008.

The court refused to instruct the jury that it was plaintiff's duty, as engineer of a passenger train, to use the utmost human care and foresight for the safety of his train, but instructed them that he owed the defendant the duty of exercising ordinary care and diligence in the performance of his duty—that is, such care as persons of ordinary prudence would exercise under the same circumstances; that whether plaintiff exercised that degree of care was to be determined in view of all the circumstances, such as the liability to danger at the time, the nature and extent of the danger, and the consequences that might be expected to result from a want of care; that the care must be commensurate with the risks of the situation. *Held*, that this correctly stated the rule of law applicable to the case. *Hall v. Chicago, B. & N. R. Co.*, 46 Minn. 439, 49 N. W. Rep. 239.

Plaintiff was employed on a float which transferred cars across a harbor, and was injured on a dark, foggy night by his foot being caught between the float and the keys or latches of a bridge in a slip, used for making the float fast to the bridge. *Held*, that the defendant was entitled to a charge "that the lack of power to see, owing to the darkness, as plaintiff alleges, must be taken into account by the jury, and the conduct of plaintiff, so hindered and embarrassed by the fact, must be considered, and he must satisfy the jury that his action, in the peculiar situation in which he found himself, was such as a reasonable and prudent man would have observed under like circumstances." *Hart v. Delaware, L. & W. R. Co.*, 51 N. Y. S. R. 291, 67 Hun 648, mem., 22 N. Y. Supp. 3.

Defendant was also entitled to a charge that "if, as the plaintiff claims, it was dark, so that he was unable to observe or discover the projecting latches, and the danger to

which he was exposed from them, it was his duty to be more vigilant and careful, and to exercise a higher degree of care to avoid injury or exposure, than if it had been daylight, or if, by the use of his sense of sight, he could have discovered the condition of the latches, and his liability to injury therefrom." *Hart v. Delaware, L. & W. R. Co.*, 51 N. Y. S. R. 291, 67 Hun 648, mem., 22 N. Y. Supp. 3.

A railroad employé sued his company for personal injuries claimed to have been caused by a defective hand-car and a defective rail. The defense was made that the injuries were the result of plaintiff's own contributory negligence. *Held*, no error for the court to instruct the jury that in determining whether there was contributory negligence in operating the car and using the track, the promise of the section master to repair the track, and the fact that he had sent the car to the shops for repairs and again put it in use, might be considered. *Missouri Pac. R. Co. v. James*, (Tex.) 10 S. W. Rep. 332.

d. Presumptions.

623. Generally.—Where a telephone was placed in defendant's switch yard for the very purpose of communicating with the office, and an employé who had charge of the switch crew in making up trains communicated by such telephone to the office the fact that the car in question was out of order, and received the reply from some one, "If she will hold together, send her off"—*held*, in the absence of evidence to the contrary, that it must be presumed that the communication was made to and answered by some one having authority to give directions as to the matter inquired about, and that evidence of such communication was properly admitted against defendant in an action based on a personal injury caused by the defective car. *Reed v. Burlington, C. R. & N. R. Co.*, 31 Am. & Eng. R. Cas. 190, 72 Iowa 166, 33 N. W. Rep. 451.

624. Presumption that company has discharged its duty.—In an action for injuries sustained on account of defective machinery, it is presumed that the master has discharged his duty to the servant by providing suitable appliances for the use of the servant in the employment and in keeping them in proper condition; and this presumption can be overcome only by affirmative proof, either direct or cir-

cumstantial, of negligence on the part of the master. Negligence cannot be inferred from the mere happening of an accident; and if the circumstances relied upon to show negligence are consistent with ordinary care on the part of the master, the charge of negligence will fail for want of proof. *Kincaid v. Oregon S. L. & U. N. R. Co.*, 53 Am. & Eng. R. Cas. 218, 22 Oreg. 35, 29 Pac. Rep. 3.—REVIEWING *Chicago & E. I. R. Co. v. Hagar*, 11 Ill. App. 498.

In the absence of proof to the contrary, there is a presumption that iron used in the construction of a car-brake is of good quality, and the jury should be so instructed, *Philadelphia & R. R. Co. v. Hughes*, 33 Am. & Eng. R. Cas. 348, 119 Pa. St. 301, 11 Cent. Rep. 822, 13 Atl. Rep. 286, 21 W. N. C. 166.

While a man was under a car, repairing it, a train was run into it, the brakeman thereon being unable to stop its momentum, and the repairer was injured. *Held*: (1) that the injury was due to the negligence of a co-servant, if attributable at all to the fault of the brakeman; (2) that the company would, in the absence of evidence showing the contrary, be presumed to have provided a proper place in which to repair the cars; (3) that if the place of doing the work was improper, the fact should have been affirmatively proved. *Campbell v. Pennsylvania R. Co.*, (Pa.) 24 Am. & Eng. R. Cas. 427, 2 Atl. Rep. 489.

625. Presumption of company's negligence, generally.—In an action by an employé for an injury resulting from the negligence of other agents or employés of the company, the presumption is that he was free from fault or negligence, and that the company is to be charged with negligence on the part of its agents. *Thompson v. Central R. & B. Co.*, 54 Ga. 509.

Railroad companies are not liable to employés as they are to passengers, and in an action by an employé, or by one who sues for the death of an employé, it must be shown that such employé, at the time the injury was received, was free from fault, or that the defendant company was in fault, before any presumption of negligence will arise against the company. *East Tenn., V. & G. R. Co. v. Maloy*, 31 Am. & Eng. R. Cas. 352, 77 Ga. 237, 2 S. E. Rep. 941.—REVIEWED IN *Smith v. East & W. R. Co.*, 84 Ga. 183.

An employer cannot be assumed to be guilty of negligence, until the facts appear

which authorize the conclusion that he wrongfully violated his duty. *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. Rep. 936.

That a railroad company furnished its employé with a lamp which became extinguished whilst the latter was making a signal with it in the usual way, raises no presumption that the company was negligent. *East Tenn., V. & G. R. Co. v. Suddeth*, 86 Ga. 388, 12 S. E. Rep. 682.

If the mere fact that the car upon which the injured employé was engaged at the time of the injury was then off the track creates a presumption of negligence on the part of the company, or some of its employés, it seems that such presumption is rebutted where it has been shown positively that the track was in good order, the engine, car, etc., in good repair, and the train properly manned, and not run at a dangerous speed; and it is then incumbent on the plaintiff to make further proof of negligence on the part of the company. *Lockwood v. Chicago & N. W. R. Co.*, 6 Am. & Eng. R. Cas. 151, 55 Wis. 50, 12 N. W. Rep. 401.—QUOTED IN *Baltzer v. Chicago, M. & N. R. Co.*, 83 Wis. 459.

626. As arising from mere proof of injury.—As between master and servant no presumption of negligence arises, on the part of the master, from the mere fact that the servant has been injured while in his employ. *Joliet Steel Co. v. Shields*, 146 Ill. 603, 34 N. E. Rep. 1108. *Short v. New Orleans & N. E. R. Co.*, 69 Miss. 848, 13 So. Rep. 826.

But where the accident occurs through a particular defect, under circumstances from which the jury may see that there was negligence in not curing the defect, this is *prima facie* evidence, and sufficient to fix the liability of the defendant, unless it can explain that it used due care with regard to the defect. *Smith v. Memphis & L. R. R. Co.*, 18 Fed. Rep. 304.

So held, where an accident resulted from an accidental detachment of part of the cars of a train. *Tuttle v. Chicago, R. I. & P. R. Co.*, 48 Iowa 236.—DISTINGUISHED IN *Kuhns v. Wisconsin, I. & N. R. Co.*, 70 Iowa 561. QUOTED IN *Brann v. Chicago, R. I. & P. R. Co.*, 53 Iowa 595.

If a company furnishes to a contractor, for use in constructing an extension of its road, one of its locomotives, together with the engineer and fireman employed thereon,

and the latter, remaining in the service of the railroad company, is, without fault or his part, injured by the running of such locomotive, the presumption of law arises that the injury was occasioned by the negligence of the railroad company. The general rule on this subject is not changed because at the time of the injury neither the engineer nor the fireman was engaged in the usual and ordinary business of the company as a common carrier of freights and passengers. *Savannah & W. R. Co. v. Phillips*, 90 Ga. 829, 17 S. E. Rep. 82.—APPLYING *Georgia R. & B. Co. v. Miller*, 90 Ga. 571. DISTINGUISHING *Central R. & B. Co. v. Kenney*, 58 Ga. 485.

627. — or proof of defects in track or machinery.—Where a servant was injured by the breaking of a chain used in raising a derailed and wrecked car, the mere fact of the breaking of the chain is not sufficient to authorize any inference or presumption that the master had failed to exercise reasonable care in its selection. *Brymer v. Southern Pac. Co.*, 90 Cal. 496, 27 Pac. Rep. 371.

There must be evidence of negligence connecting him with the injury. The mere fact that machinery proves defective and that an injury results therefrom, does not fix the master's liability. *Johnson v. Chesapeake & O. R. Co.*, 36 W. Va. 73, 14 S. E. Rep. 432.

Where the judge charged the jury "that, if the car was overturned by reason of any defect in said car, or of the track on which it was running, this is in itself presumptive evidence of negligence on the part of the defendant, and the burden is then on the defendant to show that there has been no negligence whatever"—held, that as between master and servant, such presumption of negligence does not so arise, and the charge was erroneous. *Minty v. Union Pac. R. Co.*, 2 Idaho 437, 21 Pac. Rep. 660.

628. Presumption of due care on employe's part.—The presumption of law, that the plaintiff's husband, being an employé of the road, is without fault, arises only when he is disconnected with the duties about the particular business which resulted in his hurt; if he himself was engaged in the very act which resulted in his death, no such presumption will arise, but the onus is upon the plaintiff to show that either her husband was without fault, or that the company's other employés were at fault, before

the *onus* is shifted on the company to defend. *Central R. & B. Co. v. Sears*, 59 Ga. 436.—FOLLOWING *Central R. & B. Co. v. Kelly*, 58 Ga. 107.—QUOTED IN *Savannah, F. & W. R. Co. v. Barber*, 71 Ga. 644; *Western & A. R. Co. v. Vandiver*, 85 Ga. 470.

629. Presumption of negligence on employee's part.—Negligence on the part of the servant will not be presumed where the fact of such negligence is not found by the jury or referee before whom the cause was tried. *Keegan v. Western R. Co.*, 8 N. Y. 175.

Where the plaintiff entered upon a dangerous occupation in the service of the defendant, and became aware of certain defects in the mine and made known the defects to the superintendent of the defendant, and the superintendent promised to remedy the defects, the presumption of contributory negligence on the part of the plaintiff is removed, and a case presented for the jury. *Reddon v. Union Pac. R. Co.*, 5 Utah 344, 15 Pac. Rep. 262.—QUOTING *Hough v. Texas & P. R. Co.*, 100 U. S. 213.

630. Presumption of competency and skill of employé.—The law presumes that a company, in employing servants, exercises usual care and prudence, and if an employé seeks to recover on the ground that it failed in this respect, it is incumbent on him to prove that the servants were incompetent or unfit, and that the company had notice either when it employed them or at some time before the happening of the injury; and the same rule substantially applies to the question of the sufficiency of machinery. *Gravelle v. Minneapolis & St. L. R. Co.*, 3 McCrary (U. S.) 352, 10 Fed. Rep. 711.

A brakeman is not necessarily a skilled mechanic, and there is no presumption that he has sufficient skill to determine, from an inspection of the brakes, their fitness for use. *Central R. Co. v. Haslett*, 74 Ga. 59.—CRITICISING *Georgia R. & B. Co. v. Kenney*, 58 Ga. 485.

4. Instructions.

631. Generally.—Where an employé sues two companies, alleging that he received personal injuries while in the service and under the control of both defendants, and the proof discloses that he was under the control and in the service of one of them only, when he received the injuries of

which he complained, the general charge for each defendant is properly given. *Dean v. East Tenn., V. & G. R. Co.*, 98 Ala. 586, 13 So. Rep. 489.

632. Interpretation.—A charge in an action by an employé for injuries, etc., that "a duty imposed by law upon a railway corporation is to do everything that can reasonably be done for the safety of its employés," is equivalent to requiring the use of ordinary care in reference to the matters referred to. *Gulf, C. & S. F. R. Co. v. Wells*, 81 Tex. 685, 17 S. W. Rep. 511.—FOLLOWED IN *Bonner v. Moore*, 3 Tex. Civ. App. 416.

633. What are correct and should be given, generally.—Where negligence of defendant is proved, an instruction to the effect that plaintiff was entitled to recover for the injury if he had not by his own carelessness contributed thereto, is correct. *Steele v. Central R. Co.*, 43 Iowa 109.

Where the negligence of an agent or officer is the negligence of the principal, as in the case of those agents of a railroad who selected its machinery and superintended its repair, and gives an action to an employé for an injury resulting therefrom, it is not error to instruct the jury that the company had no means of acting except through its agents, and that the act or negligence of an agent was the act of the company itself. *Houston & T. C. R. Co. v. O'Hare*, 64 Tex. 600.

In an action for the death of an engineer caused by a defective track, where defendant pleaded that deceased had full knowledge for a long time of the condition of the track, and yet continued in defendant's employment without objection, etc., and the court instructed the jury that, if they believed from the evidence that the decedent had full knowledge for a long time of the alleged defects in the track, etc., they should find for defendant—*held*, that defendant, not having asked a different instruction on the point, could not complain that the court followed its answer in the use of the words "full" and "long," on the ground that decedent could have waived the alleged defects without having had full knowledge thereof for a long time. *Worden v. Humes-ton & S. R. Co.*, 72 Iowa 201, 33 N. W. Rep. 629.

A switchman sued for personal injuries caused by the negligence of an employé who had charge of the movements of the train,

in backing without a signal from the switchman. The court instructed the jury, placing the burden on the plaintiff to establish gross negligence, and making his right of recovery dependent thereon, and correctly instructed the jury as to contributory negligence. *Held*, that the instructions were as favorable to the company as it was entitled to. *Louisville & N. R. Co. v. Wallingford*, (Ky.) 22 S. W. Rep. 439.

634. What are incorrect and properly refused, generally.—An instruction to the effect that if a railroad company failed to keep in good repair and safe condition its engines and machinery, and as a consequence an employé, in the exercise of reasonable care and prudence, is injured, the company is liable, is not the law and should not be given. *Peoria, D. & E. R. Co. v. Johns*, 43 Ill. App. 83.

Where an employé sues for an injury caused by a train leaving the track and turning over, and the evidence tends to show that, notwithstanding its leaving the track, the locomotive and train could have been stopped before the locomotive turned over, which produced the injury, had the air brakes been in order, and also tended to show that the brakes would not work because out of order, it is not error to refuse the charge, as asked by the defendant, to the effect that plaintiff could not recover on account of any defects in the brakes on the car that was derailed. *Texas Pac. R. Co. v. Johnson*, 42 Am. & Eng. R. Cas. 7, 76 Tex. 421, 13 S. W. Rep. 463.

In a suit for the killing of an employé, it was error to charge as follows: "A railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotive or cars or other machinery of such companies, or for damage done by any person in the employment and service of such companies, unless it shall appear from the evidence that their agents had exercised all necessary and reasonable care and diligence, the presumption in all cases being against the company, with the following modifications, that where the party injured was in a position to control the movements of the train, such as an engineer was, or a conductor injured in the running of the train, that the presumption of negligence did not arise against the company; but this modification did not apply to one who was engaged to sweep out the train, or like employés, such as firemen."

East Tenn. V. & G. R. Co. v. Maloy, 31 Am. & Eng. R. Cas. 352, 77 Ga. 237, 2 S. E. Rep. 911.

Defendant company let a contract for a certain amount of wood to be sawed and piled at a station. Plaintiff was engaged by the contractor, and was injured by cars leaving the track and running against him while piling wood. There was some evidence tending to show that the cars left the track by reason of a plank which the contractor had placed between the rails to aid in his work; but there was no evidence that plaintiff knew that the plank was there. The trial court refused two instructions asked by the defendant: (1) That plaintiff and the contractor were bound to use the same care against accidents as was incumbent on the company, and that plaintiff could not recover, in the absence of wanton or wilful negligence on the part of the company, if the negligence of either contributed proximately to the accident; (2) that if the accident was caused by the contractor placing the plank on the track, this was negligence which contributed proximately to the accident, and plaintiff could not recover, in the absence of wanton or wilful negligence on the part of the company. The action of the court was affirmed on appeal by a divided court. *Michigan C. R. Co. v. Leahey*, 10 Mich. 193.—REFERRED TO IN *Davis v. Milwaukee R. Co.*, 1 Mich. N. P. [Supp.] xxvi.

635. Further instructions, properly given.—The court having instructed the jury that if the iron clamps used to fasten the belt used by the employer were in common use and not known to be dangerous, the defendant would not incur liability for injuries caused by them to an employé, when requested, and there being some evidence upon the issue, the court should have given the converse of the proposition. There was some evidence to the effect that those used by defendant on this belt were not like those in common use, and were more dangerous by reason of the difference. *Nix v. Texas Pac. R. Co.*, 82 Tex. 473, 18 S. W. Rep. 571.

636. — properly refused.—The accepting of employment from a company, although an assumption of risks incident to the employment, does not absolve the company from liability to the employé for injury caused by the "want of reasonable care and diligence in keeping its track in good

repair." If the general charge be applicable to the testimony, the refusal of the court to instruct in terms that "when plaintiff accepted employment as a section hand he assumed all risk incident to such employment" is not error. *Southern Pac. R. Co. v. Aylward*, 79 Tex. 675, 15 S. W. Rep. 697.

The court having charged upon the facts in evidence, added: "The law requires a master to furnish his servant with such reasonably safe appliances as are usually provided for the performance of like services by persons of ordinary prudence and care," and that "this is the extent of the master's duty in this regard to his servant." *Held*, that there was no error in the refusal to give a requested charge, "that the master is not an insurer of his servant while in his employ, but is only bound to use ordinary care in providing for his safety." *Bonner v. Moore*, 3 Tex. Civ. App. 416, 22 S. W. Rep. 272.

637. Proper modifications.—An instruction to the effect that deceased assumed all dangers incident to the service in entering it, including dangers of ice and snow, ought not to have been given without a modification to the effect that deceased must have had knowledge of the danger resulting from the ice and snow. *McDermott v. Iowa Falls & S. C. R. Co.*, (Iowa) 47 N. W. Rep. 1037.

638. Improper modifications.—Where a court was requested to charge "that the employer does his duty when he provides his employés in such manner as he fairly and reasonably deems prudent and safe," it was not error to refuse the point, and to substitute for the words, "he fairly and reasonably deems prudent and safe," the words, "in such manner as is fairly and reasonably prudent and safe." *McCombs v. Pittsburgh & W. R. Co.*, 130 Pa. St. 182, 18 Atl. Rep. 613.

It was error to add to an instruction that it was the further duty of the corporation "to furnish safe machinery for the use of its employés," and that a failure to do so would render it liable for any injury resulting from defective machinery, unless the negligence of plaintiff contributed to the injury. *Gulf, C. & S. F. R. Co. v. Wells*, 81 Tex. 685, 17 S. W. Rep. 511.

639. Argumentative instructions.—An instruction requested in an action for injuries inflicted by a defective brake-rod, to the effect that the jury might look to the

fact, if it be a fact, that the brake was used by the plaintiff several times on the same day prior to the accident without injury, as showing its condition, is argumentative and properly refused. *Louisville & N. R. Co. v. Campbell*, 97 Ala. 147, 12 So. Rep. 574.

640. Contradictory instructions.—A charge is both erroneous and contradictory in that, after stating correctly that the plaintiff had no right, even if ordered by the conductor, to board the train if going at a dangerous speed, the court adds: "If you find that the proximate cause of the accident to the plaintiff was his attempt to board the train while in motion, you will proceed to inquire whether the plaintiff exercised ordinary care in making the attempt, or if he could have avoided the accident by the exercise of ordinary care and prudence." *Louisville & N. R. Co. v. Wallace*, 90 Tenn. 53, 15 S. W. Rep. 921.

641. Instructions too general.—While plaintiff was flagging a train at a public crossing he was knocked down and injured by defendant's horse-car. The defendant asked the court to charge that if plaintiff stepped back, and came in collision with the car in consequence of stepping back, and if the car would not have struck him if he had not stepped back, he could not recover. *Held*, that the instruction was properly refused, as being too general and asking too much. Slight motions backward while in the discharge of duty might be considered by the jury on the question of contributory negligence, but could not, as a matter of law, be said to prevent a recovery. *D'Oro v. Atlantic Ave. R. Co.*, 13 N. Y. Supp. 789.

642. — too broad.—Instructions in an action for personal injuries charged to have been caused by defective machinery furnished to plaintiff by defendant for use in the latter's service should be confined to the instrumentalities which caused the injury. *Coontz v. Missouri Pac. R. Co.*, 115 Mo. 669, 22 S. W. Rep. 572.

In an action under section 4425, Mo. Rev. St. 1889, the instructions should not contain words not found in the statute, such as "wanton," etc., and should be confined to the acts of the servants and the employés of the defendant, mentioned in the statute, whilst running, conducting, or managing any locomotive, etc., and not permitted to include defects in the track. *McKenna v. Missouri Pac. R. Co.*, 54 Mo. App. 161.

Plaintiff was engaged in flagging a train at a public crossing, and was injured by being struck by defendant's horse-car approaching from behind. Defendant asked the court to instruct that it was plaintiff's duty to look and listen for approaching horse-cars, and if he failed to do so could not recover. *Held*, that the instruction was properly refused as too broad. It could not be said, as matter of law, that it was his duty while flagging to turn around and look for the approaching horse-cars. *D'Oro v. Atlantic Ave. R. Co.*, 13 N. Y. Supp. 789.

643. — too narrow.—In an action for the death of an engineer, who was killed by his engine falling through a burnt bridge, the company was charged with negligence in having set fire to the bridge by a former defective locomotive which had passed over. The court was asked to instruct the jury that "if a person of ordinary care would not have foreseen that the use of engines of this type could reasonably have been expected to result in injury to the deceased," then plaintiff could not recover. *Held*, that the instruction was properly refused as being too narrow. The question was whether the company might reasonably have expected injury generally from the use of such an engine, and not whether it might have expected injury to the deceased alone. *Texas & P. R. Co. v. Minnick*, 57 Fed. Rep. 362.

Plaintiff sued for an injury received while uncoupling cars of a moving train. The court instructed that if the evidence failed to show that the engineer and fireman knew that plaintiff was between the cars, and failed to stop as soon as possible after the latter gave a signal, then the evidence failed to show any negligence on the part of the company. *Held*, erroneous, because it ignored the fact that it might be negligence on the part of the engineer and fireman not to know that plaintiff was between the cars. *Neville v. Chicago & N. W. R. Co.*, 79 Iowa 232, 44 N. W. Rep. 367.

644. Ignoring material issues.—An instruction which ignores the fact that the rules of a company may not have been known to an employé killed by the derailing of a switch engine is properly refused. *Conners v. Burlington, C. R. & N. R. Co.*, 87 Iowa 147, 53 N. W. Rep. 1092.

An instruction that if a locomotive is in a defective, dangerous condition and the de-

fendant company knew it, and by conduct, actions, or words lulls its engineer into a feeling of security, whereby he is killed, the company is liable, is erroneous because it omits altogether the element of the engineer's ignorance of the defective and dangerous condition of the locomotive. *McKelvey v. Chesapeake & O. R. Co.*, 53 Am. & Eng. R. Cas. 230, 35 W. Va. 500, 14 S. E. Rep. 261.—FOLLOWING *Hoffman v. Dickinson*, 31 W. Va. 142.

645. Outside the issue.—Where the action is to recover for the death of an employé, caused by a train drifting from a side track, where there is no question as to the siding having become defective after its construction, it is error to submit to the jury whether the company exercised ordinary care in its construction, and whether it was constructed according to scientific principles. *Twitchell v. Grand Trunk R. Co.*, 39 Fed. Rep. 419.—FOLLOWING *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S. 189, 7 Sup. Ct. Rep. 1166.

An instruction which makes the liability of the employer dependent on the furnishing of machinery properly constructed, where the proper construction of the machinery is not made an issue in the case either by the pleadings or evidence, is erroneous. *Chicago, C. & St. L. R. Co. v. Dixon*, 49 Ill. App. 292.

Proof of the negligent acts or omissions charged in the declaration, which fails to show negligence by plaintiff, establishes a *prima facie* right of recovery; and it is incumbent on defendant to show such negligence in plaintiff as will defeat a recovery, or at least offer some evidence tending to prove it, in order to warrant the court in giving an instruction relating to contributory negligence. *United States Rolling Stock Co. v. Wilder*, 25 Am. & Eng. R. Cas. 414, 116 Ill. 100, 5 N. E. Rep. 92.

In an action for damages sustained by an employé, an instruction respecting the different degrees of care required to be exercised toward a passenger and an employé is not pertinent to the issues. *Cooper v. Central R. Co.*, 44 Iowa 134.

An instruction that it was the duty of the plaintiff to use his eyes and ears and watch and listen to see that a car standing near where he was at work did not move, is rightly refused where under the testimony there was nothing to suggest such moving or danger from any such source. *Helbig v.*

Michigan C. R. Co., 85 *Mich.* 359, 48 *N. W. Rep.* 589.

Where the complaint contains no allegation that the company had neglected to prescribe suitable rules and regulations for the government and management of its trains, employes, and business, it is error to charge the jury in relation to such duty. *Woodward v. Oregon R. & N. Co.*, 18 *Oreg.* 289, 22 *Pac. Rep.* 1076.

Where an employé sues to recover for injuries received by reason of a latent defect in the machinery, it is proper to refuse an instruction that the machine was considered safe when babbitted and oiled, where it appears that a failure to keep the machine oiled would not have contributed to the injury. *Columbia & P. S. R. Co. v. Hawthorne*, 3 *Wash. T.* 353, 19 *Pac. Rep.* 25.

Where an employé sues to recover for an injury received through a latent defect in a particular part of the machinery, an instruction that implies that if he knew of any apparent danger he could not recover, though the danger did not relate to the defect causing the injury, is error. Knowledge of danger in general, which would not have existed except for a particular defect, of which the plaintiff had not notice or knowledge, is immaterial. *Columbia & P. S. R. Co. v. Hawthorne*, 3 *Wash. T.* 353, 19 *Pac. Rep.* 25.

The court instructed the jury that if the brakeman had no notice, or by the exercise of reasonable care could have had no notice, "of that dangerous and defective condition of the car," etc. *Held*, that the instruction was erroneous in calling the attention of the jury to the "dangerous and defective condition of the car," there being no complaint as to the car itself, its construction, or repair. *Chicago & A. R. Co. v. Bragonier*, 119 *Ill.* 51, 7 *N. E. Rep.* 688; reversing 11 *Ill. App.* 516.

646. Assuming facts.—When neither the law nor any rule of a company makes it the duty of a brakeman on a freight train to inspect the cars as to their construction, strength of wheels or axles, or timbers used in their manufacture, it is not proper to introduce the question of such duty into the case by an instruction, in a suit for an injury to the brakeman. *Chicago & A. R. Co. v. Bragonier*, 119 *Ill.* 51, 7 *N. E. Rep.* 688; reversing 11 *Ill. App.* 516.

An instruction that if a servant knew, or by using reasonable diligence could have

known, that certain machinery was defective, and continued to use it, he cannot recover for personal injury received while so doing, is properly refused when there is no evidence tending to show that plaintiff knew, or by the use of reasonable diligence might have known, of the defect. *Macy v. St. Paul & D. R. Co.*, 35 *Minn.* 200, 28 *N. W. Rep.* 249.

An instruction which impliedly tells the jury that an injured employé may recover if he was injured in consequence of a defect in machinery without negligence on his part, is error, where there is no proof of negligence on the part of the defendant. The plaintiff has the burden of proving negligence on the part of defendant. *Allen v. Union Pac. R. Co.*, 7 *Utah* 239, 26 *Pac. Rep.* 297.

647. Not assuming facts.—Where the declaration alleged that plaintiff was injured by defendant's negligence in using certain defective tools, the court was authorized to charge as to negligence in using them in an unskilful manner, especially as the plaintiff was allowed to introduce evidence on this point without objection. *Central R. & B. Co. v. Attaway*, 90 *Ga.* 656, 16 *S. E. Rep.* 956.

Where it appeared from the evidence that plaintiff was one of several hands engaged in using the tools which were alleged to have caused the injury, though not actually using them himself when the injury occurred, but merely standing by ready to assist the others who were using them, it was not error as against the defendant for the court to charge as if the plaintiff was using them. *Central R. & B. Co. v. Attaway*, 90 *Ga.* 656, 16 *S. E. Rep.* 956.

An instruction that if the jury believed from the evidence that plaintiff, while in the employ of defendant as section foreman, and while in the performance of his duty in helping to repair a bridge, and while in the exercise of due care, etc., was forced to jump from a hand-car on such bridge to the ground to save his life, "through the neglect and wrongful acts proven of the servants of the defendant in wrongfully running a freight train," etc., is not open to the objection that it assumes that the defendant was guilty. The instruction would have been better if the word "proven" had been omitted. *Peoria, D. & E. R. Co. v. Rice*, 144 *Ill.* 227, 33 *N. E. Rep.* 951. — **DISTINGUISHING** *Wabash, St. L. & P. R. Co. v. Coble*,

113 Ill. 115; *Chicago & A. R. Co. v. Bragonier*, 110 Ill. 51.

An instruction that "the uncontradicted evidence shows that the plaintiff was in the employ of the defendant" at the time of the alleged injury is not objectionable upon the ground that the evidence showed that at such time the plaintiff was in the joint employment of the defendant named and another not a party to the action, as either employer was individually liable. *Knott v. Dubuque & S. C. R. Co.*, 84 Iowa 462, 51 N. W. Rep. 57.

648. Contrary to the facts.—It is error to charge, where the evidence shows the contrary, that one when injured was in the relation of a passenger and not of an employe to the defendant. *Texas & P. R. Co. v. Scott*, 64 Tex. 549.

An instruction to the effect that if the machine in question had been in use several years it should be deemed safe is properly refused, where the uncontradicted evidence shows that the machine had been dangerous during the whole time of its use. *Columbia & P. S. R. Co. v. Hawthorne*, 3 Wash. T. 353, 19 Pac. Rep. 25.

A freight train, while standing at a station where the track was not level, started down the track and collided with some detached cars, killing a brakeman who was there engaged in the discharge of his duty. When the train so started the conductor was in the station house engaged in his proper business there. He had not himself set the brakes which had stopped the train, and had no reason to suspect that they were not sufficiently set to hold the train where it had been stopped. After discovering that the train had started, there was not sufficient time for him to stop it before the collision occurred. *Held*, that the evidence of these facts did not tend to show any negligence on the part of the conductor, and that an instruction based on a contrary theory was erroneous. *Brady v. Burlington, C. R. & N. R. Co.*, 72 Iowa 53, 33 N. W. Rep. 360.

649. Misleading instructions.—Where the complaint attributes the injury to the negligence of the defendant in not providing sound lumber for scaffolding, and this is the real issue, it is erroneous and misleading for the court to give instructions to the jury as to the measure of duty on the part of defendant in selecting and retaining plaintiff's fellow-servants. *Willis v. Oregon*

5 D. R. D.—20.

R. & N. Co., 17 Am. & Eng. R. Cas. 539, 11 Oreg. 257, 4 Pac. Rep. 121.

One of the main issues was, whether the injury of plaintiff was caused by the negligence of the company in its failure to furnish a car in question with proper steps or an end ladder. An instruction was asked that if the jury believed, from the evidence, that the plaintiff had, before the trial, made written statements of the cause of the accident to an agent of the defendant, wherein he attributed the accident to the manner in which the engineer slacked up the train, and the way in which the car door slid, as well as to the absence of a step, and that such statements were true, and that the accident could not have happened if the engineer had not slacked up as he did, the plaintiff could not recover. *Held*, properly refused, as it gave undue prominence to a part of the evidence, and tended to divert the attention of the jury from the main issue, and cause them to decide the whole case upon a mere subordinate issue. *Chicago, B. & Q. R. Co. v. Warner*, 18 Am. & Eng. R. Cas. 100, 108 Ill. 538.

In an action for an injury to a brakeman, the ground of liability alleged was that the ratchet wheel or the dog on a freight car or both of them, were out of repair, and no other defect was alleged or shown. The court instructed the jury that there was an undertaking by the company with its brakemen to exercise reasonable care to furnish safe and suitable cars to work with. *Held*, that while this was good law, it had nothing to do with the case, and was calculated to mislead. *Chicago & A. R. Co. v. Bragonier*, 119 Ill. 51, 7 N. E. Rep. 688; *reversing* 11 Ill. App. 516.—DISTINGUISHED IN *Peoria, D. & E. R. Co. v. Rice*, 144 Ill. 227.

In an action by a brakeman for an injury received by coming in contact with an overhead bridge while on top of the cars at night, some question was made as to whether a rule of the company required him to be there or not. The court charged that if the jury "believe from the evidence that by reason of negligence on the part of defendant, plaintiff * * * was prevented from complying with one or more of the rules offered in evidence, then you should find for plaintiff, notwithstanding such failure to observe such rule." There was no evidence that any negligence on the part of defendant prevented the plaintiff from complying

with the rules; therefore the instruction was error, as tending to mislead and confuse the jury. *Chicago & A. R. Co. v. Matthews*, 39 Ill. App. 541.

In the charge given was the following paragraph: "If the goose-neck coupling apparatus was not more dangerous than an ordinary coupler, and if plaintiff knew of it being there and did not use ordinary care as a man of ordinary care and skill should have used under the circumstances and danger attending the making of such coupling," then the verdict should be for the defendant. *Held*, error. Either one of the facts would have been a defense, and each should have been submitted as a separate defense. *Texas & N. O. R. Co. v. Conroy*, 83 Tex. 214, 18 S. W. Rep. 609.

A fireman was injured by the parting of the engine from the tender. The jury were told that if it should appear from the evidence that the injuries were received in consequence of the fault or negligence of the plaintiff, then he could not recover. A requested charge was, in substance, that if the plaintiff knew, or by the exercise of ordinary care might have known, of any old crack, if any, in the casting which coupled the tender to the engine, and he continued in his employment and in the use of said tender and engine, that he could not recover. While in the abstract correct, this charge might have misled the jury as to the care required of the plaintiff, when taken in connection with the duty of the defendant to furnish reasonably safe machinery; because plaintiff was not charged with the duty of inspecting the coupling for latent defects. *Sabine & E. T. R. Co. v. Ewing*, 1 Tex. Civ. App. 531, 21 S. W. Rep. 700.

650. Invading the province of the jury.—Where an employé sues for an injury caused by defects in machinery, it is error to instruct that the defendant is liable if, by the exercise of reasonable and ordinary care on the part of defendant, the defect could have been discovered and corrected. It was for the jury to say what defects would have been discovered by the exercise of ordinary care, not what could have been discovered. *Wabash, St. L. & P. R. Co. v. Moran*, 13 Ill. App. 72.

In an action by an employé for injuries sustained within the scope of his employment while employed in another state, an instruction stating the law of that state would be improper, for the law of the sister

state is a matter of fact for the jury. *Chicago & N. W. R. Co. v. Johnson*, 27 Ill. App. 351.

Where an employer is sued for the death of an employé, caused by the explosion of a boiler, and there is no evidence of what tests would have been proper to apply to it to have ascertained its safety, it is error to charge that, "if the defects were such as were known, or were discoverable by examination or by application of known tests, defendant was liable, whether he knew of the defects or not." *Ballard v. Hitchcock Mfg. Co.*, 21 N. Y. S. R. 548, 51 Hun 188, 4 N. Y. Supp. 940.

It is error in a suit by an employé to recover for being run over by a hand-car, to instruct the jury positively that plaintiff had given notice to the company of the defect in the hand-car, where the company denied that such was the case. *Texas & P. R. Co. v. Kane*, (Tex.) 15 Am. & Eng. R. Cas. 218.

In a suit by a brakeman for injuries sustained in an effort to board a moving train, there was evidence tending to show that the brakeman was inexperienced; that in making the effort to board the train, he acted under an order of the engineer and conductor, or, at least, believed that he had such order, having, in consequence of the attendant noise and the confusion produced by the acts of his superiors, misunderstood the order given. There was evidence on the other hand tending to show that the train was running at a rate of speed that made the effort to board it dangerous; that the conductor ordered the brakeman not to board the train, and believed the order was understood. The conductor saw the brakeman approach the moving train, running as if to board it. Prompt action taken at this time to stop the train would have averted the injury; but there was not time to prevent the injury after the brakeman had put himself in a place of danger by actually attempting to get on the train. *Held*, that the court erred in charging upon these facts that the company was guilty of reckless conduct, and could not rely upon plaintiff's contributory negligence in defense, if the train could, by the exercise of ordinary care, have been stopped by efforts begun immediately upon the conductor's discovering the brakeman approaching the train as if to board it; and that the jury might look to the acts of the conductor to ascertain whether he knew that the brakeman in-

tended to board the train. This charge invades the province of the jury, and determines for them the proximate cause of the injury. It excludes from consideration the plaintiff's contributory negligence. *Louisville & N. R. Co. v. Wallace*, 90 *Tenn.* 53, 15 *S. W. Rep.* 921.

651. Calculated to inflame minds of jury.—An instruction to the jury, "You would not be willing to lose your arm for the world, or for the wealth of a Vanderbilt," though followed by the caution that it "would be no test of value," is an undesirable form of presenting the question of damages to the jury, prone enough without it to measure verdicts by sympathy. *Kehler v. Schwenk*, 144 *Pa. St.* 348, 22 *Atl. Rep.* 910.

652. Not correctly stating the law of contributory negligence.—In an action for personal injuries suffered by the plaintiff, who in his employment was rightfully upon a hand-car which collided with a train, the trial court should instruct the jury that they should consider the company's rules, etc., only if known to plaintiff, upon the issue of contributory negligence. *Garteiser v. Galveston, H. & S. A. R. Co.*, 2 *Tex. Civ. App.* 230, 21 *S. W. Rep.* 631.—FOLLOWING *International & G. N. R. Co. v. Gray*, 65 *Tex.* 32.

Where a servant was run over by a train and injured, there being two tracks at the place of the accident, and there was evidence of the failure to ring a bell or sound a whistle on the approaching train, the defendant asked the court to instruct the jury that if they found that the deceased was injured solely by his making a mistake as to which track the train was coming on, then plaintiff could not recover. *Held*, that the instruction was properly refused, as the mistake of the deceased may have been caused by the neglect to give the proper signals of the approach of the train. *Chicago & E. I. R. Co. v. O'Connor*, 119 *Ill.* 586, 9 *N. E. Rep.* 263; *affirming* 19 *Ill. App.* 591.

It was insisted for the railroad company that "the circuit court should have instructed the jury that if there was a neglect of duty on the part of F. (the engineer who was killed) as well as the section boss, in failing to cause the removal of the tree, the plaintiff (F.'s executrix) could not recover." *Held*, that this was not the law if the section boss, or some other agent of the com-

pany than F., was alone guilty of wilful negligence, causing the death of the latter, although in his own sphere he may have been guilty of some neglect of duty. *Louisville & N. R. Co. v. Filbern*, 6 *Bush (Ky.)* 574.—DISTINGUISHING *Ohio & M. R. Co. v. Hammersley*, 28 *Ind.* 371; *Wright v. New York C. R. Co.*, 25 *N. Y.* 562; *Farwell v. Boston & W. R. Corp.*, 4 *Metc. (Mass.)* 49, FOLLOWING *Louisville & N. R. Co. v. Collins*, 2 *Duv. (Ky.)* 114; *Louisville & N. R. Co. v. Robinson*, 4 *Bush* 507.

653. — as touching employee's notice of defects or knowledge of danger.—The court charged that although the employé knew of the dangerous proximity of the stationary car, yet the mere knowledge of the danger was not of itself a defense, but only a circumstance to be considered on the question of contributory negligence. *Held*, to be error. *Kansas City, M. & B. R. Co. v. Burton*, 53 *Am. & Eng. R. Cas.* 115, 97 *Ala.* 240, 12 *So. Rep.* 88.

An instruction to the effect that defendant is not liable for the reason that it is not shown that the end gate was defective and could not have been raised and secured in that position by deceased, leaves out the thought essential to make it a correct rule, viz., that deceased knew of its dangerous position before the accident and had time and opportunity to raise it, and was rightly refused. *McDermott v. Iowa Falls & S. C. R. Co. (Iowa)* 47 *N. W. Rep.* 1037.

654. — as touching employee's obedience or disobedience of rules or orders.—The evidence being that the plaintiff was furnished with a coupling-stick to be used until he learned to couple without it, and that his injury was received after he had learned to couple without a stick and had on many occasions done so, some of the instances being in the presence of his superior officers, who made no objection, the court properly denied a request by the defendant to charge the jury that if the plaintiff, in undertaking the service, was furnished with a coupling-stick and directed to use it in coupling, but did not use it at the time of the injury, and attempted to make the coupling with his hand instead of the stick, and was hurt in making such attempt, he could not recover. *Central R. & B. Co. v. Maltby*, 90 *Ga.* 630, 16 *S. E. Rep.* 953.

In an action by a brakeman for injuries received while attempting to couple cars,

the court rightly instructed the jury that a certain rule of the company in relation to the care to be exercised in coupling cars was a proper one, and that obedience thereto was incumbent on plaintiff; but in another instruction the jury were advised, in substance, that plaintiff might recover, even though he violated the rule, if he was not guilty of negligence in any other respect. *Held*, that the last instruction was erroneous, because it substituted the judgment and discretion of the plaintiff in place of the rule. *Deeds v. Chicago, R. I. & P. R. Co.*, 74 Iowa 154, 37 N. W. Rep. 124.—APPROVED IN *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112.

655. — as touching degree of care required of employee.—An instruction which holds that a servant in the employ of a railroad company may be relieved from the observance of that care the law exacts of him, is pernicious in the extreme. *Chicago & A. R. Co. v. Bragonier*, 119 Ill. 51, 7 N. E. Rep. 638; *reversing* 11 Ill. App. 516.

In an action for a personal injury to an engineer, the court instructed the jury, in substance, that the engineer did not waive the defect by remaining in the company's employment without objection, after knowledge of the defect, if, in so doing, he acted as an ordinarily prudent man would have done under the circumstances. *Held*, error, as it is immaterial in such a case what an ordinarily prudent man would have done. *Worden v. Humeston & S. R. Co.*, 72 Iowa 201, 33 N. W. Rep. 629.

The following instruction was asked: "If it was the usual and common custom of defendants' railroad to carry projecting timbers on cars, the same as when plaintiff was hurt, then it was plaintiff's duty to watch and look for such projecting timbers and avoid them; and if he did not, when he could or should have done so, he is not entitled to recover." *Held*, that the instruction was properly refused, on the grounds that it required of the plaintiff the exercise of more than ordinary care and foresight. *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa 31.—DISTINGUISHED IN *Baldwin v. Chicago, R. I. & P. R. Co.*, 50 Iowa 680; *Atchison, T. & S. F. R. Co. v. Plunkett*, 2 Am. & Eng. R. Cas. 127, 25 Kan. 188.

5. Questions of Law and Fact.

a. In General.

656. What are questions of fact.—Where a duty is imposed by a company

upon one of its employees, and afterwards another duty is assigned to him by his employer, without expressly relieving him from the performance of the first duty, the question whether the assignment of this second duty relieves him from the performance of the first duty is a question of fact, to be submitted to the jury upon the evidence, and is not a question of law. *Union Pac. R. Co. v. Fray*, 29 Am. & Eng. R. Cas. 309, 35 Kan. 700, 12 Pac. Rep. 98.

Where shovelers in the hold of a vessel inform their foreman that a rope has become weakened so that its further use is dangerous to them, and material and appliances for replacing it with a safe rope are provided by the employer, the question whether it was the duty of the shovelers or their foreman, or of the employer, to replace the weak rope with a safe one is a question of fact for the jury. *Daley v. Boston & A. R. Co.*, 33 Am. & Eng. R. Cas. 298, 147 Mass. 101, 6 N. Eng. Rep. 349, 16 N. E. Rep. 690.—DISTINGUISHED IN *Cregan v. Marston*, 126 N. Y. 568.

657. — whether employee was in the line of his duty.—Whether or not a train flagman, who was injured while giving signals to the engineer, was in the line of his duty or was assuming to act for the conductor, and whether or not he was guilty of contributory negligence, were questions for the jury. *Hudson v. Georgia Pac. R. Co.*, 85 Ga. 203, 11 S. E. Rep. 605.—DISTINGUISHING *Central R. & B. Co. v. Sims*, 80 Ga. 749.—FOLLOWED IN *Georgia Pac. R. Co. v. Hudson*, 89 Ga. 558.—*Georgia Pac. R. Co. v. Hudson*, 89 Ga. 558, 16 S. E. Rep. 70.—FOLLOWING *Hudson v. Georgia Pac. R. Co.*, 85 Ga. 203.

658. — the law of a sister state.—Where an employee sues for an injury which occurred in another state, and seeks to recover according to the law of that state, and to prove what the law is introduces decisions of the supreme court of that state, the question of what the law is for the jury. *Chicago & N. W. R. Co. v. Johnson*, 27 Ill. App. 351.

659. What is not a question of fact.—The belief or understanding of the plaintiff in regard to the protection from injury he would receive in accepting employment as defendant's car inspector and performing the duties of that position is not for the consideration of the jury. *Howard v. Savannah, F. & W. R. Co.*, 84 Ga. 711, 11 S. E. Rep. 452.

b. Questions Relating to the Company's Negligence.

660. Company's negligence when a question of fact, generally.—The question of negligence on the part of the company with respect to its employees is a question of fact for the jury. *Dilberner v. Chicago, M. & St. P. R. Co.*, 47 Wis. 138, 2 N. W. Rep. 69. *Turner v. Boston & M. R. Co.*, 158 Mass. 261, 33 N. E. Rep. 520.

The weight of testimony is for the jury. So held, in an action by a brakeman against the company for personal injuries, where the evidence of the locomotive engineer's negligence was conflicting. *Stewart v. St. Paul, M. & M. R. Co.*, 43 Minn. 268, 45 N. W. Rep. 431.

Whether the omission of a master to supply the proper means to prevent an injury to a servant which might have been foreseen is negligence on his part is a question of fact to be determined from the evidence. So is the question whether the servant is guilty of contributory negligence. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. Rep. 285.

Where a brakeman sues to recover for personal injuries, the question of negligence is to be determined by the jury under all the facts of the case, and it is not error for the court to fail to give a special instruction to find for the company where there is evidence to support a verdict in favor of the plaintiff and tending to show that he did not contribute to his injuries. *Houston & T. C. R. Co. v. Maddox*, 2 Tex. Unrep. Cas. 312.

661. — Illustrations.—The driver of a street-car drawn by horses was given a span of horses, one of which was a broncho and would kick when struck, which fact was known to the master, but of which the driver was not aware and was not informed by the master. The car was under the care of a conductor, who permitted the same to be overcrowded, every available foot of space, both in the car and on the platform, being filled. On attempting to start the car the broncho refused to pull, whereupon the driver, who was crowded close to the broncho, slapped it with the lines, when it kicked him in the abdomen, causing death in a few hours. Held, that there was sufficient testimony to submit the question of fact to a jury. *Leigh v. Omaha St. R. Co.*, 36 Neb. 131, 54 N. W. Rep. 134.

In an action against a receiver for the death of an engineer, the evidence showed that he was killed by an engine leaving the track, but there was a conflict of evidence as to whether the track was defective; but there was uncontradicted evidence that the flange of one of the engine wheels was broken, due to a latent defect or undiscoverable flaw. Held, that it was proper to leave the case to the jury to determine whether the engine left the track by reason of defects in the track or the breaking of the wheel, with an instruction that if by the latter there could be no recovery. *Durkin v. Sharp*, 8 Am. & Eng. R. Cas. 520, 88 N. Y. 225; affirming 22 Hun 132, 12 Wkly. Dig. 421.

In such case it was proper to refuse to instruct the jury that if they believed the track had been inspected within a reasonable time prior to the accident, by a competent inspector, and had been by him adjudged to be in a safe condition, then plaintiff could not recover. *Durkin v. Sharp*, 8 Am. & Eng. R. Cas. 520, 88 N. Y. 225; affirming 22 Hun 132, 12 Wkly. Dig. 421.

Defendant company employed plaintiff and others to make repairs on its track, the nature of which would not prevent the running of trains. The time when trains would pass was well known, and the only thing necessary to secure safety was to provide the men with an accurate timepiece, so that they could be off the track in time to avoid approaching trains. Held, that it was the duty of the company to provide such timepiece. *Matteson v. New York C. R. Co.*, 62 Barb. (N. Y.) 364.

In such case there was evidence that the officers of the company did not provide timepieces, but left it entirely to the foreman of the gang to provide such time as they might have and to regulate his own watch. Held, that it was a question for the jury to say whether the company was negligent. *Matteson v. New York C. R. Co.*, 62 Barb. (N. Y.) 364.

Suit was brought to recover for personal injuries to plaintiff, received while operating a float used in transferring railroad cars to and from a pier. It appeared that one of the iron keys, after being used in the removal of a former float, was left projecting, instead of being drawn back as it should have been, which caught and crushed plaintiff's leg. Held, that the question of the company's negligence was for the jury.

Hart v. Delaware, L. & W. R. Co., 27 N. Y. Supp. 767.

602. When not a question of fact for the jury, generally.—The servant cannot recover against his master for personal injuries without showing negligence, where he claims to recover through defects in tools or machinery furnished him; but where the evidence is equally consistent with the absence as well as the presence of negligence, it is error to leave the case to the jury. *Bailey v. Rome, W. & O. R. Co.*, 19 N. Y. S. R. 656, 49 Hun 377, 3 N. Y. Supp. 585.

Where in an action to recover for personal injuries neither the testimony nor the model disclosed any defect in an apparatus by which the plaintiff was hurt, the jury were properly not allowed to say whether the machine was defective. *Downey v. Sawyer*, 157 Mass. 418, 32 N. E. Rep. 654.

In the absence of expert testimony or proof of an accepted railroad method it is improper to allow a jury to speculate as to what are the proper methods to be adopted by a company in any given case. To do this would be to take the management of the corporation out of its own hands. *Hebert v. Delaware & H. Canal Co.*, 41 N. Y. S. R. 860, 62 Hun 618; affirmed in 136 N. Y. 655, mem., 32 N. E. Rep. 1016, 49 N. Y. S. R. 916. *Larow v. New York, L. E. & W. R. Co.*, 61 Hun 11.

In an action for negligence, where, upon plaintiff's evidence, the accident appears unaccountable, and defendant's evidence, so far as it accounts therefor, shows that it arose from an occult risk incident to the employment, or that, if there was negligence, it was that of the plaintiff, it is error to submit the question of defendant's negligence to the jury. *Chicago & N. W. R. Co.*, 101 Ill. 335, 1 Ana. Ry. Rep. 385.—QUOTED IN *Fallbrook v. Chicago & N. W. R. Co.*, 5 Am. & Eng. R. Cas. 480, 54 Wis. 257, 41 Am. Rep. 31.

The question of negligence on the part of the company is not for the jury where an employé has worked for several months without complaining that the company's staff was not sufficient. *Skipp v. Eastern Counties R. Co.*, 9 Ex. 223, 23 L. J. Ex. 23, 3 C. L. R. 185.

603. — illustrations.—The company's negligence is a question of law for the court, where the plaintiff with others was employed as a laborer in surfacing the

track, and while being taken to his work by a gravel train was injured by collision with a "wild" train in charge of the company's servants; the gravel train being on regular time and the wild train having orders to flag it. Under the rules of the company the person flagging was required to be three fourths of a mile ahead of the flagging train, but in this case he was within four hundred feet therefrom and could not see the gravel train until upon it. *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599, 21 Pac. Rep. 32.

604. Negligence with respect to the promulgation of rules.—(1) *When for the jury.*—It is the duty of a railroad company to make and promulgate rules which, if faithfully observed, will give reasonable protection to its employés; and whether it is negligent in that respect in a given case, is a question for the jury. *Abel v. Delaware & H. Canal Co.*, 28 Am. & Eng. R. Cas. 497, 103 N. Y. 581, 9 N. E. Rep. 325, 4 N. Y. S. R. 269, 57 Am. Rep. 773.—FOLLOWED IN *Bushby v. New York, L. E. & W. R. Co.*, 107 N. Y. 374. QUOTED IN *Carr v. North River Constr. Co.*, 17 N. Y. S. R. 945. REVIEWED IN *Hankins v. New York, L. E. & W. R. Co.*, 55 Hun 51, 28 N. Y. S. R. 59, 8 N. Y. Supp. 272; *Larow v. New York, L. E. & W. R. Co.*, 40 N. Y. S. R. 26; *Hebert v. Delaware & H. Canal Co.*, 41 N. Y. S. R. 860, 62 Hun 618, 16 N. Y. Supp. 561.—*International & G. N. R. Co. v. Hall*, 78 Tex. 657, 15 S. W. Rep. 108.

Plaintiff's testator was under a car on a side track making repairs, when another car was carelessly backed against it and he was killed. It appeared that other railroad companies had adopted a rule providing for a blue flag by day and a blue light by night upon cars undergoing repairs, which is understood to prohibit moving the car while the signal remains, but that the defendant had not adopted such rule or anything similar. Held, that the question of its negligence in failing to adopt the rule was for the jury. *Abel v. Delaware & H. Canal Co.*, 28 Am. & Eng. R. Cas. 497, 103 N. Y. 581, 9 N. E. Rep. 325, 4 N. Y. S. R. 269, 57 Am. Rep. 773.

(2) — *and when not.*—In an action by a car repairer for injuries received while working under a disabled car, it appeared that defendant's assistant yard master, who had charge of the switch engine and the

handling of cars in the yard, switched upon the track on which the disabled car stood, another car, which, coming into collision with the former, caused the damages complained of. The rules of defendant provided that car repairers must see that they are protected by a red flag when under and between the cars, on perceiving which the engineer must immediately stop his train before passing it. It was also provided that "All employés of the company are expected and required in all cases to exercise the greatest care and watchfulness to prevent injury or damage to person or property; * * * in all cases of doubt to adopt the safe course." Every employé was required to acquaint himself with the rules and directions and have a copy of them in his possession. The rules were printed on the backs of time-tables which were kept for distribution among the employés at all points; plaintiff knew the custom and regulation in regard to hanging out a red flag, and observed it. *Held*, that there was no proof of neglect on the part of defendant to make and promulgate suitable rules for the information and government of its employés, and that the submission of that question to the jury was error. *Corcoran v. Delaware, L. & W. R. Co.*, 126 N. Y. 673, 27 N. E. Rep. 1022, 38 N. Y. S. R. 251, 4 *Sikv. App.* 483.

Plaintiff's intestate was killed while coupling cars in a yard, by a switch engine being suddenly run down against them without any signal of its approach. The court left it to the jury to determine whether it was reasonable to require the company to promulgate a rule forbidding entrance on a switch when another engine and train are upon it, unless a signal is given or notice sent to the employés of that train; and further instructed the jury that they might find the company negligent if they found such a rule reasonable. *Held*, error, in the absence of any evidence that any other company had adopted such rule, or what its workings would be if adopted. *Larow v. New York, L. E. & W. R. Co.*, 40 N. Y. S. R. 26, 61 *Hun* 11, 15 N. Y. Supp. 384.—REVIEWING *Abel v. Delaware & H. Canal Co.*, 103 N. Y. 581, 4 N. Y. S. R. 269; *Ford v. Lake Shore & M. S. R. Co.*, 36 N. Y. S. R. 494.—REVIEWED IN *Shepard v. New York C. & H. R. R. Co.*, 44 N. Y. S. R. 816, 18 N. Y. Supp. 665.—*Doing v. New York, O. & W. R. Co.*, 73 *Hun* 270, 26 N. Y.

Supp. 405.—QUOTING *Berrigan v. New York, L. E. & W. R. Co.*, 131 N. Y. 582.

Defendant company maintained a yard about a mile long, with six parallel tracks, with a wagon way across these tracks for the purpose of hauling railroad supplies, and an employé was killed by a switch engine while driving a wagon on this way. The evidence tended to show that standing cars on the various tracks prevented the engineer in charge of the engine from seeing the deceased in time to prevent a collision; and the company was charged with negligence in not promulgating rules governing the movement of trains and engines in the yard. *Held*, that it was error to leave it to the jury what were proper methods to be adopted, in the absence of evidence of rules in other yards, or of any methods in common use among railroads for the regulation of such matters. *Hebert v. Delaware & H. Canal Co.*, 41 N. Y. S. R. 860, 62 *Hun* 618, 16 N. Y. Supp. 561; *affirmed in* 136 N. Y. 655, *mem.*, 32 N. E. Rep. 1016, 49 N. Y. S. R. 916.—REVIEWING *Abel v. Delaware & H. Canal Co.*, 103 N. Y. 581, 4 N. Y. S. R. 269.

Plaintiff's intestate was a brakeman on a train that came into the yard at night, and was killed while placing the train on a siding, by colliding with other cars that had been stored there, and the company was charged with negligence in not adopting a rule requiring a light to be placed on cars at night when stored upon tracks. *Held*, that it was error to submit the question of the company's negligence to the jury, in the absence of evidence that other companies had adopted a rule requiring lights on such cars, or that defendant could practically carry out such a rule in the management of its business. *Shepard v. New York C. & H. R. R. Co.*, 44 N. Y. S. R. 816, 63 *Hun* 634, 18 N. Y. Supp. 665.—REVIEWING *Grippen v. New York C. R. Co.*, 40 N. Y. 41; *McGrath v. New York C. & H. R. R. Co.*, 63 N. Y. 528; *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 220; *Larow v. New York, L. E. & W. R. Co.*, 40 N. Y. S. R. 26.

A switchman went to signal a passenger train, and under the mistaken belief that a switch was set wrong, under the impulse of the moment, threw it open and ran the train off the main track and killed the engineer. *Held*, that a failure of the company to adopt a rule that would prevent improperly opening switches is not sufficient negli-

gence to justify a submission to the jury, in the absence of any evidence that a rule was necessary. *Burke v. Syracuse, B. & N. Y. R. Co.*, 23 *N. Y. Supp.* 458, 69 *Hun* 21.

665. Negligence in failing to inform, warn, or instruct employe.—Where a mechanic from car shops is working under orders from a superior on a ladder leaning against a train, whether he was guilty of contributory negligence in not himself giving notice to the trainmen of his position, or whether he might properly rely upon his superior giving notice of his position, is a question for the jury. *Pierce v. Central Iowa R. Co.*, 73 *Iowa* 140, 34 *N. W. Rep.* 783.

Where a machinist is injured while coupling moving cars under the direction of his foreman, without being instructed as to the proper method of doing the work, or as to the danger connected with it, it is a question for the jury as to whether he possessed sufficient knowledge not to demand further instruction, or whether the injury resulted from his ignorance of the want of instruction. *McDermott v. New York C. & H. R. R. Co.*, 38 *N. Y. S. R.* 33, 59 *Hun* 619, 13 *N. Y. Supp.* 435; affirmed in 131 *N. Y.* 668, *mem.*, 43 *N. Y. S. R.* 964.

A switchman was killed while running to turn a switch, and it subsequently turned out that his foreman had turned the switch and there was no need of his going, but he had not been informed of the fact. *Held*, that it was a question for the jury whether the company was liable for negligence by reason of the foreman failing to inform the switchman of the fact. *Grant v. Union Pac. R. Co.*, 45 *Fed. Rep.* 673.

The evidence tended to show that the coupling of a Baldwin locomotive car to a car of defendant, in consequence of the peculiar and unusual construction of the draw-heads of the former, was extra hazardous, dangerous, and unsafe; that to those acquainted with the Baldwin locomotive cars they were known as "man-killers"; that plaintiff was directed, on a dark night, to couple one of these cars to one of the defendant's; that he had never before made this coupling, and he had no knowledge of the dangerous, unsafe, and unusual construction of the draw-head of the Baldwin locomotive car; that while, from the light of his lantern, he could see the place for the draw-head to enter, it did not apprise him of the dangerous character of the

blocks attached to the draw-head, which caused his arm to be caught and crushed while attempting to put in the pin to effect the coupling. *Held*, that the trial court properly overruled defendant's demurrer to the evidence. *Crane v. Missouri Pac. R. Co.*, 25 *Am. & Eng. R. Cas.* 440, 87 *Mo.* 588.

A train dispatcher telegraphed the operator at P. station to flag and hold an east-bound train for orders, and was then told to have the train pass the west-bound train at his station. A little later he was directed to have the trains pass at the next station west, which they did; and the operator at P. understanding that the first order to hold the east-bound train for orders had been superseded by later orders, allowed the train to pass his station, and it collided with another west-bound train a little east of the station and killed an engineer on the east-bound train. It seemed that the operator had wired the engineer where the trains were to pass, but gave him no further directions as to where to stop, or that another train was approaching. *Held*, that it was a question for the jury whether the company was negligent in failing to give the engineer additional notice for the movement of his train. *Sutherland v. Troy & B. R. Co.*, 8 *N. Y. Supp.* 83.

Where, in an action for an injury to a brakeman, alleged to have been caused by negligence in not warning him of the extra hazard involved in coupling cars of a particular kind which might come upon its road, the evidence that he was so inexperienced as to need special instructions or caution on that subject was not undisputed nor conclusive—*held*, that it was error for the court so to instruct the jury as to take from it the question of defendant's negligence. *Hughes v. Chicago, M. & St. P. R. Co.*, 79 *Wis.* 264, 48 *N. W. Rep.* 259.—**FOLLOWING Kelly v. Abbot**, 63 *Wis.* 307.

666. — as to the abandonment and reopening of a switch.—The closing of a railroad switch, and the removal of the lights, with a notice to the engineers of passenger trains, who were required to slow up in passing it when in use, that it was abandoned, and that the track was thereafter to be treated as if no switch were there, and its reopening without any notice to such engineers, and without their knowledge, and its use without such lights, make a clear case of negligence against the company, if the presence of such

lights would have prevented the running of a passenger train into the switch, which question, in case of conflicting testimony, is for the jury. *Town v. Michigan C. R. Co.*, 84 Mich. 214, 47 N. W. Rep. 665.

In such a case it was contended by the company that the absence of the lights was not the proximate cause of the accident; that if the switch had been locked, the train would have passed in safety; and that the opening or unlocking of the switch was caused either by the intermeddling of a stranger or trespasser, or by the negligence of fellow-servants of the plaintiff, and that he could not recover in either event. *Held*, that if the lights would have prevented the accident in the condition in which the switch was, by giving timely warning of the danger, the negligence of the company in reopening it for use without replacing the lights was just as much the proximate cause of the injury as the unlocking and turning of the switch rails; and if they were concurrent causes, the defendant would be liable. *Town v. Michigan C. R. Co.*, 84 Mich. 214, 47 N. W. Rep. 665.

667. Negligence in failing to provide safe working place.—It is a question of fact for the jury to determine whether it was negligence on the part of a master to permit a large quantity of dynamite to be stored in such a position that an accidental explosion of it might result in death or injury to his servants. *Tissue v. Baltimore & O. R. Co.*, 112 Pa. St. 91, 3 Atl. Rep. 667.

Where an employé is injured from defects in the premises where he works, and it is shown that the defects were known to the company 24 hours before the accident, the question of whether the company had reasonable time in which to repair is for the jury. *Missouri Pac. R. Co. v. Sasse*, (Tex. Civ. App.) 22 S. W. Rep. 187.

Plaintiff and others were in the employ of a city in laying a water-pipe near defendant's track, when a passing car struck a pipe which they were about to lay, and knocked it against plaintiff, injuring him. It appeared that the company had stationed a watchman at the place. *Held*, sufficient evidence of negligence to justify a submission to the jury, and to support a verdict for plaintiff. *Lahey v. Central Park, N. & E. R. R. Co.*, 51 N. Y. S. R. 589, 22 N. Y. Supp. 380.

668. — company's yard or station.
—Action by an employé for personal injury

sustained by the falling of a pile of lumber in defendant's yard. Under the issues plaintiff was required to prove (1) that the lumber was so negligently piled as to be dangerous, and that defendant was negligent in allowing it to remain so piled; and (2) that he was not guilty of any negligence himself which contributed to the injury. Upon evidence tending to establish both of these propositions, plaintiff was entitled to have them submitted to the jury; and the court, after having erroneously directed a verdict for the defendant, properly sustained plaintiff's motion for a new trial. *Baldwin v. St. Louis, K. & N. W. R. Co.*, 72 Iowa 45, 33 N. W. Rep. 356.

Plaintiff's intestate was killed, after two months' service as a brakeman, while attempting to couple slowly moving cars at night at a way station, by falling in an uncovered ditch under the track. *Held*, that the question of the company's negligence in maintaining the uncovered ditch was for the jury. *Plank v. New York C. & H. R. R. Co.*, 1 T. & C. (N. Y.) 319; *affirmed in* 60 N. Y. 607, *mem.*

669. Negligence in failing to provide safe track.—Whether the company was negligent in not knowing of the wash-out, so as to have given the plaintiff due notice and warning, is a question for the jury, under proper instructions. *Central R. & B. Co. v. Kent*, 84 Ga. 351, 10 S. E. Rep. 965.

Whether or not an engineer exercised proper diligence in looking out for defects in the tracks is a question for the jury, in determining which they should take into consideration the various other duties which he was required to perform in managing and running his engine. *Central R. & B. Co. v. Kent*, 87 Ga. 402, 13 S. E. Rep. 502.

The negligence of a railroad company in sending out a repair train with workmen, after an unusual storm, without first sending persons ahead to ascertain the condition of the track, is a question for the jury. *Conlon v. Oregon S. L. & U. N. R. Co.*, 53 Am. & Eng. R. Cas. 356, 23 Oreg. 499, 32 Pac. Rep. 397.

A train running through mountains was thrown from the track by a pine knot on the track catching in the pilot. It appeared that fires had been burning on the mountain side for some days, causing stones, sticks, and logs to roll down on the track, and that the company had knowledge of

the facts, and that the pine knot on the track was due to these fires. *Held*, that the question of whether the company was negligent in failing to have track walkers at the place was for the jury. *Denver, S. P. & P. R. Co. v. Wilson*, 12 *Colo.* 20, 20 *Pac. Rep.* 340.

A misplaced switch caused a train to leave the track and killed the fireman. There were 10 switches at the station, with about 80 trains passing each day, several of which stopped and had to be switched; and it appeared that but one switchman was employed, who had to work from 12 to 13 hours out of every 24 hours. The railroad company was charged with negligence in intrusting the switching to an incompetent and inexperienced person, and in failing to employ a sufficient number of persons. *Held*, that the question of the company's negligence, and its failure to employ a sufficient number of persons, should have been left to the jury, and it was error to grant a nonsuit. *Harvey v. New York C. & H. R. R. Co.*, 19 *Hun (N. Y.)* 556.

In such case evidence that the company had employed an additional switchman immediately after the accident was admissible. Also it was proper to prove that the switchman had complained to the company that he had not the requisite experience, and that the work was too much for one man. *Harvey v. New York C. & H. R. R. Co.*, 19 *Hun (N. Y.)* 556.

The contributory negligence of a fireman, who is killed by a misplaced switch, is not a defense, if the accident was caused by a failure of the company to employ a competent switchman, or a sufficient number of them. *Harvey v. New York C. & H. R. R. Co.*, 19 *Hun (N. Y.)* 556.

670. — or safe roadbed.—A brakeman employed in a freight yard, while uncoupling cars stepped into a hole in the roadbed under a switch rod, and was caught and injured. There was evidence that the hole or space under the rod was larger than need be for working the switch, and larger than under any other rod in the yard, and looked as though it had been dug out for a drain, that the hole had existed for a week without plaintiff's knowledge, and he did not notice it at the time, and it was afterwards partially filled up and made safe; that he was acting under orders of the conductor of a train he was helping to make up, and went between the cars and rails to pull the

coupling-pin, which stuck; and that it was customary and quite as safe to go between the rails under such circumstances. *Held*, that whether the defendant was negligent and its roadbed defective, and whether the plaintiff was in the exercise of due care, were for the jury. *Hannah v. Connecticut River R. Co.*, 154 *Mass.* 529, 28 *N. E. Rep.* 682.

Plaintiff, a laborer, was engaged in shoveling ashes from a pit between the rails. In attempting to get out of the pit as a locomotive approached, he was struck by it and injured. Near the pit was a water-plug so arranged that a locomotive, discharging ashes into the pit, could at the same time take water. The court submitted the question to the jury as to whether the relative position of the water-plug and the stopping place on the ash-pit was an improper and negligent construction. *Held*, error. *Reichel v. New York C. & H. R. R. Co.*, 130 *N. Y.* 682, *mem.*, 3 *Silv. App.* 662, 29 *N. E. Rep.* 763, 42 *N. Y. S. R.* 510; *reversing* 29 *N. Y. S. R.* 999, 9 *N. Y. Supp.* 960.

Plaintiff, an employé, was being transported over the road in a hand-car, and while sitting on the side of the car with his feet hanging down, was injured by his feet striking boards where the track had been planked, which had been allowed to become loose and warped, so that they stood several inches above the proper level. *Held*, that it could not be said, as a matter of law, that this did not show a defective roadbed, so as to constitute actionable negligence. *Pool v. Chicago, M. & St. P. R. Co.*, 3 *Am. & Eng. R. Cas.* 332, 53 *Wis.* 657, 11 *N. W. Rep.* 15.

671. — or safe sidings and switches.—In an action by a brakeman for personal injuries, when there was evidence tending to show that the accident was the result of running a loaded freight car upon a siding where the rails were put down without fish-plates, it was not error to submit the question of the company's negligence, under all the evidence, to the jury. *McCombs v. Pittsburgh & W. R. Co.*, 130 *Pa. St.* 182, 18 *Atl. Rep.* 613.

A train was derailed by an open switch and injured the plaintiff, a brakeman. He claimed that if a certain safety switch had been used at the place the train would have passed with safety, notwithstanding the misplaced switch. *Held*, that it was error to submit to the jury the question of whether the company should have used

the safety switch. *Coppins v. New York C. & H. R. Co.*, 43 *Hun* 26, 6 *N. Y. S. R.* 572.—DISTINGUISHING *Smith v. New York & H. R. Co.*, 19 *N. Y.* 127; *Hegeman v. Western R. Corp.*, 16 *Barb.* 353; *Kirkpatrick v. New York C. & H. R. Co.*, 79 *N. Y.* 240; *Pantzar v. Tilly Foster Iron Min. Co.*, 99 *N. Y.* 368; *Ellis v. New York, L. E. & W. R. Co.*, 95 *N. Y.* 546. QUOTING *Piper v. New York C. & H. R. Co.*, 1 *T. & C.* 290.

Plaintiff, a brakeman, who had but two weeks' experience, was injured at night while uncoupling moving cars, by coming in contact with the handle of a switch stand which had not been in use for some time, the rails being spiked down. *Held*, that the question whether the company was negligent in maintaining the switch as it did was properly left to the jury; and it was not error to charge that the company was not bound to light the switch stand or point it out to plaintiff. *Smith v. New York, N. H. & H. R. Co.*, 33 *N. Y. S. R.* 707, 26 *J. & S.* 284, 11 *N. Y. Supp.* 586.

672. — or safe overhead roofs and bridges.—In an action for the death of a brakeman it is proper to leave the case to the jury, where the proofs show that the deceased had been in the employ of the company for two months, and that he was killed on the top of a freight car while in the yard, the roof of which was low; that a beam extended 12 inches over one of the side tracks, which was dangerous to one standing on the top of the cars, and that the cars used by the deceased were of different heights, thus tending to increase the danger. *Nance v. Newport News & M. V. R. Co.*, (Ky.) 17 *S. W. Rep.* 570.—QUOTING *Hughes v. Cincinnati, N. O. & T. P. R. Co.*, 91 *Ky.* 526, 16 *S. W. Rep.* 275.

Plaintiff, a brakeman, was injured while passing under a bridge, and the evidence showed that if the bridge had been a few inches higher brakemen could have passed under it in safety. *Held*, that the question of whether the company was negligent in maintaining the bridge as it was, was properly left to the jury. *Williams v. Delaware, L. & W. R. Co.*, 39 *Hun* (N. Y.) 430.—APPLIED IN *Rogen v. Enoch Morgan's Sons Co.*, 16 *N. Y. S. R.* 693.

There was a conflict of evidence as to whether plaintiff knew the exact height of the bridge, or whether he could pass under it while standing on top of the car. *Held*,

that the question of his contributory negligence was properly left to the jury. *Williams v. Delaware, L. & W. R. Co.*, 39 *Hun* (N. Y.) 430.

673. Negligence in failing to block frogs, etc.—Whether a failure to keep a frog blocked so that brakemen's feet would not be caught while uncoupling cars is negligence is a question for the jury. *Meek v. New York C. & H. R. Co.*, 23 *N. Y. Supp.* 420, 69 *Hun* 488. *Huhn v. Missouri Pac. R. Co.*, 31 *Am. & Eng. R. Cas.* 221, 92 *Mo.* 440, 10 *West. Rep.* 405, 4 *S. W. Rep.* 937.

674. Negligence in allowing obstructions near track.—Defendant, a manufacturing concern, negligently piled a quantity of smoke-stacks and other material near a railroad track, and a passing train caught one of the stacks and pushed it against a tower in which plaintiff was stationed to signal trains, and injured him. *Held*, that the question of whether defendant was negligent, as to plaintiff, in placing the material near the track was for the jury; that so far as defendant is concerned, negligence in law is not to be attributed either to the railroad company or to plaintiff because the company continued to run trains after it knew of the danger, or because the plaintiff continued in his place to signal trains. *Martin v. North Star Iron Works*, 15 *Am. & Eng. R. Cas.* 156, 31 *Minn.* 407, 18 *N. W. Rep.* 109.

675. — ledge of rock.—Where there was an allegation and evidence that the company left a ledge of rock in such a position that the jar of a passing train would probably cause it to fall on its track, and it did so fall, and plaintiff, an employé, was thereby injured—*held*, that the issue of negligence was properly submitted to the jury. *Bean v. Western N. C. R. Co.*, 107 *N. Car.* 731, 12 *S. E. Rep.* 600.

676. — mail crane.—In an action for the death of a fireman on a locomotive, whose death was caused by coming in collision with a mail-catcher standing near the track—*held*, that the opinions of railroad men, as experts, that the mail-catcher in its proximity to the track was not dangerous, were not conclusive, on that question, but the jury might consider any other evidence in the case on the subject, and it was proper to so instruct the jury. *Chicago, B. & Q. R. Co. v. Gregory*, 58 *Ill.* 272, 11 *Am. Ry. Rep.* 75.

In such case, where it was shown that the accident occurred in the night-time, and while the fireman was acting in the line of his duty, watching for signals, it was proper to instruct the jury that they might consider the fact that the casualty happened in the night, and that it was customary and usual for firemen to look out of the side window or gangway of the locomotive, for the purpose of discovering signals. Such facts were proper to be considered, as tending to show the exercise of due care and caution on the part of the deceased at the time of the accident. *Chicago, B. & Q. R. Co. v. Gregory*, 58 Ill. 272, 11 Am. Ry. Rep. 75.

677. — pile of stones.—After making a coupling plaintiff stepped back and fell over a pile of stones which the company had carried to the station and placed near the track for its own use, and was injured. The stones had been placed there about six weeks before. *Held*, that the stones had been there a sufficient time to give plaintiff notice, and the questions both of negligence and of contributory negligence were for the jury. *Wooster v. Western N. Y. & P. R. Co.*, 40 N. Y. S. R. 844, 61 Hun 623, 16 N. Y. Supp. 764; *affirmed in* 48 N. Y. S. R. 929.

678. — section house.—The negligence charged against defendant was building a section house in such dangerous proximity to a side track that the caves struck the plaintiff, a brakeman, while descending the ladder on the side of a moving freight car. The contributory negligence charged against the plaintiff was attempting to descend the ladder at an improper place. *Held*, that on both questions the evidence presented a case for the jury. *Flanders v. Chicago, St. P., M. & O. R. Co.*, 51 Minn. 193, 53 N. W. Rep. 544.

679. — shed.—The switchman was upon the platform of a car which was being switched on the side track. Water was running from a steam-pipe at the end of the car, and to avoid it he leaned outward from the steps, and was struck by the shed, which was 22½ inches from the side of the car. His duties required him to be upon the platform and at times to lean out. There was evidence tending to show that he did not know of the shed and its distance from the track, and had not the means of such knowledge. *Held*, that the court could not say, as matter of law, that the defendant

was not negligent or that the plaintiff was guilty of contributory negligence. *Kelleher v. Milwaukee & N. R. Co.*, 80 Wis. 584, 50 N. W. Rep. 942.

680. — telegraph pole.—The question of a company's negligence in allowing a telegraph pole to remain so near the track that an employé would strike it while in the discharge of his duty on cars is for the jury. *Hall v. Union Pac. R. Co.*, 16 Fed. Rep. 744, 5 McCrary (U. S.) 257.—QUOTED IN *Ryan v. Canada Southern R. Co.*, 10 Ont. 745. REVIEWED IN *Murphy v. Wabash R. Co.*, 115 Mo. 111.

681. Negligence in failing to furnish safe machinery, etc.*—When an employé is injured by a break in machinery, and the machinery and its operation have been described, it is a question for the jury whether the injury was caused by unsuitable machinery, or by reason of its being out of repair. *Burke v. Brown*, 14 N. Y. S. R. 619.

Negligence in a corporation in the performance of its duty to its employés to furnish them safe and suitable implements is a fact to be established for the jury. But when the injury complained of is traced to defective implements furnished by the master, whether any further evidence of negligence is necessary, until it is shown by the master that reasonable care was exercised in their selection, *quære*. *Galveston, H. & S. A. R. Co. v. Delahunty*, 4 Am. & Eng. R. Cas. 628, 53 Tex. 206.

The defendant, knowing the dangerous nature of an appliance and that its servants were employed about it, must have known that their safety required a competent person to supervise the work; and in the absence of evidence that the plaintiff knew the dangerous character of the appliance, the question whether a competent man was placed in charge of it was for the jury. *Trainor v. Philadelphia & R. R. Co.*, 137 Pa. St. 148, 20 Atl. Rep. 632.

682. — belt.—Plaintiff was engaged in defendant's car shops and was struck in the face and injured by the end of a leather belt which had parted. It appeared that the belt was fastened by staples, which were shown to be expeditious, but insecure. *Held*, that the question of the company's negligence should have been submitted to

* Injury to employé by defective machinery or appliances. When negligence of company and plaintiff's contributory negligence are for the jury, see 41 AM. & ENG. R. CAS. 288, *abstr.*

the jury, and a nonsuit was error. *Harley v. Buffalo Car Mfg. Co.*, 15 N. Y. Supp. 37.

683. — "Jack."—Plaintiff and another workman were engaged in jacking up a car, and plaintiff was injured by the car falling after it was partly lifted. The evidence tended to show that the jack used was defective, and that many of the jacks used about the shop were worn and unsound. *Held*, that the question of whether the company was negligent in providing defective tools should have been left to the jury. *Williams v. New York, L. E. & W. R. Co.*, 21 N. Y. Supp. 259, 49 N. Y. S. R. 568, 2 Misc. 30.

Evidence in such case that defendant's foreman had been informed that the jacks were unsafe was sufficient to justify a submission to the jury whether the company had notice of the defect. *Williams v. New York, L. E. & W. R. Co.*, 21 N. Y. Supp. 259, 49 N. Y. S. R. 568, 2 Misc. 30.

The evidence showed that plaintiff had only been employed a little more than two weeks and had never used a jack before, and that an inexperienced person could not detect defects therein. *Held*, that it could not be said that plaintiff had the same means of information as the company. *Williams v. New York, L. E. & W. R. Co.*, 21 N. Y. Supp. 259, 49 N. Y. S. R. 568, 2 Misc. 30.

684. — "push pole."—A company is bound to furnish suitable instruments to carry on the business in which its employés are engaged; but where a "car shifter" claims damages for an injury received in attempting to use a "push pole," and the evidence is conflicting as to whether the pole was a proper one, it is proper to submit the question to the jury. *Philadelphia, W. & B. R. Co. v. Keenan*, 103 Pa. St. 124.

685. — rope.—It was improper for the court to rule, as a matter of law, that in the use of a rope instead of a chain in coupling cars which lacked a draw-head, the company did not exercise reasonable care. *Tabler v. Hannibal & St. J. R. Co.*, 31 Am. & Eng. R. Cas. 185, 93 Mo. 79, 11 West. Rep. 458, 5 S. W. Rep. 810.

Plaintiff was injured by the breaking of a rope, and produced three witnesses who testified that the rope was not more than three inches thick, while an equal number of witnesses for the defendant testified that it was at least four inches thick. It was an admitted fact that a three-inch

rope was not sufficient for the work. *Held*, that the question of the defendant's negligence was properly submitted to the jury. *Mikkelsen v. Ocean & I. Transp. Co.*, 31 N. Y. S. R. 408, 9 N. Y. Supp. 741. *McGowaty v. Curran*, 11 N. Y. Supp. 777.—**FOLLOWING** *Mikkelsen v. Ocean & I. Transp. Co.*, 9 N. Y. Supp. 741.

An employé was killed by the breaking of a rope on a derrick. It was shown that the rope externally appeared sound, but it had been in use for two or three years and continually exposed to the weather, and there was evidence that it was actually rotten when the break occurred. There was evidence also that such a rope, after exposure for a year or more, becomes unsound, although this one betrayed no outward sign of decay. *Held*, that there was evidence for the jury upon the question whether such a rope was a sound one, and if not the railroad company would be liable for one injured by reason of such unsoundness. *Baker v. Allegheny Valley R. Co.*, 8 Am. & Eng. R. Cas. 141, 95 Pa. St. 211.—**DISTINGUISHED** in *Cregan v. Marston*, 126 N. Y. 568; *Peschel v. Chicago, M. & St. P. R. Co.*, 17 Am. & Eng. R. Cas. 545, 62 Wis. 338. **QUOTED** IN *Gutridge v. Missouri Pac. R. Co.*, 105 Mo. 520; *Mensch v. Pennsylvania R. Co.*, 150 Pa. St. 598; *Bradbury v. Kingston Coal Co.*, 157 Pa. St. 231.

686 — turntable.—An employé was injured while attempting to turn an engine on a turntable by using another engine, with a stick placed between the two engines, when the engine on the turntable ran off, causing the injury. The evidence tended to show that the turntable was in bad order and unsuitable for the use required, and that the manner of operating it by the aid of another engine was authorized by the company. *Held*, that the questions of both negligence and contributory negligence were properly submitted to the jury. *McDonald v. Chicago, St. P., M. & O. R. Co.*, 41 Minn. 439, 43 N. W. Rep. 380.

Plaintiff was employed by defendant to operate a turntable by means of a crank that was stationary upon and revolved with the turntable, and a track was laid in such proximity to the turntable that while an engine was on the turntable, being turned by the plaintiff, it was struck by an engine passing upon the track, causing the crank to strike the plaintiff by a reverse motion, inflicting the injury complained of. *Held*, that wheth-

er the defendant was guilty of negligence in the construction and use of the track and turntable, and whether the plaintiff was chargeable with contributory negligence, were questions properly left to the jury. *Lake Shore & M. S. R. Co. v. Fitzpatrick*, 31 *Ohio St.* 479.

687. Negligence in failing to provide safe engines.—Whether the foot-board was unsafe because of its slanting condition was, under the evidence, a question for the jury. *O'Mellia v. Kansas City, St. J. & C. B. R. Co.*, 115 *Mo.* 205, 21 *S. W. Rep.* 503.

Plaintiff was at work on a scaffold near the defendant's track and was injured by the scaffold falling as a locomotive passed, and plaintiff testified that the locomotive knocked the scaffold down; but it appeared that several others had passed before without injuring the scaffold. *Held*, that the mere fact that plaintiff's statement that the locomotive knocked the scaffold down was not contradicted, would not justify a submission to the jury, in the absence of evidence that the engine was wider than the others that passed without striking the scaffold. *Hayden v. Brooklyn El. R. Co.*, 44 *N. Y. S. R.* 377, 17 *N. Y. Supp.* 352.—DISTINGUISHING *Germann v. Suburban Rapid Transit Co.*, 37 *N. Y. S. R.* 360.

While a fireman was attempting to shake a grate it was lifted from its position, the shaking-bar fell from his hands, and he slipped and fell, causing an injury. It appeared that the grate was so constructed as to cause it sometimes to slip; that the bars where he stood were wet and slippery, caused by a leaking faucet; that on former occasions he had been supplied with a longer shaking-bar. *Held*, that the question of the company's negligence should have been left to the jury. *Fancher v. New York, L. E. & W. R. Co.*, 75 *Hun* 350, 27 *N. Y. Supp.* 62, 56 *N. Y. S. R.* 745.

688. Negligence in failing to provide safe cars.—Whether or not a company was guilty of negligence in failing to inspect and repair a car of another company passing over its road, such as would render it liable to an employé for injuries sustained by reason of such car becoming out of repair while on its passage over the road, in a particular which would have been disclosed by an inspection conducted with ordinary care, was a question for the jury. *Brann v. Chicago, R. I. & P. R. Co.*, 53 *Iowa*

595, 6 *N. W. Rep.* 5, 21 *Am. Ry. Rep.* 184.—DISTINGUISHING *De Graff v. New York C. & H. R. R. Co.*, 76 *N. Y.* 125.

What is a reasonable examination and inspection, and to what parts of the car it must be specially directed, will depend upon the particular circumstances of each case, and present generally a question of fact for a jury. *Solomon R. Co. v. Jones*, 15 *Am. & Eng. R. Cas.* 201, 30 *Kan.* 601, 2 *Pac. Rep.* 657.—FOLLOWED IN *Solomon R. Co. v. Jones*, 34 *Kan.* 443.

Whether the company could by the exercise of ordinary care have discovered the defect in the hand-hold on its car which caused the accident was a question, under the evidence in the case, for the jury. *Gutridge v. Missouri Pac. R. Co.*, 105 *Mo.* 520, 16 *S. W. Rep.* 943.—QUOTING *Allen v. Union Pac. R. Co.*, 7 *Utah* 239, 26 *Pac. Rep.* 297; *Baker v. Allegheny Valley R. Co.*, 95 *Pa. St.* 211.

A brakeman who was ordered to go forward and make a coupling, started and fell and was injured. There was evidence tending to show that the injury was caused by a defective car, and the case disclosed nothing to show that the accident could have happened in any other way. *Held*, that the question of the company's negligence was for the jury. *Cuthrie v. Maine C. R. Co.*, 81 *Me.* 572, 18 *Atl. Rep.* 295.—REVIEWING *Stevens v. European & N. A. R. Co.*, 66 *Me.* 74.

A brakeman was ordered by the conductor of a freight train, under whom he was working in a freight yard, to separate coal cars in the middle of the train from box cars at the rear, and in so doing to ride upon one of the coal cars. He proceeded to get upon the rear coal car, as brakemen usually do in the absence of means for getting upon this kind of car, by climbing over the side. He put one hand on the top of the car and tried to put his left foot upon the jaw-strap, an appliance placed out of sight under the body of such a car to strengthen it. The jaw-strap of the rear car had been gone for some time, and his foot went onto the rail just as the train was starting, and was crushed. *Held*, in an action brought by him against the railroad company to recover for his injuries, that he was entitled to go to the jury. *Coates v. Boston & M. R. Co.*, 153 *Mass.* 297, 26 *N. E. Rep.* 864.

Plaintiff was a foreigner, and was injured

the second day after he was employed to work on a gravel train, while trying to swing up between cars after they had started. He did not understand the English language generally, but did understand the order to get on the cars, and attempted to do so as soon as the order was given, and no way was provided for getting on except as plaintiff attempted. Before he had cleared the top of the cars they came together and crushed his legs, by reason of neither car being provided with a bumper. *Held*, that it was for the jury to say whether the company had discharged its duty in furnishing safe appliances, and whether plaintiff had assumed the risk of working on such cars. *Pullitro v. Delaware, L. & W. R. Co.*, 27 N. Y. S. R. 63, 7 N. Y. Supp. 510. —QUOTING *Ellis v. New York, L. E. & W. R. Co.*, 95 N. Y. 546. REVIEWING *Gottlieb v. New York, L. E. & W. R. Co.*, 100 N. Y. 462.

689. — brakes and brake apparatus.—Proof that a brakeman was injured by the brake pulling out while he was attempting to set it, and that the brake-pin was afterward found missing, is not sufficient to justify a submission to the jury of whether the company was negligent. *Bailey v. Rome, W. & O. R. Co.*, 55 Hun 509, 29 N. Y. S. R. 755, 8 N. Y. Supp. 780.

The question of defendant's negligence was properly submitted to the jury upon evidence that a bolt in the brake-beam of one of its cars projected unnecessarily for a considerable distance, so as to be in the way of a brakeman coupling such car to another, and that the injury complained of, received by plaintiff while coupling for defendant, was caused by such projection. *Weigwood v. Chicago & N. W. R. Co.*, 44 Wis. 44, 19 Am. Ky. Rep. 393.

Plaintiff went to set a brake, and was thrown down and injured by the breaking of a brake-wheel. The wheel seemed to have been fractured before, and the evidence was sufficient to justify the conclusion that the fracture could have been detected by a proper inspection; and it appeared that the fracture had existed for some time. *Held*, sufficient proof of negligence to justify a submission to the jury. *Disher v. New York C. & H. R. Co.*, 2 N. Y. S. R. 276, 41 Hun 637; affirmed in 114 N. Y. 619, mem., 21 N. E. Rep. 415, 22 N. Y. S. R. 1000.

Plaintiff was injured by being thrown from a car by the giving way of a defective brake.

The evidence showed that defendant had received the car from another company, and that an inspection had been made, and that the brake had not been used before since defendant received the car; that the brake gave way by reason of a bolt pulling out which connected the brake-staff with the chain, and that the bolt was old and rusty, without any nut, and that the end had been riveted, but not sufficient to hold. *Held*, that the jury were justified in finding that the car was not properly inspected, and that the defect existed when defendant received it; that the company's negligence was properly left to the jury. *Fahy v. Rome, W. & O. R. Co.*, 36 N. Y. S. R. 67, 13 N. Y. Supp. 24, 59 Hun 619; affirmed in 128 N. Y. 677, mem., 29 N. E. Rep. 148, 40 N. Y. S. R. 979. —DISTINGUISHING *Bailey v. Rome, W. & O. R. Co.*, 49 Hun 377, 19 N. Y. S. R. 656.

Defendant company hauled a car-load of coal to its destination and put it on a trestle for the consignee, marked as having been inspected and found all right. Soon afterward a laborer, who was engaged by the consignee to unload the coal, was killed by reason of a defective brake, which could readily have been seen by looking under the car. *Held*, that the question whether the defect existed when the car was inspected was for the jury. *Kovalewska v. New York, L. E. & W. R. Co.*, 25 N. Y. Supp. 184, 55 N. Y. S. R. 167, 72 Hun 611.

690. — couplings and coupling apparatus.—At the trial of an action for personal injuries to a brakeman, by reason of the draw-bar on a locomotive being too low, if the facts are in dispute, the defendant is not entitled to a ruling that, upon all the evidence in the case, the plaintiff cannot recover; and that, if the jury find that the only defect in the engine was the height of the draw-bar, the plaintiff cannot recover. *Lawless v. Connecticut River R. Co.*, 18 Am. & Eng. R. Cas. 96, 136 Mass. 1.

Where the rear car of a train became uncoupled by reason of the spreading of a link, and an employé who, in the discharge of his duty, was waiting for the train to pass attempted to cross and was run over by such car, which was traveling rapidly without signals, and without any person in charge, the administrator of such employé is entitled to have the case submitted to the jury upon the question of the defendant's negligence, and also upon the question of

the contributory negligence of the deceased. *Griffin v. Boston & A. R. Co.*, 38 Am. & Eng. R. Cas. 184, 148 Mass. 143, 19 N. E. Rep. 166, 1 L. R. A. 698.—DISTINGUISHED IN *Fletcher v. Fitchburg R. Co.*, 149 Mass. 127, 3 L. R. A. 743, 21 N. E. Rep. 302; *Thyng v. Fitchburg R. Co.*, 156 Mass. 13.

Where plaintiff is injured while on a train by reason of a draw-head pulling out, and the evidence shows that it would not have pulled out had it not been out of repair or improperly constructed, the question of the company's negligence is properly submitted to the jury, and a verdict for plaintiff will not be set aside. *Goodrich v. Pennsylvania & N. Y. C. & R. Co.*, 29 Hun (N. Y.) 50.

If it be conceded that the proximate cause of an injury to an employé was the breaking of the coupling-link between a car and the tender, it does not follow that the breaking of the link constituted negligence *per se* in the company, where the evidence, although uncontradicted, is such that reasonable minds might draw different conclusions, and in one aspect of the case the jury might have reached the conclusion that a fellow-servant of plaintiff negligently used the coupling-link, notwithstanding its defects were apparent on bare inspection, though there were quite a number of other links provided which were safe, and which might have been selected. In such case the question of negligence is for the jury. *Sweeney v. New York, N. H. & H. R. Co.*, 32 N. Y. S. R. 416, 10 N. Y. Supp. 305.

691. Negligence in failing to provide safe hand-cars.—Plaintiff, a section hand, was injured whilst operating a hand-car, through the breaking of the handle. It appeared that there was a knot in the wood at or near the place where it broke, which caused a deflection in the grain of the wood under the clasp. It was fastened in the clasp by screws or nails passing into the wood. It had been so fastened a second time, and there was, under the band, a second nail-hole, well worn, extending through the wood at the place where it broke. There was testimony to the effect that the handle was weakened by the presence of the knot and nail-hole. *Held*, that there was evidence sufficient to warrant a finding that the handle was unsafe for the purpose to which it was applied, and that it was for the jury to determine whether the defendant was negligent in permitting such a piece of wood to be used for a car handle

or in suffering it to remain in use. *Anderson v. Minnesota & N. W. R. Co.*, 38 Am. & Eng. R. Cas. 206, 39 Minn. 523, 41 N. W. Rep. 104.

692. Negligence in the management of engines and cars.*—Where two employés of a railroad company have worked together for a day and a half, one throwing timber through a window and the other receiving it on the outside and bearing it off; and where the one on the inside suddenly and without notice changes from a system of timing his throws through the window which was safe to his fellow-laborer on the outside, to a system which was dangerous to the latter, and in consequence the latter was stricken with a piece of timber and injured, the case is one for reference to a jury on the question of negligence and contributory negligence, and the court erred in ordering a nonsuit. *Tuten v. Central R. & B. Co.*, 88 Ga. 228, 14 S. E. Rep. 185.

It is proper to leave the case to the jury where a brakeman sues the company for an injury, where it appears that, after being ordered by the conductor to uncouple cars while the train was in motion, the conductor, after signaling the engineer, went about other work, plaintiff supposing that the conductor was in a position to render necessary protection; that in stepping between the cars his foot was caught in a splinter on a rail, causing him to fall, where his leg was crushed; it further appearing that the train was moving about two miles an hour when the brakeman was ordered to uncouple the cars; that it was increased to about five miles an hour, and that the engine was operated by a fireman who had not been declared competent to handle an engine, under the rules of the company. *Greer v. Louisville & N. R. Co.*, 94 Ky. 169, 21 S. W. Rep. 649.

Plaintiff, a brakeman, was engaged in cutting a train while running slack, and was thrown from the train and injured by a sudden checking of the train, caused by the application of the brakes by the conductor. *Held*, that under all the circumstances, it was a question of fact for the jury whether the conductor was negligent in applying the brakes when he did, and that it was error

*When negligence and contributory negligence are for the jury in an action by a laborer for injury received by the sudden starting of a car which he was unloading, see 45 AM. & ENG. R. CAS. 45, *abstr.*

for the court to attempt to determine it as a matter of law. *Dunlavy v. Chicago, R. I. & P. R. Co.*, 21 *Am. & Eng. R. Cas.* 542, 66 *Iowa* 435, 23 *N. W. Rep.* 911.

Defendant company maintained a blacksmith shop on its grounds with a track running diagonally in front, which came so near one corner of the shop that a man could not safely pass between the shop and cars on the track. The plaintiff was employed as a blacksmith, but was sometimes called to assist in moving cars in the yard. He was familiar with the grounds generally, but had never helped move cars on this track, and had never been between the track and the corner of the building, where he was injured while assisting in moving a car in the daytime, by being crushed between the car and the building. *Held*, that it could not be said, as a matter of law, that the evidence did not warrant the jury in finding the company negligent, and plaintiff in the exercise of due care. *Ferren v. Old Colony R. Co.*, 143 *Mass.* 197, 9 *N. E. Rep.* 608.—DISTINGUISHED IN *Gaffney v. New York & N. E. R. Co.*, 15 *R. I.* 456. QUOTED IN *McDonald v. Chicago, St. P., M. & O. R. Co.*, 41 *Minn.* 439, 43 *N. W. Rep.* 380.

693. — in leaving cars standing on track.—In an action, under Mass. St. 1887, ch. 270, § 1, cl. 3, for personal injuries sustained by a brakeman by being crushed between a moving car and a stationary car so near it on another track as to leave a space of less than five inches between them, there was evidence that freight cars were distributed and made up into trains in an extensive freight yard of the defendant by a day gang and a night gang, each having a conductor and a switching engine; that the injured brakeman belonged to the night gang, and was assisting, when injured, in making up a freight train to which the moving car was attached; that the night was dark, and he attempted to get upon the moving car in the usual manner of brakemen; and that the day gang had during the afternoon placed cars upon the track where the stationary car was. *Held*, that whether the stationary car was left where it was through the negligence of a person in charge of a train, and whether the brakeman was in the exercise of due care, were for the jury. *Dacey v. Old Colony R. Co.*, 153 *Mass.* 112, 26 *N. E. Rep.* 437.

Plaintiff's intestate, a woman engaged to
5 D. R. D.—21.

clean cars, was killed while crossing a track on a foggy morning at a place where there were many trains and engines moving, and consequently a great deal of noise, steam, and smoke, by certain cars being "kicked" down the track and striking a baggage car, which was forced against her. The cars, though running of their own momentum, were in charge of a brakeman, who testified that he did not know the baggage car was there, and did not see it until it was struck; that there were no signals, and that he had the cars under control. There was evidence that the baggage car had good brakes, which were set, and one witness testified that it could not have been moved as far as plaintiff claimed. *Held*, sufficient evidence of negligence to justify a submission to the jury. *Young v. New York C. & H. R. R. Co.*, 13 *Daly (N. Y.)* 294; *affirmed* (?) 103 *N. Y.* 678, *mem.*, 7 *N. Y. S. R.* 861, *mem.*

694. — backing against standing car.—A carpenter who was engaged in repairing cars was on a ladder leaning against the car, when a locomotive backed against the car and threw him to the ground, causing the injury sued for. It appeared that the fireman saw him when a considerable distance away, but did not notify the engineer until the engine was in about a car's length, when the engineer reversed his engine and had come almost to a standstill; but a switchman, who did not see the carpenter, signaled him to go ahead, when he again moved up and caused the accident. *Held*, that it was a question of fact for the jury whether it was the fireman's duty to notify the engineer that a man was in danger, instead of giving him a general signal to stop. *O'Neill v. Chicago & N. W. R. Co.*, 50 *Fed. Rep.* 189.

695. — violently bringing cars together.—Where a brakeman is injured while making a coupling and charges negligence in the manner of moving the train, it is a question for the jury whether the engineer was guilty of negligence in throwing the cars together with unusual or unnecessary violence. *Whalen v. Chicago, R. I. & P. R. Co.*, 38 *Am. & Eng. R. Cas.* 141, 75 *Iowa* 563, 39 *N. W. Rep.* 894.

696. — allowing cars to move unattended in yard.—The mere fact that in a company's private yard, where cars are loaded and unloaded and trains made up, such cars are permitted to move along the

tracks unattended by a brakeman cannot be held negligence as matter of law as against the company's servants employed in such yard. *Kelley v. Chicago, M. & St. P. R. Co.*, 5 Am. & Eng. R. Cas. 469, 53 Wis. 74, 9 N. W. Rep. 816.

697. — failing to keep lookout or give signals.—Where an employé of a railroad has been permitted for more than a year to walk over the company's bridge to and from his work, which was the only convenient way of passage, he cannot be considered a trespasser; and in an action for wilfully killing him while crossing at the accustomed time of day, where the inference is reasonable from the evidence that he might have been seen in time to have avoided the accident, the case should be left to the jury. *Hammill v. Louisville & N. R. Co.*, 93 Ky. 343, 20 S. W. Rep. 263.

Plaintiff was engaged as a laborer on a gravel train, and was injured while trying to get on the rear car of the train, as he was directed to do, by its being backed against other cars and crushing his foot; and the company was charged with negligence in failing to ring a bell or to give notice, as was the custom, that the cars were about to be backed. As to whether a signal was given there was a conflict of evidence. *Held*, that the question of the company's negligence was for the jury, and their verdict for plaintiff could not be disturbed, though there was a preponderance of evidence for the company that the signal was given. *Boyle v. Chicago, R. I. & P. R. Co.*, 2 Am. & Eng. R. Cas. 234, 56 Iowa 765, 9 N. W. Rep. 360.

Plaintiff's intestate was sent out on a stormy, blustering morning to shovel snow from defendant's track, and was killed by an engine backing on him. Plaintiff produced several witnesses who were near by, who testified that no signal of the approach of the engine was given, one of whom testified that he was listening, but heard no signal; and the defendant produced several witnesses, some employés of the company, who testified that the whistle was blown. *Held*, that the question whether a signal was given was for the jury. *Wall v. Delaware, L. & W. R. Co.*, 7 N. Y. Supp. 709.

698. — setting car in motion down grade.—When a car on a railway is set in motion on a down grade by the person having it in charge, without taking proper precautions or having means to check its

progress, and such car gets beyond control of the person in charge and collides with another car, whereby an employé is injured, the question of negligence *vel non* is properly submitted to the jury. *Tennessee C. I. & R. Co. v. Hayes*, 97 Ala. 201, 12 So. Rep. 98.

699. — insufficiently manning trains.—The question of a company's negligence in failing to provide a sufficient number of employés for the proper operation of its trains is a question of fact for the jury. *Harvey v. New York C. & H. R. R. Co.*, 19 Hun (N. Y.) 556.

700. — improperly loading cars.—Where a switchman is injured while attempting to couple cars which are loaded with projecting timbers so as to be unusually dangerous, where there is no conclusive evidence of want of due care on the part of the switchman, and where he had no knowledge or notice of the dangerous condition of the cars, it is proper to leave the questions to the jury whether the car was properly loaded, and whether the switchman, by the exercise of proper diligence, could have discovered the projecting timbers in time to have avoided the accident. *Northern Pac. R. Co. v. Everett*, 152 U. S. 107, 14 Sup. Ct. Rep. 474.

701. — issuing dangerous orders.—The question of the negligence of a railroad company in directing, by its assistant road-master, its section men to load steel rails lying along the track onto moving flat cars should have been submitted to the jury under the circumstances of the case. *Palmer v. Michigan C. R. Co.*, 87 Mich. 281, 49 N. W. Rep. 613.

The plaintiff was one of the section gang under a foreman. On the way to work, while riding on a hand-car, they saw a passenger train approaching on the same track. The gang (under the lead of the foreman) attempted to get the car off, but when the engine was some 60 feet distant the foreman ordered the men to "get out of the way." Plaintiff had not reasonable time to escape, and was struck by the hand-car when it was thrown off by the engine. *Held*, that the questions of negligent direction of the foreman and of contributory negligence of plaintiff were for the jury. *Schroeder v. Chicago & A. R. Co.*, 53 Am. & Eng. R. Cas. 436, 108 Mo. 322, 18 S. W. Rep. 1094.

702. Company's wilful negligence.—Where a brakeman was killed while coup-

ling cars, the mere fact that one of the cars was improperly loaded, by reason of the fact that lumber projected over the end of it so as to interfere with the space necessary for coupling it, or even the fact that the conductor knew that the car was thus improperly loaded, does not of itself show wilful neglect. To constitute wilful neglect in such a case it must also appear that the conductor, or other person in charge of the train, knew, or by the use of ordinary care could have known, that the car was so improperly loaded as to imperil the life of the servant or employé. *Louisville & N. R. Co. v. Brice*, 28 Am. & Eng. R. Cas. 542, 84 Ky. 298, 1 S. W. Rep. 483.

703. Whether company's negligence was the proximate cause.—

In an action by a servant for an injury caused by a defective derrick in raising lumber, the question as to what was the cause of the injury, or the combination of causes producing the result, is one of fact, which by law it is not the duty of the court to consider. *Pullman Palace Car Co. v. Blum*, 18 Am. & Eng. R. Cas. 87, 109 Ill. 20, 50 Am. Rep. 601.

In an action for injuries to an employé by being crushed between a moving car and a car left standing on another track so near as to leave but five inches between them, it is a question for the jury whether it is negligence for the employés thus to leave a car standing; and if such negligence is found, the act of so leaving it will, in the absence of any other intervening cause, be deemed the proximate cause of the injury. *Dacey v. Old Colony R. Co.*, 153 Mass. 112, 26 N. E. Rep. 437.

In an action, under Mass. St. 1887, ch. 270, for injuries to a brakeman on a freight train, it appeared that plaintiff's post was at the forward end of the train, a part of his duty being to do the uncoupling there; that the conductor in the plaintiff's absence chained to the engine a car upon which a draw-bar was broken, and when he met the plaintiff shortly afterwards told him to be at his post, but omitted to mention the broken draw-bar; and that at the next stop, during the conductor's temporary absence upon a duty connected with the proper management of the train, the plaintiff, while attempting, without specific orders from the conductor and in ignorance of the danger, to uncouple such car from the engine, so that the engine might assist

in making up the train, was caught between the engine and the car, by reason of the broken draw-bar, and injured. *Held*, that whether the conductor's omission amounted to negligence on his part which was the proximate cause of the injury, and whether the plaintiff was in the exercise of due care, were for the jury. *Donahoe v. Old Colony R. Co.*, 153 Mass. 356, 26 N. E. Rep. 868.

Where the action is for the death of an employé and there was no eye-witness to the accident, a stipulation that he was killed between two cars while making a coupling, and that one of the cars had no bumper, is sufficient evidence to warrant a submission to the jury whether the accident was due to the defective car. *Mahoney v. New York C. & H. R. R. Co.*, 15 N. Y. Supp. 501.

Where a brakeman fell and was killed while in the act of braking, and the brake was found to be defective and dangerous, and the defect was only discoverable by use, and the brakeman had no previous knowledge of the defect, and only had two or three minutes to examine before using it, and was then engaged in other duties, the questions whether the defective brake was the cause of the fall, and whether the brakeman knew or might have known of its unsafe condition, were properly left to the jury. *Philadelphia & R. R. Co. v. Huber*, 128 Pa. St. 63, 18 Atl. Rep. 334.—DISTINGUISHED IN *Mensch v. Pennsylvania R. Co.*, 150 Pa. St. 598; *Bradbury v. Kingston Coal Co.*, 157 Pa. St. 231.

Plaintiff, a brakeman, was injured while riding on the pilot of an engine and about to couple the engine to cars on a spur track. Upon the evidence—*held*, that the question whether the accident was caused by the running of the engine at a dangerous rate of speed up to within a few feet of the cars and its sudden reversal at that point, whereby plaintiff was thrown forward and caught between the bumpers, or whether plaintiff accidentally and without fault of the engineer lost his balance while reaching forward to make the coupling, was properly a question for the jury. *Baltzer v. Chicago, M. & N. R. Co.*, 83 Wis. 459, 53 N. W. Rep. 885.

There being no evidence that the defective condition of the spur track was the proximate cause of the injury, instructions which left it to the jury to determine whether such condition was the cause, were

erroneous. *Baltzer v. Chicago, M. & N. R. Co.*, 83 Wis. 459, 53 N. W. Rep. 885.

c. Questions Relating to Assumption of Risk and Contributory Negligence.

704. Generally.—A brakeman was injured while engaged in making up a train, by the violent and reckless conduct of the engineer, who suddenly stopped and reversed the switch engine without giving any signal of his intention so to do, knowing the brakeman off a car upon which he was standing. There was evidence to show that the engineer was of a violent and reckless disposition, and that the company had actual knowledge of this. On the other hand, it appeared that plaintiff had been employed by the company about a week and had known the engineer during that time, but had failed to report his disposition to the company. *Held*, that the question whether or not the plaintiff had been guilty of contributory negligence or had assumed the risks of his employment, was properly left to the jury. *Mares v. Northern Pac. R. Co.*, 17 Am. & Eng. R. Cas. 620, 3 Dak. 336, 21 N. W. Rep. 5.—QUOTING *Abbott v. Chicago, M. & St. P. R. Co.*, 30 Minn. 482.—APPROVED IN *Gram v. Northern Pac. R. Co.*, 1 N. Dak. 252.

705. Whether employe voluntarily assumed risk.—Where a servant does not assert his judgment, in opposition to the supposed better judgment or the stronger will of his master, the law usually allows a jury to determine whether he voluntarily assumed the risks, or acted in reliance upon the judgment of his master, or out of a constrained acquiescence in the rule of obedience which his relation as servant imposed. *Cullen v. Norton*, 52 Hun 9, 22 N. Y. S. R. 221, 4 N. Y. Supp. 774; *reargument denied* in 24 N. Y. S. R. 103, 5 N. Y. Supp. 523.—APPLYING *Hawley v. Northern C. R. Co.*, 82 N. Y. 370.

706. — or extra danger.—When a workman engaged in an employment not in itself dangerous is exposed to danger arising from an operation in another department over which he has no control—the danger being created or enhanced by the negligence of the employer—the mere fact that he undertakes or continues in such employment with full knowledge and understanding of the danger is not conclusive to show that he has undertaken the risk so as to make the maxim, *Volenti non fit*

injuria, applicable in case of injury. The question whether he has so undertaken the risk is one of fact and not of law. *Smith v. Baker*, [1891] A. C. 325.

707. Whether injury was result of an assumed risk.—Whether the use of a switch rope was or was not a risk incident to plaintiff's service was a question for the jury, and an instruction to the jury that he did not make his contract with reference to any dangers arising from the use of the switch rope for coupling was erroneous. *Tabler v. Hannibal & St. J. R. Co.*, 31 Am. & Eng. R. Cas. 185, 93 Mo. 79, 11 West. Rep. 458, 5 S. W. Rep. 810.—FOLLOWS *ED* IN *Muirhead v. Hannibal & St. J. R. Co.*, 103 Mo. 251.

708. — or a risk incident to the employment.—Whether the injury resulted from a risk incident to plaintiff's employment was a question of fact that could not be passed upon by the judge on a motion for nonsuit. *Boatwright v. Northeastern R. Co.*, 25 So. Car. 128.

709. Whether employe had notice of danger.—Whether a servant understood and appreciated the danger of working in a particular place and manner, or whether in the exercise of reasonable care he ought to have known it, is a question for the jury. *McDonald v. Chicago, St. P. M. & O. R. Co.*, 41 Minn. 439, 43 N. W. Rep. 380.—QUOTING *Ferren v. Old Colony R. Co.*, 143 Mass. 197, 9 N. E. Rep. 608.

710. — of defects in track.—Where a brakeman is injured after a month's service by stepping in an uncovered culvert, and the evidence shows that he did not know of its existence, except as he passed over it on trains, the question of whether he ought to have known of it was for the jury. *Franklin v. Winona & St. P. R. Co.*, 31 Am. & Eng. R. Cas. 211, 37 Minn. 409, 34 N. W. Rep. 898, 5 Am. St. Rep. 856.

Whether or not it was the custom or mode of doing business of defendant to leave frogs unprotected, so that its employes might be presumed to know that such was the custom or mode of doing business, and, by continuing in the employment, to have taken on themselves the risk incident to that way of doing it, is a question for the jury. *Sherman v. Chicago, M. & St. P. R. Co.*, 34 Minn. 259, 25 N. W. Rep. 593.

Where the evidence shows that an employe was injured by stepping in an un-

blocked frog, and that some of the frogs in the yard were blocked and that others were not, an instruction for the defendant that if the employé knew that some of the rails were not blocked and did not complain, but remained in the employ of the company, although he did not know when he went on the track whether that particular rail was blocked or not, then there could be no recovery, is properly refused. *Sherman v. Chicago, M. & St. P. R. Co.*, 34 *Minn.* 259, 25 *N. W. Rep.* 593.

711. — of obstruction on side track.—Whether the employé had knowledge of a temporary obstruction on a side track in dangerous proximity to the main line, by which he was injured, is a question of fact for the jury; but such knowledge will not be presumed from the mere existence of such obstruction for only a few hours. *Kansas City, M. & B. R. Co. v. Burton*, 53 *Am. & Eng. R. Cas.* 115, 97 *Ala.* 240, 12 *So. Rep.* 88.

Nor will such knowledge be presumed from the mere fact that plaintiff knew the general position of the car; but if the evidence shows that he knew the particular danger, and that his attention had been called to it a few moments before the collision which resulted in his injuries, then the unnecessary exposure of his person beyond the line of the car on which he was riding was contributory negligence which would defeat a recovery. *Kansas City, M. & B. R. Co. v. Burton*, 53 *Am. & Eng. R. Cas.* 115, 97 *Ala.* 240, 12 *So. Rep.* 88.—**DISTINGUISHING** *Wilson v. Louisville & N. R. Co.*, 85 *Ala.* 269.

712. — of defects in machinery and appliances.—It was a question of fact whether a train master charged with the duty of examining for defects, etc., in machinery, etc., actually knew or could have known the defect causing his own death. His duty as employé does not, as matter of law, relieve the company employing him from responsibility for negligence in the use of defective machinery. *International & G. N. R. Co. v. Kindred*, 11 *Am. & Eng. R. Cas.* 649, 57 *Tex.* 491.

713. — of defect in car.—If a brakeman on a freight train receives injuries in attempting to descend a ladder on one of the cars, on account of the absence of some rounds, should it appear that the car had been used while he was brakeman on the train of which it was a part, he

would be presumed to know of its condition and required to govern his conduct in reference to such defect. But whether the brakeman would be chargeable with such knowledge of the defect as to impair his right of recovery for the injuries is a matter for the jury to determine. *Chicago & N. W. R. Co. v. Jackson*, 55 *Ill.* 492, 1 *Am. Ky. Rep.* 569.

714. — of defect in hand-car.—It was for the jury to determine whether the plaintiff, by the exercise of reasonable diligence, might have discovered the character and extent of the defect in the hand-car (a knot in the handle weakening it), and must therefore be held to have assumed the risk arising therefrom. (Gilfillan, C.J., and Mitchell, J., dissenting.) *Anderson v. Minnesota & N. W. R. Co.*, 38 *Am. & Eng. R. Cas.* 206, 39 *Minn.* 523, 41 *N. W. Rep.* 104.

715. — of existence of a certain rule.—Where a brakeman sues for an injury received while coupling cars, and he is charged with contributory negligence in coupling by hand, in violation of a rule requiring him to use a stick, and there is a conflict of evidence as to just how the parts of the train were being moved, and it is uncertain whether the brakeman, who had only been in the service of the company six or eight weeks, had any knowledge of the rule in question, or was negligent in not knowing it, the case is properly left to the jury. *Louisville & N. R. Co. v. Perry*, 87 *Ala.* 392, 6 *So. Rep.* 40.—**FOLLOWED** in *Louisville & N. R. Co. v. Hawkins*, 92 *Ala.* 241.

716. Employee's negligence, when a question of fact, generally.*—The contributory negligence of a railroad employé is ordinarily a question of fact for the jury, in an action against the company for personal injuries. *Eldredge v. Atlas Steamship Co.*, 28 *N. Y. S. R.* 501, 8 *N. Y. Supp.* 433. *Houston & T. C. R. Co. v. O'Hare*, 64 *Tex.* 600. *Mares v. Northern Pac. R. Co.*, 17 *Am. & Eng. R. Cas.* 620, 3 *Dak.* 336, 21 *N. W. Rep.* 5. *Schroeder v. Chicago & A. R. Co.*, 53 *Am. & Eng. R. Cas.* 436, 108 *Mo.* 322, 18 *S. W. Rep.* 1094. *Ferren v. Old Colony R. Co.*, 143 *Mass.* 197, 9 *N. E. Rep.* 608. *Williams v. Delaware, L. & W. R. Co.*, 39 *Hun (N. Y.)* 430. *Flanders v. Chicago, St. P., M. & O. R. Co.*, 51 *Minn.* 193, 53 *N. W. Rep.*

* When contributory negligence of employé is for the jury, see 38 *AM. & ENG. R. CAS.* 182, *abstr.*

544. *Foster v. Missouri Pac. R. Co.*, 115 Mo. 165, 21 S. W. Rep. 916. *Griffin v. Boston & A. R. Co.*, 38 Am. & Eng. R. Cas. 184, 148 Mass. 143, 19 N. E. Rep. 166, 1 L. R. A. 698. *Dacey v. Old Colony R. Co.*, 153 Mass. 112, 26 N. E. Rep. 437. *Hannah v. Connecticut River R. Co.*, 154 Mass. 529, 28 N. E. Rep. 682. *Donahoe v. Old Colony R. Co.*, 153 Mass. 356, 26 N. E. Rep. 868. *Pullman Palace Car Co. v. Laack* 143 Ill. 242, 32 N. E. Rep. 285. *Williams v. New York, L. E. & W. R. Co.*, 49 N. Y. S. R. 568, 2 Misc. 30, 21 N. Y. Supp. 259. *Martin v. North Star Iron Works*, 15 Am. & Eng. R. Cas. 156, 31 Minn. 407, 18 N. W. Rep. 109.

Where contributory negligence is set up as a defense to a suit by an employé of a company to recover for personal injuries, the question should be left to the jury, under proper instructions, whenever the evidence is conflicting. *Gardner v. Michigan C. R. Co.*, 150 U. S. 349, 14 Sup. Ct. Rep. 140.

The defense of contributory negligence being interposed to an action for injury to a servant, alleged to have resulted through the negligence of a person put in charge by the master, it is peculiarly the function of the jury to determine from the evidence whether the plaintiff was acting as a reasonably prudent man would have done under like circumstances at the time of receiving the injury. And their finding on such a question, when supported by evidence, will not be disturbed by reason of mere preponderance of evidence to the contrary. *Lantry v. Silverman*, 1 Colo. App. 404, 29 Pac. Rep. 180.

717. — Illustrations.—Whether or not a flagman who was injured while giving signals to the engineer was guilty of contributory negligence is a question of fact for the jury. *Georgia Pac. R. Co. v. Hudson*, 89 Ga. 558, 16 S. E. Rep. 70.

Where the want of care and diligence imputed to the plaintiff, who was a fireman upon a locomotive, relates to his failure to keep the engineer awake, or take other measures for his own safety, and the imputed negligence reaches back some hours, a paragraph of the court's charge to the jury, which might be understood by them as restricting the inquiry to a much shorter period, is erroneous; and for the court, in the same paragraph, to specify certain conduct of the fireman, and instruct upon it in a way to imply that the same would not be

negligence, is additional error, the question whether such conduct would or would not be negligence being for the jury. *Carroll v. East Tenn., V. & G. R. Co.*, 41 Am. & Eng. R. Cas. 307, 82 Ga. 452, 10 S. E. Rep. 163.

The act of a servant in walking over a train of flat cars while the same are in motion, or even stepping from one of such cars to another while the train is in motion, is not negligence *per se*. The question of contributory negligence is for the jury. *Atchison, T. & S. F. R. Co. v. McCandliss*, 22 Am. & Eng. R. Cas. 296, 33 Kan. 366, 6 Pac. Rep. 587.

Defendant company maintained a switch or spur track for the purpose of taking lumber to and from a planing mill, and no cars were run on the track except those going to or from the mill as they might be needed. Plaintiff's intestate was engaged in carrying dressed lumber from the mill across the track and piling it up, and was killed by a car that was "kicked" down the track at an unusual rate of speed, without any warning. The mill made so much noise that employés could not hear approaching cars, but the intestate could have seen the car if he had looked up the track. *Held*, that his failure to keep a lookout for cars was not *per se* negligence, but was a question for the jury. *Mark v. St. Paul, M. & M. R. Co.*, 32 Minn. 208, 20 N. W. Rep. 131.

A quarry hand was working about a railroad track near a curve at which locomotives were required by defendant's rules to whistle. His duties compelled him to frequently stand on the track with his back towards the curve, and to attend to the movement of small cars carrying rock across the main track to an inclined plane leading to a rock crusher. He was hit and killed by an engine coming rapidly around the curve without the required signal. *Held*, that the question whether he used ordinary care to avoid danger was one of fact for the jury. *Dixon v. Chicago & A. R. Co.*, 53 Am. & Eng. R. Cas. 589, 109 Mo. 413, 19 S. W. Rep. 412.

Plaintiff, a brakeman, was at the rear of a car when an engine moved down against it for the purpose of being coupled thereto, but with such force as to knock plaintiff down, and after being pushed about 200 feet by the brake-beam, he fell under the car and was injured. There was evidence that it was the custom to set the brakes on all cars left on the tracks, and that if the brake of

the jury of the question of contributory negligence, where there is no evidence showing how he put the coal on—whether it was negligent or not. *Atchison, T. & S. F. R. Co. v. Howard*, 49 Fed. Rep. 206, 4 U. S. App. 202, 1 C. C. A. 229.

Under statutory provisions, as at common law, contributory negligence is a defense, and is established, as matter of law, when it is shown that the plaintiff had been in the employment of the railroad company as brakeman for two or three months, was acquainted with the location and surroundings of a water tank, and, when struck by the pipe, was descending from the top of the caboose for a private purpose, without his lantern, having first started to descend on the other side, where some person sitting obstructed his descent. *Wilson v. Louisville & N. R. Co.*, 85 Ala. 269, 4 So. Rep. 701.

Where the action is for the death of a brakeman, and the evidence shows that he was killed while he was away from his post of duty, and omitted to apply the brakes, and it is more than probable that but for such absence the accident would not have happened, it is error to submit the question of contributory negligence to the jury, though it appears that the train was on an ascending grade, and it was a cold morning, and the brakeman had gone to the cab to get warm. *Sprong v. Boston & A. R. Co.*, 60 Barb. (N. Y.) 30; affirmed in 58 N. Y. 56, 9 Am. Ry. Rep. 475.—DISTINGUISHED IN *Tinney v. Boston & A. R. Co.*, 62 Barb. 218.

719. When a mixed question of law and fact.—Whether a freight conductor who is injured by reason of a defective bridge acted with ordinary care, is a mixed question of law and fact to be determined by the jury. *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701, 16 Pac. Rep. 146.

720. While occupying a position of danger.—The usual position of an employé desiring to make a signal for the purpose of controlling the movements of a train, when not on a curve, is on the engineer's side; but when there was evidence that the train had just passed a curve on which a signal could not have been seen on the engineer's side, it was a question for the jury whether the plaintiff was negligent in signaling from the other side. *Buckle v. Central Iowa R. Co.*, 64 Iowa 603, 21 N. W. Rep. 103.

Where the employé of a coal company

engaged in unloading a coal car had a right to be where he was, and while at work faced the direction from which engines usually came, and though not expecting nor listening for an engine, was nevertheless attentive, but heard and saw nothing of an engine approaching from the opposite direction, the court should not, as a matter of law, declare such employé guilty of contributory negligence. *Ridings v. Hannibal & St. J. R. Co.*, 33 Mo. App. 527.

Plaintiff was employed as watchman of a pile driver and the engine that operated it, but temporarily took charge of a locomotive to pull the pile driver and its engine out to where they were to be used, and was injured while going to the rear of the train by an explosion of the pile-driver engine. *Held*, that whether he was guilty of contributory negligence in thus going to the rear of the train, was for the jury. *East Line & R. R. Co. v. Scott*, 71 Tex. 703, 10 S. W. Rep. 298.

An employé who sued for a personal injury was charged in defendant's answer with contributory negligence, in that he knew of the danger and unnecessarily went to the place where the danger existed, and there was some evidence to support the charge. The court only instructed the jury as to contributory negligence in plaintiff's going to the place of the danger "contrary to the rules of his employer." *Held*, that the jury should have been instructed as to contributory negligence, independent of any rule of the company. *Union Pac. R. Co. v. Jarvis*, 3 Wyo. 375, 23 Pac. Rep. 398.

721. While working upon track.—Contributory negligence is question for the jury. *So held*, where a watchman was injured while upon the company's tracks taking down the numbers of the standing cars, etc. *Watts v. Richmond & D. R. Co.*, 89 Ga. 277, 15 S. E. Rep. 365.

Whether a switchman who is killed by an engine while in the discharge of his duties was guilty of negligence in failing to keep a constant lookout for the approach of engines and trains, is a question of fact for the jury, and not one of law. Therefore, in an action for his death, an instruction that it was the duty of deceased to keep a constant lookout for his safety, and that if he did not, at the time of his accident, keep such a lookout, and the injury occurred wholly or in part from such omission, the plaintiff could not recover, was properly re-

fused, as it in fact declared that certain facts made out a case of negligence which precluded a recovery. *Lake Shore & M. S. R. Co. v. O'Conner*, 115 Ill. 254, 3 N. E. Rep. 501.—QUOTED IN *Chicago & E. I. R. Co. v. Tilton*, 26 Ill. App. 362.—*Dübernier v. Chicago, M. & St. P. R. Co.*, 47 Wis. 138, 2 N. W. Rep. 69, 21 Am. Ky. Rep. 37.

722. — under a car.—The danger of going under a car which is being jacked up, to raise a pin in use, is not exposing oneself to an apparent danger, so as to be chargeable with negligence *per se*, where the car falls by reason of defective jacks furnished by the company. *Williams v. New York, L. E. & W. R. Co.*, 49 N. Y. S. R. 568, 2 Misc. 30, 21 N. Y. Supp. 259.

Plaintiff's intestate was killed by the engine moving, while he was necessarily under tank cars with no bumpers, making a coupling. *Held*, that the questions of intestate's contributory negligence and the negligence of the engineer, were for the jury. *Butler v. Chicago, B. & Q. R. Co.*, 87 Iowa 206, 54 N. W. Rep. 208.

723. — or near track.—Defendant company let a contract for repairing its track, and plaintiff, a workman under the contractor, was injured while making repairs at a highway crossing, by being struck by a moving engine while working near the track. A train had just passed and plaintiff testified that he did not hear any signal given by the engine injuring him, but it appeared that it might have been seen a mile and a half. *Held*, that the question of his contributory negligence was for the jury. *Ominger v. New York C. & H. R. R. Co.*, 4 Hun (N. Y.) 159, 6 T. & C. 498.

The rule of law that persons traveling on highways must look in both directions for approaching trains before crossing a railroad track, does not apply, in all its fullness, to track repairs whose work requires them to be constantly on or near the track. *Ominger v. New York C. & H. R. R. Co.*, 4 Hun (N. Y.) 159, 6 T. & C. 498.—APPROVING *Barton v. New York C. & H. R. R. Co.*, 1 T. & C. 297; *Goodfellow v. Boston, H. & E. R. Co.*, 106 Mass. 461.—FOLLOWED IN *Crowley v. Burlington, C. R. & N. R. Co.*, 18 Am. & Eng. R. Cas. 56, 65 Iowa 658. QUOTED IN *Noonan v. New York C. & H. R. R. Co.*, 42 N. Y. S. R. 41.

724. — or running along track.—A railroad switchman, while running upon the track at station grounds, when he might,

but with some inconvenience, have been outside the track, was overtaken and injured by a locomotive which was moved without the customary signal. *Held*, to present a proper question for the jury whether he was chargeable with contributory negligence. *Sobieski v. St. Paul & D. F. Co.*, 41 Minn. 169, 42 N. W. Rep. 863.

725. — or attempting to cross track.—Plaintiff's intestate, a woman engaged in cleaning cars, was killed while crossing the track at a highway crossing, by trains being shoved down against a baggage car that stood near the crossing, which pushed the baggage car against her. Evidence showed that she was familiar with the manner of doing business in the yard, and that cars were moved without signals or watchman, and that she had been told that she must look out for herself; but a witness, who was with the deceased, testified that as they approached they saw that the baggage car had no engine attached to it, and were attempting to pass at least ten feet from it. *Held*, that the question of her contributory negligence was properly left to the jury. *Young v. New York C. & H. R. R. Co.*, 13 Daly (N. Y.) 294; *affirmed* (?) 103 N. Y. 678, *mem.*, 7 N. Y. S. R. 861, *mem.*

726. While riding in a perilous place.—Whether an employé of a railway company is guilty of contributory negligence from not being at his appropriate place on the train at the time of receiving an injury, is a matter of fact for the jury and not of law for the court. *Texas & St. L. R. Co. v. Vallie*, 60 Tex. 481.

The question whether an engineer who observes water running out of the tank of his locomotive is in the line of his duty in taking a position on the outside of his cab, without stopping the train, for the purpose of correcting the defect in the machinery, is one for the jury, where there is evidence that other engineers were accustomed to act in the same way. *Murphy v. Wabash R. Co.*, 115 Mo. 111, 21 S. W. Rep. 862.

The front brakeman on a freight train running between several small country stations, whose duties require him to be on top of the cars while the train is moving (attending to the brakes of the front cars), or on the ground in front of the engine at or near a station or siding (opening and turning switches), and who receives personal injuries while riding on the cross-

beam in front of the engine between two stations, with his legs hanging down, is guilty of such contributory negligence as bars an action for damages; and the court may so instruct the jury, as a matter of law. *Warden v. Louisville & N. R. Co.*, 53 *Am. & Eng. R. Cas.* 470, 94 *Ala.* 277, 10 *So. Rep.* 276.—*APPROVING* *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439. *REVIEWING* *Kresanowski v. Northern Pac. R. Co.*, 18 *Fed. Rep.* 229.

Nor can he be allowed to prove by railroad men that, in their opinion, it is not more dangerous thus to ride in front of the engine than on the top of the cars. *Warden v. Louisville & N. R. Co.*, 53 *Am. & Eng. R. Cas.* 470, 94 *Ala.* 277, 10 *So. Rep.* 276.

In such case the plaintiff cannot be allowed to prove that it was usual and customary for him and other brakemen, while on duty, thus to ride on the cross-beam in front of the engine, since this would not excuse or palliate the negligence. *Warden v. Louisville & N. R. Co.*, 53 *Am. & Eng. R. Cas.* 470, 94 *Ala.* 277, 10 *So. Rep.* 276.

Plaintiff's intestate was engaged in switching and coupling cars, and coupled cars in front of an ordinary freight engine which was being used for switching purposes, and then got on the platform to which the pilot is attached, immediately in front of the boiler head and behind the pilot beam, to ride to where some loaded cars were to be attached, and was killed by reason of the speed with which the engine was driven against the loaded cars. *Held*, that the questions whether the position was one of danger and voluntarily chosen by the deceased, and whether it was the usual custom of brakemen in the yard and other yards of the company to ride on the pilot, were for the jury. *Missouri Pac. R. Co. v. McCally*, 41 *Kan.* 639, 655, 21 *Pac. Rep.* 574.—*DISTINGUISHING* *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439; *Hough v. Texas & P. R. Co.*, 100 U. S. 213; *Kresanowski v. Northern Pac. R. Co.*, 18 *Fed. Rep.* 230; *Union Pac. R. Co. v. Estes*, 37 *Kan.* 715.

It is only when it clearly appears, and the facts are undisputed, that an injured employé has voluntarily chosen a dangerous position, when a safer one has been provided by the company, that the court can say, as a matter of law, that the selection of the position was such contributory neg-

ligence as to defeat a recovery. *Missouri Pac. R. Co. v. McCally*, 41 *Kan.* 639, 655, 21 *Pac. Rep.* 574.

727. — In the tool car.—Although the result may show that it was more dangerous to travel in the tool car of a wrecking train, by reason of its position in the train, than in the way car, an employé is not, as a matter of law, guilty of contributory negligence by so travelling, if the tool car is as well adapted for travel as the way car, and is fitted up and intended by the company to be used for that purpose. *Meley v. Chicago & N. W. R. Co.*, 38 *Am. & Eng. R. Cas.* 130, 77 *Iowa* 743, 42 *N. W. Rep.* 563.—*DISTINGUISHING* *Player v. Burlington, C. R. & N. R. Co.*, 62 *Iowa* 727; *Doggett v. Illinois C. R. Co.*, 34 *Iowa* 284.

728. — on the front end of a car.—Plaintiff's intestate was killed while riding on the front end of a coal car in a mining train of which he was conductor. The evidence was conflicting as to whether he chose the safest place to ride, or whether he was guilty of contributory negligence. *Held*, that it was properly submitted to the jury. *Crabell v. Wapello Coal Co.*, 68 *Iowa* 751, 28 *N. W. Rep.* 56.

729. — or too far forward on loaded lumber car.—Plaintiff was a head switchman, and was injured by being thrown to the ground from a car loaded with lumber, by a sudden and unexpected slackening of the speed of the train. He testified that his duties required him to stand up, and that he alone had the authority to give signals to stop, but that the signal was given without his knowledge by a yard man; but it did not appear that it was necessary for him to stand at the edge of the car, but he testified that standing where he did was not necessarily dangerous, if he had known that the speed would be checked. *Held*, that the question of his contributory negligence was for the jury. *Central R. & B. Co. v. Dickson*, 82 *Ga.* 629, 10 *S. E. Rep.* 203.

730. — or too near the door.—Plaintiff's wife was engaged as a cook on a construction train, and was injured by the starting of the train, and it was charged that she was guilty of contributory negligence in standing in the door of the car from which she was thrown and injured by a sudden start of the train. *Held*, that the question of whether it was contributory negligence to stand in the door of the car

was for the jury. *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. Rep. 288.

731. — with part of person projecting beyond or over the car.—

An experienced brakeman, in charge of cars that were being pushed ahead of the engine, was riding with his left foot in the stirrup at the right-hand side of the front end of the front car, with his right foot on the bumper, and one arm over the side of the car, which exposed a part of his body beyond the line of the cars, and was injured by the car leaving the track and bringing him against a pile of lumber near the track. It appeared that if he had been on the bumper he would not have been injured. *Held*, that the question of his contributory negligence was for the jury. *Pennsylvania R. Co. v. Zink*, 126 Pa. St. 288, 17 Atl. Rep. 614.

It having been decided (53 Wis. 657) that the allegations of the complaint that the plaintiff sat upon the hind end of the hand-car with his feet hanging down, under the direction of the person in charge of the car, and without being aware of the danger of the position, did not show negligence on his part contributing to an injury caused by plank placed on the defendant's road between the rails being loose, warped, and sticking up, so as to hit his heels, additional facts, brought out by the evidence on the trial, in regard to the dimensions of the car, the height of the platform on which the plaintiff sat above the road-bed, and the danger which he would be in from the handle of the lever with which the car was worked—*held*, not to be sufficient to justify the court in taking the question of negligence from the jury. *Pool v. Chicago, M. & St. P. R. Co.*, 8 Am. & Eng. R. Cas. 360, 56 Wis. 227, 14 N. W. Rep. 46.

732. — on the top of the car.—

The fact that a track laborer when struck by a bridge was standing on top of a box car, upon the top of which he had been ordered by his superior to go, cannot be held as a matter of law to have been negligent on his part; the question is for the jury. *Nelson v. Chesapeake & O. R. Co.*, 54 Am. & Eng. R. Cas. 82, 88 Va. 971, 14 S. E. Rep. 838.

The deceased, an employé, was ordered to go on top of a train and release a bell cord which had become entangled, and was killed in doing so by being knocked from the top of an unusually high car which the

company had received from another line, by striking an overhead bridge. It appeared that the company's regular cars would pass under the bridge with safety, and that the deceased had no warning that a higher car was in the train. *Held*, that the question of his contributory negligence was for the jury. *Stirk v. Central R. & B. Co.*, 79 Ga. 495, 5 S. E. Rep. 105.

The plaintiff, a brakeman, was injured by striking an overhead bridge while on top of cars. He knew of the existence of the bridge, having passed under it some 30 times, but at the time of the accident was standing with his back to the bridge with his mind intent upon his duties, and for the time being forgot that he was approaching a bridge. It appeared that the company had erected a tell-tale or "tickler" 50 feet from the bridge, but it was out of order at the time. *Held*, that he was not chargeable, as a matter of law, with contributory negligence. *Wallace v. Central Vt. R. Co.*, 52 N. Y. S. R. 351, 138 N. Y. 302, 33 N. E. Rep. 1069; reversing 63 Hun 632, mem., 43 N. Y. S. R. 639, 18 N. Y. Supp. 280.—DISTINGUISHING *McGrath v. New York C. & H. R. R. Co.*, 59 N. Y. 468, 63 N. Y. 522; *Cullen v. Delaware & H. Canal Co.*, 113 N. Y. 667, 23 N. Y. S. R. 719; *Rodrian v. New York, N. H. & H. R. Co.*, 125 N. Y. 526, 35 N. Y. S. R. 814; *Williams v. Delaware, L. & W. R. Co.*, 116 N. Y. 628, 27 N. Y. S. R. 760.

733. While obeying orders.—

Whether obedience to a master's order on the part of the servant constitutes contributory negligence is ordinarily a question of fact for the jury. *Fogus v. Chicago & A. R. Co.*, 50 Mo. App. 250.

Where a servant is directed to do a peculiarly dangerous work and is injured in attempting to obey, it is ordinarily a question for the jury whether he knew, or in the exercise of ordinary care ought to have known, that the work was extra dangerous. *Thompson v. Chicago, M. & St. P. R. Co.*, 4 McCrary (U. S.) 629, 14 Fed. Rep. 564.

Evidence that the engineer was momentarily absent and the fireman was in his place; that the fireman had applied the air brakes; that the engine was moving slowly and was derailed at a curve by a pine knot caught in the pilot, and was overturned on the fireman, the rules of the company making the fireman subject to the directions of the engineer—is sufficient to sustain a find-

ing that the fireman was free from fault. *Denver, S. P. & P. R. Co. v. Wilson*, 12 *Colo.* 20, 20 *Pac. Rep.* 340.

Plaintiff was engaged as a laborer on a gravel train and was directed to get aboard just as the train was to move, and in doing so attempted to put his foot on the dead-wood of the rear car, but instead put it on the draw-bar, from which it slipped and rested on the coupling-link, and he was injured by the car being backed against others. It appeared that a storm was approaching and the conductor was anxious to move the train, and there were some haste and confusion. *Held*, that plaintiff was not chargeable with contributory negligence simply because he placed his foot on the draw-bar or link; but it was a question for the jury to determine, from all the facts, considering the haste, the time allowed, and the means of getting on the car, whether he acted with due care. *Boyle v. Chicago, R. I. & P. R. Co.*, 2 *Am. & Eng. R. Cas.* 234, 56 *Iowa* 765, 9 *N. W. Rep.* 360.

Plaintiff, an engineer, was injured by the overturning of his engine, caused by the bad condition of defendant's road. It appeared that plaintiff was running his engine by express orders, without cars attached, ahead of a passenger train; he knew that the road was somewhat out of repair, and that he incurred some danger, but it did not appear conclusively that he knew how badly it was out of repair, or that the danger was very great. Plaintiff and other engineers had frequently run their engines over the road with safety, in the same way plaintiff was running his at the time of the accident. Plaintiff was ordered by competent authority to so run his engine, and he had the assurance that the road would soon be put in repair. *Held*, that the evidence authorized the submission of the question of contributory negligence to the jury. *Hawley v. Northern C. R. Co.*, 2 *Am. & Eng. R. Cas.* 248, 82 *N. Y.* 370; *affirming* 17 *Hun* 115.—APPLIED IN *Cullen v. Norton*, 52 *Hun* 9, 22 *N. Y. S. R.* 221, 4 *N. Y. Supp.* 774. DISTINGUISHED IN *Sweeney v. Berlin & J. Envelope Co.*, 101 *N. Y.* 520, 5 *N. E. Rep.* 358; *Monaghan v. New York C. & H. R. R. Co.*, 45 *Hun* 113, 9 *N. Y. S. R.* 672. QUOTED IN *Flynn v. Kansas City, St. J. & C. B. R. Co.*, 78 *Mo.* 195; *Rogen v. Enoch Morgan's Sons Co.*, 16 *N. Y. S. R.* 693.

734. — order inconsistent with rule.—When acting under the order of the

conductor, but contrary to a rule of the company to which he had assented, the plaintiff was injured in coupling defective cars, of which defect he had no notice until it was too late to escape. *Held*, that the court erred in withdrawing the case from the jury on the ground that plaintiff, upon such facts, could not recover. *Mason v. Richmond & D. R. Co.*, 53 *Am. & Eng. R. Cas.* 183, 111 *N. Car.* 482, 16 *S. E. Rep.* 698.—QUOTING *Chicago, M. & St. P. R. Co. v. Ross*, 112 *U. S.* 377. REVIEWING *Cowles v. Richmond & D. R. Co.*, 84 *N. Car.* 309.

735. Employee's negligence in the use of machinery and appliances, generally.—The question of plaintiff's contributory negligence is properly submitted to the jury where his hand was injured by the slipping of an oil tank against the block designed for keeping it in place, which he took hold of in attempting to couple cars, and he testifies that he never saw one like it before, and supposed that he was holding to the grab-iron. *Graham v. Boston & A. R. Co.*, 156 *Mass.* 4, 30 *N. E. Rep.* 359.

An employé in railroad shops was injured while putting a belt on a pulley by hand. It was in proof that it was usual to provide a lever for such work, which lessened the danger; that plaintiff had worked in the shops for 18 months, but did not know of the danger of the machinery. There was some evidence of contributory negligence. *Held*, that the case was properly left to the jury. *Washington & G. R. Co. v. McDade*, 44 *Am. & Eng. R. Cas.* 505, 135 *U. S.* 554, 10 *Sup. Ct. Rep.* 1044.

Defendant company was engaged in removing signal posts from along the track by wrapping a cable, one end of which was fastened to a train, around the posts and pulling them out, and plaintiff was injured while engaged in handling the cable. *Held*, that it was a question for the jury whether he was guilty of contributory negligence in wrapping the cable around a post more times than was necessary. *Union Pac. R. Co. v. O'Hern*, 24 *Neb.* 775, 40 *N. W. Rep.* 293.

736. Negligence in the operation and management of cars and engines.—Whether or not plaintiff, a brakeman, was guilty of contributory negligence in not taking hold of the brake-rod, or something else, to steady himself, in anticipation of a "jerk," is a question for the

jury. *Sloan v. Central Iowa R. Co.*, 11 Am. & Eng. R. Cas. 145, 62 Iowa 728, 16 N. W. Rep. 331.

Plaintiff's intestate had been three or four days engaged as a brakeman, and as one of a station yard crew, he being previously a stranger to the locality. While descending from a moving freight car by a side ladder he was swept off by a trestle standing 14½ inches from the side of the car, was run over, and killed. *Held*, sufficient to submit to the jury upon the questions (1) of defendant's negligence; (2) as to whether the servant knew this danger, or was chargeable with want of ordinary prudence if he had failed to inform himself of it, so that he should be deemed to have assumed the risk; and (3) as to his contributory negligence. *Robel v. Chicago, M. & St. P. R. Co.*, 35 Minn. 84, 27 N. W. Rep. 305.—DISTINGUISHING *Clark v. St. Paul & S. C. R. Co.*, 28 Minn. 128, 9 N. W. Rep. 581; *Russell v. Minneapolis & St. L. R. Co.*, 32 Minn. 230, 20 N. W. Rep. 147; *Cook v. St. Paul, M. & M. R. Co.*, 34 Minn. 45, 24 N. W. Rep. 311; *Dorsey v. Phillips & C. Constr. Co.*, 42 Wis. 583; *Mayes v. Chicago, R. I. & P. R. Co.*, 63 Iowa 562, 14 N. W. Rep. 340, 19 N. W. Rep. 680; *Chicago & I. R. Co. v. Russell*, 91 Ill. 298.

A brake-rod on a flat car pulled out and threw plaintiff, a brakeman, to the ground, causing the injuries sued for. The pin at the bottom of the rod, which held it in place, was missing, and its absence could have been detected by looking under the car, but not from where plaintiff stood. A rule of the company required the car to be inspected before it started, which had not been done. *Held*, that the question of the defendant's negligence should have been submitted to the jury, and it was error to grant a nonsuit. *Bailey v. Rome, W. & O. R. Co.*, 139 N. Y. 302, 34 N. E. Rep. 918, 54 N. Y. S. R. 550; reversing 29 N. Y. S. R. 755, 8 N. Y. Supp. 780, 55 Hun 509.—FOLLOWING *Wright v. New York C. R. Co.*, 25 N. Y. 566.

Plaintiff was an engineer on a single-track road, and under a rule of the company trains could not run either way without what was called a train staff or a substitute ticket. Plaintiff started on a foggy morning, having a train staff, but was running with the tender in front, with a red light displayed instead of the usual white or headlight. About the same time an engineer at

the other end of the line got permission to run up the track for water, and was flagging, but running without a train staff. When plaintiff saw the other engine coming he reversed his lever and jumped, and was injured. *Held*, that the fact of his running without a headlight was not conclusive evidence of contributory negligence, but was a circumstance to be considered by the jury. *Gross v. Pennsylvania, P. & B. R. Co.*, 42 N. Y. S. R. 808, 62 Hun 619, 16 N. Y. Supp. 616.

737. — while coupling cars.—The question of contributory negligence on the part of a brakeman injured in coupling cars is, in general, one of fact for the jury. *Gottlieb v. New York, L. E. & W. R. Co.*, 24 Am. & Eng. R. Cas. 421, 100 N. Y. 462, 3 N. E. Rep. 344; affirming 29 Hun 637.—APPROVED IN *Scott v. Oregon R. & N. Co.*, 28 Am. & Eng. R. Cas. 414, 14 Oreg. 211. REVIEWED IN *Pullutro v. Delaware, L. & W. R. Co.*, 27 N. Y. S. R. 63, 7 N. Y. Supp. 510.

Where an employé sues for injuries received while coupling cars, and under the evidence the question of his contributory negligence is doubtful, the case should be submitted to the jury. *Central R. Co. v. Freeman*, 66 Ga. 170.—DISTINGUISHED IN *Smith v. Central R. & B. Co.*, 41 Am. & Eng. R. Cas. 490, 82 Ga. 801, 10 S. E. Rep. 111.

Whether or not it is negligent for a brakeman to stand facing the draw-bar while making a coupling is a question of fact for the jury. *Belair v. Chicago & N. W. R. Co.*, 43 Iowa 662, 14 Am. Ry. Rep. 575.

It cannot be said as a matter of law that an employé who, after giving the proper signal for the train to stop, steps upon the track to make a coupling, without waiting to see whether his signal will be obeyed or not, is guilty of contributory negligence in so doing; but the question is a proper one to be submitted to the jury with all the facts in the case. *Bucklew v. Central Iowa R. Co.*, 64 Iowa 603, 21 N. W. Rep. 103.—DISTINGUISHING *Steele v. Central R. Co.*, 43 Iowa 109; *Pennsylvania Co. v. Hankey*, 93 Ill. 580. FOLLOWING *Beems v. Chicago, R. I. & P. R. Co.*, 58 Iowa 150; *Berry v. Central R. Co.*, 40 Iowa 564.—FOLLOWED IN *Nichols v. Chicago, R. I. & P. R. Co.*, 69 Iowa 154.

Proof that a brakeman knew, or might have known, that the draw-bars of a loco-

motive and of a car to be coupled, were of unequal height, so that they would be likely to pass each other, is strong evidence of contributory negligence on his part, but will not, as a matter of law, preclude him from recovering for injuries received by the draw-bars overlapping while he is attempting to make a coupling. *Lawless v. Connecticut River R. Co.*, 18 Am. & Eng. R. Cas. 96, 136 Mass. 1.

Where it appears that a brakeman only saw that the bumper of the moving car was lower than the bumper of a stationary car when they were four or five feet apart, and that he thought that the coupling could be made with the straight link in the draw-bar, the question whether he was guilty of contributory negligence in attempting to so make the coupling instead of obtaining and using a crooked link, is for the jury. (Follett, C.J., and Potter, J., dissenting.) *Goodrich v. New York C. & H. R. R. Co.*, 41 Am. & Eng. R. Cas. 259, 116 N. Y. 398, 22 N. E. Rep. 397, 26 N. Y. S. R. 767, 5 L. R. A. 750; affirming 3 N. Y. S. R. 774.

738. — while uncoupling cars.— If it is the duty of a servant to uncouple cars, and this cannot easily be done while the train is still, and if he, in endeavoring to uncouple them while the train is in motion, steps between the cars and meets with an injury which is caused by a want of repair of the roadbed, the court cannot rule, as a matter of law, that he was careless, but should submit the question to be determined by the jury, although he continued in the employment of the company after he knew of the defect. *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441. — **DISTINGUISHING** *Lucas v. New Bedford & T. R. Co.*, 6 Gray (Mass.) 64; *Gavett v. Manchester & L. R. Co.*, 16 Gray 501; *Todd v. Old Colony & F. R. R. Co.*, 3 Allen 18, 7 Allen 207; *Gahagan v. Boston & L. R. Co.*, 1 Allen 187. — **APPROVED** IN *Gibson v. Pacific R. Co.*, 46 Mo. 163. **DISTINGUISHED** IN *Laning v. New York C. R. Co.*, 49 N. Y. 521. **EXPLAINED** IN *Tinney v. Boston & A. R. Co.*, 62 Barb. (N. Y.) 218. **FOLLOWED** IN *Greenleaf v. Dubuque & S. C. R. Co.*, 33 Iowa 52. **QUOTED** IN *Roux v. Blodgett & D. Lumber Co.*, 85 Mich. 519; *Walsh v. Oregon R. & N. Co.*, 10 Oreg. 250.

Stepping between moving cars to uncouple them is not, as a matter of law, negligence. *Ashman v. Flint & P. M. R. Co.*,

53 Am. & Eng. R. Cas. 80, 90 Mich. 567, 51 N. W. Rep. 645.

A brakeman was injured while uncoupling moving cars, and it was claimed that the company required brakemen to uncouple moving cars, which was denied by the company, and some evidence introduced to support the above claims. *Held*, that it was a question for the jury whether the company did require the brakeman to uncouple moving cars. *Peoria, D. & E. R. Co. v. Puckett*, 42 Ill. App. 642.

Plaintiff was injured while uncoupling cars, by catching his foot in a frog and being held until the cars ran over him. The evidence showed that four persons were necessary to do the switching and making up trains in the yard, but it was being done at the time of the accident by plaintiff and another; that the yard master, who was charged with the employment of men, was absent, and that he had been informed that another yard man was sick and would not be present; that the engineer was a man addicted to drunkenness, which was known to the company, and was drinking at the time of the accident, and ran the train in a reckless manner; and there was also evidence that plaintiff knew that the frog was dangerous. *Held*, that it was for the jury to determine whether a man of common prudence would have undertaken to do the work with one assistant, and whether plaintiff might have reasonably supposed that the work could be done with safety by the use of great caution and skill. *Standard v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 514. — **REVIEWING** *Brothers v. Cartter*, 52 Mo. 372; *Conroy v. Vulcan Iron Works*, 62 Mo. 39. — **REVIEWED** IN *Craig v. Chicago & A. R. Co.*, 54 Mo. App. 523.

The plaintiff, while uncoupling moving cars at night, was injured by having his foot caught between switch rails insufficiently blocked; he was familiar with the railroad yard and tracks where the accident happened, but had no actual knowledge of the defective block. *Held*, that the question of his negligence in the circumstances was for the jury. *Alcorn v. Chicago & A. R. Co.*, 53 Am. & Eng. R. Cas. 87, 108 Mo. 81, 18 S. W. Rep. 188.

739. — while getting on moving engine.— A brakeman attempted to get on an engine after it had started, and was injured by striking railroad ties that had

been piled some 17 or 18 inches from the track, of which he did not know, or at the time failed to remember. *Held*, that the question of whether or not he exercised due care was for the jury. *Babcock v. Old Colony R. Co.*, 150 Mass. 467, 23 N. E. Rep. 325.—**DISTINGUISHED** in *Thompson v. Boston & M. R. Co.*, 153 Mass. 391.

740. — while getting on moving train.—Plaintiff was employed on a gravel train, which had been backed in on a side track to the gravel pit for the purpose of loading, and, being obliged to wait for an express train, plaintiff and his companions left the cars and went on the adjoining bank, which was higher than the level of the cars. The boarding cars had been left on the main track, a few rods distant, to be attached when the gravel cars were loaded. While thus waiting, the gang foreman, as the engine backed in to take out the cars, called out, "All aboard!" Plaintiff did not hear this order, but seeing the other men starting for the cars, followed them, and as the train was moving out jumped from the bank onto the car, and, the gravel slipping under him, he fell off, and his arm was crushed under the wheels. The men had general orders not to board moving cars. *Held*, that the case should have been taken from the jury, it being clear that plaintiff acted as he saw others act, and paid no heed to the risk that was patent to everybody. *Novock v. Michigan C. R. Co.*, 63 Mich. 121, 29 N. W. Rep. 525.

The language used by the foreman was the same sort of warning generally given when cars are about leaving, and was no more than notice of that fact, and was no more proof of negligence than if given when a passenger train is about leaving the station, which would justify no one in boarding or leaving cars in motion. *Novock v. Michigan C. R. Co.*, 63 Mich. 121, 29 N. W. Rep. 525.

An employé of a company who worked on a gravel train was injured by attempting to get on it after it was in motion, by orders of the foreman. The cars stood about six feet high from the track, and were not supplied with any means of getting on except swinging up between them, or by iron steps on the side. *Held*, that the question of contributory negligence, under the circumstances, was properly left to the jury. *Pulituro v. Delaware, L. & W. R. Co.*, 27 N. Y. S. R. 63, 7 N. Y. Supp. 510.—**DISTINGUISH-**

ING Hunter v. Cooperstown & S. V. R. Co., 112 N. Y. 376, 21 N. Y. S. R. 1; *Solomon v. Manhattan R. Co.*, 103 N. Y. 443, 3 N. Y. S. R. 636.

741. — while getting off moving train.—Plaintiff, a section hand, was injured by jumping from a caboose to a platform as the train reached its destination. The evidence showed that it had slowed up and all the other men jumped off safely; but plaintiff testified that he was waiting for the train to come to a full stop, but was told by the conductor to get off. The company, on the other hand, introduced evidence tending to show that he jumped without any orders from the conductor while the train was moving some four miles an hour, and that the platform to which he jumped was only a little over a foot below the step of the caboose. *Held*, that the question of his contributory negligence was for the jury. *Northern Pac. R. Co. v. Egeland*, 56 Fed. Rep. 200.

742. Negligence in failing to inspect track.—Whether or not an employé is guilty of contributory negligence in not examining a switch frog for defects in blocking is a question of fact for the jury. *Kroener v. Chicago, M. & St. P. R. Co.*, 88 Iowa 16, 55 N. W. Rep. 28.

743. — machinery.—A company may, by rules adopted for the government of its employés, require them to inspect machinery before using it, and such rule imposes on them the duty of making a reasonable examination; but in an action for injuries resulting from defective machinery, it is a question of fact for the jury to determine whether the employé made such an examination or not. *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 12 So. Rep. 176.

744. — brakes.—A brake broke as it was being set, and killed a brakeman. Several spokes of the brake-wheel broke from the rim and their ends were rusty, showing that the break was not recent. The company put in evidence an agreement, whereby the brakeman agreed to examine all cars, machinery, appliances, etc., before using them, and agreeing to release the company from damages which resulted from his own neglect to do so; the agreement further providing that the brakeman was entitled to sufficient time to make the necessary examinations, and that he might refuse to obey any order which would expose him to danger. But there was other

evidence tending to show that only an expert would have been likely to detect the defect in the brake. *Held*, that the question of his contributory negligence was properly left to the jury. *Pratt v. Lake Shore & M. S. R. Co.*, 18 N. Y. Supp. 682.

745. — cars.—Whether the plaintiff, an employé, was guilty of contributory negligence in not exercising reasonable care to ascertain the condition of the car was a question for the jury. *Roddy v. Missouri Pac. R. Co.*, 104 Mo. 234, 15 S. W. Rep. 1112.

In a case where an employé sues to recover for injuries to his wife, it is a question of fact for the jury whether it is a part of the duty of a railroad employé to inspect a train or any of its appliances for the purpose of ascertaining defects, where the evidence in that regard is conflicting. *Missouri Pac. R. Co. v. White*, 48 Am. & Eng. R. Cas. 206, 80 Tex. 202, 15 S. W. Rep. 808.

746. Remaining in service after notice of defects in track.—An engineer is not necessarily guilty of contributory negligence, as a matter of law, because he remains in service after he knows that the track is somewhat out of repair; but it might be otherwise if he knew when it was dangerously out of repair. *Mehan v. Syracuse, B. & N. Y. R. Corp.*, 73 N. Y. 585, *mem.*—FOLLOWED IN *Fuller v. Jewett*, 1 Am. & Eng. R. Cas. 109, 80 N. Y. 46.

747. — defect in bridge.—The question of the contributory negligence of a brakeman who remains on a train after he knows a bridge is defective is for the jury. *Hall v. Galveston, H. & S. A. R. Co.*, 39 Fed. Rep. 18.

748. — defects in machinery and appliances.—The question of negligence on the part of the employé in remaining in a company's employ after knowledge of defects in machinery, is the same as in any other, a question of fact for the jury under all the evidence of the case. *Greenleaf v. Dubuque & S. C. R. Co.*, 33 Iowa 52.—DISTINGUISHING *Muldowney v. Illinois C. R. Co.*, 32 Iowa 176. FOLLOWING *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441.

It is a question of fact whether a servant is guilty of negligence in continuing to use defective machinery for a reasonable time for the master to make the needed repairs, after his promise to do so. *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *affirming* 9 Ill. App. 319. *Conatz v. Missouri Pac. R. Co.*, 115 Mo. 669, 22 S. W. Rep. 572.

If the defect or insufficiency in the appliances, which term embraces the men employed to do the work as well as other instrumentalities employed, is so great that, obviously, with the use of great caution, the danger is imminent, then as a matter of law, the servant who incurs the risk is guilty of contributory negligence and cannot recover; but if upon this question there is substantial doubt, the question is one of fact for the jury, and a nonsuit or demurrer to the evidence is not permissible. *Thorpe v. Missouri Pac. R. Co.*, 89 Mo. 650, 2 S. W. Rep. 3.

749. — defect in engine.—An engineer gave notice of a defect in his engine to the proper officers of the road, who promised that the defect should be remedied. The engineer continued to run his engine, some new appliances were made, but before they were attached, the engineer was killed by what was claimed as the defects he had called attention to. *Held*, that his continued use of the engine was not, as a matter of law, such contributory negligence as to prevent a recovery for his death. Under the circumstances it was a question for the jury, and the burden of proof was on the company to show contributory negligence. *Hough v. Texas & P. R. Co.*, 100 U. S. 213, 21 Am. Ry. Rep. 451.—APPROVED IN *Stephenson v. Duncan*, 73 Wis. 404, 41 N. W. Rep. 337. QUOTED IN *Kresanowski v. Northern Pac. R. Co.*, 5 McCrary (U. S.) 528, 18 Fed. Rep. 229; *Hyatt v. Hannibal & St. J. R. Co.*, 19 Mo. App. 287; *Southern Pac. Co. v. Leash*, 2 Tex. Civ. App. 68; *Reddon v. Union Pac. R. Co.*, 5 Utah 344, 15 Pac. Rep. 262. REVIEWED IN *Dalton v. Atlantic, M. & O. R. Co.*, 4 Hughes (U. S.) 180.

750. — defect in air brake.—Where a fireman is charged with contributory negligence in remaining on the engine after he knows that the air brakes are defective, in determining the question the jury should consider whether the accident would have happened had the air brakes been in proper order, and whether the defect was such that a man of ordinary prudence would not have remained. The mere fact that he remained after such knowledge will not defeat a recovery for an injury. *New Jersey & N. Y. R. Co. v. Young*, 49 Fed. Rep. 723, 1 U. S. App. 96, 1 C. C. A. 428; *affirming* 46 Fed. Rep. 160.—APPROVED IN *Dwyer v. St. Louis & S. F. R. Co.*, 52 Fed. Rep. 87.

751. Forgetting defect in car in time of an emergency.*—Where it appears that a brakeman was intent upon his duty at the time of a severe storm, the question of whether he was guilty of contributory negligence in failing to remember that a step was missing from a car, which he attempted to descend in the hasty discharge of duty, is for the jury. *Kane v. Northern C. R. Co.*, 128 U. S. 91, 16 Wash. L. Rep. 715, 9 Sup. Ct. Rep. 16.—FOLLOWED IN *Jones v. East Tenn., V. & G. R. Co.*, 128 U. S. 443; *Dunlap v. Northeastern R. Co.*, 130 U. S. 649. REFERRED TO IN *Wallace v. Central Vt. R. Co.*, 138 N. Y. 302.

752. While attempting to save the life of another.—Where an exposure is made for the purpose of saving human life, and the person making the exposure is injured thereby, it is for the jury to say whether the conduct of the party injured is to be deemed rash or reckless. *Condiff v. Kansas City, Ft. S. & G. R. Co.*, 48 Am. & Eng. R. Cas. 417, 45 Kan. 256, 25 Pac. Rep. 562.

6. Amount of Recovery; Damages.**a. In General.**

753. Actual and compensatory damages.—The award of damages in actions for injuries to employes must not be excessive. They are only to be remunerative—compensatory—a just and fair amount for the injury sustained. *Parody v. Chicago, M. & St. P. R. Co.*, 5 McCrary (U. S.) 38, 15 Fed. Rep. 205.

The object of the law allowing employes to recover for personal injuries is simply to compensate them for the injuries they have sustained, and nothing more. *Carpenter v. Mexican Nat. R. Co.*, 39 Fed. Rep. 315, 17 Wash. L. Rep. 630.

The damages recoverable by an injured employé should be limited to the natural and probable consequences of the injury. *St. Louis & S. F. R. Co. v. Farr*, 56 Fed. Rep. 994.

A master is liable for actual damages for an injury resulting from the negligence of his servant in the course of his employment, even though the act be in direct violation of the master's order; but the same rule does not apply to exemplary damages.

* When contributory negligence of employé, who forgets that a car is defective and is injured while using it, is for the jury, see 41 AM. & ENG. R. CAS. 420. *abstr.*

Texas Trunk R. Co. v. Johnson, 41 Am. & Eng. R. Cas. 122, 75 Tex. 158, 12 S. W. Rep. 482.

754. Punitive damages.—Where an employé sues his company for a personal injury and there is no evidence whatever that the company was guilty of gross negligence, it is error to instruct the jury that they may find punitive damages if they find gross negligence. *Louisville & N. R. Co. v. Law*, (Ky.) 21 S. W. Rep. 648.

755. Aggravation of injury by employe's own act.—An injured employé can only recover damages for such injuries as were properly caused by the accident, and not for any aggravation thereof brought about by his own negligence. *Owens v. Baltimore & O. R. Co.*, 39 Am. & Eng. R. Cas. 276, 35 Fed. Rep. 715.—FOLLOWING *Gould v. McKenna*, 86 Pa. St. 297; *Secord v. St. Paul, M. & M. R. Co.*, 5 McCrary (U. S.) 515; *Sills v. Brown*, 9 C. & P. 601; *Greenland v. Chaplin*, 5 Ex. 243; *Sherman v. Fall River Iron Works Co.*, 2 Allen (Mass.) 524; *Wright v. Illinois & M. Tel. Co.*, 20 Iowa 195; *Plummer v. Penobscot Lumbering Assoc.*, 67 Me. 363; *Willmot v. Howard*, 39 Vt. 447; *Hathorn v. Richmond*, 48 Vt. 557.

756. Elements and measure of damages, generally.—In estimating the damages that an injured employé is entitled to, a jury is authorized to consider (1) the value of the time lost while disabled from his work or labor, taking into consideration the nature of his business and the value of his services in conducting the same; (2) fair compensation for the mental and physical suffering caused by the injury; (3) the probable effect of the injury in the future upon his health, and the use of his injured limb, and his ability to labor and attend to his business, and generally any reduction of his capacity to earn money and pursue the course of life which he might otherwise have done. *Carpenter v. Mexican Nat. R. Co.*, 39 Fed. Rep. 315, 17 Wash. L. Rep. 630.

In case of personal injury to an employé from negligence, the injured party may recover such actual damages as are the natural and proximate result of his injury, such as his loss of time, his pain and suffering, his necessary and reasonable expenses in medical and surgical aid and nursing, as shown by the evidence; and if the injury is permanent and incurable, the jury, in assessing the damages, may take such fact

into consideration. The fact that he has a wife living cannot, however, be considered by the jury in fixing the plaintiff's damages. *Chicago & E. R. Co. v. Holland*, 30 Am. & Eng. R. Cas. 590, 122 Ill. 461, 13 N. E. Rep. 145, 11 West. Rep. 51; affirming 18 Ill. App. 418.

757. Physical pain and suffering.—

In an action by an employé for a permanent injury resulting from a railroad accident, future pain and suffering may form an element in estimating damages, provided the evidence renders it reasonably certain that they will necessarily result from the injury. *Atlanta & W. P. R. Co. v. Johnson*, 66 Ga. 259.

758. Expenses of cure.—

Plaintiff may recover the expenses of his cure, the value of his time lost during his cure, and a fair compensation for his physical and mental suffering caused by the injury, as well as for any permanent reduction of his power to earn money. *Riley v. West Virginia C. & P. R. Co.*, 27 W. Va. 145.

759. Loss of time.—If one, in the employ of another, has lost time by reason of a personal injury caused by the negligence of a third person, he is entitled to compensation for such loss, notwithstanding his wages may have been continued during the time either as a provision of his contract or as a grace of his employer. *Missouri Pac. R. Co. v. Jarrard*, 65 Tex. 560.

760. Reduction of earning capacity.—An employé who has been injured by a company's negligence, without fault on his part, may recover general damages on account of pain, physical injury, and general depreciation of power to labor, although no proof of the value of his services as such employé, or in other business, be introduced. *Georgia Southern R. Co. v. Neel*, 68 Ga. 609.

Where an employé of a railroad is unfitted for business by a personal injury, he should not be allowed a sum as damages, which would produce a greater income than he could have earned had he not been injured, where no vindictive damages are allowable. *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492, 1 Am. Ry. Rep. 569.

A charge instructing the jury that if an injury received by an employé by reason of the negligence of his employer impaired the employé's ability to earn money in the future, the amount of compensation was from necessity left to the sound discretion of the jury, not to exceed the amount

claimed, is erroneous. *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378, 11 So. Rep. 733.

761. Under the Missouri Damage Act.—

When a laborer employed by a railroad company is killed in consequence of the use of defective apparatus, a cause of action accrues to his widow under section 3 of the Missouri Damage Act (Wagn. St. p. 520) and not under section 2; and the measure of damages will not be the sum of \$5000, as provided in section 2, but a sum not exceeding that amount as provided in section 3. *Holmes v. Hannibal & St. J. R. Co.*, 69 Mo. 536.—FOLLOWING *Elliott v. St. Louis & I. M. R. Co.*, 67 Mo. 272.—FOLLOWED IN *Schlereth v. Missouri Pac. R. Co.*, 96 Mo. 509, 10 S. W. Rep. 66.

762. Assessment of damages, generally.—

In an action by a brakeman for personal injuries, plaintiff's attorney in his argument to the jury stated that plaintiff would probably live forty years, and a proper way for estimating the damages was to ascertain his yearly earnings and multiply the amount by forty. Defendant objected to the statement as not forming the correct method of ascertaining the damages, but the court overruled the objection, and remarked, "That is a fair argument." Held, error, which was not cured by subsequently instructing the jury to allow such a sum as would compensate plaintiff for his pecuniary loss sustained, or that he would hereafter sustain, by reason of the disabilities caused by the injury; but that the jury should not assume that he was entirely incapacitated because he could not longer act as a brakeman, but should consider his power to earn money in other stations of life. *St. Louis & S. F. R. Co. v. Farr*, 56 Fed. Rep. 994.—FOLLOWING *St. Louis, I. M. & S. R. Co. v. Needham*, 52 Fed. Rep. 371, 3 C. C. A. 129.

763. Evidence admissible on the question of damage.—

It is competent to show what the plaintiff's capacity to earn wages was at and before the time when he suffered the injury. *Louisville, N. A. & C. R. Co. v. Frawley*, 28 Am. & Eng. R. Cas. 308, 110 Ind. 18, 9 N. E. Rep. 594.

It is competent to show the compensation the plaintiff was receiving at the time the injury occurred. *Kline v. Kansas City, St. J. & C. B. R. Co.*, 50 Iowa 656.

Where the plaintiff alleges that he was compelled to and did pay out and expend large sums of money in and about being cured of his injuries, it will not be suffi-

cient for him to prove merely that he has paid a certain physician's bill in order to its recovery, but he must also show that by reason of his injuries he has necessarily incurred such bill, and that it is reasonable. *North Chicago St. R. Co. v. Cotton*, 52 Am. & Eng. R. Cas. 238, 140 Ill. 486, 29 N. E. Rep. 899; *affirming* 41 Ill. App. 311.

In such case the court, on specific objection, may, before admitting proof of the plaintiff's liability incurred in the employment of a physician, and its amount and reasonableness, require an assurance from counsel that he will follow up the evidence by proof of payment. On failure to prove that such a bill has been paid, defendant should move to exclude all evidence in relation to the physician's bill, or ask the court to instruct the jury to disregard it. *North Chicago St. R. Co. v. Cotton*, 52 Am. & Eng. R. Cas. 238, 140 Ill. 486, 29 N. E. Rep. 899; *affirming* 41 Ill. App. 311.

A declaration alleged that plaintiff was employed as a train hand on a freight train; that by the negligence of other employés the accident occurred (describing it), by which his fingers and a portion of his hand were so mashed as to necessitate amputation; and that his capacity to labor and earn money was thereby permanently diminished one half. *Held*, that evidence as to plaintiff's age and capacity to labor was admissible without more specific allegations in regard to them. *Atlanta & W. P. R. Co. v. Johnson*, 66 Ga. 259.

The plaintiff sued for personal injuries in falling from a freight car, and charged in the complaint that his left leg was crushed, necessitating amputation, and that his right hip was bruised. His own evidence showed that he was in good health prior to the injury, and after recovering from the injury was in good health for nine months, when soreness appeared about the right hip, and in three months developed into a troublesome abscess, but there was no other evidence showing that the abscess was caused by the fall. *Held*, that the abscess could not form the basis of an additional recovery, and the evidence should have been withdrawn from the jury. *St. Louis & S. F. R. Co. v. Farr*, 56 Fed. Rep. 994.

764. Evidence in mitigation of damages.—Where an employé of a company sues another company for personal injuries, it is competent for the defendant company to prove, as affecting the dam-

ages, that the employing company retained the plaintiff in service, and paid him his wages, after the injury. *Texas & P. R. Co. v. Volk*, 151 U. S. 73, 14 Sup. Ct. Rep. 239.

The fact that the salary of one sustaining physical injury through the negligence of another is continued by his employer during the time he is disabled by such injury, cannot mitigate the damages that the injured party may recover in an action therefor. *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 317.

After plaintiff had given evidence of loss of wages as an item of damages, he was asked on cross-examination if he was not paid his wages by his employer during the time he was sick; this was objected to and excluded. *Held*, error; that the defendant was entitled to show that plaintiff did not suffer such loss. *Drinkwater v. Dinsmore*, 80 N. Y. 390; *reversing* 16 Hun 250.

765. Evidence in aggravation of damages.—It is error to admit evidence that plaintiff had a family and was unable to support them by his labor since the injury. *Pittsburg, Ft. W. & C. R. Co. v. Powers*, 74 Ill. 341.—APPLIED IN *Pennsylvania Co. v. Keane*, 143 Ill. 172; *Dayharsh v. Hannibal & St. J. R. Co.*, 103 Mo. 570. REVIEWED IN *Louisville & N. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. Rep. 706.—*Louisville & N. R. Co. v. Gower*, 31 Am. & Eng. R. Cas. 168, 85 Tenn. 465, 3 S. W. Rep. 824.—REVIEWING *Nashville & C. R. Co. v. Prince*, 2 Heisk. (Tenn.) 580; *Louisville & N. R. Co. v. Burke*, 6 Coldw. (Tenn.) 46.

It is proper to allow an injured employé to testify "that he had no means or property to subsist upon, and that he was entirely dependent upon his labor for his support," for the purpose of showing the nature of his business and the value of his services in conducting it, as a ground of estimating damages. *Hunt v. Chicago & N. W. R. Co.*, 26 Iowa 363.—REVIEWED IN *Stafford v. Oskaloosa*, 64 Iowa 251.

But it is error to allow an injured employé to prove the ability of the railroad company to pay, for the purpose of enhancing the damages. *Hunt v. Chicago & N. W. R. Co.*, 26 Iowa 363.

An employé's expectation of promotion is too remote to be taken into consideration when it is not shown that he was qualified to receive promotion, or that he had any reason to expect promotion; and evidence

of the earnings of persons occupying higher grades of employment is improperly admitted. *Chase v. Burlington, C. R. & N. R. Co.*, 38 *Am. & Eng. R. Cas.* 148, 76 *Iowa* 675, 39 *N. W. Rep.* 196.—APPROVING *Brown v. Cummings*, 7 *Allen (Mass.)* 507. EXPLAINING *Belair v. Chicago & N. W. R. Co.*, 43 *Iowa* 676. FOLLOWING *Brown v. Chicago, R. I. & P. R. Co.*, 64 *Iowa* 656.—*Richmond & D. R. Co. v. Elliott*, 149 *U. S.* 266, 13 *Sup. Ct. Rep.* 837.

b. Excessive Damages.

766. Generally.—Where the evidence shows that a fireman was severely burned by his engine turning over, whereby he remained ill for a considerable time, suffering intense pain, and the evidence tends to show that he was still suffering at the time of the trial and would for a considerable time, and that the spinal cord was injured, with resulting hernia, a verdict in his favor for \$1700 is not so large as to show passion or prejudice on the part of the jury. *Delie v. Chicago & N. W. R. Co.*, 5 *Am. & Eng. R. Cas.* 464, 51 *Wis.* 400, 8 *N. W. Rep.* 265.

Appellee was the night yard master, and was hurt while filling a car with water at night, which was one of his duties. The tank spout fell upon him after he had filled the car and returned the spout in the usual manner. The day yard master had been notified that the spout was out of order, but plaintiff had no knowledge of the defect, and it was not a part of his duty to keep the tank fixtures in repair, or to inspect or report them. His injuries were severe. Under these facts a verdict for \$6000 was affirmed. *Texas & P. R. Co. v. Crow*, 3 *Tex. Civ. App.* 266, 22 *S. W. Rep.* 928.

767. Slight bodily injuries.—A verdict in favor of a section man for \$1500 for the loss of the thumb of the left hand is not excessive. *Njus v. Chicago, M. & St. P. R. Co.*, 47 *Minn.* 92, 49 *N. W. Rep.* 527.

Where the negligence of defendant, if any, was very slight, and plaintiff had no bones broken, was not disabled from working for more than nine months, and the injury did not appear to be permanent—held, that \$5000 damages were excessive. *Chicago, R. I. & P. R. Co. v. McKiltrick*, 78 *Ill.* 619.

A verdict in favor of a track repairer for \$4000, for negligence which caused his leg to be broken, is excessive and properly re-

ducible to \$2500. (Beck, J., dissenting.) *Lombard v. Chicago, R. I. & P. R. Co.*, 47 *Iowa* 494.

A verdict in favor of a common laborer, who suffered the loss of part of the second finger of the left hand, for \$2000 is not so large as to evince passion or prejudice on the part of a jury, or to strike the mind at first blush as being unreasonable, and therefore should not be disturbed. *Willard v. Swanson*, 22 *Ill. App.* 424.

768. Crushed hands.—A verdict for \$500 damages for injury to the hand in uncoupling cars—held, not excessive. *Georgia Pac. R. Co. v. Elliott*, 85 *Ga.* 183, 11 *S. E. Rep.* 580.

Where plaintiff had the fingers of his left hand badly mashed while coupling cars, and it appeared that one of his fingers was rendered permanently stiff and that the injury was one of the most painful a man could have, a verdict for \$1425 damages—held, not excessive. *Kline v. Kansas City, St. J. & C. B. R. Co.*, 50 *Iowa* 656.

It cannot be held that a verdict for \$2500 is excessive, in favor of a young man whose right hand was crushed while an employé of a railway company, without fault on his part. *Campbell v. McCoy*, 3 *Tex. Civ. App.* 298, 23 *S. W. Rep.* 34.

A verdict in favor of a brakeman for \$5000 damages, caused by the brakeman's hand being crushed through the negligence of the company in leaving a ditch unfilled, across which the brakeman was required to work in coupling cars, will not be disturbed. *Houston & T. C. R. Co. v. Pinto*, 15 *Am. & Eng. R. Cas.* 286, 60 *Tex.* 516.—FOLLOWING *Houston & G. N. R. Co. v. Randall*, 50 *Tex.* 254.

769. Permanent injuries.—The plaintiff's (an engineer) injuries being grave and permanent, damages to the amount of \$2266.66 are not excessive. *Georgia Pac. R. Co. v. Bowers*, 86 *Ga.* 22, 12 *S. E. Rep.* 182.

A verdict for \$3500 to a section hand whose knee has been permanently injured, he being also a mechanic, is not excessive. *Rayburn v. Central Iowa R. Co.*, 74 *Iowa* 637, 35 *N. W. Rep.* 606, 38 *N. W. Rep.* 520.

In view of plaintiff's age and business at the time of the injury, his previous ability to earn money by his labor, the permanent disablement of his right hand by the accident, and the pain and suffering endured, the court refused to find, in a verdict for

\$4500, such evidence of passion or prejudice in the jury as would warrant a reversal for excessive damages. *Schultz v. Chicago, M. & St. P. R. Co.*, 48 Wis. 375, 4 N. W. Rep. 399.—QUOTED IN *Berg v. Chicago, M. & St. P. R. Co.*, 2 Am. & Eng. R. Cas. 70, 50 Wis. 419.

A verdict for \$5000 damages in favor of an employé engaged as a "pumper," for injuring the foot—the injury being permanent and accompanied by much pain—held, not excessive. *Bonner v. Glenn*, 79 Tex. 531, 15 S. W. Rep. 572.

Plaintiff, a common laborer, sustained injuries which disabled him for life and deprived him of ability to labor, upon which he was dependent for a support. The bone of his thigh was crushed, and he received severe internal injuries and suffered most intense pain for several weeks. Held, that a verdict for \$9000 was not excessive. *Deppe v. Chicago, R. I. & P. R. Co.*, 38 Iowa 592.

Where a young man thirty years of age, engaged in an employment having a regular system of promotions, and earning \$540 a year, was permanently disabled, a verdict of \$11,000, in an action for damages therefor—held, not to be excessive. *Belair v. Chicago & N. W. R. Co.*, 43 Iowa 662, 14 Am. Ry. Rep. 575.—DISTINGUISHING *Rose v. Des Moines Valley R. Co.*, 39 Iowa 246.—EXPLAINED IN *Chase v. Burlington, C. R. & N. R. Co.*, 38 Am. & Eng. R. Cas. 148, 76 Iowa 675.

770. Crippled for life.—A verdict for \$4000 is not excessive when a brakeman, a stout healthy man aged twenty-nine, earning \$2.10 a day, had both ankle joints broken, rendering him practically a cripple for life. *St. Louis & S. F. R. Co. v. Woolum*, 84 Tex. 570, 19 S. W. Rep. 782.

A verdict for \$7500 in favor of a track hand is not excessive where he is so injured that he becomes paralytic. *Cleveland, C. & St. L. R. Co. v. Brown*, 56 Fed. Rep. 804.

A brakeman nineteen years of age, and qualified only for the work of a laborer, but who was a strong and active man, was injured by defendant's negligence so that he suffered excruciating pain for a long time, and the joints of his ankle and foot were stiffened, making him a cripple for life. Held, that a verdict for \$8000 would not be disturbed as excessive. *Henry v. Sioux City & P. R. Co.*, 75 Iowa 84, 39 N. W. Rep. 193.

Where the plaintiff, a brakeman, has suffered beyond estimate, his life for weeks hanging in the balance, and he is a cripple for life, disabled from earning a living, at least at his accustomed employment, if not altogether, and in a large measure deprived of the enjoyment of life, a verdict awarding \$10,000 as compensatory damages will not be set aside upon the ground that it is excessive. *Louisville & N. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. Rep. 706.

771. Totally incapacitated for work.—The plaintiff, a common laborer, in good health and earning about two dollars per day, was injured when he was fifty-six years old, so as to be practically unable to perform manual labor for the remainder of his life. Held, that a verdict for \$1000 was not excessive. *Soderman v. Troy S. & I. Co.*, 70 Hun 449, 53 N. Y. S. R. 678.

A verdict for \$10,000 in favor of an injured employé, who was but twenty-four years old, and is unfitted for pursuing his calling, will not be disturbed as excessive, where it appears, if the amount was loaned at legal interest, his income would only about equal his earnings had the accident not occurred. *Bowers v. Union Pac. R. Co.*, 4 Utah 215, 7 Pac. Rep. 251.

Plaintiff, a brakeman in good health, was injured when he was seventeen years old, by having his collar bone broken, his chest compressed between the cars, his right arm broken in two places above and two places below the elbow, and the elbow joint crushed. His sufferings were long and intense, and his health probably impaired for life, and life itself shortened, with the use of the arm necessarily in a large measure destroyed. Held, that a verdict for \$15,000 would not be disturbed, where the case was fairly submitted to the jury, though regarded as large. *Gulf, C. & S. F. R. Co. v. Dorsey*, 25 Am. & Eng. R. Cas. 446, 66 Tex. 148.

772. Partially incapacitated for work.—A brakeman who was injured, testified that he was entirely disabled for nine months, and after that time was unable to work but about one third of the time, and that as a shoemaker; that he was earning two dollars a day at the time of the injury, and was left with one leg shorter than the other, and with a stiffness in the back which prevented him from sitting long at a time and working at the shoe trade, and that he still continued to suffer. Held,

that a verdict for \$5000 would not be disturbed, though seeming large. *Texas & P. R. Co. v. McAttee*, 61 *Tex.* 695.

Plaintiff was a carpenter in the employ of the defendant company, and was injured when he was fifty-five years old and receiving two dollars and a half to three dollars per day. The injury consisted in the breaking of two ribs and the laceration of the pleura of the left lung, and there was a reasonable certainty, according to the medical testimony, that there would be a permanent adhesion of the pleura to the lung tissue. He testified, two years after the injury, that the pain in his lung was as severe as in the beginning, and that he could not lie on his back; that he could not work for six months after the accident, and had never been able to work since for more than a few days in each week. *Held*, that a verdict for \$5500 was not excessive. *German v. Suburban Rapid Transit Co.*, 13 *N. Y. Supp.* 897, 37 *N. Y. S. R.* 360; *affirmed in* 128 *N. Y.* 681, *mem.*, 29 *N. E. Rep.* 149.

In an effort to couple cars plaintiff was injured, thereby losing the use of one hand. *Held*, that a verdict for \$6000 damages was not excessive. *Missouri Pac. R. Co. v. Jones*, 41 *Am. & Eng. R. Cas.* 363, 75 *Tex.* 151, 12 *S. W. Rep.* 972.—REVIEWING UNION *Pac. R. Co. v. Young*, 19 *Kan.* 493.

Where a sober, prudent, and trusty engineer, less than forty years old, who is earning more than one hundred dollars per month, is permanently injured, so that he can no longer follow his occupation, and cannot earn one third as much as before, a verdict for \$9500 is not excessive. *Knapp v. Sioux City & P. R. Co.*, 71 *Iowa* 41, 32 *N. W. Rep.* 18.

773. Loss of one arm.—A verdict in favor of an injured brakeman for \$7000, where the injury consisted chiefly in the loss of an arm below the elbow, when he was thirty years of age, with a family depending upon him, is not so large as to be disturbed on appeal, where there seems to have been a fair and honest trial. *Sobieski v. St. Paul & D. R. Co.*, 41 *Minn.* 169, 42 *N. W. Rep.* 863.

Plaintiff was twenty-eight years old when he was injured so that he lost the use of his left arm and the hearing of his left ear, and his ability to earn wages was diminished thereby \$300 per annum. *Held*, that a verdict for \$8000 could not be said to be excessive, where the jury were authorized

to allow compensation for pain and suffering and for the inconvenience and mortification of being maimed for life. *Anglo-American P. & P. Co. v. Baier*, 31 *Ill. App.* 653.

In an action by a brakeman for an injury, whereby one arm was amputated, \$10,000 damages were excessive, where there was no ground for vindictive damages. *Illinois C. R. Co. v. Welch*, 52 *Ill.* 183.

774. Loss of one leg.—A verdict for \$9000 for personal injuries of an employé is not excessive when one leg had to be amputated, an arm was crippled, and a severe spinal shock sustained. *International & G. N. R. Co. v. Hinsie*, 82 *Tex.* 623, 18 *S. W. Rep.* 681.

A brakeman twenty-seven years of age, and receiving sixty dollars a month, was injured so as to necessitate the amputation of the leg below the knee, which had to be amputated three times before it healed, confining him to his room for nearly two months, during which time he apparently suffered all that a man could and live. Upon the first trial the jury gave \$8000, and upon the second \$10,000. *Held*, that the latter amount is not so excessive as to warrant setting it aside and granting a new trial. *Atchison, T. & S. F. R. Co. v. Moore*, 15 *Am. & Eng. R. Cas.* 312, 31 *Kan.* 197, 1 *Pac. Rep.* 644.

The plaintiff, who was twenty-four years of age and a brakeman, received an injury resulting in the amputation of his leg about ten inches below the knee. There was no evidence as to what plaintiff was earning at the time of the injury, or that he had paid out or contracted to pay out anything by reason of the injury, or that he lost any time thereby, or to what extent his liability to earn money was impaired by the injury received. No allowance was made for his pain and suffering. *Held*, that a verdict for \$10,000 was excessive. *Missouri Pac. R. Co. v. Dwyer*, 36 *Kan.* 58, 12 *Pac. Rep.* 352.

A verdict of \$11,000—sustained, in the case of a trackman who, being a strong, healthy laboring man, having a wife and four children, received an injury which necessitated the amputation of one leg above the knee, and who, at the time of the trial, nearly a year after the accident, was unable to do any work, and testified that if he walked, stood, sat, or kept his leg down for any length of time he became dizzy. *Berg v. Chicago, M. & St. P. R. Co.*, 2 *Am. &*

Eng. R. Cas. 70, 50 *Wis.* 419, 7 *N. W. Rep.* 347.—*QUOTING* *Schultz v. Chicago, M. & St. P. R. Co.*, 48 *Wis.* 375.—*FOLLOWED IN* *Ferguson v. Wisconsin C. R. Co.*, 19 *Am. & Eng. R. Cas.* 285, 63 *Wis.* 145.

775. Loss of both legs.—Fifteen thousand dollars is not excessive damages for the loss of both legs by a healthy man of forty-five years of age, a teamster in the employ of a railroad at \$45 per month. *Hobson v. New Mexico & A. R. Co.*, (Ariz.) 28 *Am. & Eng. R. Cas.* 360, 11 *Pac. Rep.* 545.

A brakeman, in attempting to descend a ladder while the train was in motion, in obedience to a signal from the engineer, lost his hold by reason of missing rounds and fell to the ground, the wheels of the cars passing over his legs and crushing them so that amputation became necessary. *Held*, that a verdict of \$18,000 was excessive. *Chicago & N. W. R. Co. v. Jackson*, 55 *Ill.* 492, 1 *Am. Ry. Rep.* 569.

776. Loss of one hand.—A train hand was so injured as to cause the loss of his right hand, and was otherwise greatly wounded and bruised, and suffered great pain for a long time. *Held*, that a verdict for \$4700 was not excessive. *Central R. Co. v. De Bray*, 71 *Ga.* 406.

A verdict of five thousand dollars for the loss of a right hand by one employed as a "wiper" in the round house of a railroad company is not excessive. *Grannis v. Chicago, St. P. & K. C. R. Co.*, 81 *Iowa* 444, 46 *N. W. Rep.* 1067.

A verdict for seventy-five hundred dollars for an injury resulting in the loss of a hand to an employé whose expectation of life is about forty-six years—*held*, not excessive. *Sprague v. Allee*, 81 *Iowa* 1, 46 *N. W. Rep.* 756.

In an action by a brakeman which has been pending in the courts for nearly nine years before the verdict, where the plaintiff seeks to recover for personal injuries resulting in the loss of a right hand at the wrist, and such plaintiff at the time of the injury was only twenty-five years of age, and engaged in an employment which has a regular system of promotions, and two juries have returned substantially the same amount of damages, and the verdict has been approved by the trial court—*held*, that a verdict of ten thousand dollars, under all circumstances of the case, is not so flagrant as to compel a reviewing court to disturb the same solely

on the ground of its being excessive. *Union Pac. R. Co. v. Young*, 19 *Kan.* 488, 19 *Am. Ry. Rep.* 52.—*REVIEWED IN* *Missouri Pac. R. Co. v. Jones*, 41 *Am. & Eng. R. Cas.* 363, 75 *Tex.* 151.

777. Loss of fingers.—A verdict for \$2300 for an injury to a brakeman twenty-three years old, whereby he lost his right thumb and had his next two fingers permanently injured and stiffened, and his arm weakened—*held*, not to be excessive. *Whalen v. Chicago, R. I. & P. R. Co.*, 38 *Am. & Eng. R. Cas.* 141, 75 *Iowa* 563, 39 *N. W. Rep.* 894.

A switchman recovered \$5000 damages for injury, his hand having been smashed; one of the fingers had to be amputated, and the others, except the thumb, are stiff and have no grip, the hand being still painful and its usefulness permanently injured. *Held*, that the verdict, though large, will not be set aside for that reason. *Bonner v. Bean*, 80 *Tex.* 152, 15 *S. W. Rep.* 798.

Where a brakeman is injured so as to cause the loss of the thumb and first finger of the right hand, and to be "laid up" for a little over a month, and unable to work for three or four months, a verdict for \$6500 is so excessive as to evince passion or prejudice on the part of the jury, and ought to be set aside. *Kansas Pac. R. Co. v. Peavey*, 11 *Am. & Eng. R. Cas.* 260, 29 *Kan.* 169, 44 *Am. Rep.* 630.—*DISTINGUISHING* *Union Pac. R. Co. v. Young*, 19 *Kan.* 489.

778. Loss of an eye.—Where an employé lost an eye through the use of defective machinery furnished by a railroad, a verdict for \$1425 damages is not excessive. *Central R. & B. Co. v. Attaway*, 90 *Ga.* 656, 16 *S. E. Rep.* 956.

779. Loss of wages, and expenses incurred.—An employé was injured so as to be disabled for some time, and was allowed his expenses incurred and the amount of his wages while disabled, and \$350 for general damages, which seemed to be for pain suffered. *Held*, not to be excessive. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 33 *Fed. Rep.* 803.

780. Internal injuries.—A verdict of \$15,000 for a broken skull, crushed hip, injured spine, deranged urinal organs, and severe suffering, physical and mental, and such internal injuries as in the opinion of his physician must soon end in death, of a brakeman who has been earning \$65 per month—*held*, not excessive. *Texas & P.*

R. Co. v. Hohn, 1 *Tex. Civ. App.* 36, 21 *S. W. Rep.* 942.

781. Nervous troubles.—The plaintiff, an engineer, was injured when he was twenty-five years of age, and the evidence of the physicians left it in doubt as to his final and complete recovery, though at the time of the trial he had so far recovered as to be engaged in business, and to be able to devote most, if not all, of his time thereto. The physicians described the injury as a concussion of the spinal cord, by which a diseased or abnormal condition of the nervous system was produced, affecting his general health to some extent, and depriving him of the ability to engage in active physical labor, and perhaps rendering him unfit to again be a railroad engineer; but he retained his mental faculties. Up to the time of trial he still suffered at times with pain in the back. *Held*, that a verdict for \$9250 was excessive, and a new trial would be granted unless plaintiff filed a remittitur of \$3000. *Sioux City & P. R. Co. v. Finlayson*, 16 *Neb.* 578, 20 *N. W. Rep.* 860, 49 *Am. Rep.* 724.

Plaintiff, a common laborer, was injured when he was thirty-six years old; he had always been well and healthy before the accident, and the evidence tended to show that the injury was to the nerves of the back and to the spinal column and was permanent, very painful, and totally disabling him from labor; that he required constant care of a nurse, and could not dress or undress without assistance, and that his lower limbs were so far paralyzed that he had but little use of them. *Held*, that a verdict for \$15,000 was not excessive. *Reddon v. Union Pac. R. Co.*, 5 *Utah* 344, 15 *Pac. Rep.* 262.

VII. ENGLISH AND CANADIAN STATUTES.

782. Employers' Liability Act of 1880.—In the Employers' Liability Act of 1880 (43 & 44 Vict. c. 42), § 1, defining the liability of employers for personal injury caused to their workmen "by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer," the expression "works" must be taken to mean works already completed, and not works in course of construction which are, on completion, to be connected with or used in the business of the employer. *Howe v. Finch*, *L. R.* 17 *Q. B. D.* 187.

Under the act an employé who is injured by reason of the negligence of a fellow-workman to whose orders he was bound to conform and did conform, by reason of which the injury resulted, is entitled to compensation. *Millward v. Midland R. Co.*, *L. R.* 14 *Q. B. D.* 68, 54 *L. J. Q. B. D.* 202, 53 *L. T.* 255, 33 *W. R.* 366, 49 *J. P.* 453.

Where an employé is not obliged to obey a foreman who offers him extra money to perform a service, the foreman is not one for whose acts the company is liable under the Employers' Liability Act. *Bunker v. Midland R. Co.*, 47 *L. T.* 476, 31 *W. R.* 231.

An employé of a company known as a "capstan-man," who propels a series of trucks along a track by means of hydraulic power, and injures another employé engaged in similar work at some distance away, is a person who has charge or control of "a train upon a railway" within the meaning of section 1, subsection 5, of the act, and the company is liable for his negligence. *Cox v. Great Western R. Co.*, *L. R.* 9 *Q. B. D.* 106, 30 *W. R.* 816.

The word "railway," as used in the fifth subsection of the first section of the act, applies to a temporary railway constructed by a contractor for the purposes of the construction of works. *Doughty v. Firbank*, *L. R.* 10 *Q. B. D.* 358, 52 *L. J. Q. B. D.* 480, 48 *L. T.* 530, 48 *J. P.* 55.

A workman employed in the signal department of a railway to clean, oil, and adjust locking apparatus, and subject to the orders of an inspector in the same department who is responsible for the points and locking gear, does not have "charge or control" of the points within the meaning of section 1, subsection 5, of the Employers' Liability Act, so as to make the company liable for his negligence whereby an injury is caused to a fellow-servant. *Gilbs v. Great Western R. Co.*, *L. R.* 12 *Q. B. D.* 208, 53 *L. J. Q. B. D.* 543, 50 *L. T.* 7, 32 *W. R.* 329, 48 *J. P.* 230; *affirming L. R.* 11 *Q. B. D.* 22, 48 *L. T.* 640, 31 *W. R.* 722.

The mere fact that a machine is dangerous to a workman employed to work with it does not show that there is a defect in the condition of the machine within the meaning of the Employers' Liability Act of 1880, section 1, subsection 1, inasmuch as by section 2, subsection 1, of the act, the only defects in respect of which the employer is

liable are defects implying negligence of the employer or some one in his service intrusted by him with the duty of seeing that the machine is in proper condition. *Walsh v. Whiteley*, L. R. 21 Q. B. D. 371.

783. Employers and Workmen Act of 1875.—The driver of a tram car is not "a person to whom the Employers and Workmen Act 1875 applies," and therefore is not entitled to the benefit of the Employers' Liability Act 1880. *Cook v. North Metropolitan Tramways Co.*, L. R. 18 Q. B. D. 683. — **APPLYING** *Morgan v. London General Omnibus Co.*, L. R. 13 Q. B. D. 832. — **REVIEWED IN** *Hunt v. Great Northern R. Co.*, [1891] 1 Q. B. 601.

The plaintiff was in the employment of a railway company as guard of a goods train. His main duty was to guard and conduct the train and to marshal the trucks; but it was also a part of his duty at times to assist in coupling and uncoupling the trucks and in unloading them. *Held*, that he was not a "workman" as defined by section 10 of the Employers and Workmen Act 1875, and was not therefore a person to whom the provisions of the Truck Acts (1 & 2 Wm. IV. c. 37, and 50 & 51 Vict. c. 46) applied. *Hunt v. Great Northern R. Co.*, [1891] 1 Q. B. 601. — **REVIEWING** *Morgan v. London General Omnibus Co.*, L. R. 12 Q. B. D. 201; *Cook v. North Metropolitan Tramways Co.*, L. R. 18 Q. B. D. 683.

784. Workmen's Compensation for Injuries Act — Ontario.—B., the plaintiff's son, was employed as fireman on a locomotive in charge of a driver named R., B. being under his orders. B. was severely scalded by the bursting of the boiler, from which death resulted. The accident was apparently caused by the sudden influx of cold water into the boiler, which had been allowed to run too low. There was no evidence to show to whom the negligence was attributable; but it was proved that, though the company held the driver responsible as regards the engine, it was the duty of the fireman, for which he also was responsible to the company, to attend to the supply of water, which was part of his education to fit him for the superior position of driver, and that from his position he had greater facilities for opening the valve than those possessed by the driver; and from a report put in by one of the defendants' officials it appeared that B. had charge of the water at the time of the

accident. In an action against defendants for damages under "the Workmen's Compensation for Injuries Act," 49 Vict. c. 28, section 3, subsection 5 (O)—*held*, that the defendants were not liable. *Brunell v. Canadian Pac. R. Co.*, 15 Ont. 375.

EMPLOYERS' LIABILITY ACT.

Of England, see EMPLOYES, INJURIES TO, 782.

— **Massachusetts**, effect of, to bar suit at common law, see EMPLOYES, INJURIES TO, 551.

EMPLOYMENT.

Assumption of risks of, see EMPLOYES, INJURIES TO, 182-205; 704-752.

Contracts of, generally, see EMPLOYES, 1-9.

Evidence of nature of, see EMPLOYES, INJURIES TO, 573.

Of attorneys, see ATTORNEYS, 1-4.

— **brakeman**, by conductor, see CONDUCTOR, 4.

— **common agents**, by connecting carriers, see CARRIAGE OF PASSENGERS, 517.

— **convicts**, see CRIMINAL LAW, 3.

— **detective**, by station agent, see STATION AGENTS, 8.

— **infant**, without consent of parents, see EMPLOYES, INJURIES TO, 459.

— **physician**, in cases of personal injuries, see MEDICAL SERVICES, 1-18.

— **subagents and assistants**, see AGENCY, 26.

Offer of, after injury, admissibility of evidence of, see EVIDENCE, 61.

Power of infant to enter into contract of, see EMPLOYES, INJURIES TO, 457.

Working under orders outside of, see EMPLOYES, INJURIES TO, 270-284.

ENACTMENT.

Of ordinances consenting to use of streets by railways, see STREETS AND HIGHWAYS, 82.

— **statutes**, see STATUTES, 1-5.

ENCROACHMENTS.

In streets and highways, liability for, see STREETS AND HIGHWAYS, 403-412.

ENGINEERS.

See CIVIL ENGINEERS; LOCOMOTIVE ENGINEERS.

ENGINES.

Claims against government for building, see CLAIMS AGAINST UNITED STATES, 5, 6.

Contributory negligence of child climbing upon, see CHILDREN, INJURIES TO, 83.
 Defects in, when constitute negligence, see NEGLIGENCE, 23.
 Duty to carry as freight, see CARRIAGE OF MERCHANDISE, 36.
 Fitness of, under English statutes, see LEASES, ETC., 126.
 Injuries to employes caused by defects in, see EMPLOYES, INJURIES TO, 129-133, 150, 155-178, 193, 212, 220, 239, 290, 314, 353, 354, 362, 371-373, 383, 385, 406, 444, 445, 450, 525, 533, 538, 610, 687, 692, 739, 749; FELLOW-SERVANTS, 21-24, 39, 66, 67, 96, 384, 385.
 Liability for fires as affected by condition or management of, see FIRES, 34-57, 166, 179, 180, 204-206, 224, 229-234, 237-242, 247, 248, 254, 255, 260, 264-268, 277, 282-284, 309-312, 316.
 — in cases of explosion of, see EXPLOSIONS, 3.
 — to passengers for defects in, see CARRIAGE OF PASSENGERS, 191, 192.
 Not consuming smoke, penalty for, see PENALTIES, 3.
 Payment of claims for, by receiver, see RECEIVERS, 84.
 Persons riding on, not passengers, see CARRIAGE OF PASSENGERS, 21.
 Riding on engine, when contributory negligence, see CARRIAGE OF PASSENGERS, 461.
 Taxation of, see INTERSTATE COMMERCE, 206.
 Trespasser riding on pilot of, see TRESPASSERS, INJURIES TO, 84.
 When deemed fixtures, see FIXTURES, 9.
 — engineer should reverse, see CARRIAGE OF PASSENGERS, 203.
 — subject to levy, see EXECUTION, 10.

ENGLAND.

Amalgamation of companies in, see CONSOLIDATION, 21.
 Carrier's lien for charges in, see CARRIAGE OF MERCHANDISE, 380.
 Compulsory purchase of lands under statutes of, see EMINENT DOMAIN, 1086-1209.
 Conditions exempting carrier from liability to person riding on free pass in, see PASSES, 21.
 Jurisdiction of county courts in, see JURISDICTION, 16.
 Liability of carrier as insurer in, see CARRIAGE OF MERCHANDISE, 24.
 Local assessments upon steam railways in,

for repairs, paving, etc., see STREETS AND HIGHWAYS, 359.

Occupation of streets by steam roads under legislative grants of, see STREETS AND HIGHWAYS, 60.

Operation of Lord Campbell's Act in, see DEATH BY WRONGFUL ACT, 11.

Passenger fares in, see TICKETS AND FARES, 136-149.

Power to appoint receivers in, see RECEIVERS, 7.

— mortgage road in, see MORTGAGES, 4.

Powers of railway commissioners in, see RAILWAY COMMISSIONERS, 6.

Rating of railways in, see TAXATION, 363-383.

Respective rights and liabilities of connecting lines in, see CONNECTING LINES, 3.

Rule in, as to limitation of liability for negligence, see CARRIAGE OF LIVE STOCK, 77; CARRIAGE OF MERCHANDISE, 479.

Sale of goods to enforce lien for charges under statute of, see CARRIAGE OF MERCHANDISE, 398.

Statutory duty to fence in, see FENCES, 35.

— regulation of grade crossings in, see CROSSING OF STREETS AND HIGHWAYS, 96.

Transportation of diseased cattle in, see CARRIAGE OF LIVE STOCK, 115.

When negligence of parent is imputable to child in, see CHILDREN, INJURIES TO, 126.

ENGLISH STATUTES.

As to carriage of goods, see CARRIAGE OF MERCHANDISE, 518-538.

— — — passengers, see CARRIAGE OF PASSENGERS, 520-522.

— — — discrimination, see DISCRIMINATION, 5, 6, 10, 34, 40, 66.

— — — distribution of damages for causing death, see DEATH BY WRONGFUL ACT, 71.

— — — foreclosure of mortgages, see MORTGAGES, 167.

— — — injuries to employes, see EMPLOYES, INJURIES TO, 782-784.

— — — intersection of railways, see CROSSING OF RAILROADS, 58-61.

— — — joint use of stations, see STATIONS AND DEPOTS, 148.

— — — liability for injuries caused by fire, see FIRES, 18.

— — — to injured employes, see EMPLOYES, INJURIES TO, 782-784.

— — — preference stock, see STOCK, 4.

— — — private ways, see PRIVATE WAYS, 10.

— — — procedure in justice of the courts, see JUSTICE OF THE PEACE, 10.

— — — rates of freight, see CHARGES, 87-128.

STREETS AND
roads under
STREETS AND

Act in, see
1.
AND FARES,

RECEIVERS,

TGAGES, 4.
ners in, see

ATION, 363-

of connect-
LINES, 3.

ity for negli-
STOCK, 77;
479.

r charges un-
AGE OF MER-

FENCES, 35.
ngs in, see

HIWAYS, 96.
le in, see CAR-

imputable to
INJURIES TO,

YES.

CARRIAGE OF

RIAGE OF PAS-

MINATION, 5,

for causing
FUL ACT, 71.

s, see MORT-

EMPLOYES, IN-

see CROSSING

STATIONS AND

ed by fire, see

see EMPLOYES,

CK, 4.

WAYS, 10.

urts, see Jus-

GES, 87-128.

As to recovery of excessive charges, see
CHARGES, 43.

— regulation of charges by commissioners,
see CHARGES, 19.

— running powers, see LEASES, ETC.,
118-128.

— sales of liquor to travelers, see INTOXI-
CATING LIQUORS, 6.

— street and highway crossings, see
CROSSING OF STREETS, ETC., 7.

— taxation, rating, etc., see TAXATION,
363-383.

Incorporation of railways under, see INCOR-
PORATION, ETC., 4.

Interpretation of Employers' Liability Act
of 1880, see FELLOW-SERVANTS, 195.

"Telegraph Acts," decisions under, see
TELEGRAPH LINES, 11.

ENTRIES.

In books, as evidence, see EVIDENCE, 159,
226.

— legislative journals, see STATUTES, 3.

Of deceased party, as evidence, see Evi-
DENCE, 228.

ENTRY.

By cattle on track, pleading and proof as to,
see ANIMALS, INJURIES TO, 128, 351,
352, 395, 463, 474, 619, 620.

— company, after payment of land damages
into court, see EMINENT DOMAIN, 401.

— when a trespass, see EMINENT DOMAIN,
1057, 1058, 1061, 1062.

Illegal, ejectment for, see EJECTMENT, 2;
EMINENT DOMAIN, 1014.

Of car, by passenger, see CARRIAGE OF PASSEN-
GERS, 14, 78, 219, 374, 375.

— judgments or decrees, see JUDGMENT, ETC.,
1-8.

— nunc pro tunc, see EMINENT DOMAIN,
850.

— on garnishee's answer, see ATTACH-
MENT, ETC., 59.

— — report of referee, see REFERENCE, 6.

— nolle prosequi in criminal prosecution for
causing death, see DEATH BY WRONGFUL
ACT, 449.

— transfer on book, to pass title to stock,
see STOCK, 82.

— verdict for land damages, interest from
time of, see EMINENT DOMAIN, 764.

On land by permission, ejectment in cases of,
see EJECTMENT, 4-7.

— land under license, see LICENSE, 2-8.

— turnpike, trespass for unlawful, see TURN-
PIKES, ETC., 6.

— wife's land, power of husband to author-
ize, see HUSBAND AND WIFE, 1.

Pending appeal in condemnation proceed-
ings, see EMINENT DOMAIN, 389, 1035.

Right of, before compensation made, see
EMINENT DOMAIN, 412-418.

Under English Lands Clauses Act, section
85, see EMINENT DOMAIN, 1095.

— license from or contract with owner, as a
defense in ejectment, see EMINENT DO-
MAIN, 1020, 1021.

Writ of, for misappropriation of land, see EMI-
NENT DOMAIN, 986. See also FORCIBLE
ENTRY, ETC.

EQUALITY.

In facilities for interchange of traffic, see
INTERSTATE COMMERCE, 99.

— mileage rates, see INTERSTATE COMMERCE,
41.

Of assessments on stock, see SUBSCRIPTIONS
TO STOCK, 63.

— charges, by common law, see CHARGES, 23.

— taxes and assessments, see STREET RAIL-
WAYS, 303.

EQUIPMENT.

Of train, duty of company as to, see CARRIAGE
OF PASSENGERS, 197-212; EMPLOYES,
INJURIES TO, 177.

EQUITABLE.

Assignment, what amounts to, see ASSIGN-
MENT, 25, 26.

Estoppel, doctrine of, generally, see ESTOP-
PEL, 18-36.

Lien, of city subscribing in aid of railroad,
on stock certificates, see MUNICIPAL AND
LOCAL AID, 177.

Mortgages, what are, effect, etc., see MORT-
GAGES, 86.

Relief, damages incidental to, see ELEVATED
RAILWAYS, 66.

— limitations of suits for, see ELEVATED RAIL-
WAYS, 169.

Remedy, existence of, effect on jurisdiction,
see ATTACHMENT, ETC., 1.

EQUITIES.

Priority of mortgages over subsequent, see
MORTGAGES, 107-129.

Purchase of stock with notice of, see STOCK,
76.

When purchaser of bonds takes subject to,
see BONDS, 50; MUNICIPAL AND LOCAL
AID, 357, 358, 383-385.

EQUITY.

Bill in, to stay prosecution of ejectment
suit, see EJECTMENT, 33.

Bills of discovery, see DISCOVERY, ETC., 1.

- Cancellation of patents for lands in, see PUBLIC LANDS, 37.
- Cannot decree a forfeiture, see CHARTERS, 81.
- Conclusiveness of rulings of, in actions at law, see JUDGMENT, ETC., 27.
- Costs in suits in, see COSTS, 8.
- Dissolving injunction for want of, see INJUNCTION, 51.
- Effect of mortgages of after-acquired property in, see MORTGAGES, 46.
- Enforcement of awards of land damages in, see EMINENT DOMAIN, 862.
- lien for charges in, see CARRIAGE OF MERCHANDISE, 396.
- orders of railway commissioners in, see RAILWAY COMMISSIONERS, 333.
- How far follows the statute of limitations, see LIMITATIONS OF ACTIONS, 9.
- Jurisdiction of, in cases of nuisances, see NUISANCE, 18-22.
- to compel issuance and delivery of railway aid bonds, see MUNICIPAL AND LOCAL AID, 285.
- under English Railway and Canal Traffic Act, see CARRIAGE OF MERCHANDISE, 530.
- Pleading in, generally, see PLEADING, 81-88.
- Power of, over railway intersection proceedings, see CROSSING OF RAILROADS, 60-73.
- to compel construction, see STREET RAILWAYS, 130.
- Proper parties to suits in, see PARTIES TO ACTIONS, 17-25.
- Reformation of insurance policy in, see FIRE INSURANCE, 10.
- Relief in, against engineer's decision as arbitrator, see CONSTRUCTION OF RAILWAYS, 72.
- Remedies in, as between lessor and lessee roads, see LEASES, ETC., 101.
- Remedy of creditors against stockholders in, see STOCKHOLDERS, 31.
- Removal of suits in, to federal courts, see REMOVAL OF CAUSES, 5.
- Restraining discontinuance of highway in, see STREETS AND HIGHWAYS, 35.
- strikes and boycotts in equity, see STRIKES, 6.
- Right of trial by jury in equity, see TRIAL, 2, 3.
- Suits in, by minority against majority of stockholders, see STOCKHOLDERS, 112-117.
- for rescission of construction contracts, see CONSTRUCTION OF RAILWAYS, 101.
- What may be set off in equity, see SET-OFF, ETC., 4.

1. What matters are within the jurisdiction of equity, generally.*—

A court of equity has no jurisdiction to compel the performance of a positive act tending to alter the existing state of things, such as the removal of a work already executed; still, it may, by framing its order in an indirect form, compel a defendant to restore things to their former condition, and thus effectuate the same results as would be obtained by ordering a positive act to be done. The order when thus framed is called a mandatory injunction. *Hall v. Chesapeake, O. & S. W. R. Co.*, (Tenn.) 12 Am. & Eng. R. Cas. 41.

A railroad company applied to the port wardens of Philadelphia for a license to build a bridge with a draw, across the Schuylkill river, which was reported favorably by the wardens, but certain persons interested in the navigation of the river appealed to the court of common pleas. At the time of the appeal a bill in equity was pending, filed by the city, to enjoin the erection of the bridge. *Held*, that as the matter could be more fully determined in the equity proceeding, the appeal would be continued until the equity proceeding was acted on. *In re Churchman's Appeal*, 17 Phila. (Pa.) 118.

2. — and what matters are not.

— From an injury which an individual or a corporation suffers in common with the public generally, equity will not relieve. *Denver & S. R. Co. v. Denver City R. Co.*, 2 Colo. 673, 20 Am. Ry. Rep. 339.—DISTINGUISHING *Newburgh & C. Turnpike Road v. Miller*, 5 Johns. Ch. (N. Y.) 101.

Equity will not interfere with a scheme for the reorganization of a company, deliberately entered into by those controlling the road, to compel the adoption of another scheme preferred by some of the parties in interest, unless a very strong case is made. *Matthews v. Murchison*, 17 Fed. Rep. 760.

Where a company has let a contract for the construction of a bridge, and afterward trouble arises between the company and its contractors, which leads to a suspension of the work on the bridge, equity has no power to seize and use the plant of the contractors, and to carry the work to completion, upon the application of the company. *Texas & St. L. R. Co. v. Rust*, 5 McCrary (U. S.) 348, 17 Fed. Rep. 275.

* Equity jurisdiction in general, over corporations, see note, 9 L. R. A. 651.

thin the
erally.*—
saction to
positive act
e of things,
ready exe-
ts order in
dant to re-
dition, and
s as would
ve act to be
framed is
Hall v.
(Tenn.) 12

to the port
license to
across the
ported favor-
persons in-
the river ap-
pleas. At
equity was
enjoin the
that as the
terminated in
al would be
ceeding was
Appeal, 17

are not.
individual or
non with the
not relieve.
ity R. Co., 2
9.—DISTIN-
mpike Road
ot.

h a scheme
company, de-
controlling
n of another
the parties in
se is made.
Rep. 760.

contract for
and afterward
pany and its
uspension of
nity has no
of the con-
to comple-
ne company.
5 McCrary

, over corpo-

A defense based on matter of fact as to liability to pay interest on an award on proceedings to condemn land, available on a trial by jury, but as to which no evidence was offered, nor any request made to the judge to admit any evidence respecting it—though he directed the jury to find against the defendant as to the interest, which direction was considered and sustained, and the liability specially found against the defendant on review by a court of law of competent jurisdiction—cannot be made the ground of relief in equity. *Mettler v. Easton & A. R. Co.*, 26 N. J. Eq. 65.

Equity will not interfere to control the proceedings of other courts where there have been mere errors of law or judgment, or where the matter is cognizable in the inferior court, and has been there decided, or even where there is concurrent jurisdiction. *Galveston, H. & S. A. R. Co. v. Dowse*, 70 Tex. 1, 6 S. W. Rep. 790.—FOLLOWED IN *Texas & P. R. Co. v. Kuteman*, 54 Fed. Rep. 547, 4 C. C. A. 503.

A claim of a contractor who has built cottages on the land of a company, under an agreement that the company was to pay a certain annual rent for them, and to have the option of purchasing at a certain price, being simply for payment of money, cannot be enforced in equity, even though such contractor is unable to sue at law, because the agreement was not under seal. Nor can such contractor claim compensation for having been induced to build on land of the company, inasmuch as he did not act in ignorance of its rights. *Crampton v. Varna R. Co.*, L. R. 7 Ch. 562, 20 W. R. 713, 41 L. J. Ch. 817.

3. — parties in pari delicto.—Where the parties to a lease are *in pari delicto*, and the contract has been executed on the part of the plaintiff by the delivery of the leased property, the plaintiff cannot recover back the possession of the property leased; so where the lease of an Illinois railroad to an Indiana railroad is *ultra vires* as to the latter, the former is bound to take notice of such fact. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 52 Am. & Eng. R. Cas. 68, 145 U. S. 393, 12 Sup. Ct. Rep. 953; *affirming* 33 Fed. Rep. 440.

Where a company enters into a construction contract with persons, some of whom are its directors, and in pursuance of the contract executes its bonds, secured by a mortgage on the road, the fact that the

contract is void will not enable the company, being a party to the fraud, to maintain a bill to cancel the mortgage as a cloud upon title. *Farley v. St. Paul, M. & M. R. Co.*, 4 McCrary (U. S.) 138, 14 Fed. Rep. 114.

Railroad companies are subject to the rule that a court of equity will not interfere on behalf of either party to a contract which is fraudulent as to both parties; and where a company, through its directors, makes a fraudulent contract, a court of equity will not interfere to either enforce it, set it aside, or to award damages for its breach. *Lewis v. Meier*, 4 McCrary (U. S.) 286, 14 Fed. Rep. 311.

In such a case equity will leave the parties where it finds them, without inquiring as to whether or not a fraud has been perpetrated. *Jackson v. McLean*, 100 Mo. 130, 13 S. W. Rep. 393.

4. — complainant not coming with clean hands.—Persons who buy stock in a corporation with a view of instituting litigation, and after certain proceedings by the directors, which are made the basis of the complaint, are not entitled to favor in a court of equity and an injunction, unless a clear case is made out. *Kingman v. Rome, W. & O. R. Co.*, 30 Hun (N. Y.) 73.

Such parties are regarded as interlopers, seeking to disturb the rights of innocent holders of stock, to their great prejudice, and should not be allowed to have or retain injunctions, where their rights can be preserved by awarding damages for such injury as they may have sustained. *Kingman v. Rome, W. & O. R. Co.*, 30 Hun (N. Y.) 73.

5. — because there is a remedy at law.—(1) *General rules.*—Suits in equity will not be sustained in any case where a plain, adequate, and complete remedy may be had at law. *Payne v. Kansas & A. V. R. Co.*, 47 Am. & Eng. R. Cas. 228, 46 Fed. Rep. 546.

To bar equitable relief the legal remedy must be equally effectual with the equitable remedy as to all the rights of a complainant. Where the remedy at law is not as practicable and as efficient to the ends of justice, and its prompt administration, the aid of equity may be invoked. *Payne v. Kansas & A. V. R. Co.*, 47 Am. & Eng. R. Cas. 228, 46 Fed. Rep. 546.

Where, in an action to enjoin a company from entering upon plaintiff's right of way, and from further constructing its railroad thereon, and from interfering with plaintiff's

occupancy thereof, and praying that the title thereto be decreed to be in plaintiff as against defendant, it appears that defendant has completed its road over the property in dispute, and is in the actual use and possession thereof, the court should not pass upon the title, but should leave the plaintiff to his remedy at law. (Berry, J., dissenting.) *Washington & I. R. Co. v. Caur d'Alene R. & N. Co.*, 2 Idaho 544, 21 Pac. Rep. 562.

An owner who has no freehold or leasehold estate in the bed of the street is not entitled to ask a court of equity to restrain the construction of a railroad, inasmuch as section 169 of art. 23 of Md. Code, making railroad companies responsible for injuries done to private property by the laying down of their tracks on public streets, furnishes adequate remedy by action at law. *O'Brien v. Baltimore Belt R. Co.*, 50 Am. & Eng. R. Cas. 194, 74 Md. 363, 22 Atl. Rep. 141.

Where a highway is located across a railroad track and the commissioners assess no damage to the company, and make no report, equity will not interfere on the application of the company, where it appears that it has a complete remedy at law by appeal. *Chicago & A. R. Co. v. Maddox*, 92 Mo. 469, 10 West. Rep. 42, 4 S. W. Rep. 417.

An allegation that a corporation was not properly organized, and therefore had no authority to collect a subscription made to its capital stock, is a question that can be tried in a court of law. *Thompson v. Guion*, 5 Jones Eq. (N. Car.) 113.

An allegation that a subscription to the stock of an incorporated railroad company was to be paid in work and materials, also that it was made upon a condition that the road was to be located on a particular site, are matters cognizable by a court of law. *Thompson v. Guion*, 5 Jones Eq. (N. Car.) 113.

Where a party contracts with a company to build a line of telegraph along its road, and the company agrees to use the same and pay to the builder one half of the earnings, and after a time ceases to use it, the remedy of the builder is by a suit at law for damages, and not in equity. *Appeal of Pittsburgh & C. R. Co.*, 99 Pa. St. 177.

A court of equity will not entertain a bill to set aside an order made under Va. Code 1873, ch. 56, relating to taking land for public use, which order confirms a report of commissioners assessing damages to a land-

owner for a right of way taken by a railroad company, though the bill avers that the company falsely promised to establish a depot on the land, and that by reason of such promise the commissioners were induced to assess less damages, and the landowner not to except to their report. The landowner's remedy in such case is an action at law for breach of promise. *Shenandoah Valley R. Co. v. Robinson*, 82 Va. 542.

(2) *Illustrations.*—A railroad in Ohio commenced an action at law to recover the amount of protested drafts given it in payment of freights. The cause was removed from a state court to a U. S. circuit court, and there, on leave of court, the company filed a bill in equity in lieu of their original petition. Held, that there was a complete remedy at law, and the circuit court could not entertain such a bill; and that there was nothing in the peculiar practice in that state to render such a change necessary. *Thompson v. Central Ohio R. Co.*, 6 Wall. (U. S.) 134.

A special assessment was made by a city against railroad property for sewer purposes, and notice given, but the company failed to appear before the council. It appeared that the council had power to revise, confirm, or annul the assessment, and that the matter could be taken to the circuit court. Held, that the company had waived any irregularities in the proceedings, and having a complete remedy at law, of which it had failed to avail itself, equity would not entertain a bill for any irregularities, or even want of compliance with requirements of law. *Ottawa v. Chicago & R. I. R. Co.*, 25 Ill. 43.—FOLLOWING *McBride v. Chicago*, 22 Ill. 574.

A company contracted in writing with a person who was to manufacture for the company a certain number of cars. This contract was assigned to another, who furnished a part of the cars, and assigned his interest in the amount owing upon the contract to certain persons to whom he was indebted for materials furnished for the construction of the cars. These creditors instituted their suit in chancery against the company to enforce the payment of the money due under the contract to them. Held, that complainants had no status in a court of equity. If there were any bona fide assignees of the contract, they could maintain a suit at law for their use. *Chicago & N. W. R. Co. v. Nichols*, 57 Ill. 464, 10 Am. Ry. Rep. 471.

6. — which must be exhausted.

Creditors and stockholders of a railroad corporation, organized under the laws of Missouri and Kansas, brought a suit in equity in the U. S. circuit court for the southern district of New York against S., to enforce his liability as the holder of shares of unpaid capital of the corporation, without making the corporation a party, and without the creditors being judgment creditors elsewhere than in Missouri. *Held*, that the corporation was not a necessary party; and that the creditors being simply creditors at large, and not having exhausted their remedy at law, and the Missouri judgments not having in New York the force of domestic judgments, except for the purpose of evidence, the bill would not lie. *Walser v. Seligman*, 21 *Blatchf. (U. S.)* 130, 13 *Fed. Rep.* 415.

7. — laches — Lapse of time — Acquiescence.

—(1) *General rules.*—The doctrine of laches applies as between a minority of the stockholders and the acts of a majority; supineness in such cases being construed as acquiescence of the minority in the acts of the majority. *Burgess v. St. Louis County R. Co.*, 99 *Mo.* 496, 12 *S. W. Rep.* 1050.

Where a company enters upon land by the owner's acquiescence, and constructs its road under a contract to purchase on certain agreed terms, the representative of the original landowner cannot maintain a bill more than twenty years afterward to compel the company to pay the fee value of the land, and to pay for the use of the land, where no reason for the delay is shown. *Sommer v. Pacific R. Co.*, 4 *Mo. App.* 586.

Where the contract of lease has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant, and the defendant has held the property and paid the stipulated consideration from time to time for seventeen years, so far as the plaintiff corporation can be considered as representing the stockholders and seeking to protect their interests, it and they are barred by laches in failing to bring an action to set the lease aside in that time. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 52 *Am. & Eng. R. Cas.* 68, 145 *U. S.* 393, 12 *Sup. Ct. Rep.* 953; *affirming* 33 *Fed. Rep.* 440. —**DISTINGUISHING** *Congress & E. Spring Co. v. Knowlton*, 103 *U. S.* 49; *Logan County Nat. Bank v. Townsend*, 139 *U. S.* 67.

(2) *Illustrations.*—After a company had become hopelessly insolvent, its treasurer obtained a judgment for \$26,000 against it, and under execution sold the company's property to a new company, in which the treasurer and one of the directors were principal stockholders. Soon afterward the director, by authority of the first company, conveyed all of the property to the new company for an expressed consideration of about \$13,000. Subsequently a third company, by authority of statute, condemned the entire property, in eminent domain proceedings, the jury assessing the damages at \$536,260, and by agreement, and after the condemning company had assumed certain encumbrances, judgment was entered for \$235,566. Plaintiff was the holder of certain bonds of the old company, and more than seven years after these transactions, and some thirteen or fourteen years after their bonds had become due and unpaid, filed a bill attacking the conveyance as fraudulent, and seeking to recover the amount of their bonds. *Held*, that plaintiff had been guilty of laches, and the bill could not be maintained. *Liverpool Royal Bank v. Grand Junction R. & D. Co.*, 125 *Mass.* 490.

The B., W. & N. R. Co. entered into an agreement with defendant and another as trustees for purchasers of the franchise and property of a railroad, by which said company agreed to lease its franchise, rights, and privileges to a new company to be organized by the trustees, and to receive therefor a specified amount of the stock of the new company. It was provided that in case the new company at any time during the period of the lease should issue mortgage bonds, the holders of said stock so transferred should have the right to exchange their stock for an equal amount of the bonds. The agreement was carried out, the stock delivered in payment for the lease was soon thereafter sold and transferred by the lessor, but the transfer was not entered on the books of the new company. Subsequently, the new company issued mortgage bonds. Nine years thereafter, and after the new company had passed into the hands of a receiver and its stock had become worthless, plaintiff, who was the owner of a portion of the stock so transferred, presented the same to defendant and demanded that it should be exchanged for bonds, and this having been refused, brought this action to recover

the value of the bonds. *Held*, that plaintiff and the previous owners of his stock were chargeable with laches in the exercise of the option, and so had waived all right to elect to exchange the stock for bonds. *Catlin v. Green*, 120 N. Y. 441, 24 N. E. Rep. 941, 31 N. Y. S. R. 532.

In a suit in chancery against a railroad for unlawfully diverting water from a stream, plaintiff's damages were found by the master to be \$75 per annum; but by reason of his laches in asserting his claim the court refused an injunction. *Held*, that his damages were to be ascertained by capitalizing the \$75, and adding thereto the amount due at the time of the decree. *Pennsylvania R. Co.'s Appeal*, 125 Pa. St. 189, 17 Atl. Rep. 478.

A railroad desiring to construct its road across a canal contracted with the canal company to fill up the canal at the place of crossing and construct a new channel, the engineers of each party to inspect the work when completed, and, upon their approval, the canal company to accept it, the report of the engineers to conclude the parties. The railroad completed the work and notified the canal company to appoint its engineer, which the latter failed to do, and subsequently a portion of the work (a bridge) was destroyed. On a bill filed by the railroad to compel an acceptance of the work—*held*, that the plaintiff should have applied to the court within the two years the bridge was standing to compel the defendants to select an engineer, but having delayed until a personal examination became impossible, and no obstacle existing to the plaintiff enforcing at law any other rights under the contract, the bill should be dismissed. *Desjardins Canal Co. v. Great Western R. Co.*, 2 Up. Can. E. & A. 330; reversing 9 Grant's Ch. (U. C.) 503.

A railroad foreclosure suit was appealed by the corporation, and after considerable delay the decree of foreclosure was affirmed. The company then promptly began a new suit to set aside the decree as fraudulent. *Held*, that the time the suit was in the appellate court could not be counted against the company on the question of laches. *Pacific R. Co. v. Missouri Pac. R. Co.*, 111 U. S. 505, 4 Sup. Ct. Rep. 583.

A company filed a bill to set aside certain fraudulent contracts made by its agents in the sale of lands, and alleged that some of the fraudulent acts were not discovered

"until within a few weeks last past," and that others were not discovered "until within a few days last past," and still a third was not discovered until "within the three months last past." *Held*, that this was not sufficient to make the bills bad on demurrer, as showing that the company had been guilty of laches in not sooner disaffirming the fraud. *Northern Pac. R. Co. v. Kindred*, 14 Fed. Rep. 77, 3 McCrary (U. S.) 627.

8. Jurisdiction in particular cases.—Accounts of agents.—Courts of equity have jurisdiction in matters of account involving the dealings of agents whenever it appears that a discovery is necessary, or there are mutual accounts between the parties, or the remedy at law is not plain, simple, and free from difficulty. *Vilwig v. Baltimore & O. R. Co.*, 79 Va. 449.

Where an agent occupies a position of trust, is charged with the duty not only of keeping but of rendering regular accounts, and is custodian of most of the vouchers of his receipts and disbursements, the remedy at law is not so plain and easy as in equity, which is the appropriate forum for relief in such cases. *Vilwig v. Baltimore & O. R. Co.*, 79 Va. 449.—*QUOTING Coffman v. Sangston*, 21 Gratt. (Va.) 263.

Where such agent executes a bond, January 13, 1875, for faithful performance of his official duties in the future, and on January 30, 1875, vouchers are passed to his credit for moneys by him paid out before said 13th, such credit must be applied to the agent's arrearages anterior to the execution of said bond. *Vilwig v. Baltimore & O. R. Co.*, 79 Va. 449.

9. — administration of assets.*—Assets of an incorporated company are regarded in equity as held in trust for the payment of the debts of the corporation, and courts of equity will enforce the execution of such trusts in favor of the creditors, even when the matters in controversy may not be cognizable in a court of law. *Bradley v. Converse*, 4 Cliff. (U. S.) 375.

If, without the payment of its debts, the property of a corporation is distributed among its stockholders, or transferred for their benefit to third persons, who are not bona fide purchasers, without notice; or if

* Change by court of equity of investments or character of property of beneficiaries, see note, 12 AM. & ENG. R. CAS. 407.

past," and
red "until
and still a
within the
, that this
bills had on
company had
disaffirm-
Co. v. *Kin-
ary* (U. S.)

ular cases
rts of equity
account in-
whenever it
necessary, or
en the par-
plain, sim-
Vilwig v.

49.
position of
not only of
ar accounts,
e vouchers
sts, the rem-
easy as in
e forum for
v. *Baltimore*
OTING Coff-
) 263.
bond, Janu-
ance of his
on January
to his credit
resaid 13th,
the agent's
ation of said
O. R. Co., 79

assets.*—
pany are re-
rust for the
corporation,
ce the exe-
of the credit-
controversy
ourt of law.
S.) 375.
its debts, the
distributed
nsferred for
who are not
notice; or if

f investments
ficiaries, see

the corporation should be dissolved, or become so disorganized that it cannot be made answerable at law, then a court of equity will lay hold of its property and effects and apply them to the payment of its creditors. *Montgomery & W. P. R. Co. v. Branch*, 59 Ala. 139.

Where there are sundry *fi. fas.* against an insolvent railroad company, threatening to seize and sell the road with its equipments, extending one hundred miles in length through six different counties, equity will take jurisdiction of the matter, direct a sale of the entire property for the benefit of all concerned, and distribute the fund according to the practice and usage in chancery in a creditor's suit against executors and administrators. In such a case no other court but that of chancery possesses adequate jurisdiction to reach and dispose of the entire merits. *Macon & W. R. Co. v. Parker*, 9 Ga. 377.

10. — confining company within strict charter limits.—While the legislature has an undoubted constitutional authority to invest a corporation with the rights, powers, and privileges contained in its charter, yet when a court of equity is applied to to define the nature of these rights and protect the citizen in the enjoyment of his property, it will see to it that the corporation is restrained within the limits of its chartered privileges. *Deschamps v. Second & T. St. Pass. R. Co.*, 3 Phila. (Pa.) 279.—**QUOTING** *Packer v. Sunbury & E. R. Co.*, 19 Pa. St. 218; *Com. v. Pittsburgh & C. R. Co.*, 24 Pa. St. 161.—**FOLLOWED** IN *Whitson v. Philadelphia & G. F. Pass. R. Co.*, 3 Phila. 284.

11. — cancellation of certificate of stock.—One who is entitled to corporate stock wrongfully transferred to another can maintain a bill in equity to have the wrongful certificates canceled and certificates issued to himself, if the loss of the stock cannot be adequately compensated in a common law action. *Walker v. Detroit Transit R. Co.*, 47 Mich. 338, 11 N. W. Rep. 187.

12. — cancellation of contracts.—Equity has the power to order the cancellation of municipal railway aid bonds or other written instruments, but it is a power which it will exercise with care, and it will not be exercised where the legal remedy is adequate, certain, and complete. *Farmington v. Sandy River Nat. Bank*, 85 Me. 46, 26 Atl. Rep. 965.

5 D. R. D.—23.

The fear that the holders of municipal railway aid bonds will resort to a suit thereon in the federal courts, which will render a decision adverse to the municipality, is no ground for a court of equity to decree a cancellation of such bonds. *Farmington v. Sandy River Nat. Bank*, 85 Me. 46, 26 Atl. Rep. 965.

Where the directors of a corporation enter into an agreement on its behalf, the corporation may itself subsequently apply in equity to have said agreement set aside on the ground of fraud. The corporation is not debarred from seeking such relief on the ground that it was a party to the fraud. *Metropolitan El. R. Co. v. Manhattan El. R. Co.*, 15 Am. & Eng. R. Cas. 1, 11 Daly (N. Y.) 373, 14 Abb. N. Cas. 103.

A municipal corporation exchanged lots with a railroad company under a contract that a street running through the lot conveyed to the company should be forever closed. After the company had built a depot and tracks on the lot and expended large sums of money in improving it, the city threatened to reopen the street, paying the usual damages therefor under its charter, under a claim that the municipal authorities did not have the power to make the contract. *Held*, that the company might maintain a bill for a cancellation of the contract, or for such other relief as might be found proper. *Mayor, etc., of Atlanta v. Macon & W. R. Co.*, 59 Ga. 251.

Plaintiff sued to procure the cancellation of an instrument by which he consented to the construction of a railroad along an alley in the rear of certain lots owned by him, alleging, among other grounds, fraud in the company's agent in representing to plaintiff that the construction of the road would increase his property in value over one hundred per cent. It appeared that such representations were not of existing facts, but a mere expression of opinion as to future benefits that would be derived by the building of the road. *Held*, no ground for avoiding the contract. *Consolidated R. T. & E. R. Co. v. O'Neill*, 25 Ill. App. 313.

13. — cancellation of guaranty.—Where fraud or illegality in the inception of negotiable paper is shown, the burden is on the indorsee to show that he is a *bona fide* holder. So where a railroad company seeks to have canceled its guaranty of the bonds of another company on the ground of illegality and fraud, the bill is good, without

alleging that the defendants, who were indorsees, are not *bona fide* holders for value. *Louisville, N. A. & C. R. Co. v. Ohio Valley I. & C. Co.*, 57 *Fed. Rep.* 42.

Where it appears that the guaranty of one railroad company has been fraudulently placed upon the bonds of another company, the guarantor company may maintain a bill to cancel such guaranty on the ground that it will prevent a multiplicity of suits, though it might have a good defense at law to an action on each of the bonds. *Louisville, N. A. & C. R. Co. v. Ohio Valley I. & C. Co.*, 57 *Fed. Rep.* 42.—FOLLOWING *New York & N. H. R. Co. v. Schuyler*, 17 *N. Y.* 592; *Saratoga County Sup'rs v. Deyoe*, 77 *N. Y.* 219; *Sheffield Waterworks v. Yeomans*, *L. R.* 2 *Ch.* 8.

14. — cancellation of lease.—The board of directors of a railroad company leased the same to another company upon certain terms. Subsequently, by agreement the leases were modified in their terms, and a bill was filed by the first-named company to annul the last-mentioned agreement. *Held*, that as they had ample remedy at law by an action to recover rent due under the original lease, equity had not jurisdiction to grant the relief sought. *Metropolitan El. R. Co. v. Manhattan El. R. Co.*, 15 *Am. & Eng. R. Cas.* 1, 11 *Daly (N. Y.)* 373, 14 *Abb. N. Cas.* 103.

But in the above case a third railroad company had also leased its road to the company first named, and was a party to the agreement specified above, and directly interested therein. *Held*, that as said third company could not by an action at law on the lease be released from its liability under the agreement, this circumstance would alone confer upon the court jurisdiction to grant the equitable relief sought. *Metropolitan El. R. Co. v. Manhattan El. R. Co.*, 15 *Am. & Eng. R. Cas.* 1, 11 *Daly (N. Y.)* 373, 14 *Abb. N. Cas.* 103.

15. — cancellation of satisfaction of judgment.—The complainant had purchased all existing judgments against the defendant company, and afterwards purchased all the company's property sold under a trust deed junior to the judgment liens, and then marked as satisfied the judgments he held, on the proper dockets. In a subsequent litigation the deed of trust and his purchase under it were adjudicated to be illegal and void. He thereupon filed a bill in chancery against the company,

praying that his satisfaction marked against the judgments might be set aside, and that the defendant be decreed to pay the judgments, and that he might have general relief. A demurrer to this bill, on the ground that he had full remedy at law, and that therefore a bill in equity did not lie, was overruled. *Hay v. Alexandria & W. R. Co.*, 1 *Hughes (U. S.)* 168.

16. — correction of mistakes.—When by the terms of the contract between a company and a contractor the estimates of the engineer are to be binding upon the parties, a court of chancery has power to correct the mistakes of the engineer. *Mansfield & S. C. R. Co. v. Veeder*, 17 *Ohio* 385.—QUOTED IN *Mitchell v. Kavanagh*, 38 *Iowa* 286.

17. — enforcement of liens.*—Liens are enforceable in equity unless the law has provided another mode. This is true of vendors' liens, equitable and other mortgages, and all statutory liens, except when the lien is in the nature of a pledge, and possession accompanies it. A court of law does not possess the means of enforcing such liens. *Cairo & V. R. Co. v. Fackney*, 78 *Ill.* 116.

Where a corporation is authorized to make a contract involving a trust and mortgage lien, and the statute confers a power of seizure and sale upon the trustee, the statute remedy is not exclusive. Such a statute creates rights and relations well known to equity, and its jurisdiction attaches. *State v. Florida C. R. Co.*, 15 *Fla.* 690.

18. — enforcement of payment of rent.—Where a company leases its road, and certain other companies guarantee a certain rental, and the guarantor companies are the holders of certain bonds of the lessee company, after the lessee company has failed for nearly two years to pay the stipulated rental, equity will compel the lessee company to pay the rental due before it pays any interest on the bonds held by the guarantor companies, and, if necessary, an injunction will issue requiring such payment, and to prevent the guarantor companies from disposing of the bonds. *St. Louis, A. & T. H. R. Co. v. Indianapolis & St. L. R. Co.*, 9 *Biss. (U. S.)* 99.

* Jurisdiction of equity to enforce statutory liens against railroads, see 57 *AM. & ENG. R. CAS.* 425, *abstr.*

19. — enforcement of trusts.—Equity will take jurisdiction of a conventional trust, such as the conveyance of the property of a railroad to trustees to secure a mortgage, and direct its administration, on application of the trustee or a party in interest, where there is any difficulty or complication likely to arise in the execution of the trust, or any question of dispute as to the powers or duties of the trustee, or as to the rights of the parties beneficially interested in the trust. *Northern C. R. Co. v. Keighler*, 29 Md. 572.

It was alleged in a bill in chancery that certain railway stock and a note were owned by a railway company, which that company had agreed to sell to G. for a certain sum of money; that they were placed in the hands of D., as a trustee, to be delivered upon the payment of such money; that D. had violated his duty as trustee by disposing of the stock and note, and that the person to whom he delivered them had notice of the trust, and sought to enforce the trust. *Held*, that the bill showed a case of equitable jurisdiction. *Stickney v. Goudy*, 132 Ill. 213, 23 N. E. Rep. 1034.

20. — enforcement of unconscionable contract.—After a railroad, in which a county held stock, had become insolvent, its stockholders agreed to a foreclosure sale and payment of sixteen per cent. of the par value of their stock. After this a holder of bonds of the county issued for said stock obtained judgment for interest due on bonds, and on execution sold \$30,000 of the county's stock to plaintiff for \$50. *Held*, that a court of equity will not lend its aid to compel a transfer of the stock to him. *Mississippi & M. R. Co. v. Cromwell*, 91 U. S. 643.

21. — reformation of contracts.—Equity will not reform a contract to subscribe to the stock of a railroad by inserting a condition, except on proof that the parties intended at the time of execution to insert it, and that it was omitted by fraud, accident, or mistake of fact; and the mistake must have been that of both parties, and not of one only. *Bell v. Americus, P. & L. R. Co.*, 76 Ga. 754.—**DISTINGUISHING** *Hendrix v. Academy of Music*, 73 Ga. 437; *Academy of Music v. Flanders*, 75 Ga. 14.

In an action to reform a contract granting a right of way to a railroad, and for relief thereunder after the same is reformed, the court may specifically enforce the same

when that may be done, or may give adequate compensation for its non-performance. *Columbus & T. R. Co. v. Steinfeld*, 22 Am. & Eng. R. Cas. 260, 42 Ohio St. 449.

On trial of an action to reform a written substituted contract granting a right of way, for fraud or mistake, and to enforce the same when reformed, or, if the same could not be reformed, then to rescind the written contract, there may be given in evidence the original writing made by the same parties upon the subject-matter in dispute, and also the subsequent acts done or procured to be done by the party charged with the fraud and which tend to prove the fraud or mistake. *Columbus & T. R. Co. v. Steinfeld*, 22 Am. & Eng. R. Cas. 260, 42 Ohio St. 449.

In an action to reform a written contract granting a right of way the court may find that the written contract in dispute does not contain the true agreement of the parties; but if the party complaining neither pays back nor offers to return the money received by him under the contract, it is error to order the contract to be set aside and held for naught. *Columbus & T. R. Co. v. Steinfeld*, 22 Am. & Eng. R. Cas. 260, 42 Ohio St. 449.

A deed conveying land to the receivers of a company contained a provision as it was written, that the latter would erect and maintain necessary fences on the land, and at the same time the receivers verbally agreed to give the grantor a free annual pass for life. The receivers objected to the provision relating to the fences, and upon their agreeing to observe the provision anyhow, it was stricken out and they built the fences and kept them up while they remained in possession of the road; but a reorganized company that succeeded the receivers refused to keep up the fences or to issue a pass. *Held*, that the grantor might maintain a bill to have the deed reformed by inserting the provision relating to the fences, but was not entitled to relief as to the annual pass. *Martin v. New York, S. & W. R. Co.*, 12 Am. & Eng. R. Cas. 448, 36 N. J. Eq. 109.—**FOLLOWING** *Green v. Morris & E. R. Co.*, 12 N. J. Eq. 165.

22. — setting aside lease.—A bill filed by stockholders to annul a lease is not sufficient where it merely alleges that they had requested the company to take action which would lead to the annulling of the lease "and gave to said company as the grounds for said action substantially the

grounds herein stated, especially alleging the invalidity of the lease," and further charging that they were advised by the proper officers of the company that no action would be taken, and the company refused and neglected to take such action or to recognize complainants as having any right to interfere. The rule laid down by the supreme court of the United States requires such bills to set forth particularly the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and if necessary of the shareholders, and the cause of his failure to obtain such action. *McHenry v. New York, P. & O. R. Co.*, 22 *Am. & Eng. R. Cas.* 50, 22 *Fed. Rep.* 130.

Where a plan for the reorganization of a company provides that the administration of the company's affairs shall be under the supervision of the bondholders, who should have "full control of the expenditures and policies of the company," and it appears that the amount of the bonds is greater than the value of the property, and the interest thereon greater than the net income of the road, so that the bondholders are in substance and fact the owners of the road, and the stock has no value except for speculative purposes, equity will not interfere with a lease which is satisfactory to the bondholders on the application of certain disinterested stockholders. *McHenry v. New York, P. & O. R. Co.*, 22 *Am. & Eng. R. Cas.* 50, 22 *Fed. Rep.* 130.

23. — suits to determine compensation for land taken.—Where, in a bill filed for that purpose, a deed granting a right of way to a railroad is set aside and damages given, a court of equity will confirm the right of way of the company and decree the payment of damages therefor. *Atlanta & W. P. R. Co. v. Hodnett*, 36 *Ga.* 669.

Where a deed for a right of way was obtained from a landowner by fraud on the part of a company, the superior court has jurisdiction to set aside the conveyance, but cannot go further, in the same action, and ascertain and enforce payment of damages suffered by the grantor by reason of the appropriation of his land as a right of way by the company, although such appropriation was made by the company under the deed in question. *Allen v. Wilmington & W. R. Co.*, 102 *N. Car.* 381, 9 *S. E. Rep.* 4.

A court of equity cannot determine the

amount of the compensation to be made for lands taken by a railway company by right of eminent domain, the matter being of purely legal cognizance; and in such a case, the failure of a defendant company to answer that the plaintiff has an adequate remedy at law, does not waive the objection. *Buchner v. Chicago, M. & N. W. R. Co.*, 56 *Wis.* 403, 14 *N. W. Rep.* 273.—FOLLOWED IN *Shealy v. Chicago, M. & N. R. Co.*, 72 *Wis.* 471, 40 *N. W. Rep.* 145. REVIEWED IN *Hanlin v. Chicago & N. W. R. Co.*, 20 *Am. & Eng. R. Cas.* 70, 61 *Wis.* 515; *Heiss v. Milwaukee & L. W. R. Co.*, 69 *Wis.* 555, 34 *N. W. Rep.* 916.

24. — suits to recover damages for personal injuries.—Equity will not entertain a bill to recover damages for the death of a person through negligence of a company, although the road at the time of the injury was in the hands of a receiver, and under his entire control, and he has conveyed the road to purchasers subject to all liabilities incurred by the receiver in operating the road. *Brown v. Wabash R. Co.*, 96 *Ill.* 297.

25. Visitatorial powers of a court of equity.—A court of equity has no visitatorial power over corporations, except such as may be expressly conferred on it by statute. *Belmont v. Erie R. Co.*, 52 *Barb. (N. Y.)* 637.

Such power does not extend to the removal of the officers of the corporation, or to take its management from its proprietors or shareholders and place it in the hands of a receiver, on the mere ground that one, or even all, of its trustees or directors are unfaithful. A court may enjoin a trustee or suspend or remove him, and if necessary may order a new election, but cannot substitute its own officer. *Belmont v. Erie R. Co.*, 52 *Barb. (N. Y.)* 637.

26. Procedure, generally.—Where bonds sought to be reached have been, by the action of a court of chancery, placed in the custody of a trustee, there to remain until the further order of the court, a third person, not a party to the suit in which the order was made so placing the custody of the bonds, but entitled to them, can only reach them by original bill. *Thomas v. Morgan County*, 59 *Ill.* 479.

In a suit by such holder of the order given for the bonds by the original railroad company, to compel the delivery of them by the custodian, such original company,

to be made
company by
matter being
and in such a
t company to
an adequate
ve the objec-
& N. W. R.
b. 273.—*FOL-*
M. & N. R.
ep. 145. RE-
& N. W. R.
61 Wis. 515;
Co., 69 Wis.

er damages
equity will not
ages for the
negligence of a
t the time of
of a receiver,
and he has
ers subject to
e receiver in
v. *Wabash R.*

s of a court
ty has no vis-
ations, except
ferred on it by
Co., 52 Barb.

end to the re-
corporation, or
its proprietors
n the hands of
nd that one, or
ectors are un-
n a trustee or
d if necessary
at cannot sub-
ont v. *Erie R.*

ally.—Where
have been, by
ecery, placed in
ere to remain
e court, a third
it in which the
the custody of
them, can only
ll. *Thomas v.*

r of the order
original railroad
elivery of them
iginal company,

having ceased to exist, and all its rights and franchises vested in its successor, is not a necessary party to the bill. *Thomas v. Morgan County*, 59 Ill. 479.

27. Who may maintain bill—Foreign company.—Before a shareholder is permitted in his own name to institute and conduct a litigation, which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances, or action in conformity with his wishes. *Howes v. Oakland*, 104 U. S. 450. *Huntington v. Palmer*, 104 U. S. 432.

Executors in New York invested in notes issued by receivers under order of court, and after they were due, sued to enforce them in a federal court in Vermont. *Held*, that as the right did not accrue to the testator, but to the plaintiffs themselves in the capacity of executors, and for anything that appears, in the same state where they were attempting to enforce the right, they might maintain the bill, though they had only qualified as executors in New York. *Griswold v. Central Vt. R. Co.*, 20 Blatchf. (U. S.) 212, 9 Fed. Rep. 797.

The state court that authorized the issue of such notes provided, by an order, that if they were not paid the holders might apply to the court for a summary order for payment out of any property in the hands of the trustees; and a copy of this order was printed on the notes as a part thereof. *Held*, that the fact that holders had a right to apply to the state court would not prevent them from applying to a federal court sitting in the same state, where the court otherwise had jurisdiction. *Griswold v. Central Vt. R. Co.*, 20 Blatchf. (U. S.) 212, 9 Fed. Rep. 797.

A bill in equity, brought by a railroad corporation against a construction company, to restrain an action at law brought by the company against the corporation, to recover sums of money alleged to be due for building its railroad, can be maintained only on the equity which the stockholders in the corporation have, if the bill proceeds upon the ground that the work was done under a contract entered into by the corporation with an irresponsible person, through the fraudulent procurement of the managing director of the corporation and for his personal benefit, which contract was

assigned to the construction company, with the assent of the directors of the corporation, many of whom were interested in the construction company, although there are creditors of the corporation, and among them is the government which granted its charter. *Union Pac. R. Co. v. Credit Mobilier*, 16 Am. & Eng. R. Cas. 570, 135 Mass. 367.

A foreign construction company cannot maintain a bill in equity against a foreign railroad corporation and a citizen to enforce specific performance of a covenant in a contract for the delivery of bonds and certificates of stock in payment of work to be performed by the construction company in a foreign state, and to restrain by injunction the citizen from disposing here of shares of stock and bonds of the railroad company, alleged to have been delivered to him in violation of the plaintiff's rights, although the railroad corporation has an office in the commonwealth for the transfer of shares of its capital stock, and has appeared by attorney in the suit. *Kansas & E. R. Constr. Co. v. Topeka, S. & W. R. Co.*, 16 Am. & Eng. R. Cas. 495, 135 Mass. 34, 46 Am. Rep. 439.

28. Sufficiency of the bill.—Where a court orders receivers to issue notes or obligations for the purpose of stocking the road, which are made a lien on the rolling stock, and another company subsequently acquires the right to operate the road, but the receivers are not discharged, and a bill is filed to enforce the lien against the rolling stock, both the receivers and the company operating the road are properly joined as defendants. *Griswold v. Central Vt. R. Co.*, 20 Blatchf. (U. S.) 212, 9 Fed. Rep. 797.

In such case, if the obligations or notes are sufficiently set forth in the bill to show their terms and effect, that is enough, without reciting them, or further referring to them or attaching copies of them to the bill. *Griswold v. Central Vt. R. Co.*, 20 Blatchf. (U. S.) 212, 9 Fed. Rep. 797.

Where a bill was filed in the Supreme Court of the District of Columbia, in behalf of some of many bondholders under railroad mortgages, impeaching the proceeding in a cause in equity instituted by the trustees in said mortgages in the Circuit Court of the United States for the Western District of Texas, and the title of purchaser under such proceedings, and where the bill shows that the circuit court obtained juris-

diction of the cause, and that the same is still pending in said court, and that the relief which is sought here can be obtained on proper application—*held*, such a bill is bad on demurrer. *Fayolle v. Texas & P. R. Co.*, (D. C.) 3 *Am. & Eng. R. Cas.* 532.

A bill charged, in effect, that the respondents, being officers of a railroad corporation, undertook, in its behalf, to take up certain of its bonds called "Norfolk county bonds," the corporation having deposited with the respondents certain other bonds called "Berdell bonds," on which to raise money wherewith to buy the Norfolk bonds, and that the respondents charged extortionate commissions on settlement, in violation of their trust and duty. The proofs tended to show the facts to be that the respondents bought up the Norfolk county bonds, and sold them to the corporation at an extortionate rate; that one of the respondents received cash for his interest, and the other part cash and part notes of the corporation, with Berdell bonds at fifty per cent. as collateral; that the collateral had been sold and not enough realized to pay the notes of the corporation. *Held*, that the allegations in the bill and the facts as exhibited by the proofs on the record did not agree. *Bradley v. Converse*, 4 *Cliff. (U. S.)* 366.

ERIE R. CO.

1. Status between Paterson and Jersey City.—The status of the Erie railway company from Paterson to the Hudson river is as follows: For about one and a half miles from Paterson it uses the franchises of the Paterson and Ramapo railroad company, and for the residue of the distance it uses the franchises of the Paterson and Hudson railroad company, down to the depot at Jersey City. *McGregor v. Erie R. Co.*, 35 *N. J. L.* 89.

Such company must be considered as running on the Long Dock railroad, under the Paterson and Hudson river charter rates, and it cannot charge as a common carrier. An additional four cents per hundred pounds for terminal expenses on freights received at Jersey City or New York, and upon all freights from said cities, is unlawful. *McGregor v. Erie R. Co.*, 35 *N. J. L.* 89.

2. Bergen tunnel.—Under N. J. Act of March 4 and 11, 1858 (*Pamph. L.* pp. 204, 321), the Delaware, L. & W. R. Co. has a right of way through the Bergen tunnel, and

the consequent right to connect its tracks with those running through the tunnel. Under the acts of 1858, the Erie R. Co.'s trains of every description have the right of precedence over those of the Delaware, L. & W. R. Co. through the tunnel. But the unlawful use of this privilege, with a view to embarrass or impede the Delaware, L. & W. R. Co. in the use of the tunnel, or the road connected with it, will, upon a proper case being made, be a ground of interference by the court. That part of the regulations of the Erie company giving preference to extra or irregular trains, enjoined. *Delaware, L. & W. R. Co. v. Erie R. Co.*, 21 *N. J. Eq.* 298.

ESCAPE.

- Of animal to track, without fault of owner, see ANIMALS, INJURIES TO, 235.
- child from control of custodian, when contributory negligence, see CHILDREN, INJURIES TO, 144.
- fire, liability for, see FIRES, 89-98.
- presumption that company will not permit, see FIRES, 259.
- slave, liability of carrier for, see CARRIAGE OF SLAVES, 9.
- steam, frightening teams by, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, 16.
- liability to persons injured by, see CARRIAGE OF PASSENGERS, 283; EMPLOYEES, INJURIES TO, 174.
- proving carelessness in permitting, see DEATH BY WRONGFUL ACT, 205.

ESCHEAT.

1. Lands of foreign corporations, when subject to escheat.—If a railroad company incorporated under the laws of another state has acquired and holds real estate within Pennsylvania, it is incumbent on the company to show that it has been specially authorized by law to hold such property. In the absence of such proof the acquisition and holding are illegal and subject to escheat under the act of April 26, 1855 (*P. L.* p. 329). *Com. v. New York, L. E. & W. R. Co.*, 30 *Am. & Eng. R. Cas.* 136, 114 *Pa. St.* 340, 7 *Atl. Rep.* 756.

2. — and when not.—Since that section of the Pa. Const. (article 17, § 5) which forbids certain corporations to hold lands, except such as may be necessary for carrying on their businesses, affixes no penalty for its violation, lands held by a railway company in violation thereof do not

ect its tracks
the tunnel.
Erie R. Co.'s
ve the right of
Delaware, L.
nel. But the
e, with a view
Delaware, L. &
tunnel, or the
upon a proper
d of interfer-
t of the regu-
giving prefer-
ins, enjoined.
Erie R. Co.,

ault of owner,
235.
todian, when
see CHILDREN,

89-98.
any will not
see CARRIAGE

by, see CROSS-
ETC., AT, 16.
ed by, see CAR-
3; EMPLOYES,
permitting, see
265.

corporations,
t.—If a rail-
under the laws
ed and holds
ia, it is incum-
w that it has
w to hold such
such proof the
legal and sub-
t of April 26,
New York, L.
g. R. Cas. 136,
6.

— Since that
rticle 17, § 5)
ations to hold
be necessary
ses, affixes no
nds held by a
thereof do not

thereby escheat to the state, although the franchises of the corporation are liable to be forfeited. *Com. v. New York, L. E. & W. R. Co.*, 43 *Am. & Eng. R. Cas.* 550, 132 *Pa. St.* 591, 19 *Atl. Rep.* 291.—REAFFIRMED IN *Com. v. New York, L. E. & W. R. Co.*, 139 *Pa. St.* 457.

Under a statute providing that all lands held by corporations in violation thereof shall escheat to the state, before there can be an escheat it must be shown that the corporation has the legal or the equitable title to the lands. If it has no title there can be no escheat. *Com. v. New York, L. E. & W. R. Co.*, 43 *Am. & Eng. R. Cas.* 550, 132 *Pa. St.* 591, 19 *Atl. Rep.* 291.

The fact that a foreign railroad company, having no license to hold lands in Pennsylvania, is the owner of the entire capital stock of a mining company incorporated in this state and authorized to hold lands, does not render liable to escheat lands held by the mining company to which the railroad company has neither legal nor equitable title. *Com. v. New York, L. E. & W. R. Co.*, 139 *Pa. St.* 457, 21 *Atl. Rep.* 528.

Such a holding of stock, being authorized by law, cannot constitute a "device" within the meaning of section 5, act of April 26, 1855, P. L. p. 329, prohibiting the holding of lands by certain corporations in violation of the provisions of the said act. *Com. v. New York, L. E. & W. R. Co.*, 139 *Pa. St.* 457, 21 *Atl. Rep.* 528.—OVERRULING *Com. v. New York, L. E. & W. R. Co.*, 114 *Pa. St.* 340. REAFFIRMING *Com. v. New York, L. E. & W. R. Co.*, 132 *Pa. St.* 591.

3. Proceedings by quo warranto.—In a proceeding by *quo warranto*, under the Pennsylvania Act of April 26, 1855, providing that no foreign corporation shall hold real estate in that state unless expressly so authorized, to escheat certain real estate of a foreign railroad company, it is a question of fact for the jury whether the foreign corporation has acquired and is holding real estate in its own name, or through a trustee, in the name of the corporation incorporated under the law of Pennsylvania purchased and owned by it, or by any other device. *Com. v. New York, L. E. & W. R. Co.*, 30 *Am. & Eng. R. Cas.* 136, 114 *Pa. St.* 340, 7 *Atl. Rep.* 756.—OVERRULED IN *Com. v. New York, L. E. & W. R. Co.*, 43 *Am. & Eng. R. Cas.* 550, 132 *Pa. St.* 591; *Com. v. New York, L. E. & W. R. Co.*, 139 *Pa. St.* 457.

ESCROW.

Delivery of deeds in, see DEEDS, 5.
— — subscription to stock in, see SUBSCRIPTIONS TO STOCK, 155.
Voting stock deposited in, see STOCKHOLDERS, 17.

ESTATES.

What acquired in condemnation proceedings, see EMINENT DOMAIN, 128-132, 1214.
— granted by deed, see DEEDS, 24-27.

ESTIMATES.

Of company's engineer, see CONSTRUCTION OF RAILWAYS, 51-65.
— damages to rental value, basis of, see ELEVATED RAILWAYS, 155.
— engineer, duty of superintendent to pay, see SUPERINTENDENT, 4.
Power of contractor to keep back, see CONSTRUCTION OF RAILWAYS, 83.

ESTOPPEL.

Against the state, see STATE AID, 22.
By former suit against carrier, see CARRIAGE OF MERCHANDISE, 332.
By part performance, see LEASES, ETC., 80.
Of carrier, to deny receipt of goods, see BILLS OF LADING, 15, 16.
— — — dispute shipper's title, see CARRIAGE OF MERCHANDISE, 220, 711.
— city, to deny validity of bonds, see MUNICIPAL AND LOCAL AID, 340, 378-381.
— director, by action of board, see DIRECTORS, ETC., 22.
— grantor of right of way, see EMINENT DOMAIN, 229.
— holder, by recitals in bonds, see MUNICIPAL AND LOCAL AID, 385.
— — of bonds of road aided by state, see STATE AID, 33.
— landowner, by acquiescence or laches, see EMINENT DOMAIN, 1044.
— licensor to revoke license, see LICENSE, 15, 16.
— stockholders, by consenting to acts of directors, see CONSOLIDATION, ETC., 13.
— — to impeach corporate acts, see STOCKHOLDERS, 5.
To appeal, see EMINENT DOMAIN, 880.
— claim full compensation for carrying the mails, see CARRIAGE OF MAILS, 12.
— deny liability on subscription, see SUBSCRIPTIONS TO STOCK, 177.
— — preliminary payment on stock subscription, see SUBSCRIPTIONS TO STOCK, 134.
— — validity of corporate acts, see ULTRA VIRES, 6.

To deny validity of over-issued stock, see STOCK, 17.

— object to repeal of charter, see CHARTER, 39.

— — report of commissioners, see EMINENT DOMAIN, 815.

— prove damages different from case made by pleadings, see EMINENT DOMAIN, 612.

— question corporate status, see SUBSCRIPTIONS TO STOCK, 156.

— — priority of receivers' certificates, see RECEIVERS, 103.

— set up defense in foreclosure, see MORTGAGES, 103.

I. GENERAL PRINCIPLES.....	360
II. ESTOPPEL BY RECORD.....	364
III. ESTOPPEL BY DEED.....	368
IV. ESTOPPEL IN PAIS.....	372

1. Equitable Estoppel, Generally.....	372
2. Acquiescence; Assent; Ratification; Silence.....	372
3. Acts of Agents.....	379
4. Compromises; Contracts.....	381
5. Representations; Admissions.....	383

I. GENERAL PRINCIPLES.

1. What amounts to an estoppel, generally.*—Where a company is sued for a personal injury where a highway crosses its track, it is estopped from denying that the crossing is a public highway, where it is constructed as such, and as required by statute, and the company has invited the public to use it as such. *Ohio & M. R. Co. v. Cox*, 26 Ill. App. 491.

The rule that conduct by one of the parties to a transaction will not amount to an estoppel if it was not accompanied by a design that the other party should act upon it, and has not been followed by any change in the situation of that party, applies to the retention, until shortly before suit, of money paid for a release of damages for personal injuries, given by the plaintiff when not of sound mind. *Carroll v. Manchester & L. R. Corp.*, 111 Mass. 1.

One who, without right and by trespass, enters and occupies the land of another cannot claim, by reason of anything he may do upon it, and the owner's delay (short of the time limited by statute) to oust him, that the owner is estopped to seek any appropriate, legal, or equitable remedy in respect to

it. *Wayzata v. Great Northern R. Co.*, 46 Minn. 505, 49 N. W. Rep. 205.

One who would be estopped to deny, as against a corporation, that he is a stockholder thereof, will also be held estopped as against a judgment creditor of the corporation. *Fisher v. Seligman*, 9 Am. & Eng. R. Cas. 670, 75 Mo. 13.

The voluntary labor and expenditure by a city, upon a work the performance of which, by the railroad company, had been released, without calling upon the company to do the work, will not sustain an action by the city, for labor and expenditure which were voluntary, even if the release by the city was without consideration. *Galveston v. Galveston City R. Co.*, 45 Tex. 435, 13 Am. Ry. Rep. 274.

When, between the time when the defendant appropriated the lot in question for right of way purposes, and the trial in the circuit court of an appeal taken from the condemnation proceedings, the defendant had sold certain buildings which were on the lot, to third parties, who had removed them—held, that defendant was estopped from claiming upon the trial of the appeal, that the buildings did not become its property by virtue of the condemnation, and that plaintiffs should not recover for their value. *Hollingsworth v. Des Moines & St. L. R. Co.*, 17 Am. & Eng. R. Cas. 113, 63 Iowa 443, 19 N. W. Rep. 325.

2. Estoppel against the state.—That the state, as well as individuals, may be estopped by its acts, conduct, silence, and acquiescence, is established by a line of well-adjudicated cases. *State v. Flint & P. M. R. Co.*, 89 Mich. 481, 51 N. W. Rep. 103.

In cases of public grants of lands in aid of railroads, the government is estopped by the action of congress from time to time, and the acts of the duly authorized agents of the government, and the public records made of such acts, from alleging the non-fulfilment of the statutory conditions of the grant. *United States v. Dallas Military Road Co.*, 41 Fed. Rep. 493.

The doctrine of estoppel cannot be invoked against the crown. *Humphrey v. Queen*, 2 Can. Exch. 386.

3. When a corporation is estopped.*—Not only estoppels, technically

* Estoppel of corporation to set up plea of *ultra vires*, see very full note, 20 L. E. A. 765.

Estoppel of terminal company to deny authority of other companies to make through contract of shipment, see 45 AM. & ENG. R. CAS. 331, *abstr.*

* Estoppel in actions to enforce statutory liability of stockholders for corporate debts, see note, 3 AM. ST. REP. 872.

so called, but estoppels *in pais* operate both for and against corporations. *Selma & T. R. Co. v. Tipton*, 5 Ala. 787.—QUOTED IN *Hall v. Selma & T. R. Co.*, 6 Ala. 741.

Where a company is sued as the "Montgomery & Mobile R. Co.," and it appears by attorney and pleads to the action in the name of the "Montgomery & M. R. Co.," the identity of the two companies is conclusively admitted, for the purpose of an action on the judgment rendered therein. *Mobile & M. R. Co. v. Yeates*, 67 Ala. 164.

Where one railroad company succeeds to the rights and property of another, matters constituting an estoppel as against the original company may apply to the purchasing company. *East Ala. R. Co. v. Tennessee & C. R. R. Co.*, 29 Am. & Eng. R. Cas. 363, 78 Ala. 274.—ADHERING TO *Tennessee & C. R. Co. v. East Ala. R. Co.*, 75 Ala. 516. RECONCILING *Morris & E. R. Co. v. Blair*, 9 N. J. Eq. 635; *Mason v. Brooklyn City & N. R. Co.*, 35 Barb. (N. Y.) 373; *Atchison, T. & S. F. R. Co. v. Mecklin*, 23 Kan. 167; *Van Wyck v. Knevals*, 106 U. S. 360; *Camp v. Camp*, 5 Conn. 291, 13 Am. Dec. 60.

Where a company has not done any work in the construction of its road for twenty-three years, and during all, or nearly all, of that time there has been no meeting of stockholders, or election of officers, except just before suit is brought, during which time its officers had made a conveyance, so far as they could, of its right of way, to another company, with the express approval of some of the stockholders, and without the dissent of any at the time, and after all expectation of building the road seems to be abandoned, it will be estopped from interfering with the completion of the road after the purchasing company has expended large sums of money in building the road. *Little Rock & N. R. Co. v. Little Rock, M. R. & T. R. Co.*, 4 Am. & Eng. R. Cas. 392, 39 Ark. 663.—QUOTING *Rochdale Canal Co. v. King*, 16 Beav. 630.

Where a company has recognized a road which crosses its line of railway as a public road, by establishing and keeping up a crossing thereon, it will not be permitted to question the public character of such road. *Markham v. Houston & T. C. R. Co.*, 1 Tex. App. (Civ. Cas.) 35.

Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part

of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them. *Gano v. Chicago & N. W. R. Co.*, 13 Am. & Eng. R. Cas. 132, 60 Wis. 12, 17 N. W. Rep. 15.—REVIEWED IN *Yorton v. Milwaukee, L. S. & W. R. Co.*, 18 Am. & Eng. R. Cas. 332, 62 Wis. 367.

If a railway company is guilty of an illegality by working steamboats, not being authorized by law to work them, it cannot set up such illegality as an answer to a claim for damages arising out of the working of such steamboats. *Doolan v. Midland R. Co.*, 2 App. Cas. 792, 3 Ky. & C. T. Cas. xxi.

Where a corporation, relying on the presumption that a statute is constitutional, pays money into court, files exceptions, and takes possession of land, such acts are to be taken as a whole and not by *piecemeal*, not valid in part and void in part; and if the statute turns out to be unconstitutional, no estoppel will arise against such corporation in consequence of complying with the statutory terms. *St. Louis & S. F. R. Co. v. Evans & H. Ste. Brick Co.*, 22 Am. & Eng. R. Cas. 517, 85 Mo. 307.—DISTINGUISHING *Meily v. Zurmehly*, 23 Ohio St. 627; *Wagner v. Railway Co.*, 38 Ohio St. 32; *Redman v. Philadelphia, M. & M. R. Co.*, 33 N. J. Eq. 165. QUOTING *Richards v. Des Moines Valley R. Co.*, 18 Iowa 260; *Central Branch U. P. R. Co. v. Atchison, T. & S. F. R. Co.*, 28 Kan. 453.

Where a company had procured the right to widen their roadbed as first constructed, the fact that they continued to run cars for a number of years over the road as constructed did not estop them from widening the road, on the ground that they had treated it as completed. *Childs v. Central R. Co.*, 33 N. J. L. 323.—DISTINGUISHING *Morris & E. R. Co. v. Central R. Co.*, 31 N. J. L. 206.—REVIEWED IN *State (Morris & E. R. Co., Pros.) v. Hudson Tunnel R. Co.*, 38 N. J. L. 548.

A company proceeded to condemn land, and three parties appearing as claimants of the land and as entitled to the damages, the company paid the money into court, and before the court had determined who was en-

titled thereto, one of the parties sued the company for injuries resulting from starting a fire on the right of way. *Held*, that the company was not estopped from denying plaintiff's title. *Ely v. Norfolk Southern R. Co.*, 102 N. Car. 42, 8 S. E. Rep. 779.

The fact that a company has taken lands on a part of the line to be constructed under its act, does not estop it from showing in a return to a writ of mandamus to compel it to complete the railway, that the capital had not been subscribed and the company could not procure it to be subscribed. *Reg. v. Ambergate, N. & B. R. Co.*, 1 El. & Bl. 372, 17 Jur. 668, 22 L. J. Q. B. 191.

4. Municipal corporations.—Where a municipal corporation enters into a contract with respect to property for depot purposes within its powers, the doctrine of estoppel applies with the same force as against individuals. *Union Depot Co. v. St. Louis*, 76 Mo. 393; *affirming* 8 Mo. App. 412.

A municipal corporation which has contracted that a bonus shall be paid by a company to which it has granted street railway privileges, in lieu of taxes, cannot, after agreeing to remit the bonus and to receive the taxes in its place, and after collecting such taxes, sue to recover the bonus, however true it be that the immunity from taxes was illegal. It cannot claim both. *New Orleans v. Crescent City R. Co.*, 40 Am. & Eng. R. Cas. 281, 41 La. Ann. 904, 6 So. Rep. 719.

Commissioners of highways have no authority to surrender a highway to a railroad company, upon the company constructing a new highway. Therefore a town is not estopped from prosecuting the company for obstructing the highway, because it has expended a considerable sum of money in building a new highway, under an authorized agreement with the commissioners of highways. *Rice v. Chicago, B. & N. R. Co.*, 30 Ill. App. 481.—**QUOTING** *St. Louis, A. & T. H. R. Co. v. Belleville*, 122 Ill. 376.

The assessment of a tax on land held under a railroad grant, without enforcing its collection, will not estop a county from setting up the claim that the land included in the grant was its own property at the time of the levy, under a swamp land grant. *Page County v. Burlington & M. R. R. Co.*, 40 Iowa 520.—**DISTINGUISHED** in *Howard County v. Bullis*, 49 Iowa 519.

Where a contract to convey swamp lands to a railroad company required a vote of the electors to render it binding on a county, its performance by the other party could not be waived nor the county estopped from denying such performance by the action of its board of supervisors in making payments thereunder. *Burlington, C. R. & M. R. Co. v. Benton County*, 56 Iowa 89, 8 N. W. Rep. 797.

The fact that one of several sinking-fund commissioners of a county holding stock was present at a meeting of stockholders of the railroad company, at which they adopted a resolution recommending that, in order to prevent the further accumulation of interest stock, a dividend of one fourth of one per cent., payable in stock, be made, did not bind the county by that recommendation. But even assuming that the county was fully represented at that meeting, that recommendation to the board of directors does not estop the county from claiming that the declaring of the stock dividend did not stop the running of interest. *Hardin County v. Louisville & N. R. Co.*, 92 Ky. 412, 17 S. W. Rep. 860.

Where a city council, without the power, attempts to grant a water right on condition that the grantee will construct a pier, the city itself is not estopped from maintaining ejectment against a railway company that has succeeded to the rights of the original grantee, to recover the land and pier. *Mayor, etc., of N. Y. v. New York C. & H. R. R. Co.*, 53 N. Y. S. R. 383, 69 Hun 324.

How far a city is estopped from opening a street across a railway track by its previous course in inducing the railway company to lay its track on the faith that the street would not be opened, and how such estoppel, if any, is to be pleaded, *quære*. *Grand Rapids v. Grand Rapids & I. R. Co.*, 58 Mich. 641, 26 N. W. Rep. 159.

5. Corporate existence.*—A corporation, by its answer and appearance to the merits, is estopped to deny its corporate existence. *Sappington v. Missouri Pac. R. Co.*, 14 Mo. App. 86.

* Party dealing with *de facto* corporation estopped to deny corporate existence, see note, 20 AM. & ENG. R. CAS. 537.

Subscriber to stock is estopped from denying corporate existence, see note, 81 AM. DEC. 402.

Stockholders estopped from denying corporate existence when sued for unpaid subscriptions, see note, 3 AM. ST. REP. 827.

A person is estopped from denying the existence of a railroad company at the time he contracts with it. If he would deny its existence at a subsequent time he must show how it ceased to exist. *Ensey v. Cleveland & St. L. R. Co.*, 10 Ind. 178.

Where at the time of the organization of a corporation there was a law in force authorizing the same, and after such organization a person contracts with the corporation, and is sued upon such contract, he is estopped to deny the existence of the corporation. *Brownlee v. Ohio, I. & I. R. Co.*, 18 Ind. 63.

A subscriber for stock is estopped to deny the existence of the corporation, in the absence of fraud. *Stoops v. Greensburgh & B. Plank-Road Co.*, 10 Ind. 47.

Where a city becomes a subscriber to the stock of a consolidated railroad company, and issues its bonds in payment thereof, and is subsequently sued on the bonds, it is estopped from denying the existence of the consolidated company, or the validity of the proceedings leading to the consolidation. *Lewis v. Clarendon*, 5 Dill. (U. S.) 329.—QUOTING Douglas County Com'rs v. Bolles, 94 U. S. 104.

Where an association is doing business as common carriers, under a name that imports a corporation, and has offices and officers, such as a corporation might have, it is estopped from denying its corporate existence as to all persons with whom it contracts. *Clarkson v. Erie & N. S. Dispatch*, 6 Ill. App. 284.

In the case of the associates in a corporation *de facto*, and those who have had dealings with it, there is a mutual estoppel resting upon broad grounds of right, justice, and equity which prevents the former from denying and the latter from disputing the incorporation. *Stoutwout v. Michigan Air Line R. Co.*, 24 Mich. 389, 4 Am. Ry. Rep. 63.

In an action to foreclose a railroad mortgage given to secure bonds, a holder of such bonds is estopped from denying the corporate existence of the company. *Wallace v. Loomis*, 97 U. S. 146.

The plaintiff's declaration describing and designating the defendant therein by a corporate name identically the same as that borne by two railway corporations, one of which purports to have been chartered by an act of the legislature of this state, and the other deriving its existence (whether

de facto or *de jure*) from the consolidation of the Georgia corporation with two others, one chartered by North Carolina and the other by South Carolina, and the consolidated company having expressly announced itself as the defendant in the action, and made defense thereto, and the plaintiff having recognized and litigated with it as the proper defendant in the suit, he cannot, on a motion made by himself to enter a decree upon a special verdict found by the jury, or in resistance to a motion made by the consolidated company to enter a decree in the cause, raise any question as to the legality of the consolidation, inasmuch as that would be to deny the existence of the corporation which he has recognized by litigating with it as the sole defendant in the action. *Lester v. Georgia, C. & N. R. Co.*, 90 Ga. 802, 17 S. E. Rep. 113.

6. Pleading an estoppel.—Suit by A. against T. railroad company for the assessment of damages, on account of the taking by the company for the use of the road, of a lot in B., belonging to A. The sixth paragraph of the answer alleged that in the year 1852, one C. being in the possession of the lot, and claiming the ownership thereof, with the full knowledge of A., died, leaving a widow and minor heirs; that one D. was appointed by the proper court guardian of said heirs, who filed his petition in the E. court of common pleas, for the sale of the interest of said heirs in the lot in question, procured an order of sale, sold the lot to the defendant at its full appraised value, reported the sale to the court, which was approved; that the defendant paid the purchase money in full; that a deed was ordered, executed, and approved by the court; that D. afterwards made a final settlement of his said trust, and obtained a discharge therefrom; that afterwards A., who was the grandfather of said minor children, having knowledge of the facts, and for the purpose of procuring the full proceeds of said sale for said children, made a voluntary application for their guardianship, and on the day of his appointment brought suit, as such guardian, against D., on his bond, setting out the sale and receipt by D. of the purchase money, alleging the failure to pay over the full amount so received, and asking a judgment for \$1500, which the company insisted was an affirmation of the judicial sale, and estopped A. from maintaining his suit.

Held, that the said paragraph was not good as a plea in estoppel, because it did not show that the T. railroad company purchased the lot, or paid the consideration therefor, on the faith of some act or statement of A., or of his silence under circumstances that required him to speak and disclose his title, nor any act of said A. subsequent to such purchase, which amounted to a ratification of the sale made by D. *Terre Haute, A. & St. L. R. Co. v. Norman*, 22 Ind. 63.

II. ESTOPPEL BY RECORD.

7. When an estoppel arises.—Where the defendant's attorney at the trial disclaims a plea of contributory negligence to be in the case, he will not afterwards be heard to claim the contrary. *Hudson v. Wabash Western R. Co.*, 101 Mo. 13, 14 S. W. Rep. 15.

Where an abutting owner commences proceedings against a railroad company for an injunction and for damages, and a stay of the injunction is granted pending an appeal, upon the condition that the company stipulates not to institute condemnation proceedings, after accepting the benefits of the stay, the company cannot refuse the stipulation or attack the decree as inequitable. *American Bank Note Co. v. Metropolitan El. R. Co.*, 49 N. Y. S. R. 375, 66 Hun 627, mem., 20 N. Y. Supp. 819.

In ejectment for lands which were taxed as the property of the plaintiff company, and sold for non-payment of the taxes, the defendants who claim title under such tax sale are estopped from claiming that the plaintiff cannot recover because the patent from the United States has not yet been issued to it. *Wisconsin C. R. Co. v. Wisconsin River Land Co.*, 71 Wis. 94, 36 N. W. Rep. 837.

The appearance before the land department of a railroad company to contest a claim of a county to certain swamp lands, on the ground that the department had no jurisdiction of the matter, does not estop the company from making other objections to the claim in a different forum. *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 22 Am. & Eng. R. Cas. 178, 112 U. S. 165, 5 Sup. Ct. Rep. 84.

Where a company has contracted with one of its directors for the construction of its railroad, the company is not estopped to deny the validity of a contract entered into

in its name by such director with third persons to construct the road, if it had no knowledge of such contract at the time when the work was done thereunder, although it may have been garnished in a suit against such third persons, and estimates for one month furnished by the director's engineer showed that the contractors had done work on the railroad. *Allemon v. Simmons*, 47 Am. & Eng. R. Cas. 400, 124 Ind. 199, 23 N. E. Rep. 768.

When an execution against a company is returned unsatisfied, and an action is commenced for a temporary receiver to sequester the company's property, and on motion of the company the judgment is opened, allowing it to appear and defend, but continuing the receiver, the fact that the company accepts the benefits of the order allowing it to appear and defend does not estop it from appealing from the portion of the order continuing the receiver. *Kodsbourn v. Utica, I. & E. R. Co.*, 28 Hun (N. Y.) 369.

A plea in bar of an appeal set forth that, before the commencement of the action in which the judgment was rendered from which the appeal was taken, the appellant had appropriated land for the use of a railway corporation; that an appraisal was made according to law; that exceptions were filed to the appraisal; that trial was had in the A. circuit court, and judgment rendered for appellee's testator in a sum in excess of the appraisal; that the case was appealed to the supreme court, and the judgment reversed; that after the reversal the venue was changed to W. county, where appellant, over appellee's objection, dismissed the condemnation proceedings; that thereupon appellee instituted this action in the superior court of A. county, and recovered the judgment from which this appeal is prosecuted; that an appeal was taken by appellee from the order dismissing the condemnation proceedings; that after the appeal of appellee had been perfected, the appellant, in the present case, filed a plea in bar of appellee's appeal, alleging therein the recovery of the judgment in this cause; that it was for the same cause of action involved in the condemnation proceedings; that this plea of appellant was held good on demurrer, and appellee failing to reply, the supreme court gave appellant judgment on demurrer, and dismissed the appeal. *Held*, on demurrer

to such plea, that the facts pleaded do not constitute an estoppel by record, or *in pais*; and that what appellant did do was simply to assert the legal right to be relieved from the burden of waging two suits for the same cause of action. *Pittsburgh, Ft. W. & C. R. Co. v. Sawinney*, 17 *Am. & Eng. R. Cas.* 124, 91 *Ind.* 399.

8. Awards in condemnation proceedings.—Where a company which had been granted a right of way over the public lands of the United States, and also power to condemn such right over the lands of private parties, had condemned a right of way over public land of which one was in possession under the pre-emption laws of the United States, and had paid the money into court for the owner, it could not, after the occupant had received his patent, contest his right to the money. *Northern Pac. R. Co. v. Jackman*, 6 *Dak.* 236, 50 *N. W. Rep.* 123.

If a company prevail upon a party to whom a verdict of condemnation has been intrusted for delivery to the proper custodian to suppress it, it cannot afterward take advantage of its own wrong by insisting that an actual return was necessary to give it validity as a final and complete adjudication. *West v. West & E. R. Co.*, 20 *Am. & Eng. R. Cas.* 402, 61 *Miss.* 536.

Where complainant, in a suit to enjoin an entry upon condemned lands, claimed and treated them as his own, and claimed and was allowed compensation for a pier for a bridge constructed by another company which he now alleged had condemned the lands, he is estopped from setting up the award in the proceedings instituted by the latter company as a bar to the right of the second company to again condemn the lands. *Trimmer v. Pennsylvania, P. & B. R. Co.*, (N. J.) 39 *Am. & Eng. R. Cas.* 124, 17 *Ill. Rep.* 967.

Where a company and a landowner mutually agree to arbitrate the question of the amount of damages that shall be paid for a right of way, after the company has entered upon the land and is sued for the amount of the award, it is estopped from disputing the landowner's title, unless it claims that it has come into possession of an adverse or paramount title. *La Crosse & M. R. Co. v. Seeger*, 4 *Wis.* 268.

A statute authorized railroad companies to take generally one hundred feet for a right of way, and more for depots, etc.,

where it was necessary. A company instituted proceedings to condemn city lots extending beyond one hundred feet, and the landowner appealed to the circuit court, where his damages were fixed and paid for the full limits of the lots. *Held*, that the landowner was estopped from alleging that the company had exceeded its power, or from claiming that any portion of the land was not held for railroad purposes. *Burns v. Milwaukee & M. R. Co.*, 9 *Wis.* 450.—DISTINGUISHED IN *State v. Baker*, 17 *Am. & Eng. R. Cas.* 15, 20 *Fla.* 616.

9. Judgments and decrees.—A judgment by default against a county for the amount of bonds issued to the stock of a railroad estops the county from setting up, in a subsequent proceeding for a mandamus to compel the levying of a tax to pay the judgment, the invalidity of the bonds, or that they were not issued under the general railroad law of the state. *United States ex rel. v. Knox County Court*, 122 *U. S.* 306, 7 *Sup. Ct. Rep.* 1171.

If the petitioner in a condemnation proceeding, with knowledge that the judgment embraces only a part of the land sought to be condemned, pays over the amount of the judgment to the county treasurer, this will estop such petitioner from claiming that the money deposited was for other property than that described in the verdict and judgment. *Union Mut. L. Ins. Co. v. Slee*, 123 *Ill.* 57, 12 *N. E. Rep.* 543.

Where the plaintiff had, in a former action, recovered damages of the defendant for injuries to his land caused by flooding the same, the same causes continuing, and the same damages accruing to plaintiff as a result, in a subsequent action to recover for subsequent damages the defendant will be estopped from denying damages as a result from the continuing cause of such damages. *Plate v. New York C. R. Co.*, 37 *N. Y.* 472.—CRITICISING *Mahon v. New York C. R. Co.*, 24 *N. Y.* 658.—REVIEWED IN *Uline v. New York C. & H. R. R. Co.*, 23 *Am. & Eng. R. Cas.* 3, 101 *N. Y.* 98, 4 *N. E. Rep.* 536.

Where a company institutes condemnation proceedings, and the landowner appeals from the award of the commissioners, and obtains a judgment for the value of the land on appeal, after payment of the amount of the judgment he is estopped from setting up any claim to the lands so long as the company continues to use them for rail-

road purposes, as prescribed by its charter. *Dodge v. Burns*, 6 Wis. 514.

Where the property of a railroad company is sold under a mortgage after a judgment has been obtained against it for land damages, the purchasing company that succeeds to the land is liable for the amount of the judgment, and is estopped from denying the landowner's right to claim the amount. *Pfeifer v. Sheboygan & F. du L. R. Co.*, 18 Wis. 155.

The purchaser of railroad property under a foreclosure decree is not entitled to the benefit of an estoppel which would result from a decree entered in a suit begun by stockholders of the company to restrain the collection of certain taxes on the railroad property after the mortgage was executed. *Keokuk & W. R. Co. v. Scotland County*, 152 U. S. 318, 14 Sup. Ct. Rep. 605.

Judgment upon an inquisition under the compensation clauses of the Lands Clauses Act 1845 does not estop the company, in an action upon the judgment, from denying that the lands were damaged. But where the damages awarded exceed £50, the company is estopped from denying that the claimant is entitled to compensation exceeding £501. *Read v. Victoria Station & P. R. Co.*, 1 H. & C. 826, 11 W. R. 1032.

Two actions on the case were brought in the same court at the same time, by the same plaintiff against the same defendant. The same act of the defendant was charged as the cause of the damage in each case; but the damage in one case was charged to be to the plaintiff's land, and in the other to the crops grown and growing upon it. The case as to the crops was the first tried, and the evidence was as to the crops, and there was a verdict and judgment for the defendant. *Held*, that such verdict and judgment could not be set up as an estoppel to the plaintiff in the other action for damages to the land. *Southside R. Co. v. Daniel*, 20 Gratt. (Va.) 344.

10. Municipal ordinances and records.—Where a city fails to provide any book for the record of its ordinances, but its ordinances, after their passage and approval, are placed and kept on file in the office of the city clerk, and a third party obtains a duly certified copy of an ordinance so placed and kept on file, and acts in good faith upon such ordinance, and is induced partly thereby to make a large expenditure of money, in a subsequent

controversy between such city and such third parties or their assigns, the rule of equitable estoppel will apply to such city, and the due passage and existence of the ordinance may be shown by parol testimony. *Troy v. Atchison & N. R. Co.*, 13 Kan. 70.

The records of a city council, denying a petition for aid to a railroad, must be presumed to have come to the knowledge of the railroad company, and it cannot successfully aver, by way of estoppel to a suit by a taxpayer to cancel bonds afterwards, without authority, issued as such aid, that it had, on faith in their validity, issued stock to the city and entered into contracts for the construction of its road. *Madison v. Smith*, 83 Ind. 502.

11. Corporate records.—The minutes of a meeting of the directors of a company showed that a resolution declaring a dividend was offered and seconded, but failed to show that it was ever voted upon or adopted. The evidence showed that the officers of the company acted upon the assumption that the resolution was adopted, and that all the stockholders save one were permitted to draw their *pro rata* of the dividend, in accordance with the resolution. The company never disclaimed the action of its officers in paying the dividend. In a suit by the unpaid stockholder to recover his share of the dividend—*held*, that the company was estopped to deny that the resolution was adopted. *Southwestern, A. & I. T. R. Co. v. Martin*, 57 Ark. 355, 21 S. W. Rep. 465.

12. Allegations in pleadings.—(1) *When raise an estoppel.*—A petition by a railroad company to condemn whatever "property rights, interests, or privileges" a defendant corporation may have in certain streets by contract with the city, admits the legality of that contract, and estops the petitioner from insisting that defendant has no interest in that which is sought to be condemned. *Metropolitan City R. Co. v. Chicago W. D. R. Co.*, 87 Ill. 317, 19 Am. Ry. Rep. 64.

A petition filed by defendant company to acquire land was verified by the company's general land agent. The landowner appeared, and without making any objection to the verification, filed an answer and thereafter consented to a reference. *Held*, that he thereby waived the right to object that the land agent was not an officer of

the company and under the statute could not verify the petition. *In re New York, L. & W. R. Co.*, 33 Hun (N. Y.) 148; affirmed (P) 98 N. Y. 664.

In an action to enjoin the construction of an underground railroad, the complaint charged that the defendant claimed to be a corporation under two specified statutes; but that it could not avail itself of the benefits of the second statute by reason of its failure to construct the portion of its road required by the statute within the time specified therein. *Held*, that plaintiffs could not raise the further objection, on demurrer, that the statute had become inoperative because the company had failed to accept its provisions. *Astor v. New York Arcade R. Co.*, 1 N. Y. Supp. 174.—FOLLOWED IN *Bailey v. New York Arcade R. Co.*, 1 N. Y. Supp. 304.

In an action by the heirs at law of a testator against a company, to enjoin the construction of its road across the lands of testator, devised to his widow, but claimed by plaintiffs as residuary devisees, the complaint alleged that the widow, now deceased, intestate, had renounced her devise and claimed dower in all of her husband's lands. *Held*, in a subsequent action between the same parties, that they could not deny this allegation and claim as heirs at law of their mother. *Tompkins v. Augusta & K. R. Co.*, 21 So. Car. 420.

(2) *When do not estop.*—The corporation is not estopped by the acts of individual stockholders, who, being admitted as parties to a suit wherein the corporation was a party, filed pleadings therein for themselves only, and not for the corporation. The corporation is not bound or estopped by the action of the court on such pleadings, although they may have set up the same acts as grounds for relief that are afterward relied upon by the corporation in another suit. *Covington & L. R. Co. v. Bowler*, 9 Bush (Ky.) 468.

Where a majority of the votes cast at an election were in favor of a subscription, and on bill filed by citizens to enjoin the subscription, and to have the election declared void on the ground of fraud and illegal votes, and because a majority of the legal votes cast were against subscription, the board of supervisors answered, traversing and denying all fraudulent and illegal voting at an election, and averring that a majority of the legal votes were in favor of

the subscription, and that the board intended to make the subscription and issue bonds therefor. *Held*, on mandamus to compel the subscription, that the statements in the answer, not being sworn to, could not be held to be an estoppel and conclusion upon the county. *People ex rel. v. Logan County Sup'rs*, 63 Ill. 374.—DISTINGUISHED IN *People ex rel. v. Cass County*, 77 Ill. 438.

A plaintiff suing a company alleged that both he and the company were non-residents, but of the same state, and in a motion to secure costs, the company, relying upon this statement, made an affidavit stating the same fact; but afterward ascertained that plaintiff was a citizen of the state where suit was brought, and filed a petition for removal to a federal court. *Held*, that the company was not estopped by its affidavit from asserting the fact. *Ohle v. Chicago & N. W. R. Co.*, 64 Iowa 599, 21 N. W. Rep. 101.

In 1872 the plaintiffs entered into a contract with the M. C. & N. W. R. Co. to furnish ties and timber for the construction of its road from Minersville, Mo., to Oswego, Kan. The contract provided for the delivery of the ties and timber along the right of way, subject to the inspection and acceptance of the chief engineer of the company. Pursuant to such contract they did deliver a large amount of the ties and timber, which actually went into the construction of the roadbed between Minersville and Brownsville, Kan. When the track had reached Brownsville the company became bankrupt, and it stopped work. Beyond Brownsville, and between it and Oswego, plaintiffs had placed along the right of way other ties and timber. Thereafter plaintiffs, believing that they could enforce a mechanic's lien for all material delivered and used in the construction of the roadbed within the limits of the state, filed a statement for a lien with the clerk of the district court of Cherokee county, and commenced suit to foreclose such attempted lien. The petition counted on ties and timber delivered and accepted. It alleged that the ties and timber sued for had been delivered and used in the construction of the roadbed in Kansas, and counted for more ties and timber than had in fact been delivered in Kansas, even including the ties and timber placed along the right of way west of Brownsville, and not then used.

That suit went to trial and judgment, resulting in a personal judgment against the company, but failing to establish a lien. *Held*, in a subsequent controversy about the ties and timber placed along the right of way west of Brownsville, that plaintiffs were not estopped by the allegations in the lien statement or petition from showing by parol testimony that said action was simply for ties and timber delivered, accepted, and used, and did not embrace the ties and timber west of Brownsville, and which they insisted had never been inspected or accepted by the company. *Hobart v. Beers*, 26 Kan. 329.

A town was sued on its bonds, issued for railroad stock and answered admitting its liability. Subsequent to the answer the company made a change in the character of its road, such as to release non-assenting stockholders, and the facts showing the change in the line of the road were set up by an amended complaint. *Held*, that the town was not estopped by its first answer from denying its liability upon its subscription to the stock. *Nasen v. Port Washington*, 37 Wis. 168.

III. ESTOPPEL BY DEED.

13. Grantor when estopped.—(1) *In general*.—A release under the corporate seal, and purporting to be signed by the president of a railroad corporation, and exhibited in court by it as its act, is binding upon the corporation in any suit against the parties to whom it was given. *Seaggs v. Baltimore & W. R. Co.*, 10 Md. 268.—QUOTING *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. (U. S.) 307.

Where a town site and a common are dedicated by the state, the purposes of the common being consistent with its use as a railroad station, and the city has granted a portion of it to a company for station purposes, and the state subsequently vests the legal title of the common in trustees for use of the city, they will take it subject to the grant for railroad purposes. *Crawford v. Mobile & G. R. Co.*, 67 Ga. 405.

Where the charter of a company authorizes it to take land for a right of way not to exceed eighty feet in width, and a landowner conveys it a right of way without specifying the width, but subsequently plats the adjoining lands into town lots bordering on a designated right of way eighty feet wide, neither he nor those hold-

ing under him can object to the company's using the full eighty feet whenever it may choose, though the whole of the width was not at first actually appropriated for track purposes. *Indianapolis, P. & C. R. Co. v. Rayl*, 3 Am. & Eng. R. Cas. 182, 69 Ind. 424.

The heirs of the grantor to the company, and their grantees, are estopped by his deed from setting up an adverse title derived from possession alone, as against his grantee and those claiming under it. *Cashman v. Brownlee*, 128 Ind. 266, 27 N. E. Rep. 560.

Where a railroad has been constructed and in operation for several years, and the landowner conveys the company the land on which its track is already laid, including an embankment over swampy land which obstructs the drainage, his deed will be deemed as a license of the obstruction, and he is estopped from claiming damages for the damming up of the water. *McCarty v. St. Paul, M. & M. R. Co.*, 14 Am. & Eng. R. Cas. 297, 31 Minn. 278, 17 N. W. Rep. 616.—FOLLOWED IN *Radke v. Minneapolis & St. L. R. Co.*, 41 Minn. 350, 43 N. W. Rep. 6.

By conveying to a company the land upon which its road has been previously constructed, a landowner is presumed as having consented to the maintenance of the road, although damage may result to his adjacent lands, and he cannot recover for damages from causes existing at the time of the conveyance. *Radke v. Minneapolis & St. L. R. Co.*, 41 Minn. 350, 43 N. W. Rep. 6.—FOLLOWING *McCarty v. St. Paul, M. & M. R. Co.*, 31 Minn. 278, 17 N. W. Rep. 616.

Although a party cannot divest himself of a freehold estate by parol, yet he may, without writing, so conduct himself with reference to it that he will be estopped afterwards to assert a claim thereto; and this doctrine of estoppel is applied without reference to the provisions of the statute of frauds. *Vicksburg & M. R. Co. v. Ragsdale*, 54 Miss. 200, 17 Am. Ry. Rep. 435.

One who conveys land to a company for their right of way, with covenants of warranty against encumbrances, is estopped to deny the truth of the covenants that the premises are free from encumbrances except those reserved in the deed, and is estopped from claiming damages for the obstruction of a way which he has covenanted does not exist. *De Rochemont v. Boston & M. R. Co.*, 64 N. H. 500, 15 Atl. Rep. 131.

Where the owner of land having thereon a highway by dedication conveys the entire tract, without allusion to the highway, to one who is ignorant of the dedication, knowing that the grantee intends to build on the part so dedicated, he will be estopped to claim damages of the grantee for obstructing the highway by such building; but the deed will not so estop him unless he had knowledge of the grantee's intention to build on the dedicated part. *Albert v. Gulf, C. & S. F. R. Co.*, 2 *Tex. Civ. App.* 664, 21 *S. W. Rep.* 779.

Where there is no statute authorizing the creation of a railroad corporation, one who conveys land to a pretended corporation, which has no legal existence whatever, is not estopped by his deed from subsequently setting up the non-existence of the corporation. The rule of estoppel only applies in such cases where there is only a question as to the legality of the organization of the corporation. *Harriman v. Southam*, 16 *Ind.* 190.—QUOTING *Jones v. Cincinnati Type Foundry Co.*, 14 *Ind.* 89.—OVERRULED IN *Snyder v. Studebaker*, 19 *Ind.* 462.

The sale of a lot or parcel of ground to a railroad company for right of way purposes, and the receipt of the consideration therefor, do not estop the owner from claiming damages to other remote and detached real estate injuriously affected by the construction of such railroad; and such sale will not be held to be a full satisfaction of all damages to other property unless such was the intention of the parties at the time of making the contract. *Republican Valley R. Co. v. Fellers*, 20 *Am. & Eng. R. Cas.* 256, 16 *Neb.* 169, 20 *N. W. Rep.* 217.—APPLIED IN *Atchison & N. R. Co. v. Boerner*, 34 *Neb.* 240.

Where one who owns an undivided half interest in land abutting on a street, grants the right to a street railway company to use the street, he is not estopped from denying the right after he has acquired the other half interest. *Edridge v. Rochester City & B. R. Co.*, 54 *Hun* 194, 26 *N. Y. S. R.* 909, 7 *N. Y. Supp.* 439.

(2) *Illustrations.*—Parties who had the location of the stations of a new railroad bought a tract of land at a certain station, and in platting it for a town site, marked several feet on each side of the right of way as "depot grounds." The company erected a depot and other structures on this ground, and for many years both parties treated it

as the property of the railroad. *Held*, that the original owner was estopped from asserting title thereto. *Morgan v. Chicago & A. R. Co.*, 96 *U. S.* 716.

The owner of lands through which a railroad passed, having previously granted the right of way to the company, was apprised when the agent of the company entered on his land to open the road, and knew that they claimed the right under his deed, but raised no objection, and took a contract for supplying the company with a portion of the materials used in the construction of the road. *Held*, that he was estopped from afterwards bringing trespass against the members of the company, although the instrument by which he conveyed the right of way might be inoperative as a deed. *Pollard v. Maddox*, 28 *Ala.* 321.

A railroad was conveyed from one company to another, the deed reserving title in the grantor company until the grantee company paid certain debts of the former. The grantee made a partial payment to one of the company's creditors and directors, with the approval of the grantor's president and consent that the creditor and director might appropriate the money to his own use. The directors of the company took no action in the matter. *Held*, that this was not a compliance with the provisions of the deed, and did not estop the grantor company from asserting title. *Tennessee & C. R. Co. v. East Ala. R. Co.*, 73 *Ala.* 426.

In ejectment against a company to recover land occupied as a right of way, it appeared that plaintiff had made a deed, but in it described a different piece of land from that occupied by the company; but the company claimed that its road was located and partially graded at the time the deed was made, and therefore plaintiff had notice of the actual location of the road, and was estopped from denying that he conveyed other land; but the evidence showed that plaintiff did not know of the actual location of the road at the time he made the deed, and conveyed a strip according to a description furnished by the company. *Held*, that in the absence of any latent ambiguity in the deed, where its terms were clear, distinct, and certain, the question of estoppel would not apply. *McCammon v. Detroit, L. & N. R. Co.*, 66 *Mich.* 442, 10 *West. Rep.* 192, 33 *N. W. Rep.* 728.

14. *Grantee when estopped.*—Where a railroad company, in pursuance

of a contract with a landowner, demands and accepts and places upon record a deed for a right of way, it cannot afterwards object to the sufficiency of the deed, or question the authority of the person making the contract. *Indiana, B. & W. R. Co. v. Fennell*, 116 Ind. 414, 19 N. E. Rep. 204.

Where a deed conveying a right of way is delivered to and accepted by a railroad company, which thereafter asserts title to the land thereby conveyed, it cannot repudiate the covenants of the deed on the ground that the grantee was not properly named. *Louisville, N. A. & C. R. Co. v. Power*, 119 Ind. 269, 21 N. E. Rep. 751.—QUOTED IN *Midland R. Co. v. Fisher*, 43 Am. & Eng. R. Cas. 578, 125 Ind. 19.

A street was opened and dedicated to public use, after which one of the complainants purchased a portion of the land over which the street extended, taking a deed therefor with full conveyance of warranty, and completely obstructed the street by making deep excavations for its road and by laying its tracks. *Held*, that the complainants are estopped from claiming that any portion of the said street was dedicated. *South Branch R. Co. v. Parker*, 41 N. J. Eq. 489, 5 All. Rep. 641.

Afterwards the surveyors made return of a public road over the same land, crossing the railroad of complainants, against the recording of which return the complainants filed a caveat and prevailed; and then built a water tank twelve feet in diameter about in the centre of the said proposed highway. *Held*, that this too works an estoppel. *South Branch R. Co. v. Parker*, 41 N. J. Eq. 489, 5 All. Rep. 641.

Plaintiff constructed a ditch, under the act of congress of July 26, 1866, over lands granted by congress to a railroad company. The company, under a misapprehension of its legal rights, accepted a deed of the right to construct its road over such person's ditch, and paid him therefor. The deed was granted on condition that the ditch should not be impaired or destroyed. After the construction of the road plaintiff sued the company for so constructing its road as to permanently obstruct and destroy the ditch. *Held*, that the company by accepting the deed was not estopped from denying the title of the owner to the ditch, or from asserting the invalidity of the covenant into which it had inadvertently entered. *Bybee v. Oregon & C. R. Co.*, 46 Am. & Eng. R.

Cas. 460, 139 U. S. 663, 11 Sup. Ct. Rep. 641.

Plaintiff claimed dower out of a water lot in Sydney harbor, granted to her husband after 1867 and before the act vesting the foreshore in the province. Defendant company relied on *Holman v. Green* (S. C. C. 709), and also on their act of incorporation ratifying and confirming the title of the company in the property which it had acquired, reserving to any person or persons the right to compensation only for any interest or lien on such property at the time of the purchase (1881, c. 73, § 15). *Held*, that the company, holding their title from the plaintiff's husband, were estopped from setting up that the title never passed out of the crown by virtue of the provincial grant. *Sword v. Sydney & L. R. Co.*, 23 Nov. Sc. 214.

15. Recitals in deeds.—An estoppel by recitals in a deed cannot be set up in favor of a stranger to the deed, in an action wholly collateral to it. *Claffin v. Boston & A. R. Co.*, 157 Mass. 489, 32 N. E. Rep. 659.

S., as president of a railroad company, made a deed for the company to certain lands. At the same time C. gave an instrument in writing to the purchaser, in which it was recited that the railroad company had made such a deed. *Held*, that this recital estopped C., and those holding under him with a knowledge of the facts, from denying that S. was authorized by the company to make the deed. *Simpson v. Greeley*, 8 Kan. 586.

A recital in a deed between a railway company and contractors, that, with the exception of the claims contained in the schedule, the company and the contractors had "settled, adjusted, and mutually satisfied every other account, claim, or demand which the parties had against each other arising out of the contract, or any other account, matter, or thing whatsoever, as the company and the contractors thereby admitted and acknowledged," is not an estoppel in an action by the company on a bond entered into by the contractors conditioned for the performance of their original contract, alleging as a breach a non-execution and completion of tunnels according to the contract. *South Eastern R. Co. v. Warton*, 6 H. & N. 520, 31 L. J. Ex. 515.

16. Leases.—A lessee company when sued for rent is estopped from denying the corporate existence of the lessor company, where it has an apparent corporate exist-

tence, and from denying its power to make the lease. *Oregonian R. Co. v. Oregon R. & N. Co.*, 27 Fed. Rep. 277, 11 Sawy. (U. S.) 564.

Where a railroad is leased for a number of years with the rent reserved payable in instalments, and suit is brought to recover one instalment, the judgment therein is conclusive as to the validity of the lease and the liability of the lessee company for the rent, and as to any defense that might be made in the first action, preventing the same from being made to any subsequent action. *Oregonian R. Co. v. Oregon R. & N. Co.*, 27 Fed. Rep. 277, 11 Sawy. (U. S.) 564.

Where a lessee company is in actual possession of the road, and is sued for an injury to live stock while operating the road, it cannot set up as a defense that it is running the road under an illegal lease or one not authorized by law. *Gould v. Bangor & P. R. Co.*, 82 Me. 122, 19 Atl. Rep. 84.

A railroad corporation cannot dispute its liability for freight delivered to it to be carried over a railroad leased to it, on the ground that the lease is void. *McCluer v. Manchester & L. R. Co.*, 13 Gray (Mass.) 124.—REVIEWED IN *Pierce v. Concord R. Co.*, 51 N. H. 590.

The lessee cannot object that, because consolidation would be illegal, therefore the lease cannot be construed to have the effect of a consolidation. A corporation, no less than a person, will not be permitted to take advantage of its own wrong. *Missouri Pac. R. Co. v. Owens*, 1 Tex. App. (Civ. Cas.) 163.

17. Mortgages and deeds of trust.

—(1) *Mortgages*.—Trustees in junior mortgages, who are parties defendant to a bill to foreclose a senior mortgage given by a company on its franchise, roadbed, and appurtenances, cannot be heard to say that the corporation had no power to execute such an instrument. If their position were correct, they would themselves have no *locus standi* in the litigation. *McAllister v. Plant*, 54 Miss. 106, 17 Am. Ry. Rep. 389.

Prior to a default a mortgagee of land need not interfere or give notice to a company of his rights, where the company is proceeding to build its road under a license from the mortgagor; but after default equity requires him to notify the company; and if he fails to do so, and permits the company to go on and make expenditures, he is bound by

the license given by the mortgagor. *Masterson v. West End N. G. R. Co.*, 4 Am. & Eng. R. Cas. 439, 72 Mo. 342; affirming 5 Mo. App. 64.—DISTINGUISHING *Provolt v. Chicago, R. I. & P. R. Co.*, 57 Mo. 256; *Baker v. Chicago, R. I. & P. R. Co.*, 57 Mo. 265.

If the power of a city to mortgage its land to aid in the construction of a railroad were admitted to be doubtful, and there were irregularities in the execution of the mortgage, the law seems to be well settled that it does not lie in the mouth of the city authorities to repudiate their contract. *Adams v. Memphis & L. R. Co.*, 2 Coldw. (Tenn.) 645.

Texas Rev. St. art. 2220 enacts that no mortgage of a railroad company shall be valid unless authorized by resolution and adopted by vote of two thirds of all the stockholders of said company; yet where in pursuance of a resolution to issue bonds secured on a mortgage not so adopted, a contract has been executed and the company has had the benefit thereof, it is estopped from denying its authority to make the contract. *Texas Western R. Co. v. Gentry*, 33 Am. & Eng. R. Cas. 46, 69 Tex. 625, 8 S. W. Rep. 98.

A railroad company executed a mortgage to secure four hundred of its bonds, but by mistake sold four hundred and twenty, all reciting that they were secured by a mortgage, the purchasers of the extra twenty having no notice of the over-issue. *Held*, that the company was estopped from denying that the extra twenty were secured by the mortgage. *Stephens v. Benton*, 1 Duv. (Ky.) 112.

(2) *Deeds of trust*.—Beneficiaries under a trust deed do not estop themselves from asserting their rights under the trust by standing by and allowing a company to take possession of and construct a railroad over lands granted in trust to secure the payment of the grantor's debts, of which trust deed the company had notice. *Mary Lee C. & R. Co. v. Winn*, 97 Ala. 495, 12 So. Rep. 607.

Where a deed of trust and bonds have been executed with all the legal formalities required by the charter of the company and its amendments, and the bonds negotiated in open market, and their proceeds paid to the company, and appropriations made by it to pay the interest, the company cannot be allowed to disavow and repudiate its own

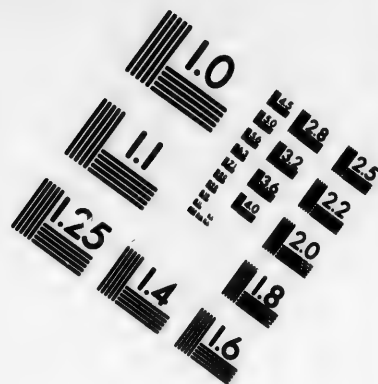
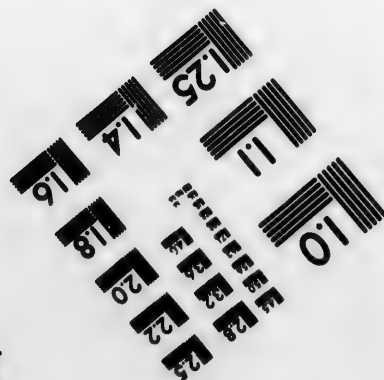
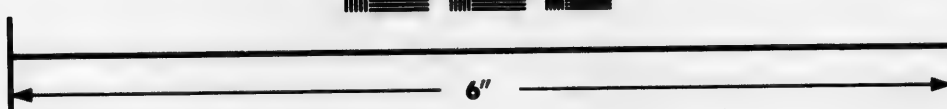
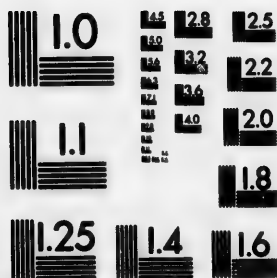


IMAGE EVALUATION TEST TARGET (MT-3)



Photographic Sciences Corporation

**23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503**

18
20
22
25
28
32
36
40
45
50
55
60
65
70
75
80
85
90
95
100

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

acts, to the injury of *bona fide* bondholders, without notice. *Harrison v. Annapolis & E. R. R. Co.*, 50 Md. 490.

Where a director of a company allows the company to occupy lands belonging to him, and to convey the same by a deed of trust, which is foreclosed, the director cannot maintain ejectment against the purchaser at the foreclosure sale. *Omaha & N. W. R. Co. v. Redick*, 17 Am. & Eng. R. Cas. 107, 16 Neb. 313, 20 N. W. Rep. 309.—QUOTING *McAulay v. Western Vt. R. Co.*, 33 Vt. 311.—APPROVED IN *Denver v. Denver & S. F. R. Co.*, 17 Colo. 583. NOT FOLLOWED IN *Jacksonville, T. & K. W. R. Co. v. Adams*, 27 Fla. 443.

IV. ESTOPPEL IN PARI

1. Equitable Estoppel, Generally.

18. When arises, generally.—An equitable estoppel arises when one party to an action has, by his faulty and negligent conduct, induced his adversary, from whom he claims a loss, to omit some act, or acts, which, but for said fault and negligence, he would have done, and which, if done, might have prevented the loss. *Wilson Sewing Mach. Co. v. Southern Exp. Co.*, 42 La. Ann. 593, 7 So. Rep. 710.

If the owner of property urges or induces a railroad company to locate its road upon the adjacent street, he will, after the invitation has been acted on, be estopped from claiming damages or enjoining the operation of the road. But the fact that such owner requested an alderman of the city to vote for the ordinance granting the right to the company to locate its road on the street, when it is not shown that such vote was necessary for the passage of the ordinance, will not be sufficient to estop him from maintaining an action for damages to his business. To create an estoppel there must be some affirmative act by the person sought to be estopped, in reliance upon which the other party has acted to his prejudice. *Penn Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 31 N. E. Rep. 138.

19. Illustrations.—Where a license to fill up a watercourse is obtained from a corporation in possession as owner, in consideration of a promise to reopen and restore the watercourse when requested so to do, the licensee, when sued for a breach of his promise, is estopped from setting up that the ownership and maintenance of the

watercourse by the corporation are *ultra vires*. *Hamilton & R. Hydraulic Co. v. Cincinnati, H. & D. R. Co.*, 29 Ohio St. 341.

A subscriber who transfers his stock to another and treats it as valid is estopped from denying that the payment necessary to give it validity, at the time of subscription, was made. *Everhart v. West Chester & P. R. Co.*, 28 Pa. St. 339.

A railway company that constructs a crossing under an agreement with the landowner whose land it appropriates for its roadbed, which it recognizes and maintains as a road crossing for the public, is estopped from setting up in an action against it, as a defense, that it is not a public road within the meaning of the statute. Whether such crossing was in a road across the railway dedicated by the owner of the land to public use and was so used by the public, are facts for a jury to determine in a suit against the company on account of injuries inflicted by its train on one who is passing over the crossing. *Missouri Pac. R. Co. v. Lee*, 35 Am. & Eng. R. Cas. 364, 70 Tex. 496, 7 S. W. Rep. 857.

Where the sections of a railroad are subject to government inspection, and rejection or acceptance, as they are completed, and the company has procured the inspection and acceptance of a section, it is estopped from claiming that the section is not complete, and is at once responsible for its maintenance and management. *Northern Pac. R. Co. v. Territory ex rel.*, 29 Am. & Eng. R. Cas. 82, 3 Wash. T. 303, 13 Pac. Rep. 604.

Defendant laid tracks on plaintiff's land, the boundaries to which were undefinable except by actual survey. Neither party knew at the time that the tracks were on plaintiff's land, nor was there any evidence that plaintiff induced defendant to lay the tracks where located. Held, in an action of ejectment against the company, that the evidence failed to show facts sufficient to create an estoppel against plaintiff. *Minneapolis Mill Co. v. Minneapolis & St. L. R. Co.*, 51 Minn. 304, 53 N. W. Rep. 639.

2. Acquiescence ; Assent ; Ratification ; Silence.

20. When acquiescence raises an estoppel.—Where a county subscribes for stock in a railroad, and issues its bonds in payment, and receives a certificate of stock, after holding the stock for seventeen years,

and c
broug
setting
which
been p
13 W
REVI
Mo. 5
Wh
of lav
acqui
estop
a col
& M
Pr. 2
Wh
by its
the p
line, a
cuted
quies
prop
the v
from
Herv
Rep.
Wh
power
not f
after
ten ye
that t
thoug
issue.
Wood
LOWE
Terre
440.
Wh
esced
freigh
it is
to ex
to do
v. Lon
S.) 67
A
escip
again
the v
opera
corpo
sons
to av
the c
the l
stock

and continuing to hold it after a suit is brought on the bonds, it is estopped from setting up in defense that the conditions on which the bonds were to issue had never been performed. *Pendleton County v. Amy*, 13 *Wall. (U. S.)* 297, 4 *Am. Ry. Rep.* 109. — REVIEWED IN *Smith v. Clark County*, 54 *Mo.* 58.

Where a town issues bonds by authority of law, in aid of a railroad, and taxpayers acquiesce therein for eleven years, they are estopped from then attacking the bonds in a collateral proceeding. *Calhoun v. Delhi & M. R. Co.*, 28 *Hun (N. Y.)* 379, 64 *How. Pr.* 291.

Where one railroad company is authorized by its charter to purchase another road, for the purpose of forming a continuation of its line, after the purchase has been fully executed, creditors of the company who acquiesce in the purchase, or who fail in a proper time to institute proceedings to test the validity of the purchase, are estopped from afterwards questioning its validity. *Hervey v. Illinois Midland R. Co.*, 28 *Fed. Rep.* 169.

Where a corporation acts in excess of its power in issuing preferred stock, which is not forbidden nor against public policy, after acquiescence by the stockholders for ten years, they are estopped from setting up that the issue of the stock was *ultra vires*, though there was constructive fraud in the issue. *Taylor v. South & N. Ala. R. Co.*, 4 *Woods (U. S.)* 575, 13 *Fed. Rep.* 152. — FOLLOWED IN *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 33 *Fed. Rep.* 440.

Where defendant for a long time acquiesced in complainant's right to have its freight carried by it, as an express carrier, it is estopped from exerting its authority to exclude it now (not admitting its right to do so, however, in any event). *Dinsmore v. Louisville, C. & L. R. Co.*, 2 *Flipp. (U. S.)* 672, 2 *Fed. Rep.* 465.

A stockholder participating and acquiescing in corporate actions, is estopped, as against the corporation, from impeaching the validity of a lease made by it, but the operation of such estoppel is between the corporation and the shareholder; third persons can claim no benefit thereby in order to avoid such lease as being *ultra vires*, and the corporation itself having repudiated the lease, the estoppel resting against the stockholder is thereby relieved. *Memphis*

& C. R. Co. v. Grayson, 43 *Am. & Eng. R. Cas.* 681, 88 *Ala.* 572, 7 *So. Rep.* 122.

Where a deed was made to the state of a right of way for the use of a railroad, and authority was therein given to the chief engineer of the state to locate its boundary, and the boundary thus fixed was acquiesced in by the grantor, such boundary will be binding upon him and his privies. *Dougherty v. Western & A. R. Co.*, 53 *Ga.* 304.

Where there has been long acquiescence in the occupation of a street, it will be presumed that the railroad was laid in the manner which the licensors intended, in the absence of evidence that any demand was made to level the bed of the railroad so as to make a level street. *Merchants' Union Barb-Wire Co. v. Chicago, R. I. & P. R. Co.*, 43 *Am. & Eng. R. Cas.* 121, 79 *Iowa* 613, 44 *N. W. Rep.* 900.

Where a company has condemned a right of way, and after a survey a fence has been built and maintained for fifteen years, without claim by the company that its right of way extends beyond the fence, it is barred from maintaining an action to recover land beyond the fence, though it appeared that, owing to an error in the survey, the fence was not on the true line. *Louisville & N. R. Co. v. Quinn*, 94 *Ky.* 310, 22 *S. W. Rep.* 221.

Where a company is proceeding to acquire land for a right of way, acceptance by the landowner of the value of the land, no matter how ascertained, is an acquiescence in the taking, and estops him from afterwards objecting, to the same extent as if he had conveyed the land by deed. *Burns v. Milwaukee & M. P. Co.*, 9 *Wis.* 450.

Mass. Gen. Sts. ch. 63, § 45, provides that railroad companies shall furnish landowners with a plan of the land to be taken for a right of way before proceeding to construct the road, and that the company shall not have a right to enter upon the land except for preliminary surveys, until such plan is furnished. *Held*, that a failure to furnish such plan does not invalidate the taking, where the company has been permitted to enter, construct, and operate its road for nearly twenty years. After such time the landowner is estopped from denying that a plan has been furnished. *Abbott v. New York & N. E. R. Co.*, 33 *Am. & Eng. R. Cas.* 146, 145 *Mass.* 450, 5 *N. Eng. Rep.* 527, 15 *N. E. Rep.* 91. — APPROVED IN *Brock v. Old Colony R. Co.*, 33 *Am. &*

Eng. R. Cas. 96, 146 Mass. 194, 5 N. Eng. Rep. 724, 15 N. E. Rep. 555.

21. Illustrations.—Where county authorities granted a railroad the right of way over public grounds of an unincorporated town, and after the town became incorporated it granted the right of way over certain alleys for additional tracks, and the railroad expended over \$4000 in improving the public grounds, under a contract with the county authorities, with the knowledge of the town, after nearly twenty years of occupancy of said grounds—*held*, that the town was estopped from denying the company the use of such grounds for right of way. *Chicago, R. I. & P. R. Co. v. Jolie*, 79 Ill. 25.—**QUOTING** *Peoria v. Johnston*, 56 Ill. 51.—**QUOTED IN** *Chicago & N. W. R. Co. v. People ex rel.*, 91 Ill. 251.

Where the authorities of a city acquiesced for nineteen years in the use of a street by a railroad, in maintaining an arch over the street, and then made an agreement in writing whereby the right to so use the street was continued until it should be necessary to rebuild the arch—*held*, that the city was estopped from compelling the company to remove the arch, until it should become necessary to rebuild the same. *Chicago & N. W. R. Co. v. People ex rel.*, 91 Ill. 251.—**QUOTING** *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25.

Where for twenty years a company had been permitted to occupy the street in front of the complainants' premises for a track, under a claim of right, without remonstrance or complaint by the complainants, or those under whom they claimed, and the company, by such acquiescence, was induced to enter into a lease with the city, binding itself to build a depot and platform, of a width that could add but little to the inconvenience to which the complainants were subjected by the occupation of the street by the track, and from which lease the company could not be released—*held*, that equity would not interfere to prevent the erection. *Higbee v. Camden & A. R. & T. Co.*, 20 N. J. Eq. 435.—**FOLLOWING** *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530.

A. recorded a plat of an addition to a city in which he showed a street on the east side forty feet wide, and soon after B. recorded a plat of an addition directly opposite, in which he showed a street on the west side forty feet wide, or the two together as making an eighty-foot street. There was nothing

on the plats or on the ground to indicate that the two forty-foot strips did not connect, but as a matter of fact there was a strip twenty-seven feet wide between them belonging to A.; but the whole space was improved and occupied for many years as a highway, and lots were sold on each side with reference to the plats. *Held*, that A., or a company claiming under him, was estopped from claiming the centre strip, as against abutting lot owners who purchased after the plats were recorded, and without notice of the intervening strip. *Weisbrod v. Chicago & N. W. R. Co.*, 20 Wis. 419; *adhering to* 18 Wis. 35.

22. What acquiescence will not raise an estoppel.*—The expenditure of money under a claim of title upon land owned by a corporation does not estop the corporation from afterwards asserting its title as against the person making the expenditure, where none of the officers of the corporation had notice of such acts. *Chicago, B. & Q. R. Co. v. Porter*, 36 Am. & Eng. R. Cas. 405, 72 Iowa 426, 34 N. W. Rep. 286.

A landowner does not necessarily lose the right to claim compensation for his land by allowing a company to build its track over the land and acquiescing in its use as a railroad. *Allen v. Wabash, St. L. & P. R. Co.*, 84 Mo. 646.

The owner of land over which a railroad has been built and put into operation may, notwithstanding the public interest in the operation of the road, maintain an action to recover the land, provided he has not by his conduct estopped himself; and the mere fact that he acquiesced in the building of the road until it was completed and put into operation does not amount to an estoppel. *Louisville, St. L. & T. R. Co. v. Hess*, 50 Am. & Eng. R. Cas. 202, 92 Ky. 407, 17 S. W. Rep. 870.—**FOLLOWING** *Holloway v. Louisville, St. L. & T. R. Co.*, 92 Ky. 244.

Where the owner of land has previously forbidden a party to make an entry upon his land, such party cannot by mere acquiescence on the part of the owner obtain a right to do so. *Currie v. Natchez, J. & C. R. Co.*, 20 Am. & Eng. R. Cas. 303, 61 Miss. 725.

Where a company has regularly con-

* When acquiescence in construction of road does not estop owner from bringing ejectment, see 43 AM. & ENG. R. CAS. 599, *abstr.*

demned land for a right of way, a fence built several feet within the right of way to prevent cattle from going on the track cannot be taken as marking a consent line between the right of way and the adjoining owner, though maintained for twenty-five years. *Fisher v. Pennsylvania Co.*, (Pa.) 2 *Atl. Rep.* 878.

23. Assent, when creates an estoppel.—Where the owner of a lot that abuts on a street consents to the building of a road in the street and waives his right to damages, neither he nor one holding under him can afterward revoke the license so given, though by parol only, and claim damages. *Pratt v. Des Moines N. W. R. Co.*, 32 *Am. & Eng. R. Cas.* 236, 72 *Iowa* 249, 33 *N. W. Rep.* 666.—*FOLLOWING Cook v. Chicago, B. & O. R. Co.*, 40 *Iowa* 451. *RECONCILING Irish v. Burlington & S. W. R. Co.*, 44 *Iowa* 380.—*Burham v. Ohio & M. R. Co.*, 43 *Am. & Eng. R. Cas.* 153, 122 *Ind.* 344, 23 *N. E. Rep.* 799. *Merchants' Union Barb-Wire Co. v. Chicago, R. I. & P. R. Co.*, 43 *Am. & Eng. R. Cas.* 121, 79 *Iowa* 613, 44 *N. W. Rep.* 900.

Where a statute authorizes counties to subscribe to railroad stock, with a provision that the company shall take tax receipts in payment for freight and passenger charges, after the company has received the county subscription and expended the money, it is estopped from denying, when sued to compel it to take such tax receipts, that its charter did not authorize it to take such subscription. *Mobile & O. R. Co. v. Wisdom*, 5 *Heisk. (Tenn.)* 125, 1 *Am. Ry. Rep.* 107.

Where a company is sued for a personal injury received while on a train, if it appears that plaintiff was on the cars with knowledge and by permission of the company, and the injury results from negligence, the company is estopped from saying that the permission to be on the cars was not granted in pursuance of the lawful rules and regulations of the company. *Lammert v. Chicago & A. R. Co.*, 9 *Ill. App.* 388.

Though under the eminent domain act it is required that the husband shall be joined as a party when the wife's lands are sought to be taken without her consent, this does not preclude her from voluntarily conveying her property to any use and at any time, the same as if she were sole. Hence, where condemnation proceedings are wholly void, they are powerless to coerce her; but if in

such proceedings she voluntarily accepts as compensation for her property a sum of money equal to the amount of a void award, she must be regarded as acting wholly independent of such proceedings, and she cannot thereafter recover possession of the premises nor further compensation for the taking. In such case she is bound by the taking and acceptance, but not by the proceedings. *Colorado C. R. Co. v. Allen*, 44 *Am. & Eng. R. Cas.* 193, 13 *Colo.* 229, 22 *Pac. Rep.* 605.

24. What is not such assent as will estop.—The fact that a landowner has consented that a company may enter upon his land and construct its road does not prevent him from maintaining an action for damages caused by the construction and operation of the road. *McReynolds v. Kansas City, C. & S. R. Co.*, 34 *Mo. App.* 581; *transferred to Sup. Court*, 110 *Mo.* 484.

The fact that a landowner gave permission to a railroad company to occupy, during his pleasure, certain grounds adjacent to the right of way with a turntable and water tank does not estop him or his grantees, after the company has abandoned the ground so occupied, from asserting title when such company subsequently attempts to retake possession, not only of the parcel formerly occupied, but also of a strip of a defined width across the entire tract. *Lake Erie & W. R. Co. v. Michener*, 117 *Ind.* 465, 20 *N. E. Rep.* 254.

Where the board of county commissioners enters an order upon the county records that certain railroad bonds issued by the county be compromised and settled at twenty-five cents for the face and accrued interest, and the chairman of the board and the county clerk of the county are authorized to receive the old bonds and issue new bonds in lieu thereof, in accordance with such order, but before issuing the new bonds the chairman and county clerk have notice by letter from the holder of the bonds that his settlement is upon the condition that if like railroad bonds be compromised at a greater figure than twenty-five per cent, he is to receive the full benefit of the same, and the chairman and county clerk proceed to issue the new bonds according to the order of the board, which are accepted by the owner—*held*, that neither the board of county commissioners nor the county of which they are officers is bound by the contents of such letter. *Leaven-*

worth County Com'rs v. Hamlin, 31 Kan. 105, 1 Pac. Rep. 237.

25. Estoppel by ratification or recognition.—A corporation is estopped to deny its liability under a contract on the ground that its officers were not technically authorized to make it, or that its own proceedings in the premises were irregular, when the contract was within the scope of its powers, was entered into by proper officers, and has been recognized by corporate acts. *Peterborough R. Co. v. Nashua & L. R. Co.*, 59 N. H. 385.

Where a corporation sells certain of its bonds to its directors for less than par, but at their full market value, with the consent of all of its stockholders, it is estopped from questioning the validity of the sale, either as against such directors or persons to whom they have assigned the bonds. *Union L. & T. Co. v. Southern Cal. Motor Road Co.*, 51 Fed. Rep. 840.

Where several persons, either as co-partners or joint contractors, had done work under an agreement with a railway company, a payment made to one of them in township aid bonds binds the rest if, with full knowledge of the facts, they decline to repudiate the payment and make a distinct claim upon the company. *Michigan Air Line R. Co. v. Mellen*, 5 Am. & Eng. R. Cas. 245, 44 Mich. 321, 6 N. W. Rep. 845.

Where a landowner deeds a company a right of way, through fraudulent representations that the road would be constructed as then surveyed, he cannot be held as having ratified the deed by accepting from the company a fair consideration for the privilege to the company to drain his mill pond temporarily to enable it to construct a trestle across the pond. (Shepherd, J., dissenting.) *Allen v. Wilmington & W. R. Co.*, 106 N. Car. 515, 525, 11 S. E. Rep. 576, 826; *adhering to* 102 N. Car. 381, 9 S. E. Rep. 4.

Although an act requires a transfer of shares to be by deed, a purchaser of shares under a transfer in blank is estopped, in an action for calls, from disputing the validity of the transfer, if he afterwards signs and transmits to the company, in pursuance of the act, a proxy paper describing him as the proprietor of the shares. *Sheffield, A.-under-L. & M. R. Co. v. Woodcock*, 7 M. & W. 574, 2 Railw. Cas. 522.

Acting by authority of the directors, the president of a railroad company negotiated

a loan and secured the money by a mortgage. The money was loaned in good faith, and the company accepted it and used it for corporate purposes, and paid interest thereon. The matter was brought to the attention of the directors, but they took no steps to repudiate the transaction for several years, when a part of the directors met and passed a resolution denying the president's authority. *Held*, that the action of the company was a tacit ratification of the act of the president, and the resolution of the directors would not prevent a foreclosure. *Augusta, T. & G. R. Co. v. Kittel*, 52 Fed. Rep. 63, 2 U. S. App. 409, 2 C. C. A. 615—**FOLLOWING** Indianapolis Rolling Mill Co. v. St. Louis, Ft. S. & W. R. Co., 120 U. S. 256, 7 Sup. Ct. Rep. 542; *Pennsylvania R. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. Rep. 770; *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 U. S. 109, 11 Sup. Ct. Rep. 36.

Where a party who was a stockholder and director in a railroad contracted to convey a right of way over his lands, and the charter was afterward amended authorizing the company to divide its road into sections and to construct any of them, and the party voted to accept and approve such amendments, and approved acts done thereunder—*held*, that he was bound thereby both as a stockholder and director, and was estopped from alleging that the corporation was not the same with which he contracted. *Ross v. Chicago, B. & Q. R. Co.*, 77 Ill. 127.

26. When standing by raises an estoppel.—(1) *In general.*—Where two railroads are chartered between the same termini, and one company stands by and encourages the other in the construction of its road at a great cost, a court of equity will not interfere. Such conduct estops the objecting company from calling in question the legality of the structure. *Erie R. Co. v. Delaware, L. & W. R. Co.*, 21 N. J. Eq. 283.—**QUOTED IN** *McGregor v. Erie R. Co.*, 35 N. J. L. 89.

Where a contract is made with the president of a railway company, and signed by him and the secretary, though not authorized by the directors, yet it appears that they knew of it, and making no objection, stood by and saw the other party performing his part of the same, the company is bound. *Texas & St. L. R. Co. v. Robards*, 60 Tex. 545.

The
in a
affairs
legal
electe
innoc
empt
assum
agers,
have
olina
Wh
anoth
direct
corpo
and e
benefi
lution
stock
severa
that
cured
tion,
ing c
chartr
v. Sea
Ga. 53
Cor
comp
ized b
held t
acquir
uity,
Co., 18
(2)
cence
necess
exerci
compa
compa
under
eviden
R. Co.
Ep. 15
A
deman
compa
operat
volve
the co
only
Louis
Ind. 1
Louis
14 W
ler v.
Rep. 4

The real owner of the majority of stock in a railroad company who permits its affairs to be managed by others holding the legal title to the stock, and the officers elected by them, cannot claim as against innocent parties that the company is exempted from any obligation which it has assumed through such officers and managers, or to which it may, through them, have become equitably liable. *North Carolina R. Co. v. Drew*, 3 Woods (U. S.) 674.

Where a corporation purchasing stock of another corporation gives notice to the directors and stockholders of the latter corporation, and regularly votes the stock and expends large sums of money for the benefit of the corporation pursuant to resolutions of the stockholders, the minority stockholders are estopped from claiming, several years after such purchase was made, that the purchasing corporation has procured the mismanagement of the corporation, and from denying that such purchasing corporation has the power under its charter to make the purchase. *Alexander v. Searcy*, 36 Am. & Eng. R. Cas. 239, 81 Ga. 536, 8 S. E. Rep. 630.

Corporators who stand by and suffer the company to construct a new work authorized by law, without interference, will be held to have acquiesced in it, and, by such acquiescence, will lose their remedy in equity. *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq. 178.

(2) *Landowner standing by.*—The acquiescence of property owners, whose consent is necessary as a condition precedent to the exercise of the franchise granted to the company, in standing by and seeing the company construct and operate their road under a claim of right, will be regarded as evidence of consent. *Paterson & P. Horse R. Co. v. Mayor, etc., of Paterson*, 24 N. J. Eq. 158.

A landowner who stands by, without demanding compensation, until a railroad company has so far completed and put in operation its railroad over his land as to involve the public interest, can neither enjoin the company nor maintain ejectment; his only remedy is an action for damages. *Louisville, N. A. & C. R. Co. v. Beck*, 119 Ind. 124, 21 N. E. Rep. 471. *Sherlock v. Louisville, N. A. & C. R. Co.*, 115 Ind. 22, 14 West. Rep. 843, 17 N. E. Rep. 171. *Strickler v. Midland R. Co.*, 125 Ind. 412, 25 N. E. Rep. 455.

But if the company has unlawfully entered upon the land the owner may maintain an action for damages, or institute proceedings under the statute for the assessment of his damages. *Strickler v. Midland R. Co.*, 125 Ind. 412, 25 N. E. Rep. 455. *Slocumb v. Chicago, B. & Q. R. Co.*, 57 Iowa 675, 11 N. W. Rep. 641.—DISTINGUISHING *Pugh v. Golden Valley R. Co.*, L. R. 15 Ch. D. 330.—*Holloway v. Louisville, St. L. & T. R. Co.*, 92 Ky. 244, 17 S. W. Rep. 572.—FOLLOWED IN *Louisville, St. L. & T. R. Co. v. Hess*, 92 Ky. 407.—*Planet P. & F. Co. v. St. Louis, O. H. & C. R. Co.*, 115 Mo. 613, 22 S. W. Rep. 616. *Goodin v. Cincinnati & W. Canal Co.*, 18 Ohio St. 169.—DISTINGUISHED IN *St. Joseph & D. C. R. Co. v. Callender*, 13 Kan. 496; *Knox v. Metropolitan El. R. Co.*, 12 N. Y. Supp. 848, 36 N. Y. S. R. 2. FOLLOWED IN *Cincinnati & I. R. Co. v. Zinn*, 18 Ohio St. 417.—*Pennsylvania Co. v. Platt*, 46 Am. & Eng. R. Cas. 558, 47 Ohio St. 366, 25 N. E. Rep. 1028.—RECONCILING *Smiley v. Wright*, 2 Ohio 506; *Resor v. Ohio & M. R. Co.*, 17 Ohio St. 140; *Rosenthal v. Mayhugh*, 33 Ohio St. 155.—*Reichert v. St. Louis & S. F. R. Co.*, 38 Am. & Eng. R. Cas. 453, 51 Ark. 491, 11 S. W. Rep. 696.—DISTINGUISHING *Little Rock & Ft. S. R. Co. v. McGehee*, 41 Ark. 202.

This rule should be applied to married women as well as to persons who are free from disability. But the mere fact that a railroad is being operated and that the public is interested in its continuance will not bar the right of the owner of the land over which the road is built to recover it, in the absence of any conduct upon his part which would amount to an estoppel. *Holloway v. Louisville, St. L. & T. R. Co.*, 92 Ky. 244, 17 S. W. Rep. 572.

An obligee who is present during the performance of the obligation of a railroad to construct its road after a delay beyond the stated time, who does not object, and allows the work to be completed, cannot, by suit brought more than a year afterwards, demand the value of the land taken for the building of the road, and claim damages consequent on the use of the grant, which were not in contemplation of the parties when the contract was entered into. *Gayden v. Louisville, N. N. O. & T. R. Co.*, 39 La. Ann. 269, 1 So. Rep. 792.

Where, in a deed conveying a right of way to the state for the use of a railroad, power was given to the chief engineer of the

state to locate its boundary, any question as to the abuse of his discretion in laying off such boundary must be made within a reasonable time and cannot be raised after a lapse of thirty years. *Dougherty v. Western & A. R. Co.*, 53 Ga. 304.

One who attests a deed, knowing its contents, and afterwards stands by and sees expensive work done under it on the premises, making no objection, is estopped to assert an older adverse title in himself, and recover the premises in opposition to the deed to which his attestation gave authenticity and credit. *Georgia Pac. R. Co. v. Strickland*, 80 Ga. 776, 12 Am. St. Rep. 282, 6 S. E. Rep. 27.

(3) *Illustrations.* — Bonds of a county were issued to pay a subscription to railroad stock, which was to bear interest until dividends should be declared, the interest being made payable by a tax, with a provision that stock certificates should be issued to the taxpayers for the amount of their taxes. These stock certificates were non-interest bearing and were to be deducted from the first dividends declared. It appeared that the control of stock and the right to order its deduction from such dividends were properly vested in county commissioners instead of the county court, but that the commissioners stood by for more than five years and, without objection, allowed the stock to be disposed of by the county court. *Held*, that they were estopped from then demanding the stock from the railroad company. *Simpson County v. Louisville & N. R. Co.*, (Ky.) 19 S. W. Rep. 665.

During the preparation of a case by the receiver of a railroad against another road to recover for certain freight charges, the purchaser of the road stood by without any suggestion or assistance on his part as to how the case should be submitted or what issues should be presented. A year afterward, when judgment was about to be rendered, he filed a petition, asking that he be substituted as plaintiff and setting up issues that would necessitate reopening the case. *Held*, that his own negligence in thus silently standing by would preclude him from complaining of the action of the court in refusing to substitute him as plaintiff. *Ritchie v. Cincinnati, N. O. & T. P. R. Co.*, (Ky.) 21 S. W. Rep. 641.

27. When standing by creates no estoppel.—Where a landowner makes no grants, executes no license, and makes no

representations, there is no estoppel *in pais*, where a company has taken his land without legal steps to acquire title. The fact that he knows that his land has been seized does not of itself estop him, for his silence is neither fraudulent nor culpable. In such case the landowner is not estopped from asserting his right to damages, although long acquiescence might preclude him from recovering the land. *Bloomfield R. Co. v. Grace*, 112 Ind. 128, 11 West. Rep. 368, 13 N. E. Rep. 680.—DISTINGUISHED IN *Moyer v. Ft. Wayne, C. & L. R. Co.*, 132 Ind. 88.—*Thornton v. Sheffield & B. R. Co.*, 33 Am. & Eng. R. Cas. 226, 84 Ala. 109, 4 So. Rep. 197, 5 Am. St. Rep. 337.

A street railway company, whose property is not subject to assessment for street improvements, is not estopped to deny its liability for an assessment, because it stands by without objection until the improvement is completed, if it is one which the city has authority to make. *Western P. & S. Co. v. Citizens' St. R. Co.*, 46 Am. & Eng. R. Cas. 176, 128 Ind. 525, 26 N. E. Rep. 188, 28 N. E. Rep. 88.

28. Silence, when raises an estoppel.—(1) *In general.*—Where a railroad company sells a lot with a provision in the deed binding the grantee to erect a house thereon, and by accident the grantee builds over the line on other lands of the company, and the officers of the company know of the mistake, but interpose no objection, the company will be compelled to allow the house to be moved at its expense, or to pay its value. *Georgia R. & B. Co. v. Hamilton*, 59 Ga. 171.

Where one company grants another a roadbed, etc., and the lessee company enters and expends large sums of money thereon, without objection from the directors or stockholders of the lessor company, they are afterward estopped from questioning its validity on the ground of irregularity. *Malaska County R. Co. v. Des Moines Valley R. Co.*, 28 Iowa 437.

If prior to the purchase of lands by a railroad, the grantor's son has received a deed for the land, which is not recorded, and, with knowledge of the facts, remains silent, he could not claim thereunder as against the company; and even with a prior re-

* Estoppel of owner by silent acquiescence from claiming damages for land appropriated by company, see note, 5 L. R. A. 183.

corded deed, it would be questionable whether his right would prevail against the company under the circumstances. *Louisville, N. O. & T. R. Co. v. Day*, 67 *Miss.* 227, 7 *So. Rep.* 349.

A stockholder in a railroad after attending various meetings of the board of directors, which were held out of the state, and making no objection thereto, cannot object to a subsequent meeting held at the same place. *Wood v. Boney*, (N. J. *Eq.*) 21 *Atl. Rep.* 574.

Where a railroad company condemns the private lands of its president, he cannot afterward object to the title acquired by the company on the ground of certain defects in the proceedings, where at the time he was the officer charged with the duty of seeing that the proceedings were regularly conducted. *Troy & B. R. Co. v. Potter*, 42 *Vt.* 265.—DISTINGUISHED IN *Austin v. Rutland R. Co.*, 17 *Fed. Rep.* 466, 21 *Blatchf. (U. S.)* 358. FOLLOWED IN *Austin v. Rutland R. Co.*, 45 *Vt.* 215. QUOTED IN *New York & N. E. R. Co. v. Comstock*, 60 *Conn.* 200. REVIEWED IN *Vermilya v. Chicago, M. & St. P. R. Co.*, 66 *Iowa* 606.

(2) *Illustrations*.—Where the plaintiff, with only a possessory title, knew and approved of a deed given by one holding the record title, conveying a right to enter the premises, together with a perpetual easement of water and water rights therein, himself receiving the consideration named in the deed, and afterwards saw the defendant, a subsequent grantee, expending large sums of money in improving the easement, but gave no warning to the defendant to desist and made no assertion of title until the completion of the work, and in which he was employed—*held*, that he was equitably estopped from asserting any title to the disturbance of the defendant's easement. *Martin v. Maine C. R. Co.*, 83 *Me.* 100, 21 *Atl. Rep.* 740.

A father licensed his son to enter upon a part of his land under a parol agreement that the son should occupy and pay taxes on such part, and, on a certain contingency, receive a deed. The land continued to be assessed to the father. Subsequently a railroad was built across it; and after condemnation proceedings and considerable litigation as to the right of way between the company and the father, it paid him, and received a deed for the right of way. All this was known to the son, who attended

upon the litigation, but remained silent. *Held*, that he cannot in equity controvert the title conveyed by his father, although he had been in possession, in the manner stated, for more than ten years, and had received a deed from his father, which was recorded just before the latter executed the deed to the company, it not having actual notice of his deed. *Day v. Louisville, N. O. & T. R. Co.*, 69 *Miss.* 589, 11 *So. Rep.* 25.

Where a canal company had for over twenty years been in the undisputed possession of water, which before that period had been in litigation with a riparian owner who knew that the canal company was about to lease its works, which were materially dependent on such water, and such riparian owner took no measures to revive the old litigation, or to give notice of such claims before the lease was given—*held*, that ground was laid for the claim of an equitable estoppel in behalf of the lessee, and that he had a sufficient standing in a court of equity to enjoin suits at law calling in question the right to such water. *Society, etc., v. Lehigh Valley R. Co.*, 32 *N. J. Eq.* 329; *affirming* 30 *N. J. Eq.* 145.

29. When silence will not estop.—Mere silence and inaction for a few months after being informed that a railroad company are constructing their track over the land will not be regarded such acquiescence as to estop the owner from his action of ejectment. *Walker v. Chicago, R. I. & P. R. Co.*, 57 *Mo.* 275.

The presence and the silence of the mortgagor when a demand was made by the mortgagee upon the common carrier for goods, and the demand was refused, were not such an admission by the mortgagor of the mortgagee's ownership as made it the duty of the carrier to yield to such demand. *Kohn v. Richmond & D. R. Co.*, 37 *So. Car. I.*

3. Acts of Agents.

30. In general.—A company receiving property under a contract made by its agent is thereby estopped from denying the authority of such agent, and would be bound to pay therefor. *Conley v. Columbus Tap R. Co.*, 44 *Tex.* 579.

Where a company accepts a deed stipulating for the performance by it of certain acts, it cannot question the authority of its agent to make the contract. *Louisville, N.*

A. & C. R. Co. v. Sumner, 24 *Am. & Eng. R. Cas.* 641, 106 *Ind.* 55, 5 *N. E. Rep.* 404.

Where the local agent of a railroad that is in the hands of a receiver, has made a contract for the shipment of a very large amount of freights, and the receiver makes no objection until the contract is half executed, he is then estopped from denying the authority of the agent to make a contract for such a large amount. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 38 *Fed. Rep.* 561.

Where a company is sued for a personal injury to a ten-year-old boy who is deaf and dumb, while riding on its train, it cannot avail itself of the defense that he was not lawfully on the train, where it appears that its employés had been in the habit of allowing and encouraging him to ride, though no special invitation or permission was given at the time of the injury. *Lammert v. Chicago & A. R. Co.*, 9 *Ill. App.* 388.

As between a railroad company and its contractors, the company is estopped from objecting to a fence built by the contractor, where it appears that its own engineer furnished the plans and one of its agents superintended the work. *Barker v. Troy & R. R. Co.*, 27 *Vt.* 766.

Where a railroad company lets a contract for the construction of its road, to be finished so as to receive the approval of its chief engineer, it cannot object to paying on account of a want of such approval, where it appears that it has no chief engineer at the time the work is completed. *Barker v. Troy & R. R. Co.*, 27 *Vt.* 766.

A company sued for the value of goods delivered to it for carriage, and which were stolen by a man representing himself to be a driver in the employ of a subcontractor of the company, is not estopped from denying that the thief was its servant. *Way v. Great Eastern R. Co.*, *L. R.* 1 *Q. B. D.* 692, 35 *L. T.* 253, 45 *L. J. Q. B. D.* 874.

Where the plaintiff intrusted certain cargoes of rails to the Erie railroad, to carry to Buffalo and forward thence to Duluth by water, and defendant, having contracted with the agent of the road at New York to carry them from Buffalo to Duluth, and to insure them, procured certificates of insurance to be issued, and deposited with the agent of the road at Buffalo, of whom it received the cargo, but had no direct dealing with the plaintiff—the receipt and retention

of these certificates by the agent of the road, without objection, estopped the plaintiff from objecting to the form of the policies or the amount of the insurance. *Scranton Steel Co. v. Ward's D. & L. S. Line*, 40 *Fed. Rep.* 866.

At the time a landowner executed a deed to a company for a right of way, the president of the company executed a contract with covenants running with the land, with certain provisions in favor of the landowner. *Held*, that the acceptance by the company of the deed charged it with notice of the covenants in the agreement, and estopped it, by holding possession of the land, from denying the authority of its president to execute the agreement. *Mobile & M. R. Co. v. Gilmer*, 85 *Ala.* 422, 5 *So. Rep.* 138.

To a bill by a railway company for the specific performance of a contract to grant a right of way over land, as against a subsequent purchaser, the latter set up an alleged estoppel, arising out of the statement of an agent of the company employed to settle for and obtain rights of way, that the company claimed a strip of less width than that provided for in the contract, made before the defendant's purchase of the land. It appeared that such statement was made in ignorance of the company's rights, and that the agent had no authority to release any of its rights acquired under the contract. *Held*, that such statements or admissions of the agent created no equitable estoppel. *Chicago & E. I. R. Co. v. Hay*, 119 *Ill.* 493, 10 *N. E. Rep.* 29.—FOLLOWED IN *Chicago & E. I. R. Co. v. Hay*, 119 *Ill.* 507.

Where a gas company, with the permission of the municipal authorities, had laid down and was maintaining its pipes in the street of a city, and a street railway company was wrongly informed by the employés of the gas company respecting the location of the latter's pipes, so that the railway track was laid over them—*held*, that the gas company could be estopped from disturbing the railway track, even for the purpose of repairing its own property. *Davenport C. R. Co. v. Davenport Gas Light Co.*, 43 *Iowa* 301, 14 *Am. Ry. Rep.* 437.

One who was temporarily employed as bookkeeper and collector was not an agent of the company in such a sense that his statement respecting the location of its gas pipes would be binding on the company.

Davenport C. R. Co. v. Davenport Gas Light Co., 43 Iowa 301, 14 Am. Ry. Rep. 437.

Where the defendants' agents were accustomed to receive notes for collection in places beyond their route—*held*, that the defendants were estopped to deny that such agents were authorized to make contracts on behalf of the company to transact business of such character beyond the limits of the defendants' route. *Knapp v. United States & C. Exp. Co.*, 55 N. H. 348.—DISAPPROVING *Hood v. New York & N. H. R. Co.*, 22 Conn. 502.

31. Corporate officers.—A city will not be permitted to deny the official character of its own officers, who acted as such in the performance of the duties necessary to execute the conditions precedent to the issuance of railway aid bonds. *Eminence v. Grasser*, 81 Ky. 52.

A railroad corporation is estopped from denying that a portion of the structure of their road, built at the same time with and as a part of it by their officers, engineers, and contractors, is authorized by their act of incorporation; and any person entitled to recover for damages occasioned by such structure has a right to assume that in making the same the corporation acted in pursuance of their charter, and to have his equitable remedy for damages under Mass. Rev. St. ch. 39, § 56, instead of treating the officers, engineers, and contractors of the corporation as trespassers. *Parker v. Boston & M. R. Co.*, 3 Cush. (Mass.) 107.

Where a person is directed by the president and vice-president of a corporation to deal with the superintendent, and he makes an oral contract with the superintendent in the name of the corporation, it cannot afterwards deny the superintendent's authority to contract. *Morrell v. Long Island R. Co.*, 1 N. Y. Supp. 65. See also *Vicksburg & M. R. Co. v. Ragsdale*, 54 Miss. 200, 17 Am. Ry. Rep. 435.—REVIEWED IN *Ragsdale v. Vicksburg & M. R. Co.*, 62 Miss. 480.

A railroad is not estopped from denying the validity of an over-issue of stock by payment of dividends to one who had held valid stock, but which had been exchanged for the over-issue stock through the fraud of the president, while not acting for the company. *Wright's Appeal*, 99 Pa. St. 425.

The officers of a county are not its agents in such a sense that they can, by the levy and assessment of taxes upon land which is exempt from taxation, create an estoppel

which shall prevent the county from subsequently asserting title to the property thus taxed, against a railroad claiming under a land grant from the United States. *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 46 Iowa 226.—FOLLOWED IN *Howard County v. Bullis*, 49 Iowa 519.

4. Compromises; Contracts.

32. Compromises.—When the plaintiff receives and retains money from the company which employed him, on the faith of the statement by him that he did not mean to sue for damages, he is estopped from suing. *Galloway v. Western & A. R. Co.*, 57 Ga. 512.—NOT FOLLOWED IN *Little Rock & Ft. S. R. Co. v. Eubanks*, 31 Am. & Eng. R. Cas. 176, 48 Ark. 460.

A county having agreed in a compromise to convey to a railroad company all the lands the latter claimed except a certain specified number of acres reserved, in lieu of which it offered ten thousand dollars in money, it could not afterwards plead that the compromise was invalid on the ground that the company obtained by the compromise all it sought by its suit, until it had been shown that the excepted lands were worth no more than ten thousand dollars. *Mills County v. Burlington & M. R. R. Co.*, 47 Iowa 66.

In an action by a county to quiet title to lands over which a railroad company exercised acts of ownership, it appeared that the lands were taxed to the company among other lands, and that a large sum was due for taxes, of which sum the county accepted a certain amount as a compromise and in settlement. *Held*, that this estopped the county from denying the company's ownership. *Adams County v. Burlington & M. R. Co.*, 39 Iowa 507.—FOLLOWING *Iowa R. Land Co. v. Story County*, 36 Iowa 48.—DISTINGUISHED IN *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 46 Iowa 226; *Howard County v. Bullis*, 49 Iowa 519. FOLLOWED IN *American Emigrant Co. v. Iowa R. Land Co.*, 52 Iowa 323.

An individual and a railroad company both claimed a tract of public land, and upon an application to the secretary of the interior the controversy was decided in favor of the company and a patent issued therefor. Subsequent thereto the individual entered into a compromise with the company, fully recognizing its title, and agreed to buy the land. *Held*, that the compro-

mise having been entered into by the parties with full knowledge of the facts, a court would not inquire into the facts as to which had the better title, but would hold the parties to the contract as made. *Atchison, T. & S. F. R. Co. v. Starkweather*, 21 Kan. 322.—QUOTING *Penn v. Baltimore*, 1 Ves. Sr. 444; *Cann v. Cann*, 1 P. Wms. 727; *Stapilton v. Stapilton*, 1 Atk. 2; *Fitch v. Baldwin*, 17 Johns. (N. Y.) 161. REVIEWING *Moore v. Fitzwater*, 2 Rand. (Va.) 442.

33. Contracts, generally.—One who makes a valid contract with a railroad company by which he agrees, in consideration of employment by it, to waive all compensation for right of way through his lands, cannot maintain an action against the company for damages for the wrongful taking of the lands. *Cory v. Chicago, B. & K. C. R. Co.*, 44 Am. & Eng. R. Cas. 183, 100 Mo. 282, 13 S. W. Rep. 346.

Where a railroad company is proceeding to condemn a right of way and the landowner agrees that he will give a right of way if the company will change the location to another portion of his land, and the company, relying upon such agreement, does so, at considerable extra expense, the landowner is thereby estopped from claiming damages for the land taken. *Oregon R. & N. Co. v. Owsley*, 3 Wash. T. 38, 13 Pac. Rep. 186.

If a party who contracts with a corporation thereby estops himself, when sued on the contract, from denying the power of the corporation to make it, as to which the decided cases are conflicting, the principle does not apply when a corporation seeks to enforce a contract, as assignee of one of the original parties. *Wilks v. Georgia Pac. R. Co.*, 79 Ala. 180.

Two companies jointly owned and operated a section of a railway. One of the companies filed a bill to compel an accounting of profits, and obtained a decree in its favor for the profits arising from the passenger traffic, but the bill was dismissed, without prejudice, as to the profits arising from local freights. Subsequently the defendant in the first suit filed a bill to compel an accounting for the local freights. *Held*, that the plaintiff in the first suit, having profited by the decree entered therein, and had the benefit of the contract as to passenger traffic, was estopped from denying the validity of the contract in the second suit, as to the local freights; and the fact that the first bill

was dismissed without prejudice as to such freights, would not change the fact. *Baltimore & O. R. Co. v. Pittsburgh, C. & St. L. R. Co.*, 55 Fed. Rep. 701.

By the terms of a contract between two companies each gave to the other the right to use its tracks and depots, and agreed to run its trains over the track of the other, the earnings of the two roads to be divided into certain specified proportions. It appeared that the contract was executed by one of the companies by its president and secretary, who were also directors, and was sealed with the corporate seal, but was never ratified by the directors as was the intention when executed. *Held*, that after the company had acted upon the contract for a year and the other company had faithfully observed its terms, it was estopped from denying that the officers were not authorized to make the contract. *Jourdan v. Long Island R. Co.*, 115 N. Y. 380, 22 N. E. Rep. 153, 26 N. Y. S. R. 138; *affirming* 42 Hun 657, 6 N. Y. S. R. 89.

In an action for the price of certain property, where it appeared that plaintiff's intestate sold the property to H.; that H. assigned his interest to a construction company; that intestate, at the request of such company, transferred the property to defendant; that defendant accepted the conveyance in consideration therefor, by resolution of its board of directors, entered on its minutes, and agreed to pay money and deliver certain stock and bonds, the defendant, by accepting the conveyance and agreeing to provide the construction, takes upon itself the fulfilment of the original contract, and is estopped to deny the consent of the construction company to its substitution. *Texas Western R. Co. v. Gentry*, 33 Am. & Eng. R. Cas. 46, 69 Tex. 625, 8 S. W. Rep. 98.

Defendant company constructed its road upon a street upon which lots of appellant fronted. In a suit for damages to the said property defendant company pleaded that plaintiff was estopped by his obligation to the defendant, made by him and others, "to obtain and procure free of all costs and expenses * * * the right of way over all and every tract of land over and through which the line of said railway may enter and pass in the county of Fayette" of one hundred feet, "except where the line is located through streets already laid out, in which case the right of way shall be so

much
opera
way
auth
was
estop
The
the c
ratio
tion,
liabil
struc
were
town
comp
by it
along
Rosen
Tex.
Illino
Kem
Seely
Ches
Hers
& N.
In
had
fit, it
contr
ter w
train
by pl
that
duct
wage
road
enter
to ru
and
after
upon
mast
from
paid
mast
mast
R. Co
7 S.
34
tion
secur
with
pany
to p
Hela
mem
setti

much of said streets as is required for the operation of said road, and which right of way shall be obtained from the municipal authorities of said town." *Held*, that it was error to charge that the plaintiff was estopped by his contract to claim damages. The contract was that they were to obtain the consent of the authorities of the corporation. This not only defines the obligation, but it is practical limitation upon the liability, and does not admit of the construction that the obligors in the contract were both to procure the consent of the town authorities and to secure the railway company immunity from injuries inflicted by it upon abutting lots upon the streets along which the track was constructed. *Rosenthal v. Taylor, B. & H. R. Co.*, 79 Tex. 325, 15 S. W. Rep. 268.—APPROVING *Illinois C. R. Co. v. Grabill*, 50 Ill. 241; *Kemper v. Louisville*, 14 Bush (Ky.) 87; *Seely v. Alden*, 61 Pa. St. 302; *Troy v. Cheshire R. Co.*, 23 N. H. 102; *Finley v. Hershey*, 41 Iowa 389; *Fowle v. New Haven & N. Co.*, 112 Mass. 334.

In an action against a company for money had and received for plaintiff's use and benefit, it appeared that plaintiff entered into a contract by which the defendant's road master was to furnish supplies for a boarding train; that the boarding train was to be run by plaintiff in the name of the road master; that the price of the supplies was to be deducted at the end of each month from the wages of defendant's men; that after the road master had been superseded, plaintiff entered into a contract with his successor to run the boarding train in his own name; and that plaintiff accepted supplies thereafter, knowing them to have been shipped upon the credit of the superseded road master. *Held*, that plaintiff was estopped from claiming from the company money paid for the supplies shipped after the road master was superseded, upon such road master's order. *Hereford v. Southern Pac. R. Co.*, (Tex.) 34 Am. & Eng. R. Cas. 133, 7 S. W. Rep. 218.

34. Guaranties.—A railroad construction company placed bonds on the market secured by a mortgage on the road, but with the guaranty of the construction company that the local aid should be sufficient to prepare the roadbed ready for the rails. *Held*, that the guaranty did not estop a member of the construction company from setting up a mechanic's lien on the road

superior to the lien of the mortgage. *Meyer v. Hornby*, 101 U. S. 728.

If the bondholders sustain a loss by reason of such guaranty, they may recover against the company giving it, but not against an individual member thereof. *Meyer v. Hornby*, 101 U. S. 728.

5. Representations; Admissions.

35. Representations.—A declaration, though untrue, can never operate as an estoppel if the person to whom it is made is not induced by it to do something which he was not under legal obligation to do. *Gulf, C. & S. F. R. Co. v. Gordon*, 70 Tex. 80, 7 S. W. Rep. 695.—QUOTING *Hinkle v. Minneapolis & St. L. R. Co.*, 15 Am. & Eng. R. Cas. 391, 31 Minn. 434.—*Chicago & G. T. R. Co. v. Miller*, 50 Am. & Eng. R. Cas. 650, 91 Mich. 166, 51 N. W. Rep. 981.

A county which by its proper officers assures the managers of a railroad that certain county bonds issued to another railroad will be paid (the validity of those bonds being in question), on the faith of which the managers effect a consolidation with the other railroad, is estopped from setting up the invalidity of those bonds against holders so acquiring them. *Tipton County v. Rogers L. & M. Works*, 1 Am. & Eng. R. Cas. 517, 10 U. S. 523.

If way bills were sent to the consignees with the knowledge of the defendants, and with the intention on their part that they should be received and acted upon by the plaintiffs as the representations and undertakings of the defendants, and they were so received and acted upon by the plaintiffs, who were induced thereby to make this claim and bring this suit, the defendants would be estopped to deny that they had so received the goods. *Barter v. Wheeler*, 49 N. H. 9.

A railroad company having filed a survey of a route over which another company also had filed a survey, and having held such other company out as the builder of the track over such route, and having taken the benefit of a contract incident to the laying of such route, made in the name of such other company, cannot repudiate such contract on the ground that itself is the builder of such road. *Coe v. Delaware, L. & W. R. Co.*, 4 Am. & Eng. R. Cas. 513, 34 N. J. Eq. 266; reversing 31 N. J. Eq. 105.

A company giving a written certificate

that a person named is the owner of a bond or certain number of shares of stock about to be issued by such company is estopped from denying the truth of such statement in favor of one who, in good faith, has changed his position in reliance on such certificate; and it is immaterial whether the certificate is negotiable or not. *Midland R. Co. v. Hitchcock*, 14 *Am. & Eng. R. Cas.* 598, 37 *N. J. Eq.* 549. *In re Bahia & S. F. R. Co.*, L. R. 3 Q. B. 584, 37 *L. J. Q. B.* 176, 18 *L. T.* 467, 16 *W. R.* 862, 9 *B. & S.* 844.—FOLLOWED IN *Hart v. Frontino & B. S. A. Gold Min. Co.*, L. R. 5 Ex. 111, 39 *L. J. Ex.* 93, 22 *L. T.* 30.

A firm which acted as financial agents of a railroad company, and the two partners of which were respectively president and director of the company, is estopped by statements made to the stock exchange in applying to have the mortgage bonds of the company, including certain income bonds, "listed," from claiming the benefit of the lien of first mortgage bond coupons paid out of money advanced by it to the railroad company, and secured by income bonds, if it would act unjustly upon innocent purchasers who acquired title in reliance upon such statements to give effect to such lien. *Fidelity I., T. & S. D. Co. v. Shenandoah Valley R. Co.*, 38 *Am. & Eng. R. Cas.* 559, 86 *Va.* 1, 13 *Va. L. J.* 309, 9 *S. E. Rep.* 759.

36. Admissions.—Where a party, pending a trial, makes an admission of his liability, and thereby obtains a supposed advantage, he is estopped from afterwards denying the truth of the admission. *Hyatt v. Burlington, C. R. & N. R. Co.*, 68 *Iowa* 662, 27 *N. W. Rep.* 815.

If a party admit himself to be a subscriber to the stock of a railroad company, and on the faith of such admission others have acted for his benefit, he will be estopped from subsequently denying that he did in fact subscribe. *Graff v. Pittsburgh & S. R. Co.*, 31 *Pa. St.* 489.

EVICITION.

Of tenant, effect of, see **LANDLORD AND TENANT, 7; LEASES, ETC., 71.**

EVIDENCE.

Account books as, see also **CARRIAGE OF MERCHANDISE, 743.**

Admission of improper, how cured, see **APPEAL AND ERROR, 64, 65.**

Admission of order of proof, see **ANIMALS, INJURIES TO, 527.**

As regards signals, their sufficiency, etc., see **CROSSINGS, INJURIES TO PERSONS, ETC., AT, 160-163.**

As to goods lost, see **CARRIAGE OF MERCHANDISE, 312.**

— sufficiency of fences, see **FENCES, 80.**

— whether lands are "superfluous," see **EMINENT DOMAIN, 1117.**

Baggage checks as, see **BAGGAGE, 56, 57.**

Best and secondary, see also **CARRIAGE OF MERCHANDISE, 742.**

Circumstantial, see **FIRES, 213.**

Commenting on, see **STREET RAILWAYS, 439; TRIAL, 120, 140.**

Conflicting, review of, see **APPEAL AND ERROR, 117.**

Cumulative, not ground for new trial, though newly discovered, see **NEW TRIAL, 94.**

Demurrer to, see **TRIAL, 58-61.**

Discretion of court as to admitting or excluding, see **ANIMALS, INJURIES TO, 528; APPEAL AND ERROR, 28.**

Documentary, see also **FIRES, 351; FLOODING LANDS, 75; SUBSCRIPTIONS TO STOCK, 112.**

Effect of judgments as, see **JUDGMENT, ETC., 11.**

Erroneous admission of, when ground for reversal, see **APPEAL AND ERROR, 37; ELEVATED RAILWAYS, 190; EMINENT DOMAIN, 897.**

— instructions on weight of, see **APPEAL AND ERROR, 42.**

Exclusion of, when ground for reversal, see **APPEAL AND ERROR, 38, 68; ELEVATED RAILWAYS, 192.**

Expert and opinion evidence, see **ELEVATED RAILWAYS, 115-126; WITNESSES, 94-198.**

Founded on experiment, discretion to admit, see **APPEAL AND ERROR, 16.**

Mearsay and opinion, see also **CARRIAGE OF MERCHANDISE, 740; ELEVATED RAILWAYS, 109.**

How framed in hypothetical question, see **WITNESSES, 191.**

In actions against carriers of goods, see **CARRIAGE OF MERCHANDISE, 740-756.**

— — — — live stock, see **CARRIAGE OF LIVE STOCK, 144-146.**

— — — — slaves, see **CARRIAGE OF SLAVES, 11.**

— — — — elevated railways, see **ELEVATED RAILWAYS, 101-126.**

— — — — express carriers, see **EXPRESS COMPANIES, 84-87.**

— — — — passenger carriers, see **CARRIAGE OF PASSENGERS, 561-594.**

In actions against receivers, see RECEIVERS, 139.

— sleeping car companies, see SLEEPING AND PALACE CAR COMPANIES, 33.

— street railway companies, see STREET RAILWAYS, 437, 438.

— by married woman for injury to her person or property, see HUSBAND AND WIFE, 29.

— stockholders, see STOCKHOLDERS, 130.

— for causing death, see DEATH BY WRONGFUL ACT, 221-288.

— conversion of personal property, see TROVER, ETC., 16.

— damage by culverts, see CULVERTS, 24.

— damages caused by fires, see FIRES, 201-290.

— nuisances, see NUISANCE, 33, 34.

— discriminating against negroes, see COLORED PERSONS, 11.

— dividends, see DIVIDENDS, 14.

— expulsion of passengers, see EJECTION OF PASSENGERS, 90-96.

— failure to build cattle-guards, see CATTLE-GUARDS, 28, 29.

— flowing lands, see FLOODING LANDS, 72-76.

— infringement of patents, see PATENTS FOR INVENTIONS, 20.

— injuries at crossings, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, 336-350.

— or near stations, see STATIONS AND DEPOTS, 133-135.

— caused by collisions, see COLLISIONS, 11-16.

— derailment, see DERAILMENT, 3, 4.

— negligence of fellow-servants, see FELLOW-SERVANTS, 457, 460-494.

— to children, see CHILDREN, INJURIES TO, 160-170.

— employees, see EMPLOYÉS, INJURIES TO, 560-630.

— minor employees, see EMPLOYÉS, INJURIES TO, 475.

— trespassers, see TRESPASSERS, INJURIES TO, 117-120.

— injury caused by defective bridge, see BRIDGES, ETC., 57.

— killing stock, see ANIMALS, INJURIES TO, 391-523.

— libel or slander, see LIBEL, ETC., 9.

— loss of baggage, see BAGGAGE, 113-117.

— goods by fire, see CARRIAGE OF MERCHANDISE, 157.

— malicious prosecution, see MALICIOUS PROSECUTION, 11.

5 D. R. D.—25.

In actions for negligence, generally, see NEGLIGENCE, 91-103.

— overcharges to passengers, see TICKETS AND FARES, 133.

— penalties, see PENALTIES, 14.

— services as physician, see MEDICAL SERVICES, 18.

— taxes, see TAXATION, 320.

— wages, see EMPLOYÉS, 13.

— wrongful arrest, see FALSE IMPRISONMENT, 16.

— growing out of collisions between street-cars, see COLLISIONS, 25, 26.

— involving leases, see LEASES, ETC., 105.

— of trespass, see EMINENT DOMAIN, 1077-1080; TRESPASS, 15, 26.

— on bills and notes, see BILLS, NOTES, ETC., 24.

— construction contracts, see CONSTRUCTION OF RAILWAYS, 111-113.

— contracts, see CONTRACTS, 97.

— coupons, see COUPONS, 20.

— covenants, see COVENANTS, 18.

— injunction bonds, see INJUNCTION, 65.

— subscriptions, see SUBSCRIPTIONS TO STOCK, 101-113.

— to enforce laborers' liens, see LIENS, 60.

— railway aid bonds, see MUNICIPAL AND LOCAL AID, 394.

— stock subscriptions, see SUBSCRIPTIONS TO STOCK, 101-113.

— foreclose mechanics' liens, see LIENS, 40.

— recover back tax paid, see TAXATION, 341.

— overcharges, see CHARGES, 45.

— condemnation proceedings generally, see EMINENT DOMAIN, 362-370.

— creditors' suits against stockholders, see STOCKHOLDERS, 74.

— criminal actions, see CRIMINAL LAW, 7.

— prosecution for causing death, see DEATH BY WRONGFUL ACT, 447.

— defense, admissibility of, in actions for injuries caused by fire, see FIRES, 219-226.

— ejectment, see EJECTMENT, 28; EMINENT DOMAIN, 1027.

— foreclosure, see MORTGAGES, 203, 204.

— husband's action for injury to wife's person, see HUSBAND AND WIFE, 19.

— joint actions by husband and wife, for injury to wife, see HUSBAND AND WIFE, 36.

— landowner's action for damages, see EMINENT DOMAIN, 1005, 1006.

— quo warranto proceedings, see QUO WARRANTO, 11.

- In railway intersection proceedings, see CROSSING OF RAILROADS, 34-36.
- rebuttal, see TRIAL, 40.
 - Instructions on weight and sufficiency of, see TRIAL, 70, 143.
 - unsupported by, see APPEAL AND ERROR, 44; DEATH BY WRONGFUL ACT, 334; NEGLIGENCE, 108; TRIAL, 139.
 - Maps or plans as, see EMINENT DOMAIN, 339.
 - New trial for improper admission or exclusion of, see NEW TRIAL, 2, 3.
 - Newly discovered, as ground for new trial, see NEW TRIAL, 90-95.
 - Non-prejudicial or harmless, see APPEAL AND ERROR, 61; EMINENT DOMAIN, 904.
 - Nonsuit for insufficiency of, see TRIAL, 64, 71, 73.
 - Not misleading, no ground for reversal, see APPEAL AND ERROR, 62.
 - Objections to competency or sufficiency of, see EMINENT DOMAIN, 914, 915.
 - not properly taken below, see APPEAL AND ERROR, 94, 95.
 - Of abandonment, or non-user, see EMINENT DOMAIN, 973.
 - agency, see AGENCY, 5-8.
 - agent's authority, see AGENCY, 20, 21.
 - attorney's authority, see ATTORNEYS, 11.
 - benefits, see ELEVATED RAILWAYS, 113, 125.
 - change in destination of goods, see CARRIAGE OF MERCHANDISE, 754.
 - compromises, see COMPROMISE, 7.
 - condition of goods shipped, see BILLS OF LADING, 20-23.
 - — track, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, 44.
 - consent of abutting owners, see STREET RAILWAYS, 104.
 - contract, railway ticket as, see TICKETS AND FARES, 5.
 - to pay rebates, see DISCRIMINATION, 70.
 - default of final carrier, see CARRIAGE OF MERCHANDISE, 655.
 - delivery, bill of lading as, see BILLS OF LADING, 57.
 - of baggage to second carrier, see BAGGAGE, 20.
 - directors' meetings, see DIRECTORS, ETC., 26.
 - failure to station flagman at crossing, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, 84.
 - incompetency of negligent fellow-servant, see FELLOW-SERVANTS, 477-494.
 - incorporation, see CORPORATIONS, 20.
 - kind and condition of crossing, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, 345.
 - law of foreign state, see DEATH BY WRONGFUL ACT, 115.
 - Of loss before delivery to connecting carrier, see CARRIAGE OF MERCHANDISE, 570.
 - of goods by carrier, see CARRIAGE OF MERCHANDISE, 111.
 - membership in association, see RELIEF ASSOCIATIONS, 4.
 - misdelivery by carrier, see CARRIAGE OF MERCHANDISE, 281.
 - negligence of watchman, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, 90.
 - offers to compromise claims for lost baggage, see BAGGAGE, 116.
 - quality of shipment, see BILLS OF LADING, 18.
 - quantity of shipment, see BILLS OF LADING, 17.
 - rates allowed to shipper, see CARRIAGE OF MERCHANDISE, 452.
 - reasonable rates, railway commissioners' decisions as, see RAILWAY COMMISSIONERS, 27.
 - rental value, leases as, see ELEVATED RAILWAYS, 105.
 - rules and regulations of relief associations, see RELIEF ASSOCIATIONS, 3.
 - shipper's assent to limitation of liability, see CARRIAGE OF MERCHANDISE, 434.
 - special value of property shipped, see CARRIAGE OF MERCHANDISE, 116.
 - subsequent repair of defect in crossing, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, 347.
 - title to land condemned, see EMINENT DOMAIN, 370.
 - — stock, see STOCK, 1, 84.
 - undue speed at crossing, to show negligence, see CROSSINGS, INJURIES, ETC., AT, 188, 189.
 - usage or custom, see CARRIAGE OF MERCHANDISE, 750; CUSTOM, ETC., 4.
 - value of shipment, see BILLS OF LADING, 19.
 - On hearing before arbitrators, see ARBITRATION AND AWARD, 9.
 - motion to set aside report of commissioners to assess damages, see EMINENT DOMAIN, 814.
 - — — verdict, see EMINENT DOMAIN, 840.
 - question of abandonment, see ABANDONMENT, 6.
 - — comparative negligence, see COMPARATIVE NEGLIGENCE, 11.
 - — contributory negligence, see CONTRIBUTORY NEGLIGENCE, 90-107.
 - — damages, see CARRIAGE OF LIVE STOCK, 160; DAMAGES, 83-98; EMINENT DOMAIN, 595-642; FIRES, 350-358.
 - — value, see EMINENT DOMAIN, 1248.

- On trial by jury of question of damages, see EMINENT DOMAIN, 559-563.
- of action in assumpsit, see ASSUMPSIT, 5.
 - replevin suit, see REPLEVIN, 5.
- Opinions as, see ANIMALS, INJURIES TO, 413-417; CHILDREN, INJURIES TO, 170; ELEVATED RAILWAYS, 115-126; FELLOW-SERVANTS, 481; FIRES, 214; WITNESSES, 94-108.
- to amount of damage, see FIRES, 357.
 - value, see EMINENT DOMAIN, 633-635.
 - and expert evidence, see CATTLE-GUARDS, 29.
- Parol, to vary contract to issue free pass, see also PASSES, 2.
- or explain bill of lading, see also BILLS OF LADING, 13, 40-43.
 - written agreement, see also CARRIAGE OF MERCHANDISE, 401, 747.
- Positive and negative, see also CROSSINGS, INJURIES TO PERSONS, ETC., AT, 348.
- Preponderance of, see CONTRIBUTORY NEGLIGENCE, 101; EMPLOYEES, INJURIES TO, 621.
- Presumption of regularity as applied to, see APPEAL AND ERROR, 32.
- Presumptive, see also FIRES, 257-277.
- Questions for jury in cases of conflict of, see DEATH BY WRONGFUL ACT, 203.
- Receipt for goods as, see CARRIAGE OF MERCHANDISE, 587.
- Reception of, on trial, see TRIAL, 39-51.
- Requests to charge not supported by, see DEATH BY WRONGFUL ACT, 352; TRIAL, 167, 168.
- Review of, on appeal, see APPEAL AND ERROR, 115-123; EMINENT DOMAIN, 924.
- Right of commissioners to assess land damages to hear, see EMINENT DOMAIN, 509.
- Rules of, for assessment of damages, see DAMAGES, 83-98.
- Secondary, see also SUBSCRIPTIONS TO STOCK, 110.
- Statements in argument unsupported by, see TRIAL, 91.
- Striking out, see TRIAL, 51.
- Sufficiency of, for jury, see NEGLIGENCE, 62, 64.
- in actions for injuries caused by collision, see COLLISIONS, 15, 16.
 - injury to passenger, see STREET RAILWAYS, 433-435, 438.
 - to show delivery to carrier, see BILLS OF LADING, 14; CARRIAGE OF MERCHANDISE, 65.
 - loss by delay, see CARRIAGE OF MERCHANDISE, 791.
 - negligent loss of goods, see CARRIAGE OF MERCHANDISE, 354.
- Time to object to, see TRIAL, 53.
- To authorize exemplary damages, see DAMAGES, 35, 36.
- be considered, notwithstanding the jury viewed premises, see EMINENT DOMAIN, 570.
 - establish contract to carry, see CARRIAGE OF MERCHANDISE, 112.
 - fix liability of final carrier, see CARRIAGE OF MERCHANDISE, 663.
 - garnishee, see ATTACHMENT, ETC., 61.
 - impeach witness, not ground for new trial, though newly discovered, see NEW TRIAL, 95.
 - prove discrimination, admissibility of, see DISCRIMINATION, 35.
 - due incorporation, see INCORPORATION, ETC., 12.
 - limitation of liability, see CARRIAGE OF MERCHANDISE, 688.
 - raise or rebut presumption of negligence on part of carrier, see CARRIAGE OF MERCHANDISE, 173-184.
 - support complaint under Interstate Commerce Act, see INTERSTATE COMMERCE, 151.
- Varying written, by parol, see SUBSCRIPTIONS TO STOCK, 111.
- Verdicts against, see EMINENT DOMAIN, 836; NEW TRIAL, 16-27; TRIAL, 197.
- Waiver of objections to, see APPEAL AND ERROR, 67.
- Weight and sufficiency of, see also DEATH BY WRONGFUL ACT, 253-273.
- of, question for jury, see ANIMALS, INJURIES TO, 554; CONTRIBUTORY NEGLIGENCE, 95; TRIAL, 105.
 - to be given to circumstantial, see EMPLOYEES, INJURIES TO, 622.
- What admissible on question of damages to injured employe, see EMPLOYEES, INJURIES TO, 763-765.
- under the pleadings, see ANIMALS, INJURIES TO, 381, 382, 630; CARRIAGE OF PASSENGERS, 553; FIRES, 172-174; PLEADING, 93-142.
 - necessary to prima facie case against carrier for loss or injury to goods, see CARRIAGE OF MERCHANDISE, 106.
- When must appear in the record, see APPEAL AND ERROR, 113, 114; EMINENT DOMAIN, 922.
- Withdrawal of, from jury, see ANIMALS, INJURIES TO, 529.

I. ADMISSIBILITY AND COMPETENCY

OF EVIDENCE, GENERALLY..... 388

1. In Actions on Contract.... 388

2. In Actions for Torts..... 394

a. In General..... 394

<i>d.</i> Increased Precaution after Accident.....	425
<i>c.</i> Safety of Track, Machinery, and Appliances.....	429
II. JUDICIAL NOTICE.....	434
III. PRESUMPTIONS; BURDEN OF PROOF.....	440
1. <i>Presumptions</i>	440
2. <i>Burden of Proof</i>	447
IV. BEST AND SECONDARY EVIDENCE.....	453
V. HEARSAY.....	458
VI. RES GESTÆ.....	463
VII. PAROL EVIDENCE TO VARY A WRITING.....	474
VIII. ADMISSIONS; DECLARATIONS.....	481
1. <i>Admissions</i>	481
2. <i>Declarations</i>	487
IX. DOCUMENTS; WRITINGS; PRINTED MATTER.....	500
X. DEPOSITIONS; TESTIMONY ON FORMER TRIAL.....	520
XI. WEIGHT AND SUFFICIENCY OF EVIDENCE.....	523
1. <i>In General</i>	523
2. <i>In Actions on Contract</i>	524
3. <i>In Actions for Torts</i>	527
4. <i>Positive and Negative Evidence</i>	533

I. ADMISSIBILITY AND COMPETENCY OF EVIDENCE, GENERALLY.

1. In Actions on Contract.

1. In general.—Evidence that a party had given a right of way to a railroad, and of the value such person had put upon the land, is admissible where the party has died pending litigation, and another person, not the legal representative of deceased, has been made a party under an express stipulation with the company that no rights should be lost thereby. *Power v. Savannah, S. & S. R. Co.*, 56 Ga. 471.

Evidence of the agent of a railroad over which property was shipped that the shipper did not disclose, at the time the shipment was made, that he was agent for his wife, but that he had stated at the time that, if the goods were lost, the company would have to pay him \$25, is proper to be considered by the jury in ascertaining the value of the goods, if for no other purpose. *Savannah, F. & W. R. Co. v. Collins*, 77 Ga. 376, 4 Am. St. Rep. 87, 3 S. E. Rep. 416.

In a suit against a common carrier for the

loss of a can of yeast, which was alleged to have been punctured or broken by careless handling, so as to allow the yeast to escape—*held*, not erroneous to allow a can, similar to that in which the yeast was shipped, to be submitted to the jury for its inspection. *American Exp. Co. v. Spellman*, 90 Ill. 455.

Where a company is sued for failing to accept coal which it had agreed to purchase, evidence of the knowledge and experience of its agent who acted in the matter, is admissible to show good faith in rejecting it, where the company claims that it was rejected because it was defective in quality. Evidence of a decline in the price of coal is also admissible. *Baltimore & O. R. Co. v. Brydon*, 25 Am. & Eng. R. Cos. 287, 65 Md. 198, 7 Cent. Rep. 396, 3 Atl. Rep. 306, 9 Atl. Rep. 126.

Where the receivers of a company are sued for the loss of a lot of wool received as freight, by fire, evidence that the company's freight house, where the wool was stored, was filled with wool sacks and paper scattered about the floor, and that oil had been permitted to leak out on the floor; that the glass was broken out of the windows of one end of the building where the most inflammable material was stored, and that a train passed within twenty-five or thirty feet of such windows, and that the fire originated in that end of the building about fifteen minutes after a train had passed, is evidence to be submitted to the jury, of a want of ordinary care by the receivers as warehousemen. *Nichols v. Smith*, 115 Mass. 332.

In an action on an agreement to pay a certain sum of money to a company in a specified time after the cars begin to run, evidence to show what would be a reasonable time for completing the road is inadmissible. *Toledo & A. A. R. Co. v. Johnson*, 55 Mich. 456, 21 N. W. Rep. 888.—FOLLOWING *Stange v. Wilson*, 17 Mich. 342.—DISTINGUISHED IN *Sickels v. Anderson*, 63 Mich. 421. FOLLOWED IN *Detroit, S. & D. R. Co. v. Gartner*, 95 Mich. 318.

In estimating the probable receipts of a railroad eating-house, the amount of travel over the road is material, if accompanied by evidence as to the facilities afforded to passengers, by the stoppage of trains, to patronize the house. *Markel v. Moudy*, 13 Neb. 322, 14 N. W. Rep. 409.

Evidence that the conductor of a passenger train had carried goods to market for an individual does not tend to show

that the company is a common carrier of goods by such trains, where it does not appear that he rendered such services by virtue of any authority derived from the company, or that any compensation was received for them, either by the company or himself. *Elkins v. Boston & M. R. Co.*, 23 N. H. 275.

Evidence of the transportation of goods by a passenger train twice in two years, and of the payment of freight for them, does not tend to prove that the company exercise the business of common carriers by such trains as a public employment, or undertake to carry goods in such way for persons generally; and is not competent evidence to be submitted to the jury as tending to prove them to be common carriers of goods by such trains. *Elkins v. Boston & M. R. Co.*, 23 N. H. 275.

An award of damages for the condemnation of the same lands by another company which owned the same franchise is not sufficiently proved in a suit to enjoin the second company from entering upon them, by the unsupported testimony of the complainant that there was an award, without giving any particulars of the signing, filing, or destruction of the award. *Trimmer v. Pennsylvania, P. & B. R. Co.*, (N. J.) 39 Am. & Eng. R. Cas. 124, 17 Atl. Rep. 967.

Where a railroad company pleads as a defense to a breach of an agreement to receive and transport cattle upon a certain day, that it was crowded with business and had no empty cars at its disposal, it is competent for plaintiff to show that empty cars not in use were standing at the point of shipment during the time of delay. *Gulf, C. & S. F. R. Co. v. McCorquodale*, 35 Am. & Eng. R. Cas. 653, 71 Tex. 41, 9 S. W. Rep. 80.

In an action for the statutory penalty, the way bill which shows that the defendant paid at the time it received the freight accrued charges amounting to as much as the entire charge agreed upon in the bill of lading for the transportation of the property for the whole distance, is admissible for the purpose of showing that the defendant did not intend to ratify the contract. *Gulf, C. & S. F. R. Co. v. Dwyer*, 42 Am. & Eng. R. Cas. 503, 75 Tex. 572, 12 S. W. Rep. 1001.

The question being upon the value of a mastiff bitch used for breeding purposes, evidence is properly received as to the elements of value in such a dog and as to her

pedigree. *Winchell v. National Exp. Co.*, 64 Vt. 15, 23 Atl. Rep. 728.

Where a railroad company is sued for a failure to transfer freight to a connecting road promptly, evidence of the company's agent as to when it would be started over the other road, is not admissible as tending to excuse the delay, as it could not be excused from the performance of its duty by the fact that its agent supposed there would be a delay in forwarding it by the connecting line. *Blodgett v. Abbot*, 72 Wis. 516, 7 Am. St. Rep. 873, 40 N. W. Rep. 491.

Plaintiff sued a company for the loss of his trunk, which he alleged contained several valuable papers, and among them the lease of a farm from his father to himself. Defendants resisted his claim as fraudulent, denying that they had ever received the trunk, and gave strong evidence to support their defense. They then offered to prove (as tending further to show the dishonesty of the claim) that this farm had been the subject of a suit in chancery, in which it was decreed that the plaintiff's father held the land only as agent for another, and should convey to him; and that the plaintiff was aware of the fact, having been examined as a witness in the case. Held, that such evidence was rightly received, and that it was sufficient to prove the decree without the other proceedings in the suit. *Thomas v. Great Western R. Co.*, 14 U. C. Q. B. 389.

2. Actual sales as evidence of value.—Where a landowner sues to recover damages by reason of a railroad being built over his land, in determining the value of the land taken the jury may consider evidence of actual sales of other land about the time that the land was taken by the company, if the lands be of the same general character and located in the immediate vicinity of plaintiff's. *Laftin v. Chicago, W. & N. R. Co.*, 33 Fed. Rep. 415. *White v. Concord R. Co.*, 30 N. H. 188. *Chicago & G. W. R. Co. v. Wedel*, 144 Ill. 9, 32 N. E. Rep. 547.

To determine the value of land in controversy, evidence of what some near it sold for ten years before is too remote. *Everett v. Union Pac. R. Co.*, 10 Am. & Eng. R. Cas. 203, 59 Iowa 243, 13 N. W. Rep. 109.

Evidence of sales of other land in the neighborhood is competent only when there is substantial similarity between the properties, and much must be left to the discretion of the trial judge in the determination

of the preliminary question whether the conditions are such as easily to admit of reasonable comparison. *Laing v. United N. J. R. & C. Co.*, 54 N. J. L. 576, 25 Atl. Rep. 409.

3. Admissibility where better evidence cannot be obtained.—In an action for negligence in carrying hay, whereby it was wet and damaged, it is a necessary part of the plaintiff's case to show the condition of the hay when it was delivered to the defendant; and evidence of its condition at a distant port from which it was shipped by vessel to the place of delivery to the defendant, could only be resorted to in the absence of more direct proof. *Marquette, H. & O. R. Co. v. Langton*, 32 Mich. 251.—FOLLOWED IN *Marquette, H. & O. R. Co. v. Kirkwood*, 9 Am. & Eng. R. Cas. 85, 45 Mich. 51.

4. Admissions of record.—Where two persons sue a carrier for goods lost, and the issue is made whether they belong to both plaintiffs as partners, or to only one of them, the company should be permitted to introduce in rebuttal the record of a suit which one of the plaintiffs had formerly brought to recover for the same goods, where the plaintiffs have testified that the goods belonged to both. *Chicago & A. R. Co. v. Mahan*, 42 Ill. 158.

5. Assessed value as evidence of market value.—Assessment lists for taxation are not competent evidence either for or against the lister to establish the value of property for purposes other than taxation; especially so where it is sought to arrive at the value of one article by proving the value of others with which that in question was listed. *Cincinnati, H. & I. R. Co. v. McDougall*, 108 Ind. 179, 8 N. E. Rep. 571. *Martin v. New York & N. E. R. Co.*, 62 Conn. 331, 25 Atl. Rep. 239.—APPROVING *Brown v. Providence, W. & B. R. Co.*, 5 Gray (Mass.) 40.

6. As to payment of internal revenue tax on lost goods.—In an action against a company for the failure to deliver a quantity of whiskey, the defendants offered to prove that the whiskey had been shipped by the plaintiffs in fraud of the revenue laws, no tax having been paid thereon, which evidence the court refused to admit. *Held*, that this evidence was proper for the purpose of determining the value of the whiskey. For if the tax of two dollars per gallon had been paid, the value

of the raw material would be enhanced to that extent, and if not paid it would be decreased that amount. *Toledo, P. & W. R. Co. v. Kichler*, 48 Ill. 438.

7. As to value of railway pass.—The issue being as to the value of a railway pass for which plaintiff had given a tract of land upon which the depot stood, evidence of the increased value of other lands of plaintiff contiguous to the road by reason of the railway and depot being there was properly excluded. The price paid for a pass is not the true criterion by which to estimate its value. *Kansas Gulf S. L. R. Co. v. Scott*, 1 Tex. Civ. App. 1, 20 S. W. Rep. 725.

The value of a railway pass for twenty-five years being in issue, the owner was asked how many trips per year he would probably have made over the road if it had not been revoked, and answered, "Ten trips per month." *Held*, error to admit it. *Kansas Gulf S. L. R. Co. v. Scott*, 1 Tex. Civ. App. 1, 20 S. W. Rep. 725.

8. As to value of services.—In an action by a contractor against a company wherein it is alleged that the defendant had hindered and delayed the plaintiff in the prosecution of the work, and had wrongfully taken it out of the latter's control and completed it at a reckless and extravagant cost and charged the plaintiff therewith, evidence as to the reasonable cost of the work is competent. *Louisville, E. & St. L. R. Co. v. Donnegan*, 34 Am. & Eng. R. Cas. 116, 111 Ind. 179, 9 West. Rep. 641, 12 N. E. Rep. 153.

Where plaintiff sues for the value of his services in obtaining subscriptions to the capital stock of defendant, and it is admitted that the subscriptions were made, but it is only denied that plaintiff procured them, oral evidence that he did obtain subscriptions to a large amount is admissible. If it is sought to prove that the subscriptions were made, then the company's books should be introduced. *Low v. Connecticut & P. R. R. Co.*, 45 N. H. 370.—DISTINGUISHED IN *Bell's Gap R. Co. v. Christy*, 79 Pa. St. 54.

9. Conduct of parties as showing their interpretation of contract.—The interpretation given to a contract by the parties themselves is competent and often very weighty evidence in determining its meaning and force. So where a county is sued on bonds issued in aid of a railroad, the whole conduct of the county,

both
issue
in de
what
issue
Nat.
267.
A
of th
for t
tion
that
fully
R. C
10
havin
to th
evid
the v
by m
ing i
mitt
brea
yond
prop
west
Rep.
11
thro
Evid
alwa
vant
jury
agai
for
ceip
man
the
& C
E
con
pany
use
whic
that
pose
Lou
Ark
E
of c
und
the
Ohi
23
W
sho
ized

both before and at the time, and after the issue of the bonds, may be shown to aid in determining under what statute and by what authority the county proceeded in the issue of the bonds. *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 13 Sup. Ct. Rep. 267.

A plaintiff who introduces oral testimony of the conduct of the parties to a contract for the purpose of showing the interpretation put upon it by them cannot object that the defendant was permitted to more fully show such conduct. *South St. Louis R. Co. v. Plate*, 15 Mo. App. 588.

10. Evidence in rebuttal.—Plaintiff having proved title to the land in question to the water's edge, defendant introduced evidence that the land taken was not above the water's edge, but was made beyond it by means of a breakwater and cribs extending into the water. *Held*, no error in permitting plaintiff then to show that the breakwater and cribs were not built beyond the water's edge, the evidence being properly in rebuttal. *Diedrich v. Northwestern Union R. Co.*, 47 Wis. 662, 3 N. W. Rep. 749.

11. General custom or habit as throwing light on a disputed fact.—Evidence of a party's course of dealing is always admissible against him when relevant to any fact to be ascertained by the jury; e. g., it may be shown in an action against a carrier for failure to deliver goods for which it produces the consignee's receipt, that its course of dealing was to demand payment of freight and a receipt for the goods before delivering them. *Mobile & G. R. Co. v. Williams*, 54 Ala. 168.

Evidence that, in making requisition on a connecting carrier for a car, a railway company is required to give information of the use to be made of the car and of the place to which it is to be sent, is admissible to show that the connecting carrier knew the purpose for which a car was required. *St. Louis, I. M. & S. R. Co. v. Henderson*, 57 Ark. 402.

Evidence as to the making and inspection of cars generally, not confined to the car under investigation, is not admissible on the question as to the fitness of a car for use. *Ohio & M. R. Co. v. Voight*, 122 Ind. 288, 23 N. E. Rep. 774.

Where there was evidence tending to show that defendant company had authorized one A. to make a certain contract with

plaintiff for boarding some of its employes, or had subsequently ratified the contract so made, there was no error in rejecting evidence offered by defendant to show that it had not in other cases paid such bills except upon special conditions not included in such alleged contract. *Hall v. Chicago, M. & St. P. R. Co.*, 48 Wis. 317, 4 N. W. Rep. 325.

Where it is shown that the agent was not at his post, and the ticket office was not open in time for plaintiff to obtain a ticket, evidence of the general negligence of the agent in the discharge of his duties is immaterial and irrelevant. *Forsee v. Alabama G. S. R. Co.*, 63 Miss. 66.

A passenger sued for an injury while alighting from the cars, and it was in dispute whether the injury occurred by a sudden start of the cars or by the act of the plaintiff in jumping off. *Held*, admissible to prove that plaintiff was in the habit of jumping off moving trains. *Craven v. Central Pac. R. Co.*, 72 Cal. 345, 13 Pac. Rep. 878.—NOT FOLLOWED IN *Savannah, F. & W. R. Co. v. Flannagan*, 39 Am. & Eng. R. Cas. 661, 82 Ga. 579, 9 S. E. Rep. 471.

12. Harmless error in the admission of evidence.—Where a second carrier is sued for injuries to freights on the second line, and it appears that the shipper has made a separate contract with the second carrier, through his agent, evidence of the shipper's understanding of his contract with the first carrier, and tending to show that it had been performed, is immaterial and harmless. *Columbus & W. R. Co. v. Kennedy*, 31 Am. & Eng. R. Cas. 92, 78 Ga. 646, 3 S. E. Rep. 267.

13. Inadmissible unless connected with the issue.—Testimony as to what expenses were necessary to be incurred by an engineer upon one section of a road in its construction is not competent to show what outlay was proper upon another section, there being no evidence that the conditions were the same in both sections. *Pensacola & A. R. Co. v. Atkinson*, 20 Fla. 450.

Representations offered in evidence by plaintiffs, in regard to the capacity of the chief engineer of defendant, and the correctness of his estimates, made by the president of the defendant, to other proposed contractors for the same work, and not communicated to plaintiffs, or having any influence in inducing them to enter into their contract, were inadmissible. *Phelps v.*

George's Creek & C. R. Co., 16 *Am. & Eng. R. Cas.* 600, 60 *Md.* 536.

Where the point in controversy was whether or not the line established for a railroad had been changed by the corporation after it had contracted with plaintiff to grade it, an offer to prove how the road was to be graded, stated in those terms, was properly rejected, it not appearing that the evidence offered would tend to show where it was to be done. *Currier v. Boston & M. R. Co.*, 34 *N. H.* 498.

A photographer who sues a company for a failure to deliver his outfit at a station in proper time, and claims that he suffered special damages in his business by not having the outfit so as to take the pictures of soldiers stationed at the point during pay day, such damages not being recoverable, it is error to permit him to testify as to the amount of his profits on former occasions when he had taken pictures at the same place during pay day. *Galveston, H. & S. A. R. Co. v. Jesse*, 2 *Tex. App. (Civ. Cas.)* 351.

An error in admitting evidence to charge a company with a loss of goods from its depot, of various acts of robbery and theft in the village, but without anything to show that they exceeded the thefts committed in other villages, is not ground for a new trial, where the court simply instructs the jury that the company was bound to exercise ordinary care, such as a prudent man in that locality would exercise, without referring to the evidence of thefts. *Dimmick v. Milwaukee & St. P. R. Co.*, 18 *Wis.* 471.

A conductor sued for a balance of salary due him, and the company claimed an offset for moneys which the conductor had collected and never paid over. *Held*, that such offset could not be proven by a comparison of plaintiff's returns for the past eleven months with the returns of a fellow-conductor who ran on alternate trips over the same portion of the road. *Denver & R. G. R. Co. v. Glasscott*, 4 *Colo.* 270.

Where the issue is as to the true value of railroad property for the purposes of taxation, it is improper to admit evidence of an advance in freight rates upon the road. That has nothing to do with the value of the property to be taxed. *Chicago & N. W. R. Co. v. Boone County*, 44 *Ill.* 240.—**EXPLAINING** *State v. Illinois C. R. Co.*, 27 *Ill.* 68.

14. Invalid instrument as evi-

dence of facts recited therein.—A company issued what were termed "change tickets," in sums of five dollars, to its contractor, payable to bearer in freight or passage, after the road was completed, but these tickets were in a form prohibited by statute. With the knowledge and consent of the company, the contractor delivered a part of these tickets to a subcontractor, and after the company had refused to honor them, he sued for the amount due him for work as represented by the tickets. *Held*, that the tickets, though void in themselves, were evidence of the amount due plaintiff. *Iron Mountain & H. R. Co. v. Stansell*, 43 *Ark.* 275.

15. Irrelevant evidence.—Upon the question whether the weather, at a certain time and place, was cold enough to freeze ink, evidence that it was not then and there cold enough to freeze apples is inadmissible. *Ingledeu v. Northern R. Co.*, 7 *Gray (Mass.)* 86.

The question being whether goods placed on a railroad switch, built for the delivery of freight to a manufacturing company, were delivered before the cars were unloaded, the practice of the railroad company in delivering freight out of cars at other switches was irrelevant. *Whitney Mfg. Co. v. Richmond & D. R. Co.*, 55 *Am. & Eng. R. Cas.* 611, 38 *So. Car.* 365, 17 *S. E. Rep.* 147.

A company was sued for a loss of a part of cotton shipped, and the issue was whether the cotton was stolen through the fault of the company or whether it had lost in weight by drying out. *Held*, that evidence tending to show that the cotton of other shippers had been stolen by the company's agents at the station where plaintiff shipped was inadmissible. *Central R. Co. v. Brunson*, 1 *Am. & Eng. R. Cas.* 308, 63 *Ga.* 504.

Plaintiff shipped goods in the autumn, from New York to Chicago, to be carried from Buffalo to the latter place by lake navigation. They did not reach their destination until the following spring, and were then returned damaged. *Held*, that evidence was not admissible to show what time navigation on the lakes closed. *McCotter v. Hooker*, 8 *N. Y.* 497.

16. Memoranda of agreements.—Where suit is brought by one company against another connecting with it, alleging that plaintiff, defendant, and another company all entered into a contract to transport

certain iron at a given rate, the freight to be apportioned among the three companies on the basis of the rate fixed, and that, in a settlement, plaintiff accounted to defendant at a higher rate for a portion of the service, and it sought to recover the excess so paid above the agreed rate, and where defendant contended that the agreed rate was to continue only during the summer months, and that for any freight thereafter it was to have advanced rates, it is admissible for defendant to introduce in evidence a memorandum made by the general freight agent of plaintiff, for the purpose of instituting suit against the party for whom the transportation was done, such memorandum indicating that at the time it was made plaintiff's agent understood the contract to be as defendant contended that it was, and the agent who made it having been authorized to do so in the prosecution of plaintiff's claim, and having acted within the scope of his authority in making it. *Georgia R. Co. v. Smith*, 76 Ga. 634.

It is immaterial that one suing on items of account for work and labor derived his information about the correctness of each item from books, memoranda, and calculations of his employes, when it is shown that the defendant admitted the correctness of the items and accepted the work. *Texas & St. L. R. Co. v. Ross*, 62 Tex. 447.

17. Of agent's custom to examine freight.—To show that freight was in good condition when it was delivered by defendant to a connecting line, evidence that it is the custom of agents of such lines to examine freights before receiving them, and if found in good condition to forward them, and that such examination was made and forwarding was done, is admissible. *Knott v. Raleigh & G. R. Co.*, 32 Am. & Eng. R. Cas. 481, 98 N. Car. 73, 2 Am. St. Rep. 321, 3 S. E. Rep. 735.

18. Of authority of officers and agents.—Evidence that one is acting as president of a company is competent to show that he is president. *Taylor v. Albemarle Steam Nav. Co.*, 105 N. Car. 484, 10 S. E. Rep. 897.

After the fact of an agency is established it is competent to prove, as tending to show that an act was done by the agent, that there was one acting where the agent should have been, and exercising the authority of the agent; and the fact that such evidence is contradicted only affects its weight and not

its competency. *South & N. Ala. R. Co. v. Henlein*, 52 Ala. 606.

Where a company denies authority of its president to bind it by drafts, it is proper to allow him to testify that on various occasions, both before and after the date of the draft in question, he had drawn drafts in the name of the company, which were honored, and was well known to the directors, but never objected to, though several years had passed. *Olcott v. Tioga R. Co.*, 27 N. Y. 546; *affirming* 40 Barb. 179.

Upon the question of the authority of a chief engineer to order stone for a bridge, evidence of a similar purchase by him of cement for the same bridge, which the company paid for, is admissible. *Beattie v. Delaware, L. & W. R. Co.*, 90 N. Y. 643, *mem.*; *affirming* 12 Wkly. Dig. 334.—QUOTED IN *International & G. N. R. Co. v. Ragsdale*, 67 Tex. 24.

19. Of care exercised by railroad companies, generally.—In an action against a company to recover for freight which, after its transportation, had been lost from their warehouse, evidence in defense that the care used about the keeping of the freight was such as railroad companies usually exercise about similar freight, is competent, but is not controlling evidence upon the question of due care. *Lane v. Boston & A. R. Co.*, 112 Mass. 455. *Armstrong v. Chicago, M. & St. P. R. Co.*, 45 Minn. 85, 47 N. W. Rep. 459.

20. Offers to sell at a given price.—Mere offers to sell real estate at a given price are not competent evidence of its value, or of the value of like property. The rule admitting evidence of value is confined to actual sales or acts done. *Sherlock v. Chicago, B. & Q. R. Co.*, 130 Ill. 403, 22 N. E. Rep. 844.

Where a carrier is sued for the loss of fruit trees shipped, and it is sought to charge the company with the value of the trees at the place of delivery, evidence of the price at which the owner had contracted to sell the trees at that place is admissible as affording some evidence of their value. *Clements v. Eurlington, C. R. & N. R. Co.*, 74 Iowa 442, 38 N. W. Rep. 144.

21. Of fraudulent representations.—Where a deed granting a right of way to a railroad is sought to be set aside for fraud, evidence that agents of the road caused a public meeting to be held for the purpose of procuring a right of way over the land of

plaintiff and others, that inducements and promises were made to such owners by speakers and agents of the company, and that agents of the road proceeded to obtain the signatures of such landowners for a right of way, without objection to such promises, is admissible to show that the deed was induced by fraudulent promises and representations of the company. *Atlanta & W. P. R. Co. v. Hodnett*, 36 Ga. 669.

Where a subscriber to stock executes his note to the company therefor and secures it by a mortgage, and an assignee of the company sues to foreclose the mortgage, and it is admitted by a stipulation filed that plaintiff was a purchaser before maturity, at par, without other information, except that the note was given for stock of the company, it is error to admit evidence tending to show that the note and mortgage were procured by fraudulent representations upon the part of the company, or that the company had agreed to pay the interest. *Andrews v. Hart*, 17 Wis. 297.

22. Of value at nearest available market.—Where there is no adequate local market, the value of personal property may be fixed by proof of value at the nearest available market, with proper addition or deduction for cost and risk of transportation, according as the property is held for sale or for use. *Jones v. St. Louis, I. M. & S. R. Co.*, 42 Am. & Eng. R. Cas. 596, 53 Ark. 27, 13 S. W. Rep. 416.

Evidence of the value of such property in a distant market is inadmissible, unless it be proved that there is no adequate local market, or that the two markets are interdependent and sympathetic, or that the evidence of the value in the distant market otherwise tends to prove the value in the local market. *Jones v. St. Louis, I. M. & S. R. Co.*, 42 Am. & Eng. R. Cas. 596, 53 Ark. 27, 13 S. W. Rep. 416.

The value of articles which have no market value may be established by evidence of their cost, use, and condition at the time they were destroyed. *Union Pac., D. & G. R. Co. v. Williams*, 3 Colo. App. 526, 34 Pac. Rep. 731.

23. Proof of damages.—Where a connecting carrier is sued for a violation of the Ga. Code, § 719, in failing to receive freight from a former line for further transportation, thereby causing a delay, it is proper for the plaintiff to testify that he was

obliged to sell the freight at a greatly reduced price by reason of the delay. *Central R. Co. v. Logan*, 30 Am. & Eng. R. Cas. 63, 77 Ga. 804, 2 S. E. Rep. 465.

Where a railroad company agrees to construct its road through a river embankment, with a culvert, so as to permit the escape of overflow water, and to leave the embankment otherwise unimpaired, and it fails to comply with the agreement, it is competent to prove what it would cost to repair the embankment, or place it in the condition that the company agreed to leave it. *Indiana, B. & W. R. Co. v. Adamson*, 34 Am. & Eng. R. Cas. 127, 114 Ind. 282, 12 West. Rep. 708, 15 N. E. Rep. 5.

24. Proof of performance of contract.—Where plaintiff had delivered a lot of ties along the line of a railroad which he claimed was under a contract with the company, in a suit to recover the value of the same the court admitted evidence that the company used some of the ties after the commencement of the suit. *Held*, that the evidence was proper, as tending to prove an acceptance by the company. *Toledo, W. & W. R. Co. v. Chew*, 67 Ill. 378.

25. Similar inducements to other subscribers for stock.—An agreement between the defendant and a third person, by which the former guaranteed to the latter dividends equal to six per cent, per annum on his stock, and the latter agreed to subscribe for said stock, is admissible in evidence, for the purpose of showing that the defendant procured others to subscribe to the stock of such company, and the inducements which he held out for that purpose. *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435.

2. In Actions for Torts.

a. In General.

26. Advice of physicians.—In an action for personal injuries it is proper for the plaintiff to prove the directions given her by her physician, and that she had obeyed them. *Louisville, N. A. & C. R. Co. v. Falvey*, 23 Am. & Eng. R. Cas. 522, 104 Ind. 409, 3 N. E. Rep. 389, 4 N. E. Rep. 908.

The court admitted evidence that the plaintiff took to her bed a second time by the advice of her physician, the intimation being that the plaintiff and her husband were disposed to exaggerate her injury, and that the physician was incompetent. *Held*,

that it was proper for the plaintiff to follow the advice of her physician, employed by her in good faith, although he might be incompetent. *Chicago, St. L. & P. R. Co. v. Spilker*, 55 Am. & Eng. R. Cas. 200, 134 Ind. 380, 33 N. E. Rep. 280.

27. Age of injured person—Contributory negligence.—The age of the plaintiff is admissible in evidence to show that he exercised such care as was reasonably to be expected of him. *Elkins v. Boston & A. R. Co.*, 115 Mass. 190. *Young v. Detroit, G. H. & M. R. Co.*, 19 Am. & Eng. R. Cas. 417, 56 Mich. 430, 23 N. W. Rep. 67.

After the plaintiff has testified in his own behalf, testimony of his father concerning his appearance, as to age, at the time of the trial, as compared with his appearance in that respect immediately before he was injured, and also that in appearance he was not older than he in fact was when he entered the defendant's service, is admissible. *Louisville, N. A. & C. R. Co. v. Frawley*, 28 Am. & Eng. R. Cas. 308, 110 Ind. 18, 9 N. E. Rep. 594.

28. As to extent of injury.—It is competent to prove by a surgeon and physician who had attended plaintiff that he had made a recent examination of the plaintiff, and to state his condition as affected by the injuries and their probable future effect upon the health and strength of plaintiff. *Gulf, C. & S. F. R. Co. v. Harriett*, 80 Tex. 73, 15 S. W. Rep. 556.

Medical evidence of the condition of the injured party after the suit was brought, as well as before, is admissible to show the nature and effects of the injury, and whether temporary or permanent. *Powell v. Augusta & S. R. Co.*, 77 Ga. 192, 3 S. E. Rep. 757.

Where a personal injury sued for consists in the loss of an arm, it is proper to prove that a former injury has disabled plaintiff's other arm, not as an element of damages, but as showing the greater incapacity to follow a business, or to earn money, by reason of the injury complained of. *Alabama G. S. R. Co. v. Yarbrough*, 83 Ala. 238, 3 Am. St. Rep. 715, 3 So. Rep. 447.

Where a female passenger sues for a personal injury, evidence as to how she was hurt, and whether she had a miscarriage or an abortion in consequence, is admissible. *Augusta & S. R. Co. v. Randall*, 34 Am. & Eng. R. Cas. 439, 79 Ga. 304, 4 S. E. Rep. 674.

If the injury resulted in abortion, evi-

dence touching the consequences of abortion upon the mother's future health is evidence relating to the past injury, and not to future injuries. *Powell v. Augusta & S. R. Co.*, 77 Ga. 192, 3 S. E. Rep. 757.

Where a passenger sues for damages caused by falling while going to a train, and claims that spinal concussion, or some similar effect, had resulted from the fall, it is admissible to show that, on the afternoon previous to the injury, he exchanged photographs with a negro girl, and had made an assignation with her for the next day, and that on the morning of the day after the fall he walked four or five miles in the direction where she lived. Such evidence tends to throw light on his physical condition after the injury. *Stevens v. Central R. & B. Co.*, 34 Am. & Eng. R. Cas. 413, 80 Ga. 19, 5 S. E. Rep. 253.

The admission of testimony, not as an element of damages, but in the nature of an index to the pain and suffering of the plaintiff, that the injuries required the administration of opiates to her, and she was thus acquiring the opium habit, that she had great pleasure in her household duties, but has not and never will have that pleasure again, and that from the effects of the nervous prostration resulting from the injury she has not the energy to work or enjoy society, was not erroneous. *Chattanooga, R. & C. R. Co. v. Liddell*, 85 Ga. 482, 11 S. E. Rep. 853.

In case, for an injury by the breaking of the plaintiff's arm, there is no error in admitting proof that the bones at the fracture had failed to unite, and had formed what is called a "false joint," as it is not a question of law for the court to determine whether this was the result of the breaking of the arm as a proximate cause, or the result of a new, independent factor. Such question can properly be tested only by hearing the evidence and submitting the questions of fact to a jury, under appropriate instructions. *Pullman Palace Car Co. v. Bluhm*, 18 Am. & Eng. R. Cas. 87, 109 Ill. 20, 50 Am. Rep. 601.

In an action for having wrongfully drenched the plaintiff, while a passenger, with water, it being specially charged that the injury caused a recurrence of dizziness and vertigo, it was competent, without offering medical testimony on the subject, to prove, among instances of such dizziness after the injury, the falling of the plaintiff

upon a sidewalk. *Terre Haute & I. R. Co. v. Jackson*, 6 Am. & Eng. R. Cas. 178, 81 Ind. 19.

Medical testimony is admissible to show the condition of the plaintiff about a year after the accident, in consequence of an abscess which then appeared, where there is sufficient evidence to connect it with, or to show that it resulted from, the accident. *Heath v. Broadway & S. A. R. Co.*, 25 J. & S. 496, 29 N. Y. S. R. 267, 8 N. Y. Supp. 863.

All the consequences of the injury, future as well as past, should be taken into consideration. So evidence of the probable duration of the injury and the probability of its leading to still more serious results is proper. *Gantard v. Rochester City & B. R. Co.*, 50 Hun 22, 18 N. Y. S. R. 692; affirmed in 121 N. Y. 661, mem.—FOLLOWING *Strohm v. New York, L. E. & W. R. Co.*, 96 N. Y. 306. REVIEWING *Cook v. New York C. & H. R. R. Co.*, 49 Hun 605, mem.

Where a passenger sues for a personal injury, and testifies that after the injury she could work but part of the time and did so for a time, it is proper to ask her why she stopped. *Griffith v. Utica & M. R. Co.*, 43 N. Y. S. R. 835, 63 Hun 626, 17 N. Y. Supp. 692; affirmed in 137 N. Y. 566, mem., 50 N. Y. S. R. 933.

In such case plaintiff may state what her income was before the accident, where no specific objection is made. *Griffith v. Utica & M. R. Co.*, 43 N. Y. S. R. 835, 63 Hun 626, 17 N. Y. Supp. 692; affirmed in 137 N. Y. 566, mem., 50 N. Y. S. R. 933.

And may prove by her physician her appearance when she reached home and he first examined her. *Griffith v. Utica & M. R. Co.*, 43 N. Y. S. R. 835, 63 Hun 626, 17 N. Y. Supp. 692; affirmed in 137 N. Y. 566, mem., 50 N. Y. S. R. 933.

The plaintiff may testify to the present condition of the injured part. *Schuler v. Third Ave. R. Co.*, 44 N. Y. S. R. 774, 17 N. Y. Supp. 834; affirmed in 48 N. Y. S. R. 663, 1 Misc. 351, 20 N. Y. Supp. 683.—QUOTING *Curtis v. Rochester & S. R. Co.*, 18 N. Y. 534.

Evidence of injury to plaintiff's general health is admissible, where it is the direct consequence of the immediate injury, and the complaint contains a sufficient averment to support such evidence. *Hanse v. Brooklyn El. R. Co.*, 66 Hun 384, 50 N. Y. S. R. 255, 21 N. Y. Supp. 230.

In order to prove future consequences of bodily injuries it is only necessary to show that there is a reasonable probability of the occurrence of future ill effects of the injury. *Gulf, C. & S. F. R. Co. v. Harriett*, 80 Tex. 73, 15 S. W. Rep. 556.

Evidence as to plaintiff's mental condition before and after the injury is admissible. *Heddes v. Chicago & N. W. R. Co.*, 77 Wis. 228, 46 N. W. Rep. 115.

29. As to party's reputation for carelessness.—Evidence of the reputation as to carelessness, of the engineer by whose recklessness in suddenly starting the train on which plaintiff was at work he was alleged to have been injured, is competent, as tending to prove notice or knowledge on the part of the company as to the negligent and careless habits of its engineer. *Lake Shore & M. S. R. Co. v. Stupak*, 41 Am. & Eng. R. Cas. 382, 123 Ind. 210, 23 N. E. Rep. 246.

30. As to plaintiff's means of avoiding the injury.—It being in question whether a fireman could, by reporting the facts of his situation to an official of the company by telegraph, have obtained relief from his peril, evidence is admissible to show that, under the usage and practice of the company in like or analogous circumstances, relief would probably have followed in a specified way, and by the use of specified means. *Carroll v. East Tenn., V. & G. R. Co.*, 41 Am. & Eng. R. Cas. 307, 82 Ga. 452, 10 S. E. Rep. 163.

In an action for personal injuries received while unloading coal from a car, it appeared that the car was so constructed as to allow the body of it to be tipped so as to more easily discharge the coal, and that the injury occurred by its swinging back and hitting the plaintiff. Plaintiff claimed that the accident was due to imperfect hooks, which was denied by the company. Held, under such issue, that it was competent for the company to introduce evidence to the effect that a block could be so used in tipping the car that the hooks would not catch, and that a man was there provided with such block, without evidence to show that a block was used on the car in question. *Donahoe v. New York & N. E. R. Co.*, 159 Mass. 125, 34 N. E. Rep. 87.

31. As to speed.—(1) *In general.*—

* Injuries at crossings. Evidence of speed of train as affecting company's liability, see 45 AM. & ENG. R. CAS. 169, *abstr.*

In an action against a street railway company to recover for a personal injury to the plaintiff by a collision of its cars with a buggy in which the plaintiff and two others were riding, evidence of the distance of the round trip of the cars, and of the schedule time for making such trip, is admissible in behalf of the plaintiff, in connection with other testimony introduced as to the rate of speed of the car at the time of the collision. *Central R. Co. v. Allmon*, 147 Ill. 471, 35 N. E. Rep. 725; affirming 45 Ill. App. 389.

If the round trip of the cars was about ten miles, and the time, as fixed by the company in its schedule, was one hour for making the round trip, proof of this tends to establish the average rate of speed as being ten miles an hour. While such evidence is not conclusive as to such average rate of speed, yet it is admissible as tending to prove such average rate. *Central R. Co. v. Allmon*, 147 Ill. 471, 35 N. E. Rep. 725.

Proof of the schedule time fixed by the company for the passage of its cars over a specified distance is not admissible for the purpose of showing negligence in running its cars on other trips than the one in question, but only for the purpose of determining the average rate of speed, as a basis of comparison with the rate of speed at which the car colliding was traveling. *Central R. Co. v. Allmon*, 147 Ill. 471, 35 N. E. Rep. 725.—APPLYING *Chicago, B. & Q. R. Co. v. Lee*, 60 Ill. 501; *Peoria & P. U. R. Co. v. Clayberg*, 107 Ill. 644.

A complaint in an action for personal injury charged that it occurred by reason of the breaking down of a bridge, which it was alleged was wholly unsafe and dangerous to run trains over, on account of its bad condition, by reason of its defective construction, and the negligent manner in which repairs were being made. Held, that under this charge evidence of the rate of speed at which the train was being run was admissible as part of the *res gestæ*. *Louisville, N. A. & C. R. Co. v. Pedigo*, 27 Am. & Eng. R. Cas. 310, 108 Ind. 481, 8 N. E. Rep. 627.

Where the defendant claims contributory negligence of the fellow-servants of the deceased in running the trains in violation of the rules of the company as to the speed, testimony is admissible on the part of the plaintiff tending to show that a strict compliance with the rules was impracticable, and that they were obeyed as nearly as possible, and the trains run on the schedule

time fixed by the company. *Hunn v. Michigan C. R. Co.*, 41 Am. & Eng. R. Cas. 452, 78 Mich. 513, 7 L. R. A. 570, 44 N. W. Rep. 502.

In an action where excessive speed is alleged as the sole cause of the injury, it was not error for the trial court to permit the introduction of evidence tending to show the unsafe condition of the track at the place where the accident occurred, as tending to prove negligence on the part of those in charge of the train. *Chicago, B. & Q. R. Co. v. Clark*, 38 Am. & Eng. R. Cas. 192, 26 Neb. 645, 42 N. W. Rep. 703.

Where plaintiff is injured at a street crossing by being struck by cars, evidence of the rate of speed at which the cars were running is material on the question of plaintiff's contributory negligence. *Nutter v. Boston & M. R. Co.*, 60 N. H. 483.

Where a company is charged with negligence in running its cars too rapidly at the time of an accident, evidence as to the schedule time of the train over the whole road, or any part of it, is admissible as tending to show the rate of speed at the time of the injury. *Nutter v. Boston & M. R. Co.*, 60 N. H. 483.

A passenger sued a street-car company for a personal injury, and the real charge was negligence in failing to stop the cars to let him off, but in giving his evidence plaintiff stated the manner of running the cars past a certain curve. In defense the company then introduced evidence that it never ran its cars over curves in the manner described by plaintiff. Held, that plaintiff had a right to introduce evidence in rebuttal as to the actual rate at which the cars did pass the curve, though not strictly a part of the issues in the case. *Saffer v. Dry Dock, E. B. & B. R. Co.*, 24 N. Y. S. R. 210, 53 Hun 629, 2 Silv. Sup. Ct. 343, 5 N. Y. Supp. 700.

Where a suit is by an employé against the railway company for personal injuries sustained, and defendant pleads contributory negligence by plaintiff in running his train at too high a rate of speed, it is proper to acquaint the jury with the different conditions under which trains can be operated with greater or less rapidity, by proof showing that fast mail trains on well-ballasted roads can be run at sixty miles per hour. *Ft. Worth & D. C. R. Co. v. Thompson*, 2 Tex. Civ. App. 170, 21 S. W. Rep. 137.

Evidence to prove that the cars of another company were driven down the same grade

at less speed than the cars of defendant, is inadmissible. *Schierhold v. North Beach & M. R. Co.*, 40 Cal. 447.

Testimony as to the cost of rolling-stock is irrelevant to the question of negligence in running passenger trains at a high rate of speed. *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537.

(2) *At other times.*—The true criterion for determining whether at the time of an accident a train was running at a higher rate of speed than was safe and prudent, taking into consideration the condition of the track where the accident occurred, is the rate of speed at which other trains have been run over that portion of the road, both before and after the accident. *Ohio & M. R. Co. v. Selby*, 47 Ind. 471. *Cleveland, C. & I. R. Co. v. Newell*, 8 Am. & Eng. R. Cas. 377, 75 Ind. 542. *Chicago, St. L. & P. R. Co. v. Spilker*, 55 Am. & Eng. R. Cas. 200, 134 Ind. 380, 33 N. E. Rep. 280. *Shaber v. St. Paul, M. & M. R. Co.*, 2 Am. & Eng. R. Cas. 185, 28 Minn. 103, 9 N. W. Rep. 575. —NOT FOLLOWED IN Savannah, F. & W. R. Co. v. Flannagan, 39 Am. & Eng. R. Cas. 661, 82 Ga. 579, 9 S. E. Rep. 471.

In an action for injuries owing to the derailment of a train, evidence to show that another train had gone over the same portion of the track alleged as defective, and at the same rate of speed, on the morning of the day before the accident, is incompetent. *Meloy v. Chicago & N. W. R. Co.*, 33 Am. & Eng. R. Cas. 358, 37 N. W. Rep. (Iowa) 335.

Some of defendant's witnesses testified that the train which injured plaintiff ran at a very slow rate of speed. Other witnesses of the defendant testified that the rate of speed was the same as it had been during the previous ten days when making the crossing. *Held*, that evidence offered by plaintiff in rebuttal, tending to show what such rate was during the previous ten days, and that it was at a high rate during all that time, was competent, and should have been received. (Campbell and Champlin, JJ., dissenting.) *Close v. Lake Shore & M. S. R. Co.*, 37 Am. & Eng. R. Cas. 522, 73 Mich. 607, 41 N. W. Rep. 828.

The question of the admissibility of evidence of the rate of speed of the defendant's trains, at other times and places than the time and place in question, as tending to show the rate of speed there, is one of fact, depending upon remoteness of time

and place, and is to be determined by the court at the trial. *Nutter v. Boston & M. R. Co.*, 60 N. H. 483.

(3) *In other places.*—Evidence of the running time of the defendants' trains over the whole road, and over any given part of it, is relevant on the question of the rate of speed at any given point on the road. *Nutter v. Boston & M. R. Co.*, 60 N. H. 483.

Evidence as to the management and speed of the engine which killed the deceased, three fourths of a mile away, was admissible, as tending to show its management and speed at the place of the accident. *Lyman v. Boston & M. R. Co.*, (N. H.) 45 Am. & Eng. R. Cas. 163, 20 All. Rep. 976.

Where the rate of speed of the train was charged as dangerous, it was competent to show that at other stations the train had run at dangerous rate of speed on the same journey. *Galveston, H. & S. A. R. Co. v. Kutac*, 37 Am. & Eng. R. Cas. 470, 76 Tex. 473, 13 S. W. Rep. 327.

Where a company is charged with running its train too fast on a street, it is proper to introduce evidence of witnesses who saw the train just before it entered the street, for the purpose of showing that it was running then at a high rate of speed. As it would raise a slight presumption that the train would continue to run at the same rate of speed for a short distance; and as trains are always in the charge of employes, it would be easy for the company to show, if such was the fact, that the speed of the train had been checked before reaching the place of the accident on the street. *Savannah, F. & W. R. Co. v. Flannagan*, 39 Am. & Eng. R. Cas. 661, 82 Ga. 579, 9 S. E. Rep. 471. —NOT FOLLOWING *State v. Boston & M. R. Co.*, 58 N. H. 410; *State v. Manchester & L. R. Co.*, 52 N. H. 528; *Shaber v. St. Paul, M. & M. R. Co.*, 28 Minn. 103; *Randall v. Northwestern Tel. Co.*, 54 Wis. 140; *Craven v. Central Pac. R. Co.*, 72 Cal. 345; *Henry v. Southern Pac. R. Co.*, 50 Cal. 176; *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218.

32. As to what company is liable.

—If a car is described in a complaint as the property of a certain street railway company, a witness may properly testify what words and marks were on the car, and another witness may testify that a car with those marks on it belonged to the company mentioned in the complaint. *Com. v. Carroll*, 145 Mass. 403, 14 N. E. Rep. 618.

In an action for personal injuries, it appeared that the injuries were inflicted upon the track and by the engine and cars of another company. There was no direct testimony that the road of such company was then owned or leased by defendant; yet, there being evidence of facts and circumstances sufficiently tending to show that defendant then operated it, it was not error to submit the question of defendant's responsibility to the jury. *Pennsylvania R. Co. v. Sellers*, 127 Pa. St. 406, 17 Atl. Rep. 987.

To show that the defendant company was the same company as originally sued, though by a different name, the plaintiff proved that the company whose name first appeared in the summons had ceased to exist, except for closing up its business, long before the alleged cause of action arose, and that its road had passed from it by sale under a decree of foreclosure, and that the defendant company, at the time of the alleged injury sued for, was the lessee of the railway, and alone operating the same, but doing business in the name of the original company, and was using the signs of the old company, and using cars marked with its initials; that the original summons was in fact served on the agent of the new company, and that its attorneys appeared and defended the action without pleading the misnomer of defendant as originally sued, and that it employed the servants whose negligence caused the injury complained of. *Held*, that such evidence was competent, as tending to prove the issue whether the suit, when brought, was in fact against the new company by the name of the original company. *Pennsylvania Co. v. Sloan*, 35 Am. & Eng. R. Cas. 440, 125 Ill. 72, 17 N. E. Rep. 37; affirming 24 Ill. App. 48.

33. Boarding and leaving trains while in motion.—A plaintiff injured in alighting from a street-car while in motion may be allowed to testify, as showing her reason for so doing, that on a former occasion the car on which she had taken passage was driven into defendant's barn, where on leaving it she was insulted by a man in said barn; and that on the occasion of the accident the car again started for the barn, when she rang the bell, but the signal was disregarded, and for fear of a repetition of her former experience she left the car. *Ashton v. Detroit City R. Co.*, 41 Am. &

Eng. R. Cas. 235, 78 Mich. 587, 44 N. W. Rep. 141.

The question whether the treatment the plaintiff received at defendant's barn was sufficient to justify her belief that she was avoiding an actual impending danger, into which she was being taken, by leaving the car, is for the jury and not for the court. *Ashton v. Detroit City R. Co.*, 41 Am. & Eng. R. Cas. 235, 78 Mich. 587, 44 N. W. Rep. 141.

Testimony as to what had been the stopping place at that station is admissible in an action for personal injuries, when defendant contends that plaintiff was injured whilst alighting from its train before it reached its usual stopping place, while in motion, and the plaintiff denies such contention. *Alexandria & L. R. Co. v. Herndon*, 87 Va. 193, 12 S. E. Rep. 289.

In an action against a railroad, under Mass. Pub. Sts. ch. 112, § 212, for causing the death of a passenger, there was a conflict of evidence as to whether the train stopped, at a place not a station, before another train went by on another track, by which train the alleged passenger, who had left the car, was killed. A witness, who was in another car on the same train, testified that he heard some one call out the name of the station, and immediately afterwards the other train went by. He was then asked, against the objection of the defendant, whether he noticed that anything took place. He answered, that he noticed "that people went towards the door, and the door was closed after." Another witness, who was in another car, was allowed to testify that after the train stopped she went onto the platform, and was assisted to the ground by an employé of the train. Another witness, who was also in another car, testified that after the station was called, she got to the ground before the other train passed. The jury were instructed that they were to consider this evidence only on the issue whether the train stopped before the other train went by, and were not to consider it on the question whether the name of the station was called, unless it was called in the hearing of the person who was afterwards killed. *Held*, that the defendant had shown no ground of exception to the admission of the evidence. *Merrill v. Eastern R. Co.*, 139 Mass. 252.

34. Comparative safety of methods employed.—The issue being whether

a vice-principal acting for the master had proceeded in the exercise of ordinary care and skill in the moving of heavy machinery, evidence was admissible to show that the work engaged in could have been performed by other and safer methods than the one adopted. *Fogus v. Chicago & A. R. Co.*, 50 Mo. App. 250.

35. Conclusions.—Where an employé sues for a personal injury received while coupling cars, and has testified to the injury and the manner of its occurrence, he may be allowed to give what, in his judgment, prevented him from making the coupling without injury. *Georgia R. Co. v. Bryans*, 77 Ga. 429.—APPROVING *Central R. Co. v. Senn*, 73 Ga. 705. DISTINGUISHING *Central R. & B. Co. v. Kelly*, 58 Ga. 108; *Central R. Co. v. DeBray*, 71 Ga. 406; *Wylly v. Gazan*, 69 Ga. 506.

Where an abutting owner sues an elevated railway company for damage to his property by reason of the construction and maintenance of the road in the street, where he purchases after the road was built, the question is, whether the road actually was an injury to the property at the time he purchased; therefore it is improper to ask him whether he "considered" it an injury or a benefit at the time he purchased. *Steubing v. New York El. R. Co.*, 19 N. Y. Supp. 313, 46 N. Y. S. R. 799; affirmed in 138 N. Y. 658, mem., 34 N. E. Rep. 369, 53 N. Y. S. R. 186, 30 Abb. N. Cas. 319.

Where in a suit against a company for a Hereford bull, injured by its train, it is shown that there is no market for such an animal in the county where killed, his market value in counties where there is a market for such animals may be shown, but a witness cannot testify what he thinks the bull would bring from any one that wanted a bull. *Gulf, C. & S. F. R. Co. v. Dunman*, (Tex. App.) 16 S. W. Rep. 421.

It is error to admit testimony that the approach to a railway crossing (where a train collided with a wagon, causing injury) was too narrow to allow a wagon to turn around on it in safety. The facts only could be stated to the jury, and the jury should be left to their own conclusions. *International & G. N. R. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. Rep. 58.—FOLLOWING *Shelley v. Austin*, 74 Tex. 608; *Cooper v. State*, 23 Tex. 336; *Haynie v. Baylor*, 18 Tex. 509.

Exclusion of testimony that the witness could "account for this washing only by the fact that at this particular point the flood was so much more sudden and severe, amounting in fact to a regular water-spout," and that he knew "nothing more than that the officers and employés were all anxious to prevent accident, used in this case all the diligence and care possible under the circumstances to prevent accident and to discover and repair damage from the heavy rain, so excessive and unusual in its character and suddenness," was not error. *Central R. & B. Co. v. Kent*, 84 Ga. 351, 10 S. E. Rep. 965.

36. Customary care or negligence of employes.*—(1) *In general.*—As tending to show the plaintiff's knowledge of a rule of the railroad company forbidding the coupling of cars by hand, and requiring the use of a stick, it is competent for the defendant to prove that he had frequently seen other employés use a stick in making couplings, but not that the several employés "frequently referred to the rules" in the discharge of their various duties. *Memphis & C. R. Co. v. Askew*, 90 Ala. 5, 7 So. Rep. 823.—REVIEWED IN *Alcorn v. Chicago & A. R. Co.*, 108 Mo. 81.

In an action involving the question of a brakeman's negligence in his failure to examine the brakes on a freight car, either party has the right to prove what were the customary and usual duties of brakemen as to the inspection of the brakes, and it is error to refuse such evidence. *Chicago & A. R. Co. v. Bragonier*, 119 Ill. 51, 7 N. E. Rep. 688; reversing 11 Ill. App. 516.

It is proper to show, in support of an allegation that the employés in charge of the train were intoxicated at the time of the injury, that the engineer was in the habit of drinking, and of visiting a certain saloon, evidence having been introduced tending to prove that he had drunk at the last station passed before the injury, and about thirty minutes before the accident. *Pennsylvania Co. v. Newmeyer*, 52 Am. & Eng. R. Cas. 454, 129 Ind. 401, 28 N. E. Rep. 860.

In an issue involving the question of negligence of a company in the management of a switch from which it is claimed that

* Evidence of custom inadmissible as bearing on negligence, see note, 23 AM. & ENG. R. CAS. 346.

the witness
ing only by
ar point the
and severe,
water-spout,"
re than that
all anxious
case all the
der the cir-
ent and to
m the heavy
in its char-
error. *Cent.*
z. 351, 10 S.

negligence
V.—As tend-
wledge of a
rbidding the
requiring the
for the de-
d frequently
k in making
several em-
he rules" in
uties. *Mem-*
Ala. 5, 7 So.
n v. Chicago

question of a
ailure to ex-
t car, either
that were the
brakemen as
ces, and it is
Chicago &
51, 7 N. E.
516.

upport of an
in charge of
the time of
was in the
ing a certain
introduced
drunk at the
injury, and
the accident.
52 Am. &
8 N. E. Rep.

estion of neg-
management of
claimed that

b'e as bearing
ENG. R. CAS.

damage results, it is competent for the defendant to introduce evidence of the mode adopted generally by prudent railroad men in switching their cars under like circumstances. *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 293.

The testimony of one of the company's servants that it was always his custom to carefully examine the bridges and culverts on the road, was not admissible. *Central R. & B. Co. v. Kent*, 84 Ga. 351, 10 S. E. Rep. 965.

Evidence of the usual mode of coupling and uncoupling cars at the switch where the deceased was injured, is not admissible as tending to prove due care on his part; what others did or were in the habit of doing did not tend to prove that he was in the exercise of due care, for such a course may have been careless, and even reckless, and would not justify the deceased in omitting to observe care. *Chicago, R. I. & P. R. Co. v. Clark*, 15 Am. & Eng. R. Cas. 261, 108 Ill. 113. *Chicago & A. R. Co. v. Bragouier*, 119 Ill. 51, 7 N. E. Rep. 688; reversing 11 Ill. App. 516. *Sammon v. New York & H. R. R. Co.*, 6 J. & S. (N. Y.) 414.

Where the question is whether those in charge of a railroad train gave a signal of its approach to a public crossing, it is not competent to show that other trains did not give the signal as they approached that place, or that trains did not usually do so. *Esbridge v. Cincinnati, N. O. & T. P. R. Co.*, 42 Am. & Eng. R. Cas. 176, 89 Ky. 367, 12 S. W. Rep. 580.—DISTINGUISHING *Kentucky C. R. Co. v. Barrow*, 6 Ky. L. Rep. 240; *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218.

Where a person is injured while driving on the street, by colliding with a street-car, and the negligence of his driver is sought to be imputed to the plaintiff, the question is whether the driver was negligent on that occasion; therefore evidence tending to show that the driver had been in plaintiff's employ for a number of years, and had always been careful, is irrelevant. *Wooster v. Broadway & S. A. R. Co.*, 55 N. Y. S. R. 174, 72 Hun 197, 25 N. Y. Supp. 378.

In an action by a laborer to recover damages for injuries received by reason of the negligence of a section master of a road, the position, duties, and powers of such section master having been proved, it was irrelevant and unnecessary to show what was the custom of other section masters in such mat-

5 D. R. D.—26.

ters. *Couch v. Charlotte, C. & A. R. Co.*, 28 Am. & Eng. R. Cas. 331, 22 So. Car. 557.

(2) *Illustrations*.—Defendant, an electric car company, having an unusual number of passengers to carry, coupled an extra car to the rear of the motor car, and being unable to carry both cars up a grade, stopped and uncoupled the rear car, when, through some defects in the brakes, or otherwise, it ran back, of its own momentum, and injured the plaintiff, who was a passenger thereon. Held, that it was proper to admit evidence of the experience of the company's servants in stopping cars at the same point on that day, and it was proper to refuse evidence that they had stopped cars there before that day without accident, as what was done on former days would not tend to disprove negligence at the time of the accident. *Journal St. R. Co. v. Call*, 42 Ill. App. 41.

Where the plaintiff on the trial of an action for injury to a child by being run over by a train, offered, for the purpose of showing negligence on the part of the company, evidence to prove that it was the daily practice of the company to run their cars without a guard at the rear of the train over the "Y," which was so situated that the engineer could not see the rear—held, that the evidence was collateral and incapable of affording any reasonable presumption or inference as to the matters in issue, and was properly excluded by the court below. *Bannon v. Baltimore & O. R. Co.*, 24 Md. 108.

Plaintiff was injured by a collision with a train approaching a station, and charged the company with negligence in running its train at too great a speed when approaching the station. The company introduced evidence tending to show that the engineer in charge of the train was a suitable man for his place, and was of average skill in running trains. Held, that it was proper for plaintiff then to prove that the engineer sometimes brought his train to the station at a rate of speed that carried it beyond the station, though it was not beyond the station at the time plaintiff was injured. *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99.

A company claimed to have abandoned a farm-crossing over its track at the time of an accident caused by its alleged non-repair, and on the trial of a suit brought by the injured party to recover the consequent damages it became a material question whether the defendant recognized the crossing at

the time of the accident, and whether the circumstances were such from the appearances that the plaintiff was invited to use it as a crossing. It appeared from the testimony of defendant's witness that a short time before the accident there were two planks between the rails at said crossing. *Held*, that the plaintiff might show the custom of defendant in relation to farm-crossings, and its instructions to its trackmen as to keeping them in repair, in order to prove that it did maintain the crossing in question at the time of the accident. *Stewart v. Cincinnati, W. & M. R. Co.*, 49 *Am. & Eng. R. Cas.* 456, 89 *Mich.* 315, 50 *N. W. Rep.* 852.—QUOTING *Nichols v. Washington, O. & W. R. Co.*, 83 *Va.* 99; *Indiana, B. & W. R. Co. v. Barnhart*, 115 *Ind.* 399.—QUOTED IN *Retan v. Lake Shore & M. S. R. Co.*, 94 *Mich.* 146.

A brakeman sued for injuries, alleging that they were due to the negligence and incompetency of the engineer of the train, and offered the testimony of a former engineer and machinist who had worked in defendant's shops from February to October. He testified that the engineer was careless in the management of his engines, because they were frequently run into the shops for repairs from damages which would not have occurred under proper management. The injury complained of occurred in the month of May of the same year. *Held*, that the evidence was admissible as tending to prove carelessness on the part of the engineer prior to the injury. *Houston & T. C. R. Co. v. Patton, (Tex.)* 9 *S. W. Rep.* 175.

37. Customs as proof of disputed facts.—(1) *Admissible*.—In an action for a personal injury, where the contract for the shipment of stallions prohibited the plaintiff from riding in the same car with the horses, it is not error to allow the plaintiff to prove that two stallions being in the same car it was necessary for some one to be in the car with them, and also that there was a custom existing between the company and shippers of stallions and other valuable horses, that a person might accompany the stock and take care of the same. *Chicago, B. & Q. R. Co. v. Dickson*, 143 *Ill.* 368, 32 *N. E. Rep.* 380.

The issue being as to whether the conduct of a company not obviously dangerous and culpable (the use of partially worn rails for side tracks at a railway station) is negligence, proof may be made that the conduct

in question is in accordance with the general custom of other companies under like circumstances. *Doyle v. St. Paul, M. & M. R. Co.*, 41 *Am. & Eng. R. Cas.* 376, 42 *Minn.* 79, 43 *N. W. Rep.* 787.—REVIEWING *Phelps v. Mankato*, 23 *Minn.* 276; *Kelly v. Southern Minn. R. Co.*, 28 *Minn.* 98, 9 *N. W. Rep.* 588; *Morse v. Minneapolis & St. L. R. Co.*, 30 *Minn.* 465, 16 *N. W. Rep.* 358.—APPLIED IN *Chicago, M. & St. P. R. Co. v. Carpenter*, 56 *Fed. Rep.* 451.

Where a company is sued for an injury to a child while on an unfastened turntable, and plaintiff proves the custom of another company to lock its turntables, the company may then, in rebuttal, prove the general custom of railroads as to locking their turntables. *Bridger v. Asheville & S. R. Co.*, 27 *So. Car.* 456, 13 *Am. St. Rep.* 653, 3 *S. E. Rep.* 860.

The admission of evidence was proper to prove the usual stopping place of freight trains at the station where an injury occurred, charged to have been occasioned by the stopping of the train at an unusual and dangerous place. *McGee v. Missouri Pac. R. Co.*, 31 *Am. & Eng. R. Cas.* 1, 92 *Mo.* 208, 10 *West. Rep.* 282, 4 *S. W. Rep.* 739.

Where a passenger on a freight train sues for a personal injury, and it appears that a rule of the company, which was unknown to him, prohibited carrying passengers on freight trains, plaintiff may prove that it was, nevertheless, the custom and usage of the company to carry passengers on freight trains. *McGee v. Missouri Pac. R. Co.*, 31 *Am. & Eng. R. Cas.* 1, 92 *Mo.* 208, 10 *West. Rep.* 282, 4 *S. W. Rep.* 739.

If an engineer is injured in a collision it is not a bar to his action that the telegrams sent by him were not reduced to writing as required by the printed rules of the road, of which he had knowledge, but this is evidence for the jury upon the question of contributory negligence; and in reply, it is competent for him to prove a usage of the road to do as he did. *Deverson v. Eastern R. Co.*, 58 *N. H.* 129.

It was a material question whether a certain gas-burner near the rear of the defendant's station was lighted at the time of the accident to the plaintiff. Two witnesses produced by the defendant testified, on direct examination, that this burner was lighted at that time. Upon cross-examination they testified that they had no memory of that particular night, but that it was the

practice to light it. The plaintiff was then allowed to show, by witnesses who had visited the station after the accident, that this burner was often unlighted in the evening. This testimony was admitted solely upon the ground that the defendant's witnesses had testified that the knowledge they had as to the burner being lighted on the night of the accident was derived from the fact that it was always the practice to light it. *Held*, that the defendant had no ground of exception. *Wentworth v. Eastern R. Co.*, 143 *Mass.* 248, 9 *N. E. Rep.* 563.

At the trial of an action under Mass. St. of 1887, ch. 270, § 1, cl. 2, for personal injuries occasioned to a brakeman at the terminus of the road by a defect in a freight car belonging to another corporation, there being transferred to a connecting line for delivery to its owner, evidence was excluded that the train of which the car had formed a part was not inspected on its arrival at such terminus, and that, as matter of custom, no inspection was made there of cars coming from the direction from which such car had arrived. *Held*, that the evidence should have been admitted. *Coffee v. New York, N. H. & H. R. Co.*, 48 *Am. & Eng. R. Cas.* 370, 155 *Mass.* 21, 28 *N. E. Rep.* 1128.

(2) *Inadmissible*.—Where a passenger sues for a personal injury, and the length of the train becomes a material issue, it cannot be proven by showing the average length of trains at that season of the year. *Newson v. Georgia R. Co.*, 62 *Ga.* 339.

Evidence as to the roadbeds of other railroads in Alabama being inadmissible, qualification of the charge by reference to such other roadbeds could not be made. *Georgia Pac. R. Co. v. Dooley*, 48 *Am. & Eng. R. Cas.* 437, 86 *Ga.* 294, 12 *S. E. Rep.* 923.

When, in a suit for an injury received while passing along a highway, an issue is made upon the unreasonable or negligent conduct of the company in the use of the highway at the time complained of, its habit at other times has no legitimate bearing upon this issue, and evidence respecting such usage is incompetent. *Gahagan v. Boston & L. R. Co.*, 1 *Allen (Mass.)* 187.

Where a passenger sues for being ejected from a train because he presented detached coupons for his passage, he cannot strengthen his belief that it was a proper tender of the fare by testifying that he had seen conductors accept detached coupons similar to the one offered by him, from other pas-

sengers. *Marshall v. Boston & A. R. Co.*, 31 *Am. & Eng. R. Cas.* 18, 145 *Mass.* 164, 5 *N. E. Rep.* 172, 13 *N. E. Rep.* 384.

Testimony concerning the usages of runners and hackmen at remote periods, to establish a custom at the time of the accident, is objectionable. *Michigan C. R. Co. v. Coleman*, 28 *Mich.* 440.

Evidence that conductors, in violation of their instructions from the corporation, had in various instances allowed tickets to be used contrary to a rule of the company, is not competent to show a usage on the part of the corporation in conflict with the rule, if such instances are not shown to have come to the knowledge of the governing officers of the corporation. *Johnson v. Concord R. Corp.*, 46 *N. H.* 213.

Where a shipper of live stock sues a carrier for injuries to the stock, it is not competent for the carrier to show that it was the general custom on railroads, and especially on defendant's, which was known to plaintiff, to furnish shippers passes over the road and for them to accompany the stock, and to hold the company harmless from damages resulting from injuries such as plaintiff sued for. It is not competent for carriers to limit their common law liability in Texas, and such a custom, if existing, would be invalid as being in violation of law. *Missouri Pac. R. Co. v. Fagan*, 72 *Tex.* 127, 2 *L. R. A.* 75, 9 *S. W. Rep.* 749.

38. Danger to employe no rebuttal to evidence of his negligence.—In an action for killing plaintiff's testator while riding on the track, on horseback, the defendant cannot be allowed to prove "that there was danger to employes on the train in running over stock," nor that other persons had been notified not to travel on the railroad track. *Tanner v. Louisville & N. R. Co.*, 60 *Ala.* 621.

39. Discharge of negligent servant after accident.—Negligence is to be determined by what was known before and at the time of the accident, and not by subsequent events. Therefore, where a street-car company is sued for a personal injury, it is improper to allow plaintiff to prove that the day after the accident defendant discharged the driver who is charged with the negligence causing the injury. *Schmitt v. Dry Dock, E. B. & B. R. Co.*, 3 *N. Y. S. R.* 257. *Couch v. Watson Coal Co.*, 46 *Iowa* 17. *Christensen v. Union Trunk Line*, 6 *Wash.* 75, 32 *Pac. Rep.* 1018.

40. Drunkenness of employe.—

Where one company sues another for injuries resulting from a collision of trains where their tracks cross, it is competent to prove that the engineer in charge of defendant's train had been drinking intoxicating liquors. *New York, C. & St. L. R. Co. v. Grand Rapids & I. R. Co.*, 35 *Am. & Eng. R. Cas.* 283, 116 *Ind.* 60, 15 *West. Rep.* 548, 18 *N. E. Rep.* 182.

Where the action is to recover for personal injuries at a street crossing, where a flagman was stationed, the question of whether the flagman was guilty of negligence causing the injury must be determined by his acts at the time of the accident; and it is not competent to prove that on other occasions he had been intoxicated. *Warner v. New York C. R. Co.*, 44 *N. Y.* 465; reversing 45 *Barb.* 299. — **DISTINGUISHED** in *Cleghorn v. New York C. & H. R. R. Co.*, 56 *N. Y.* 44.

41. Exhibition of wounds to the jury.—

In an action for personal injuries it is competent for a physician, for the purpose of showing the extent of the injuries, to exhibit the plaintiff to the jury, and to place him in different attitudes in order to enable the jury to determine the extent of his injuries. *Citizens' St. R. Co. v. Willooby*, 58 *Am. & Eng. R. Cas.* 485, 134 *Ind.* 563, 33 *N. E. Rep.* 627. *Cunningham v. Union Pac. R. Co.*, 4 *Utah* 206, 7 *Pac. Rep.* 795. — **QUOTING** *Malhado v. Brooklyn City R. Co.*, 30 *N. Y.* 370.

The practice of permitting persons who sue for personal injuries to exhibit to the jury their wounds or injured limbs has been too long sanctioned to be now called in question. *Barker v. Perry*, 67 *Iowa* 146, 25 *Iowa* 100.

42. Extent of injury to car irrelevant.—

Where a passenger sues for a personal injury by collision of cars, it is not competent for the company to prove the extent of the injury to the car on which plaintiff was riding. Such evidence has no relevancy to plaintiff's injuries or to the force of the collision as testified to by the plaintiff. *Rosevelt v. Manhattan R. Co.*, 27 *J. & S.* 197, 37 *N. Y. S. R.* 894, 13 *N. Y. Supp.* 598; affirmed in 133 *N. Y.* 537, *mem.*, 30 *N. E. Rep.* 1148, 44 *N. Y. S. R.* 929, *mem.*

43. Failure to call a skilled physician.—

Where an employe sues his company for a personal injury, and the company

attempts to show that the injuries were so slight that a doctor was not called, it is competent for the employe to prove that he did not call a doctor because he had no money. *St. Louis, A. & T. H. R. Co. v. Jones*, (Tex.) 14 *S. W. Rep.* 309.

Where the defendant cross-examines the plaintiff's witnesses as to the standing of the physicians who attended him, and proves that they were ordinary country practitioners who have no special knowledge of the treatment of persons suffering from injuries similar to plaintiff's, and that there is an eminent physician from New York, skilled in the treatment of such cases, the defendant thereby raises the issue that the plaintiff had not had proper care and treatment; and the plaintiff may offer testimony showing that he was poor and dependent upon his earnings, and consequently he could not employ any skilled physician from a distance. *Alberti v. New York, L. E. & W. R. Co.*, 41 *Am. & Eng. R. Cas.* 201, 118 *N. Y.* 77, 23 *N. E. Rep.* 35, 27 *N. Y. S. R.* 865, 6 *L. R. A.* 765; affirming 43 *Hun* 421. — **NOT FOLLOWING** *Caldwell v. Murphy*, 11 *N. Y.* 416.

44. Failure to stop a sufficient length of time.—

In an action for damages resulting to a passenger from the refusal of the conductor to stop his train at the passenger's station, evidence for the company not only that the train was a through freight train, but also that it was not running on schedule time but on telegraphic orders, and that the station was not a telegraph station, is admissible. *St. Louis, I. M. & S. R. Co. v. Rosenberry*, 45 *Ark.* 256.

If there was a customary time during which trains in general, including the one in question, stopped at such stations as the one where plaintiff was injured, defendant might show it as a foundation for showing that the train in question stopped the customary time before the accident. *Nichols v. Dubuque & D. R. Co.*, 27 *Am. & Eng. R. Cas.* 183, 68 *Iowa* 732, 28 *N. W. Rep.* 44. *Chesapeake & O. R. Co. v. Reeves*, (Ky.) 11 *S. W. Rep.* 464.

In such an action, where the defendant company has been allowed to introduce evidence that the train stopped as long, or longer, than usual, the plaintiff may show in rebuttal how long it was customary for defendant's train to stop at the station. *Gulf, C. & S. F. R. Co. v. Rowland*, 52

Am. & Eng. R. Cas. 298, 82 *Tex.* 166, 18 *S. W. Rep.* 96.—QUOTING *Maguire v. Middlesex R. Co.*, 115 *Mass.* 240.

As relevant to the question of negligence, considered in connection with all the attendant circumstances—the signal to stop the train, the answer to it, checking the speed of the train, etc.—plaintiff may testify that he had been in the habit, for fifteen years, of getting on and off the cars at the station at which the accident happened. *Montgomery & E. R. Co. v. Stewart*, 91 *Ala.* 421, 8 *So. Rep.* 708.

In an action for injuries received by a passenger alighting from a train, one of plaintiff's witnesses testified that at about the date of the occurrence in question, but at a different time, he saw a woman getting off a train at the same station, and that she fell, and that he saw her get up from the station platform when the train was moving away from the station. *Held*, that the evidence was irrelevant, and its admission was reversible error. *Gulf, C. & S. F. R. Co. v. Rowland*, 52 *Am. & Eng. R. Cas.* 298, 82 *Tex.* 166, 18 *S. W. Rep.* 96.

45. Harmless error.—Where a company is sued for setting fire to and burning hay in a field, the exclusion of the trip report of the engineer in charge of the locomotive which is alleged to have started the fire is not reversible error, where he was examined as a witness and stated orally every material fact that the report contained. *Chicago & A. R. Co. v. Shenk*, 30 *Ill. App.* 586; *reversed on other grounds* in 131 *Ill.* 283, 23 *N. E. Rep.* 436.

46. Injuries to others in same accident.—The plaintiff having received his injuries by leaping from the car, while others who remained inside were not hurt, it is proper for him to prove that others besides himself did the same, and also their declarations at the time of their reasons for so doing, to show the reasonableness of his conduct and to avoid the charge of contributory negligence. *Mobile & M. R. Co. v. Ashcraft*, 48 *Ala.* 15.

There was no error in admitting evidence of the death of a fellow-traveler where the circumstance of his death was inseparably connected with the accident. *Chicago, St. L. & P. R. Co. v. Spilker*, 55 *Am. & Eng. R. Cas.* 200, 134 *Ind.* 380, 33 *N. E. Rep.* 280.

Evidence that the custom of a railroad corporation was not to allow passengers to go forward from one car to another in get-

ting out at stations; that the rear car of a train was frequently stopped at a certain point; and that several witnesses had been jarred and shaken up in getting out of the car at that place, is admissible on the question of due care by the corporation in providing for the safety of its passengers in alighting from the car at that place. *Bullard v. Boston & M. R. Co.*, 27 *Am. & Eng. R. Cas.* 117, 64 *N. H.* 27, 5 *Atl. Rep.* 838.

Where the action is to recover for the death of a track repairer, who was killed by a passing engine, evidence that another man who stood by the side of the deceased was also injured, is admissible as tending to show that the peril of the deceased was not brought about by his own carelessness. *Missouri Pac. R. Co. v. Lehmborg*, 75 *Tex.* 61, 12 *S. W. Rep.* 838.—QUOTED IN *Nelson v. Galveston, H. & S. A. R. Co.*, 48 *Am. & Eng. R. Cas.* 8, 78 *Tex.* 621.

In an action by a passenger for a personal injury, caused by a car leaving the track, where the issue is as to whether plaintiff was injured at all by the accident, and there is a conflict of evidence on this point by medical witnesses, it is error to admit evidence to show that the conductor, who sat near the plaintiff, was not injured. *Lery v. Campbell*, (Tex.) 19 *S. W. Rep.* 438.*

47. Irrelevant to the issue.—(1) *Injuries to passengers.*—In an action for injury to the person of a drover traveling on a stock pass, evidence that the plaintiff had continued since the injury to make contracts for the shipment of stock, and to ride on stock passes in the same manner as at the time of the injury, is inadmissible. *Ohio & M. R. Co. v. Selby*, 47 *Ind.* 471.

It is not competent in a defendant company to show in defense that the road was unprofitable and a losing business. Its duties to the public do not depend upon its financial ability. *Texas Trunk R. Co. v. Johnson*, 41 *Am. & Eng. R. Cas.* 122, 75 *Tex.* 158, 12 *S. W. Rep.* 482.

(2) *Injuries to employés.*—Evidence of the wages of another employé at the time of the injury and at the time of the trial is irrelevant. *Kansas City, M. & B. R. Co. v. Burton*, 97 *Ala.* 240, 12 *So. Rep.* 88.

When the yard master testified that there were no "clear posts" where plaintiff was

* Injury to passenger. Relevancy of evidence that conductor sitting near plaintiff was not injured, see 52 *AM. & ENG. R. CAS.* 623, *abstr.*

injured, it is error to reject the testimony of such witness that there were several "clear posts" in other portions of the railroad yard. *Kansas City, M. & B. R. Co. v. Burton*, 97 *Ala.* 240, 12 *So. Rep.* 88.

The fact that an accident from certain causes is unusual, or not likely to result, is no excuse for the negligence which causes it. *So held*, where a coupling-pin was left on a car platform and dropped off while the car was in motion, falling on a car wheel which threw it some distance, and injured a track repairer who had otherwise withdrawn a safe distance from the track to allow the train to pass. In such case it was not competent to ask a brakeman if, in case a coupling-pin should roll off a platform, he would expect such force to be given it as to do injury. *Doyle v. Chicago, St. P. & K. C. R. Co.*, 39 *Am. & Eng. R. Cas.* 314, 77 *Iowa* 607, 42 *N. W. Rep.* 555.

Evidence of the belief, expectations, or purpose of a co-employé in charge of the engine with which a coupling was made, as to the action of the employé making the coupling, of which the latter had no knowledge, is not admissible in an action to recover for injuries sustained in such service. *Grannis v. Chicago, St. P. & K. C. R. Co.*, 81 *Iowa* 444, 46 *N. W. Rep.* 1067.

In an action by an employé for an injury caused by a particular stump left by the defendant in dangerous proximity to its railway, it is not error to reject testimony offered by the defendant which tends to show generally that the defendant's railway in its construction compares favorably with other railroads. *Riley v. West Virginia C. & P. R. Co.*, 27 *W. Va.* 145.

(3) *Injuries to persons on track.*—Where the fact that an accident occurred at a particular crossing, in a certain street, is conclusively established, it was not error to introduce testimony as to the location of the line of the railroad. *Chicago, St. L. & P. R. Co. v. Spilker*, 55 *Am. & Eng. R. Cas.* 200, 134 *Ind.* 380, 33 *N. E. Rep.* 280.

In an action for an injury occasioned by a locomotive to a man delivering wood by the side of the track, the plaintiff, after having introduced evidence tending to show that there was at the time of the accident a traveled crossing at that place, was not allowed to show that such a crossing was there before the railroad was made, and also at the time of the trial. *Held*, that the exclusion of this evidence was no ground of

exception. *Robinson v. Fitchburg & W. R. Co.*, 7 *Gray (Mass.)* 92.

Where a street-car company is sued for an injury to a woman on the street, by negligently driving a car against her, it is not competent to prove by a policeman that he arrested the driver of the car immediately after the accident. *Luby v. Hudson River R. Co.*, 17 *N. Y.* 131.

(4) *Injuries causing death.*—Plaintiff's intestate having been killed while walking along a railroad trestle across a ravine in what was once the north end of a public street in the town, but which had become impassable, and its use as a street discontinued, the fact that the south end was still open and in use as a street is irrelevant and inadmissible as evidence. *Glass v. Memphis & C. R. Co.*, 94 *Ala.* 581, 10 *So. Rep.* 215.

Where the action is for negligently killing a person, it is not competent for the plaintiff to show at a second trial that at the former trial the company relied on a different theory of defense; especially where, under the rules of practice, different and even inconsistent theories of defense may be urged at the same trial. *Harris v. Central R. Co.*, 30 *Am. & Eng. R. Cas.* 581, 78 *Ga.* 525, 3 *S. E. Rep.* 355.

The residence of the children of the deceased, and with whom they were living at the time of the trial, are not material facts to any question to be passed upon by the jury. *Baltimore & O. R. Co. v. State*, 12 *Am. & Eng. R. Cas.* 149, 60 *Md.* 449.

(5) *Injuries to property.*—Where an abutting owner sues for injury to his property by the construction and operation of a railroad in the street, and has already testified to the value of the property, and that after the construction of the road it would not sell at all, and that the rental value had much decreased, it is not competent for the company to ask him what was paid for the property some years previous and before it was improved. *Denver & R. G. R. Co. v. Schmitt*, 11 *Colo.* 56, 16 *Pac. Rep.* 842.—*FOLLOWING* *Denver & R. G. R. Co. v. Bourne*, 11 *Colo.* 59.

The question at issue being the legality or illegality of the running of a railway car and engine on a street in a city, and the measure of damages for the injury done to plaintiff's house and lot, and the lessening of the value thereof, it was irrelevant to show that the porch of the plaintiff projected upon the sidewalk. If such projection was

illegal and a nuisance by reason of its illegality, the municipal authorities could abate it, unless some license, or lapse of time, or other reason showing it to have been authorized or acquiesced in, should have legalized it. *Mayor, etc., of Macon v. Harris*, 75 Ga. 761.

48. Malicious acts of third persons.—Where a company which is sued for an injury to a passenger by the train leaving the track, for the purpose of disproving negligence on its part is allowed to introduce evidence tending to show that a rail had been placed in a frog, and that just before the accident four persons had been seen in the vicinity, acting in a suspicious manner, and that certain track repairers were still encamped in the neighborhood, but who had been discharged by the company, causing ill feeling, it is proper to allow the company to follow up this evidence with other proof tending to show that two of these persons had made threats against the company, one of them to the effect that he would ditch a train. *Worth v. Chicago, M. & St. P. R. Co.*, 51 Fed. Rep. 171.—APPLYING *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. Rep. 912. DISTINGUISHING *Miller v. Southern Pac. Co.*, 20 Oreg. 285, 26 Pac. Rep. 75.

Where a company is sued for an injury to an employé caused by the derailment of a train, by reason of defects in the track, and the company claims that the defect was caused by the criminal act of some unknown person, it is permissible for the plaintiff to describe the topography of the country about the place of the accident, showing that it was a place plainly exposed to view, and therefore that it was improbable that a criminal would interfere with the track at that place. *Worden v. Humeston & S. R. Co.*, 76 Iowa 310, 41 N. W. Rep. 26.

49. Maps, diagrams, and photographs.—Where a passenger sues for a personal injury, resulting from a collision, and introduces a diagram of the place, it is competent for him to prove by a witness who was present at the time of the accident that the diagram is correct, except that a chock-block represented on the diagram was not there at the time of the accident, and to follow this up by proof that the accident resulted from the absence of such block. *Stouter v. Manhattan R. Co.*, 25 N. Y. S. R. 683.

Photographic sketches representing the

place of a railroad accident are admissible in evidence in an action against the company; and it is competent to prove by oral evidence a change in the scenery, caused by the falling of the leaves. *Dyson v. New York & N. E. R. Co.*, 57 Conn. 9, 17 Atl. Rep. 137.

It was not error to permit a witness to testify that a photograph introduced in evidence was a correct representation of the crossing and surroundings where the accident occurred. *Miller v. Louisville, N. A. & C. R. Co.*, 128 Ind. 97, 27 N. E. Rep. 339.

Where a passenger sues for a personal injury while riding on a street-car, it is competent for him to introduce in evidence a photograph of the car upon which the accident happened; but not the photograph of another car, and then supplement it by other proof showing that the two cars were alike. *People's Pass. R. Co. v. Green*, 6 Am. & Eng. R. Cas. 168, 56 Md. 84.

A photograph of an injured person taken in the presence of a physician who testifies that it correctly represents a contraction of the limbs of such person, which is alleged to have resulted from the injury, is competent evidence on the same principle as a map or diagram. *Cooper v. St. Paul City R. Co.*, 58 Am. & Eng. R. Cas. 598, 54 Minn. 379, 56 N. W. Rep. 42.

50. Negative evidence.—The testimony of co-employés of a plaintiff that they were not informed of the dangerous nature of the common employment is inadmissible to rebut the testimony of the defendant that the plaintiff was so informed. *Fox v. Peninsular W. L. & C. Works*, 92 Mich. 243, 52 N. W. Rep. 623.

The statement of a witness at a great distance that he did not hear the ringing of a bell upon the locomotive, is inadmissible. *Chapman v. New York C. & H. R. R. Co.*, 14 Hun (N. Y.) 484.—APPLYING *Culhane v. New York C. & H. R. R. Co.*, 60 N. Y. 133.

Where a company is sued for personal injuries, it is competent for it to prove by neighbors of the plaintiff that he had made no complaint whatever to them, where they were situate so as to be likely to hear of such injuries if they had occurred. *Barrelle v. Pennsylvania R. Co.*, 4 N. Y. Supp. 127, 21 N. Y. S. R. 109; affirmed in 121 N. Y. 697, mem.

Where a passenger on a street-car sues for personal injuries, and claims at the trial

that the driver threw him from the car, it is error to reject evidence offered by the company, of witnesses who were with him immediately after the accident, that he made no such claim. *Kummer v. Christopher & T. St. R. Co.*, 46 N. Y. S. R. 386, 20 N. Y. Supp. 116.

51. Of aggravation of other ailments.—Where a female passenger sues for injuries that are likely to be permanent, it is competent for her to show that she will suffer more from existing ailments by reason of the permanent injuries. *Crank v. Forty-second St. M. & St. N. A. R. Co.*, 53 Hun 425, 25 N. Y. S. R. 53, 6 N. Y. Supp. 229.

Where a party suing for a personal injury had a leg amputated ten years before the injury complained of, the defendant sought to prove that at a period anterior to such amputation the plaintiff had some disease which, though dormant from the time of the amputation to the date of the recent injury, may then have manifested itself again, and have been the real cause of some portion of his sufferings. *Held*, that the matter thus sought to be investigated was too remote, and the inference sought to be drawn from it too conjectural, and that the proposed evidence was properly refused. *North Chicago St. R. Co. v. Colton*, 52 Am. & Eng. R. Cas. 238, 140 Ill. 486, 29 N. E. Rep. 899; *affirming* 41 Ill. App. 311.

52. Of authority of officers and agents.—Proof that a claim for damages was presented to the local agent of a company, who promised to forward it, and proof that he had on former occasions received similar claims and paid them, is sufficient to go to the jury, as tending to show that the claim was properly presented, though it appear in fact that the agent was not authorized to receive such claims. *Alabama G. S. R. Co. v. Roebuck*, 23 Am. & Eng. R. Cas. 176, 76 Ala. 277.

Where a passenger sues for a personal injury it is not competent for him to prove that the company's master of trains agreed to pay all expenses incurred by plaintiff on account of the injuries and ailments, as such agent has no power to bind the company by such a promise, and it was not an admission made by an agent *dum fervet opus*. *Blitch v. Central R. Co.*, 76 Ga. 333.

It is not competent for a person who sues for an injury at a crossing to prove a conversation had by a third person with the

president of the company immediately after the accident, in reference to sending plaintiff to a hospital, where it appears the such person was entirely disinterested, and unauthorized to make any such proposition to the president. *Galena & C. U. R. Co. v. Dill*, 22 Ill. 264.

Evidence that its servants exceeded their rightful powers, is not admissible to defeat a recovery against the company by one injured by their acts, unless he had notice of the extent of the servants' powers. *Lake Shore & M. S. R. Co. v. Brown*, 31 Am. & Eng. R. Cas. 61, 123 Ill. 162, 14 N. E. Rep. 197.

Where a passenger buys a round-trip ticket, with a condition that he shall identify himself as the original purchaser, and have it stamped by the company's agent before starting on the return trip, it is but a simple contract, and its performance may be waived by parol. It is therefore competent to prove that the passenger stopped at an intermediate station, and that the company's agent there permitted plaintiff to identify himself, and stamped the ticket for the return trip. *Taylor v. Seaboard & R. Co.*, 34 Am. & Eng. R. Cas. 344, 99 N. Car. 185, 6 Am. St. Rep. 509, 5 S. E. Rep. 750.

In an action to recover for having been put off the train, where the company claims that it is not liable by reason of the failure of the plaintiff to procure a ticket in conformity with its rules, which require passengers to procure tickets before entering freight trains, and the plaintiff, for the purpose of showing that the defendant's freight trains carried passengers for hire, and that no rule was enforced by the defendant requiring the purchase of tickets before entering its trains, offered to prove by four witnesses that said witnesses had on a number of occasions taken passage on defendant's freight trains without first procuring tickets, and that they paid their fares to the conductors of said trains, which testimony, on the objection of the defendant, was excluded—*held*, that said testimony was competent, and its exclusion error. *Brown v. Kansas City, Ft. S. & G. R. Co.*, 38 Kan. 634, 16 Pac. Rep. 942.

53. Of character of injured person.—Where a passenger on a street-car sues for personal injuries resulting from negligence, it is improper to allow the company to introduce evidence touching her moral character, or the character of the

house where she lives. *Joliet St. R. Co. v. Call*, 42 Ill. App. 41.

Where a passenger sues for a personal injury, and the company sets up the defense that the injury was caused by plaintiff's being so drunk that he staggered off the platform, it is competent for the plaintiff to prove by his acquaintances that they had never seen him staggering drunk. *Gulf, C. & S. F. R. Co. v. Gross*, (Tex. Civ. App.) 21 S. W. Rep. 186.

In an action by a woman to recover damages for a personal injury, the defendant introduced evidence tending to prove that after the alleged injury the plaintiff had been guilty of adultery, and attempted to follow it up by other proof to the same effect, which the court refused. It was claimed to be competent for the purpose of disproving the nature and extent of plaintiff's injuries, as testified to by her and her physicians. *Held*, that as the defendant had the benefit of the evidence without objection, to the extent of proving the act, the offered evidence was properly refused, as it could only have the effect of prejudicing the plaintiff's case. *Joliet St. R. Co. v. Call*, 143 Ill. 177, 32 N. E. Rep. 389.

54. Of customary acts of other persons.—Where a railroad company is sued for the homicide of a person while walking on the track, it is competent for plaintiff to prove that the public had been constantly in the habit of walking on the tracks at and near the place of the accident, though it was neither a crossing nor such other place as the public had a right to go. *Western & A. R. Co. v. Meigs*, 74 Ga. 857. **DISTINGUISHED IN** *Smith v. Central R. & B. Co.*, 41 Am. & Eng. R. Cas. 490, 82 Ga. 801, 10 S. E. Rep. 111.—*Eckert v. St. Louis, I. M. & S. R. Co.*, 13 Mo. App. 352; *affirmed on another point, sub nom. Bergman v. St. Louis, I. M. & S. R. Co.*, 88 Mo. 678. *Cassida v. Oregon R. & N. Co.*, 14 Oreg. 551, 13 Pac. Rep. 438. *Townley v. Chicago, M. & St. P. R. Co.*, 4 Am. & Eng. R. Cas. 562, 53 Wis. 626, 11 N. W. Rep. 55.—**QUOTED IN** *Virginia Midland R. Co. v. White*, 84 Va. 498, 5 S. E. Rep. 573.—*Hoppe v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 74, 61 Wis. 357, 21 N. W. Rep. 227.

Since railroad companies cannot, in the absence of statutory provisions, prevent the use of their track by pedestrians, evidence of a custom on the part of pedestrians to walk on the track is not admissible as evi-

dence against the company in an action to recover damages for the death of a person who was killed while on the track. *Memphis & C. R. Co. v. Womack*, 37 Am. & Eng. R. Cas. 308, 84 Ala. 149, 4 So. Rep. 618. *Carlington v. Louisville & N. R. Co.*, 41 Am. & Eng. R. Cas. 543, 88 Ala. 472, 6 So. Rep. 910. *Mason v. Missouri Pac. R. Co.*, 6 Am. & Eng. R. Cas. 1, 27 Kan. 83, 41 Am. Rep. 405.

Where a brakeman sues for a personal injury, and is charged with contributory negligence, it is competent for him to disprove the charge by showing that in the performance of the duty in which he was engaged when injured he adopted the course usually pursued under the same circumstances by brakemen generally. *Whitsett v. Chicago, R. I. & P. R. Co.*, 22 Am. & Eng. R. Cas. 336, 67 Iowa 150, 25 N. W. Rep. 104.

Evidence that plaintiff, who was injured while passing between cars unlawfully blocking a street, saw others cross before him is admissible on the issue of defendant's negligence in starting the train without warning. *Burger v. Missouri Pac. R. Co.*, 112 Mo. 238, 20 S. W. Rep. 439.

Evidence that it was the custom of the inhabitants of a locality to allow boys to play in the street, does not tend to prove that such use of the street is lawful. *Schierhold v. North Beach & M. R. Co.*, 40 Cal. 447.

It is error to admit evidence that, at previous times, a bell had not been rung or whistle sounded as trains passed the place where the accident occurred, to prove negligence at the time of the collision. Nor does it waive the error that defendant had permitted similar evidence of other witnesses without objection. Nor was it admissible to discredit the evidence of the engineer, as he made the statements intended to be contradicted, in answer to questions propounded by plaintiff on cross-examination. A party cannot cross-examine a witness as to a collateral fact for the purpose of laying a foundation to contradict him. *Chicago, B. & Q. R. Co. v. Lee*, 60 Ill. 501.

Evidence offered as to the absence of casualties on other roads conducted in a more populous community, and at crossings more generally used than the highway in question, was properly excluded. *Louisville, C. & L. R. Co. v. Com.*, 14 Am. & Eng. R. Cas. 613, 80 Ky. 143, 44 Am. Rep. 468.

In an action by a boy against a street railway company for damages for personal injuries, evidence that other boys than plaintiff had been in the habit of jumping on the cars and rocking, and scaring the mules, is inadmissible. *Hays v. Gainesville St. R. Co.*, 34 *Am. & Eng. R. Cas.* 97, 70 *Tex.* 602, 8 *S. W. Rep.* 491.

55. Of damages to land by overflow of water.—In an action against a railroad for damages caused by surface water upon the plaintiff's land, proof that an attempt was made to raise a crop on the damaged land, and that the crop was drowned out by the nuisance, is admissible as tending to show that the yearly value of the land was affected by the nuisance, the declaration alleging that water was caused to back over and stand upon the land. *Georgia R. & B. Co. v. Berry*, 78 *Ga.* 744, 4 *S. E. Rep.* 10.

The yearly value of land being in question, the crop which it would produce if free from the alleged nuisance is a relevant fact when coupled with the cost of production. *Georgia R. & B. Co. v. Berry*, 78 *Ga.* 744, 4 *S. E. Rep.* 10.

In an action for damages from a permanent obstruction of a watercourse, and the consequent flooding of the plaintiff's land, a former recovery for the same cause, for damages suffered prior to the commencement of this action, is admissible in evidence upon the same issues as those involved in the former action. *Byrne v. Minneapolis & St. L. R. Co.*, 38 *Minn.* 212, 36 *N. W. Rep.* 339.

In an action for destruction of crops, where the specific act alleged in the petition is the negligent construction of the roadbed adjoining the lands upon which the crops were growing, evidence that defendant's roadbed was negligently constructed at a point six or seven miles above plaintiff's farm, which caused the water to flow back across the channel of the river and onto plaintiff's land, is inadmissible. *Gulf, C. & S. F. R. Co. v. McGowan*, (Tex.) 34 *Am. & Eng. R. Cas.* 210, 8 *S. W. Rep.* 57.

56. Of dangerous bridges.—Where a member of a construction gang sues for an injury caused by the falling of a temporary bridge, evidence is admissible that a portion of the bridge, which did not fall, but was braced, leaned at a certain angle, for the purpose of showing the general character of the structure. *Bowen v. Chi-*

cago, B. & K. C. R. Co., 95 *Mo.* 268, 14 *West. Rep.* 744, 8 *S. W. Rep.* 230.

In an action for injuries received by a passenger in the wrecking of a train caused by the fall of a bridge over which the train was passing, where the stability of the whole structure is involved in the charge of negligence alleged in the complaint, it is competent to give evidence of the condition at the time of the accident of portions of the bridge left standing, and not immediately involved in the wreck. *Leonard v. Southern Pac. Co.*, 21 *Oreg.* 555, 28 *Pac. Rep.* 887.—**DISTINGUISHING** *Louisville & N. R. Co. v. Fox*, 11 *Bush* (Ky.) 505; *Grand Rapids & I. R. Co. v. Huntley*, 38 *Mich.* 540, 31 *Am. Rep.* 321.

The question being as to the character of a stream, a railway bridge over which had been destroyed by a flood, and whether the defendants were negligent in not foreseeing and providing against such occurrence—*held*, that evidence of floods subsequent to that which occasioned the injury was improperly received. *Kansas Pac. R. Co. v. Miller*, 2 *Colo.* 442.

Where a brakeman sues for injuries received by coming in contact with an overhead bridge, evidence that there are bridges on all the roads in the country too low for brakemen standing on ordinary box cars, to pass under with safety, is incompetent. *Louisville, N. A. & C. R. Co. v. Wright*, 38 *Am. & Eng. R. Cas.* 41, 115 *Ind.* 378, 13 *West. Rep.* 798, 16 *N. E. Rep.* 145, 17 *N. E. Rep.* 584.

In an action for the death of plaintiff's intestate, caused by the falling of a train on which he was employed, through a bridge, one of plaintiff's witnesses offered a piece of timber sawed from the piling of a part of the bridge which did not go down at the time of the accident. *Held*, that the evidence was not admissible to show that the timbers of the bridge which caused the accident were decayed and unsound, but that it was admissible to show that the caps or timbers resting on the piling were not bolted thereto. *Mann v. Sioux City & P. R. Co.*, 46 *Iowa* 637.—**QUOTED IN** *Hawes v. Burlington, C. R. & N. R. Co.*, 19 *Am. & Eng. R. Cas.* 220, 64 *Iowa* 315.

57. Of degree of care in selecting employes.—In a suit against a corporation for personal injuries, caused by falling into a ditch dug by it in the public highway, its liability depends wholly on its

having caused or continued the nuisance, and the plaintiff's suffering the injury without fault on his part; and hence evidence of the care used in selecting a watchman to warn persons approaching the ditch, or his general character or reputation as a watchman, at the time of his employment, is inadmissible. *South & N. Ala. R. Co. v. Chappell*, 61 Ala. 537.

Testimony of the president of the defendant corporation as to the degree of care exercised before the injury in the selection of drivers for its horse-cars, was not material to the question whether the driver was negligent at the time of the injury. *Augusta & S. R. Co. v. Randall*, 85 Ga. 297, 11 S. E. Rep. 706.

Where a company is sued for an injury resulting from negligence of an engineer, and plaintiff has alleged that he was employed by the company at low wages because of his want of skill, it is competent for the company to prove by its president that he employed the engineer as a competent and safe person. *Robinson v. Fitchburg & W. R. Co.*, 7 Gray (Mass.) 92.

58. Of drunkenness of person when injured.—Where a passenger sues for a personal injury, evidence of his drinking habits is not admissible in mitigation of damages, where there is no issue made as to his ability to earn a livelihood before the injury. *Union Pac. R. Co. v. Reese*, 56 Fed. Rep. 288.

Plaintiffs having introduced evidence to show that the decedent did not drink intoxicants during the afternoon before the accident in the evening, and was sober, they cannot complain of the admission of evidence in rebuttal, tending to show he was intoxicated. *Sherfey v. Evansville & T. H. R. Co.*, 121 Ind. 427, 23 N. E. Rep. 273.

59. Of earning capacity of injured person.—It is only in cases where plaintiff's earnings proceed entirely from his own labor that evidence thereof is admissible in actions for personal injuries. Therefore evidence of such earnings is improper where they proceed in part from the use of invested capital. *Johnson v. Manhattan R. Co.*, 52 Hun 111, 23 N. Y. S. R. 388, 4 N. Y. Supp. 848.

Proof of the wages that plaintiff was earning before the accident and since, is proper; therefore it is competent for him to show that his wages were reduced by

reason of the accident, from twenty-five dollars per week to seven or eight dollars per week. *Miller v. Manhattan R. Co.*, 73 Hun 512, 36 N. Y. Supp. 162, 56 N. Y. S. R. 189.

In cases where the death of the injured party is the basis of the suit for damages, his health, habits of industry, sobriety, economy, skill and capacity for business, are all legitimate matters of inquiry. *Texas Mex. R. Co. v. Douglass*, 73 Tex. 325, 11 S. W. Rep. 333.—FOLLOWING *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 293.

On the question what was the annual income of the plaintiff, a physician, evidence offered by the defendant to prove by a purchaser of the plaintiff's practice that he called on persons named as patients on the plaintiff's visiting list previously given him by the plaintiff, and found but one who needed any medical treatment, is too remote to be competent. *Nelson v. Boston & M. R. Co.*, 155 Mass. 356, 29 N. E. Rep. 586.

So also evidence tending to show that the plaintiff committed a fraud by making a false list of patients in connection with the sale of his practice is immaterial and incompetent. *Nelson v. Boston & M. R. Co.*, 155 Mass. 356, 29 N. E. Rep. 586.

60. Of efforts to compromise.—A portion of a letter written by an injured servant before commencement of an action against the company, to an officer of such company, containing an offer to compromise, but which contained no statement which could be separated from the offer to compromise, and still convey the idea which was in the writer's mind, was correctly excluded when offered in evidence. *Louisville, N. A. & C. R. Co. v. Wright*, 38 Am. & Eng. R. Cas. 41, 115 Ind. 378, 13 West. Rep. 798, 16 N. E. Rep. 145, 17 N. E. Rep. 584.

61. Offer of employment after injury.—In an action by a brakeman for injuries received by him whilst engaged in giving signals to an approaching train, it is admissible for him to show that his proper position at such time was on the track of the railway. That the defendant offered the plaintiff employment after he had been injured in its service is irrelevant testimony, unless followed by proof showing the terms and character of the offer. *Helton v. Alabama Midland R. Co.*, 97 Ala. 275, 12 So. Rep. 276.

62. Of frightening teams at crossings.*—On the trial of an action for personal injury to the plaintiff, caused by being thrown from his carriage in consequence of his horse becoming frightened at the sound of a locomotive whistle, at a railroad crossing near a station, it is competent for the plaintiff to show that the sound of the whistle produced a similar effect upon other horses at the same time and place; also to show the usual effect of that whistle, at the same place, on ordinary horses. *Hill v. Portland & R. R. Co.*, 55 Me. 438.

Where a company is charged with negligence in leaving its cars so that plaintiff's horses were frightened while driving on the highway, and the company secures the admittance of evidence over plaintiff's objection, that other horses had passed the cars without becoming frightened, it cannot complain of the admission of testimony upon, the same subject in rebuttal, even though such evidence might otherwise be incompetent. *Pittsburgh, C. & St. L. R. Co. v. Kitley*, 37 Am. & Eng. R. Cas. 511, 118 Ind. 152, 20 N. E. Rep. 727.

On the question whether the noise of escaping steam from a locomotive was likely to frighten horses, evidence that other horses were frightened by it is admissible. *Gordon v. Boston & M. R. Co.*, 58 N. H. 396. Contra see *Lewis v. Eastern R. Co.*, 60 N. H. 187.—REVIEWING State v. Manchester & L. R. Co., 52 N. H. 528; *Gordon v. Boston & M. R. Co.*, 58 N. H. 396.

Where it was sought to show that the horse frightened by the blowing of a steam whistle was at the time gentle, the admission of testimony of former and prior use, and that he was always gentle at such times, even though it were inadmissible, is harmless error. *Indianapolis Union R. Co. v. Boettcher*, 131 Ind. 82, 28 N. E. Rep. 551.

Evidence that the horses were "old timers," that is, aged and infirm, was proper in rebuttal of plaintiff's evidence that they had been driven far and furiously. *Barry v. Second Ave. R. Co.*, 1 Misc. 502, 49 N. Y. S. R. 705, 20 N. Y. Supp. 871.

63. Of incompetency of employees.—Where suit is brought to recover for injuries to property caused by the negligent running of trains, it is competent for the

plaintiff to introduce evidence of the general character of the company's engineer in charge of the train doing the injury, tending to show that he was reckless and untrustworthy; and such evidence is not objectionable on the ground that it would tend to prejudice the jury and enhance the damages. *Vicksburg & J. R. Co. v. Patton*, 31 Miss. 156.

Testimony to show the qualification of a man in charge of an engine which probably inflicted the injury complained of, is not immaterial and irrelevant, upon the question of negligence, to show that the train was run by skillful and careful engineers. *Flynn v. Manhattan R. Co.*, 1 Misc. 188, 48 N. Y. S. R. 670, 20 N. Y. Supp. 652.

A recovery being sought against a company, on the grounds only that it employed an engineer who was old, near-sighted, and unacquainted with the road, and by reason of such defects incompetent, and that a brake upon one of its cars was defective, which incompetency and defect are alleged to have caused the injury complained of, it was error to have allowed proof of the fact that after the accident complained of had occurred such engineer ran his train (freight) without a brakeman a distance of several miles and ran his engine off the track. *Ransier v. Minneapolis & St. L. R. Co.*, 11 Am. & Eng. R. Cas. 647, 30 Minn. 215, 14 N. W. Rep. 883.

The fact that the person in charge of the defendant's locomotive was a fireman, not a skilled engineer, is entirely immaterial, where the evidence shows that the collision was not occasioned by any lack of skill on his part. *Culhane v. New York C. & H. R. Co.*, 60 N. Y. 133.—DISTINGUISHING *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445.

In an action for the death of an engineer in consequence of a collision resulting from the yard master's negligence in sending him out when a coming train was past due—held, that as bearing upon the competency of the yard master, questions as to the number of tracks in the depot yard, the number of engines ordinarily employed in switching, the average number of freight trains in the yard, and similar questions, were relevant as tending to show the character and importance of the work the yard master had charge of, and the need of experience and skill. *Michigan C. R. Co. v. Gilbert*, 2 Am. & Eng. R. Cas. 230, 46 Mich. 176, 9 N. W. Rep. 243.

*Frightening teams at crossings, by letting off steam, etc. Admissibility of evidence of frightening other teams, see note, 49 AM. REP. 613.

64. Of matters not alleged in pleadings.—Where a passenger sues for a personal injury, and charges in his declaration that he was injured by jumping from the train in view of imminent danger of a collision, he cannot introduce evidence that he remained on the train and was injured by the collision. *Shepard v. New Haven & N. Co.*, 45 Conn. 54.—REVIEWING *Shaw v. Boston & W. R. Corp.*, 8 Gray (Mass.) 45.

Evidence that there was a point on the defendant's road over which the train on which the plaintiff was riding passed, where there was a grade of two hundred and ninety feet to the mile, and that, in ascending it, the engine emitted steam and cinders in greater quantities and with much more force than when passing over other portions of the road, was inadmissible, where it was not pertinent to any issue made by the pleadings; and especially so where there was no allegation or offer to prove that it was a scale or cinder emitted in this locality which struck the plaintiff in the eye and occasioned the injury for which this suit was brought. *Higgins v. Cherokee R. Co.*, 27 Am. & Eng. R. Cas. 218, 73 Ga. 149.

In an action to recover for being ejected from a train with excessive force, there is no question of negligence or of contributory negligence in the case, and it is error to permit the plaintiff to prove that he was upon the train in pursuance of information given him by the defendant's ticket agent that the train would stop at the station where he wanted to alight. *Chicago, St. L. & P. R. Co. v. Bills*, 37 Am. & Eng. R. Cas. 121, 118 Ind. 221, 20 N. E. Rep. 775.

If it be not laid in the declaration that the plaintiff's health was affected by the wrong complained of, then evidence as to the state of his health at the time of the alleged injury is irrelevant. *Forsee v. Alabama G. S. R. Co.*, 63 Miss. 66.

Where the negligence imputed to defendant, as the cause of the injury, was the negligent and careless running of the train by defendant's servants, the evidence should have been limited to this inquiry. *Milburn v. Hannibal & St. J. R. Co.*, 21 Mo. App. 426.

Where a train employé sues for an injury, caused by the train striking cattle on the track and being thrown off, and the company is charged with negligence in not keeping its track fenced, but answers, charging that the injury was the result of

plaintiff's own carelessness and negligence, such allegation in the answer is deemed denied by the plaintiff, and he may introduce evidence to show that he was ignorant of the defects in the fence which caused the injury. *Magee v. North Pac. Coast R. Co.*, 78 Cal. 430, 20 Pac. Rep. 709, 21 Pac. Rep. 114.

65. Of negligence in starting train.—In an action for personal injuries, evidence that the train started with a severe jerk is admissible; and although it is necessary in starting a freight train to jerk the cars, an unusually hard jerk is evidence of negligence on the part of the engineer. *Birmingham Mineral R. Co. v. Wilner*, 97 Ala. 165, 11 So. Rep. 886.

Where the issue is whether plaintiff was injured while alighting from cars by the sudden starting of the same, or by negligently jumping from the train while it is in motion, evidence is admissible on the part of the company that plaintiff had within a year frequently traveled over the road, and had often jumped off while the trains were moving, and had been warned against the danger of doing so. *Craven v. Central Pac. R. Co.*, 72 Cal. 345, 13 Pac. Rep. 878.—DISTINGUISHING *Largan v. Central R. Co.*, 40 Cal. 272; *Martinez v. Planel*, 36 Cal. 578.

Where the charge of negligence of a defendant is the sudden starting of a detached car upon which the plaintiff was engaged in unloading brick, without previous notice or warning, by the collision of other cars being pushed back, evidence tending to show that the pushing of the cars instead of pulling them was not negligence, is inadmissible. The custom in other yards as to pushing or drawing cars in such a case is wholly immaterial. *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57, 29 N. E. Rep. 186.

Where a person in charge of cattle leaves the caboose for the purpose of attending to them and gets upon the top of the train upon its starting, evidence that no notice of the starting of the train was given to him is admissible in an action for damages. *Missouri Pac. R. Co. v. Callahan*, 41 Am. & Eng. R. Cas. 85, 12 S. W. Rep. 835.

66. Of objection to physical examination by other party.—The fact that a plaintiff, in an action for personal injuries, objected to a medical examination of her person, ordered at the instance of the opposite party, cannot affect the merits of the case, and should not be admitted in evidence. *Louisville, N. A. & C. R. Co. v.*

Falvey, 23 *Am. & Eng. R. Cas.* 522, 104 *Ind.* 409, 3 *N. E. Rep.* 389, 4 *N. E. Rep.* 908.

67. Of other similar accidents.*—

(1) *In general.*—Where the sufficiency or safety of the instrument which is claimed to have caused the accident is in issue, evidence of similar accidents resulting from the same cause is competent. Such facts are in the nature of experiments to show the actual condition of the instrument, and how it served its purpose when put to the use for which it was designed, and that the common cause of these accidents was a dangerous or unsafe thing. *Morse v. Minneapolis & St. L. R. Co.*, 11 *Am. & Eng. R. Cas.* 168, 30 *Minn.* 465, 16 *N. W. Rep.* 358. —NOT FOLLOWING *Phelps v. Mankato*, 23 *Minn.* 276; *Kelly v. Southern Minn. R. Co.*, 28 *Minn.* 98.—*Clapp v. Minneapolis & St. L. R. Co.*, 36 *Minn.* 6, 29 *N. W. Rep.* 340.—FOLLOWING *Morse v. Minneapolis & St. L. R. Co.*, 30 *Minn.* 465, 16 *N. W. Rep.* 358.

While, when in an action against a railroad corporation to recover damages for injuries alleged to have been caused by defendant's negligence, it is important to show that defendant had notice of the dangerous character of the defect which caused the injury, testimony is competent to prove other similar accidents; but such evidence is not competent where it can have no bearing upon the issues presented. *Dye v. Delaware, L. & W. R. Co.*, 53 *Am. & Eng. R. Cas.* 286, 130 *N. Y.* 671, 29 *N. E. Rep.* 320, 41 *N. Y. S. R.* 690, 3 *Silv. App.* 610.

Where the evidence tends to show that an injury resulted by reason of the defective condition of an engine, whereby it started of its own accord, it is competent for the company to show in defense that other engines with steam on had been known to move of themselves, without any discoverable defect therein. *Hurd v. Union Pac. R. Co.*, 8 *Utah* 241, 30 *Pac. Rep.* 982.

Evidence of similar occurrences on other occasions is not admissible to raise a presumption that the accident in question happened, or that the place was defective and dangerous, or that the situation was of such a character that the accident resulting in the injury for which damages are claimed might have taken place. *Cleveland, C., C. & I. R. Co. v. Wynant*, 35 *Am. & Eng. R.*

Cas. 328, 114 *Ind.* 525, 14 *West. Rep.* 512, 17 *N. E. Rep.* 118. *Early v. Lake Shore & M. S. R. Co.*, 30 *Am. & Eng. R. Cas.* 163, 66 *Mich.* 349, 9 *West. Rep.* 863, 33 *N. W. Rep.* 813.

(2) *Injuries to passengers.**—In an action by a passenger to recover damages for personal injuries occasioned by a run-off, evidence that the train on which the accident occurred and of which witness was conductor, had run off the track seven or eight times within a month before the accident, is admissible. *Mobile & M. R. Co. v. Ashcraft*, 48 *Ala.* 15.

In such action it is competent for the plaintiff to prove that, about two weeks before the accident by which he was injured, the defendant's cars had run off the track twice during one trip. There is no better evidence of negligence than the frequency of accidents. *Mobile & M. R. Co. v. Ashcraft*, 49 *Ala.* 305.

Where the action is for personal injuries to a passenger in falling from the station platform, and the company is charged with negligence in not making its platform safe for the accommodation of passengers, evidence that other persons had fallen at the same place under similar circumstances, is admissible. *Missouri Pac. R. Co. v. Neiswanger*, 39 *Am. & Eng. R. Cas.* 471, 41 *Kan.* 621, 21 *Pac. Rep.* 582.

Where a female passenger sues for injuries occurring while getting on a car, by striking the car step and falling between the steps and the station platform, and charges the company with negligence in having the car step higher than the platform, evidence of similar accidents is admissible, though it appears that she was a frequent traveler, and knew the relative height of the platform and car step. *Hanrahan v. Manhattan R. Co.*, 24 *N. Y. S. R.* 790, 53 *Hun* 420, 6 *N. Y. Supp.* 395; affirmed in 130 *N. Y.* 658, mem., 29 *N. E. Rep.* 1033.

In such case the company could not deny notice of the dangerous position of the platform and the step, as the fact that other accidents had happened was sufficient to give it notice. *Hanrahan v. Manhattan R. Co.*, 24 *N. Y. S. R.* 790, 53 *Hun* 420, 6 *N. Y. Supp.* 395; affirmed in 130 *N. Y.* 658, mem., 29 *N. E. Rep.* 1033.

* Other accidents to different persons at same place; admissibility of evidence as to, see notes, 39 *AM. & ENG. R. CAS.* 477; 44 *AM. REP.* 694.

* Injuries to passengers about platforms. Admissibility of evidence as to similar accidents at other stations, see 47 *AM. & ENG. R. CAS.* 528, *abstr.*

If, notwithstanding the fact of this notice by the happening of accidents, the structure was of such character that passengers were safe if they used reasonable care in boarding cars, the happening of accidents is no proof of negligence. *Hanrahan v. Manhattan R. Co.*, 24 N. Y. S. R. 790, 53 Hun 420, 6 N. Y. Supp. 395; affirmed in 130 N. Y. 658, mem., 29 N. E. Rep. 1033.

Where a passenger sues for an injury resulting from a defective car, evidence of previous accidents from the same cause is admissible. *Chase v. Jamestown St. R. Co.*, 15 N. Y. Supp. 35.

Where a passenger on an elevated railroad sues for an injury in falling from its stairway by reason of an alleged defect of the hand-rail, evidence of other accidents subsequent to plaintiff's injury is not admissible for the purpose of showing that the company had knowledge of the defect. *Johnson v. Manhattan R. Co.*, 52 Hun 111, 23 N. Y. S. R. 388, 4 N. Y. Supp. 848.

In an action against a company to recover damages for an injury sustained by one of its passengers in consequence of alleged negligence on the part of the company, evidence of another accident having occurred at the same place, under similar circumstances, is inadmissible. *Davis v. Oregon & C. R. Co.*, 8 Oreg. 172.

(3) *Injuries to persons at crossings or on track.*—As relevant to the question whether the defendant's track, at the time and place of the accident to plaintiff, was in safe and proper condition for the passing of vehicles, it would be permissible for plaintiff to prove similar accidents to other persons at or about the same time and place; and on the other hand, the defendant may prove that other vehicles were constantly crossing under similar conditions without inconvenience, hindrance, or accident. *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133, 9 So. Rep. 525.

Where a company is sued for injuries sustained in a sleigh upsetting, through the alleged negligence of the company in putting a switch in the public highway in a certain manner, or in suffering it to get in bad condition, it is admissible to prove other accidents at the same place. *Wooley v. Grand St. & N. R. Co.*, 3 Am. & Eng. R. Cas. 398, 83 N. Y. 121.

Where one is injured while walking on the track by being struck by detached cars that are broken loose from the main part

of the train, the company is not liable on proof showing that heavy trains had frequently broken loose at or near the point, without proof of negligence as to the breaking loose of the particular cars doing the injury. *Louisville & N. R. Co. v. Schmetzer*, (Ky.) 22 S. W. Rep. 603.

Where the action is for an injury at a crossing, and the company is charged with negligence in failing to ring a bell or blow a whistle, evidence that other accidents have occurred at the same crossing within a short time is properly excluded. *Menard v. Boston & M. R. Co.*, 150 Mass. 386, 23 N. E. Rep. 214.

(4) *Injuries to children.*—Testimony of a witness to the effect that another child had been hurt on the same evening that plaintiff was injured is admissible in an action for damages for injuries done to a child by the failure of the railway company to properly secure its turntable. *Gulf, C. & S. F. R. Co. v. Evansich*, 63 Tex. 54.

Where a company is sued for an injury to a child on an unlocked turntable, evidence of former accidents on the turntable is properly excluded, unless it be shown that the company had knowledge of such accidents. *Bridger v. Asheville & S. R. Co.*, 27 So. Car. 456, 13 Am. St. Rep. 653, 3 S. E. Rep. 860.

(5) *Injuries to employes.*—Where a brakeman sues for an injury by coming in contact with an overhead bridge, evidence that other persons were previously injured by coming in contact with the same bridge is competent for the purpose of showing that the company had notice that the bridge was dangerous. *Louisville, N. A. & C. R. Co. v. Wright*, 38 Am. & Eng. R. Cas. 41, 115 Ind. 378, 13 West. Rep. 798, 16 N. E. Rep. 145, 17 N. E. Rep. 584.

Where an employe sues for an injury received by a piece breaking off from a hammer which he was using, and striking him, evidence of the breaking of other hammers at the same work is not sufficient to charge the company with negligence in their selection, where there were no apparent defects therein. *Georgia R. & B. Co. v. Nelms*, 39 Am. & Eng. R. Cas. 355, 83 Ga. 70, 29 Cent. L. J. 352, 9 S. E. Rep. 1049.

(6) *Injuries to property.**—In an action

* Fires. Evidence of escape of sparks from other engines and of other fires, see 56 AM. & ENG. R. CAS. 91, *abstr.*

for goods stolen from a sleeping car, it was competent to prove that another person was robbed on the same night, and on the same car, as bearing upon the question of negligence. *Pullman Palace Car Co. v. Gardner*, (Pa.) 16 Am. & Eng. R. Cas. 324.

In an action for damages for injury to a horse by reason of the negligent and defective construction of a railroad crossing, evidence of a former and similar accident, which happened to another at the same place, was not competent, and should have been excluded. *Hudson v. Chicago & N. W. R. Co.*, 8 Am. & Eng. R. Cas. 464, 59 Iowa 581, 13 N. W. Rep. 735.—CRITICISING *Kelly v. Southern Minn. R. Co.*, 28 Minn. 98, 9 N. W. Rep. 588. QUOTING *Collins v. Dorchester*, 6 Cush. (Mass.) 396; *Parker v. Portland Pub. Co.*, 69 Me. 173.

Proof that other houses, several squares distant from the complainant's, had been injured by smoke and cinders, and by being shaken by passing trains, and also that engines sometimes ran at a high and dangerous rate of speed along the street in front of his lot, was incompetent. *Jeffersonville, M. & I. R. Co. v. Esterle*, 13 Bush (Ky.) 667.

In an action against a company for excavating in a highway, whereby travel was cut off from plaintiff's tavern, evidence is not admissible to show that carriages of third persons had been upset in passing over the road. The question of whether the company is liable must be determined by evidence of the condition of the road—i.e., its smoothness, its elevations and depressions, the obstructions remaining thereon, and their size and position. *Hubbard v. Androscoggin & K. R. Co.*, 39 Me. 506.

68. Of pecuniary condition of the parties.—In an action for an injury to the plaintiff's eye, caused by a spark or cinder from the defendant's engine, there was no error in refusing to permit the plaintiff to prove that the defendant was worth from two to three hundred thousand dollars. *Higgins v. Cherokee R. Co.*, 27 Am. & Eng. R. Cas. 218, 73 Ga. 149.—FOLLOWED IN *Georgia R. Co. v. Homer*, 27 Am. & Eng. R. Cas. 186, 73 Ga. 251.

Where an employé sues for a personal injury, it is error to admit evidence that he was a man with a family dependent upon him, and unable to support them since the injury. *Pittsburg, Ft. W. & C. R. Co. v. Powers*, 74 Ill. 341. *Illinois C. R. Co. v. Zang*, 10 Ill. App. 594.

69. Of plaintiff's habit of making similar claims.—A person has a right to sue as many times as he is injured; therefore a defendant company when sued for personal injuries cannot introduce evidence that plaintiff had sued other companies for other injuries. *Hanse v. Brooklyn El. R. Co.*, 66 Hun 384, 50 N. Y. S. R. 255, 21 N. Y. Supp. 230.

70. Of similar acts of party at other times.—(1) *Admissible.*—In an action for negligence it is competent to show that the party charged therewith had performed or omitted the same act in the same way before, as tending to show that he did or omitted the act at the time in question. *Parkinson v. Nashua & L. R. Co.*, 61 N. H. 416.

The habitual high speed of the same engine when run previously by the same engineer on the same street being of doubtful admissibility, the court did not err in admitting evidence concerning it. *Savannah, F. & W. R. Co. v. Flannagan*, 39 Am. & Eng. R. Cas. 661, 82 Ga. 579, 9 S. E. Rep. 471.

Particular instances of careful and safe driving by the plaintiff's driver are competent to rebut the evidence of his character for unsafe driving, shown by particular instances of that kind. *Plummer v. Ossipee*, 59 N. H. 55.

Evidence of prior acts and conduct of an employé on specific occasions, showing negligence and carelessness on his part, is proper in connection with proof charging the general agent with knowledge thereof. *Baulec v. New York & H. R. Co.*, 59 N. Y. 356, 48 How. Pr. 399; affirming 62 Barb. 623.—APPLIED IN *Sutton v. New York, L. E. & W. R. Co.*, 50 N. Y. S. R. 514.

Where a street-car passenger sues for an injury resulting from the alleged negligence of the driver, it is competent to prove careless and reckless driving by him on other portions of the trip. *Reichman v. Second Ave. R. Co.*, 15 N. Y. S. R. 928, 48 Hun 620, 1 N. Y. Supp. 836.—QUOTED IN *Pyne v. Broadway & S. A. R. Co.*, 46 N. Y. S. R. 662.

Where an employé sues to recover for an injury alleged to have been caused by the negligence of his foreman, evidence on the part of plaintiff that another employé who was working with him at the time was afterward killed on defendant's road is not objectionable as tending to show other accidents or negligence on the part of the

company. *Texas Mex. R. Co. v. Douglass*, 73 *Tex.* 325, 11 *S. W. Rep.* 333.

The question being whether the bell was rung and the whistle blown as a locomotive approached a highway crossing, evidence that those things were not done at a similar crossing three miles distant was admissible. *Bower v. Chicago, M. & St. P. R. Co.*, 19 *Am. & Eng. R. Cas.* 301, 61 *Wis.* 457, 21 *N. W. Rep.* 536.

(2) *Inadmissible*.—In an action for damages on account of personal injuries received by a person while walking on a railroad trestle, his habits as to walking on or crossing railroad tracks, whether careful or careless, are not admissible as evidence. *Glass v. Memphis & C. R. Co.*, 94 *Ala.* 581, 10 *So. Rep.* 215.

In an action for an injury to a boy about fourteen years old, alleged to have been caused by a defective platform, by means of which he was thrown under a moving train and crushed, it was not competent for the defendant to prove that the boy was in the habit of jumping on moving trains at that place and had been warned of the danger. The boy having testified positively that the injury was caused by his stepping on a rotten plank in the platform and being thrown under the train, and his statement corroborated by convincing circumstances, such testimony was not competent either to impeach the boy or to show that the injury was caused by his negligence. *Louisville & N. R. Co. v. Berry*, 88 *Ky.* 222, 10 *S. W. Rep.* 472.—*APPLYING Gahagan v. Boston & L. R. Co.*, 1 *Allen (Mass.)* 187.

In an action to recover damages sustained by the negligent management of a locomotive, evidence of specific acts of negligence of the engineer on other occasions, previous and subsequent, is inadmissible. *Robinson v. Fitchburg & W. R. Co.*, 7 *Gray (Mass.)* 92.

In an action for an injury caused by the alleged unskillful driving of a horse car driver, evidence of similar negligent acts on his part at other times is not admissible. *Maguire v. Middlesex R. Co.*, 115 *Mass.* 239.—*QUOTED IN Gulf, C. & S. F. R. Co. v. Rowland*, 52 *Am. & Eng. R. Cas.* 298, 82 *Tex.* 166.

The jury have nothing to do with the habits or care or want of care of the plaintiff in crossing at the same place at other times, but the inquiry is limited to the particular time when the collision occurred. *Guggenheim v. Lake Shore & M. S. R. Co.*,

5 *D. R. D.*—27.

32 *Am. & Eng. R. Cas.* 89, 66 *Mich.* 150, 9 *West. Rep.* 903, 33 *N. W. Rep.* 161.

Where the action is to recover for personal injuries at a crossing it is not competent for the defendant to ask plaintiff whether he had not been injured at other times by careless and negligent driving. *Shoemaker v. New York C. & H. R. R. Co.*, 4 *N. Y. Supp.* 931, 21 *N. Y. S. R.* 541.

In an action against a railroad company for injuries inflicted upon a passenger by a conductor, the plaintiff cannot show that the conductor had been guilty of similar conduct on other occasions with reference to other persons. *Hayes v. St. Louis R. Co.*, 15 *Mo. App.* 583.

Where it has been shown that the act of the company, which resulted in an injury to plaintiff, was negligent, evidence on the part of the company that on previous occasions it had done the same thing without accident is not admissible. *Weiler v. Manhattan R. Co.*, 53 *Hun* 372, 25 *N. Y. S. R.* 543, 6 *N. Y. Supp.* 320; *affirmed in* 127 *N. Y.* 669, 28 *N. E. Rep.* 255.

71. Of taking water from a stream to the damage of plaintiff.—Where a company is sued for taking water from a stream it is error to exclude evidence offered by plaintiff to the effect that there was less water in the stream during the summer months after defendant commenced to take it than before. Such evidence tends to prove a relative fact, and it is competent for the company to then show, by cross-examination or otherwise, that the diminished amount of water was due to a decreased rainfall. *Garwood v. New York C. & H. R. R. Co.*, 2 *Sihv. App.* 409, 116 *N. Y.* 649, *mem.*, 22 *N. E. Rep.* 396, 26 *N. Y. S. R.* 620; *affirming* 2 *N. Y. S. R.* 701.

72. Of wilful negligence.—The charge in the petition of negligent management of the train will authorize proof of negligence of the company after its employees saw the peril to which plaintiff was exposed. *Hanlon v. Missouri Pac. R. Co.*, 104 *Mo.* 381, 16 *S. W. Rep.* 233.

In an action for personal injuries where the plaintiff charges negligence on the part of the defendant he may prove negligence so gross as to be wilful, as the fact of wilful negligence does not show a wilful injury. *Southern Exp. Co. v. Brown*, 67 *Miss.* 260, 8 *So. Rep.* 425.

In an action for injuries resulting from a refusal of a conductor to permit plaintiff to

alight at his proper station, evidence of language or manners of the conductor amounting to indignity, insult, inhumanity, or oppression should be considered by the jury in fixing exemplary damages. *Dawson v. Louisville & N. R. Co.*, (Ky.) 11 *Am. & Eng. R. Cas.* 134.

73. Proof of notice to company.—Evidence of prior notice to the defendant that the party of workmen to which deceased belonged was engaged in loading cars about the place of injury was properly admitted. *Spotts v. Wabash Western Ry. Co.*, 111 *Mo.* 380, 20 *S. W. Rep.* 190.

Notice to a railway company that cars on passing over a certain place in its track had a "jumping" or a "jarring" motion would not tend to prove notice to it of a latent internal seam in a rail at that place which subsequently caused the rail to split and break, there being no evidence that the uneven motion of the cars was caused by, or even suggestive of, the latent defect in the rail. *James v. Northern Pac. R. Co.*, 46 *Minn.* 168, 48 *N. W. Rep.* 783.

It was incompetent and irrelevant to prove that after the overflow, and when the defendant railway company was repairing the embankment, the witness had warned the boss superintending the work that the bridge and trestle were not high enough, and that they would cause overflows, etc. This was calculated to prejudice the jury, and was error. *Gulf, C. & S. F. R. Co. v. Hepner*, 52 *Am. & Eng. R. Cas.* 670, 83 *Tex.* 136, 18 *S. W. Rep.* 441.

In an action for injuries alleged to have resulted from the defective condition of defendant's fence, where actual notice to defendant of the defect is not shown, plaintiff should be permitted to prove the existence of the defect for some time previous to the accident, in order to charge defendant with notice. *Jones v. Chicago & N. W. R. Co.*, 1 *Am. & Eng. R. Cas.* 61, 49 *Wis.* 352, 5 *N. W. Rep.* 854.

Plaintiff was injured while rolling car wheels down a track, a part of which was descending, by other wheels being rolled against him from behind. *Held*, that it was competent for plaintiff to prove that a fellow-workman had, before the accident, told their superior, or boss, that he had better put a man at the place to check the wheels; that such a man had been stationed, but the boss had ordered him away just before the accident. *Savannah, F. & W. R. Co. v. Goss*, 80 *Ga.* 524, 5 *S. E. Rep.* 777.

Two "live," unattended engines escaped from a yard and collided with a train and killed the plaintiff's intestate, a brakeman. The company was charged with negligence in not providing a sufficient number of men in the yard to take care of the engines. The evidence showed that on the night of the accident three engines were left in charge of one watchman, and while he was at some distance attending to one the other two escaped. *Held*, that it was proper to introduce evidence that it was so foggy that the watchman could not see that the engines had escaped from where he was, and that it had been foggy for two weeks, and that the foreman of the road had been informed two months before that there were not enough men employed in the yard. *Southern Pac. Co. v. Lafferty*, 57 *Fed. Rep.* 536.—*FOLLOWING Morgan v. Southern Pac. Co.*, 95 *Cal.* 510, 30 *Pac. Rep.* 603.

74. Proof of pain and suffering.—Statements made to a physician in his official capacity are competent when descriptive of subsisting symptoms of pain, although they are not admissible when mere narratives of passing events. *Louisville, N. A. & C. R. Co. v. Wood*, 113 *Ind.* 544, 12 *West. Rep.* 303, 14 *N. E. Rep.* 572, 16 *N. E. Rep.* 197.—*DISTINGUISHING Ihinger v. State*, 53 *Ind.* 251. *FOLLOWING Quaife v. Chicago & N. W. R. Co.*, 48 *Wis.* 513, 33 *Am. Rep.* 821.—*Louisville, N. A. & C. R. Co. v. Miller*, (Ind.) 58 *Am. & Eng. R. Cas.* 304, 37 *N. E. Rep.* 343.

In an action for personal injuries, after the plaintiff has testified that he had always been healthy before the accident, it is proper to allow him to state that since the accident he has headaches every day. It is evidence of a physical fact, and therefore proper. *Doyle v. Manhattan R. Co.*, 37 *N. Y. S. R.* 604, 59 *Hun* 625, 13 *N. Y. Supp.* 536.

In an action by a husband to recover for injuries to his wife he has a right to prove anything which relates to the duration of the injury and the loss of her services. Therefore it is proper for him to introduce evidence as to her pain and suffering, so far as it tends to show the extent of her injuries. *Sloan v. New York C. & H. R. R. Co.*, 1 *Hun* (N. Y.) 540, 4 *T. & C.* 135.—*QUOTED IN Cregin v. Brooklyn Crosstown R. Co.*, 18 *Hun* 368.

Where a female passenger sues for personal injuries, it is proper for her to introduce evidence to the effect that since the

accident she had suffered from fainting spells, pains, etc., and had experienced difficulty in eating, walking, or riding on cars, where there is medical evidence that such results may follow an injury such as plaintiff received, and where she has testified that she had always been well before the accident. *Filton v. Brooklyn City R. Co.*, 5 N. Y. Supp. 641.

A female passenger, suing for an injury, proved at the trial, by her physician, that the last time he examined the wound she had persistent pain on motion. *Held*, that the testimony was not objectionable on the ground that it involved the presumption that the pain continued to the time of the trial. *Rosevelt v. Manhattan R. Co.*, 37 N. Y. S. R. 894.

75. Requiring other evidence to connect it with the issue.—(1) *In general.*—As a general rule, evidence of defects in a railroad track five or six months after a personal injury is not admissible; but when connected with other proof, showing that the condition of the track remained substantially the same, such evidence may be received, as tending to show the condition at the time of the injury, the court limiting the same for that purpose. *Jacksonville S. E. R. Co. v. Southworth*, 135 Ill. 250, 25 N. E. Rep. 1093; *affirming* 32 Ill. App. 307. *Pennsylvania Co. v. Marion*, 27 Am. & Eng. R. Cas. 132, 104 Ind. 239, 3 N. E. Rep. 874.

(2) *Injuries to passengers.*—In an action for injuries caused by being thrown from the platform of a street-car by a jolt caused by a defect in the track, testimony as to the condition of the track on a day subsequent to the accident, and that such condition would produce such a jolt, is admissible, where there is evidence that the condition of the track is the same at the time of the trial as on the day of the accident. *Byrne v. Brooklyn City & N. R. Co.*, 6 Misc. 260, 26 N. Y. Supp. 760, 58 N. Y. S. R. 127.—*QUOTIN* *Wooley v. Grand St. & N. R. Co.*, 83 N. Y. 121.

Evidence that the driver of a street-car was overworked is not admissible for the purpose of proving that his condition might have caused the accident to plaintiff, when no such ground of action is alleged in the complaint, and there is no evidence that the accident was occasioned by the fatigue or sleepiness of the driver. (*Bradley, J., dissenting.*) *Gumb v. Twenty-third St. R. Co.*,

43 Am. & Eng. R. Cas. 315, 114 N. Y. 411, 21 N. E. Rep. 993, 23 N. Y. S. R. 748; *reversing* 21 J. & S. 466, 1 N. Y. S. R. 715.—*DISTINGUISHED IN* *Morseman v. Manhattan R. Co.*, 16 Daly (N. Y.) 249.

(3) *Accidents at crossings.*—Where a party is injured at a crossing through the alleged bad condition of the crossing, it is proper to admit proof that other crossings in the town, at which he might have crossed, were also in bad condition, such evidence tending to show why plaintiff did not attempt to cross elsewhere, it appearing that he knew the condition of all the crossings. *Galveston, H. & S. A. R. Co. v. Matula, (Tex.)* 19 S. W. Rep. 376.

Where the action is for an injury at a crossing, evidence is not admissible for the purpose of showing that the train ran to the next station before it stopped, where there is no evidence of wanton negligence, and where those in charge of the train testified that they did not see plaintiff. *Griffith v. Baltimore & O. R. Co.*, 44 Fed. Rep. 574.

(4) *Injuries to employes.*—Whether the foreman of the crew of a switch engine knew how to run a locomotive is irrelevant, when it is shown that he had no part in its management. *Louisville & N. R. Co. v. Mothershed*, 97 Ala. 261, 12 So. Rep. 714.

Where it appeared that the coupling might have been made more safely with a crooked link, evidence that defendant was accustomed to carry a crooked link in the caboose was properly excluded, where it was shown that as a matter of fact there was no such link in the caboose at the time of the accident. *Van Gent v. Chicago & St. P. R. Co.*, 80 Iowa 526, 45 N. W. Rep. 913.

Where an employé is injured and sues for damages, it is error to allow evidence that the company's foreman brought the employé a release to sign after the accident, unless the proof be followed up by showing that the foreman was the agent of the company, and authorized to make such release. *St. Louis, A. & T. R. Co. v. Jones, (Tex.)* 14 S. W. Rep. 309.

An employé was killed while on top of a car by striking an overhead bridge, and the company was charged with negligence in taking into the train the car from another company, it being higher than usual freight cars. At the trial a witness testified that another person pointed out the car to him and that he measured it. *Held*, that the evidence was admissible to show that the

witness had measured a particular car, but not for the purpose of showing that the car was the one on which the employé was killed. *Stirk v. Central R. & B. Co.*, 79 Ga. 495, 5 S. E. Rep. 105.

(5) *Injuries to property*.—In an action against a company for the loss of goods destroyed by fire in its depot at the place of destination, evidence cannot be received as to the intemperate habits of the depot agent, nor of the fact that he was found to be a defaulter soon afterwards, nor as to the bad character of the servant employed at the depot, unless some connection is shown between these facts and the fire. *Western R. Co. v. Little*, 37 Am. & Eng. R. Cas. 659, 86 Ala. 159, 5 So. Rep. 563.

Where the action is for a physical injury to property near a railroad track, by jarring the house, casting upon and in it dust, ashes, cinders, smoke, and the like, evidence is not admissible to show that the property had diminished in value a certain fixed amount, where it appears that there had been a general depreciation in the value of the property, and the witness is not able to state how much was caused by the injuries complained of, and how much from general causes. *Chicago & E. I. R. Co. v. Hall*, 8 Ill. App. 621.—FOLLOWING *Chicago, B. & Q. R. Co. v. McGinnis*, 79 Ill. 269; *Chicago, M. & St. P. R. Co. v. Hall*, 90 Ill. 42.—QUOTED IN *Chicago & W. I. R. Co. v. Berg*, 10 Ill. App. 607.

Where a wife sues a company for setting fire to her property by sparks from an engine, the admissions of her husband as to the origin of the fire are not admissible for the company, where it appears that he is not a party to the suit, and has no interest in the property, and the admissions are made after the occurrence of the fire, and there is nothing to show that he was his wife's agent. *Louisville, N. A. & C. R. Co. v. Richardson*, 66 Ind. 43.

The value of a colt killed cannot be proved by testimony of one witness that it resembled other particular colts, and of another witness as to the value of such colts. *Atchison & N. R. Co. v. Harper*, 19 Kan. 529.

Where the action is for flooding land and destroying growing crops, evidence of the value of crops of the same variety after they had matured is admissible for the purpose of showing the value of the crops destroyed. *Gulf, C. & S. F. R. Co. v. McGowan*, 73 Tex. 355, 11 S. W. Rep. 336.

Where a landowner sues for both permanent and temporary damages to his land, and the evidence shows that the damages were temporary only, it is error to admit evidence tending to show a general depreciation in the value of the land. *Gulf, C. & S. F. R. Co. v. Frederickson*, (Tex.) 19 S. W. Rep. 124.

76. Res gestæ and surrounding circumstances.—Where the gist of the action is negligence, it is not error to admit testimony of all surrounding facts that may tend to show the degree of care necessary in the case. *Pacific R. Co. v. Nash*, 7 Kan. 280. *Indianapolis Union R. Co. v. Boettcher*, 131 Ind. 82, 28 N. E. Rep. 551.

In an action for negligently running a train against plaintiff's horses and wagon at a street crossing in a city, evidence of the number of residences south of the railroad is properly admitted, when offered by plaintiff, for the purpose of showing the exact situation and surroundings, as bearing on the question of negligence in running the train. *Nosler v. Chicago, B. & Q. R. Co.*, 73 Iowa 268, 34 N. W. Rep. 850.

It was competent for plaintiff to show that no conductors or trainmen were at the platform when she alighted to assist passengers in alighting, not as a ground of recovery, but as showing the surroundings. *Sherwood v. Chicago & W. M. R. Co.*, 88 Mich. 108, 50 N. W. Rep. 101; *former appeal* 82 Mich. 374, 46 N. W. Rep. 773.

The clothing of one injured by being run over by a street-car is competent evidence in an action therefor, when it tends to establish any controverted fact in issue. *Senn v. Southern R. Co.*, 108 Mo. 142, 18 S. W. Rep. 1007.

The plaintiff may, for the purpose of showing how she received the injuries, testify as to the construction of the car, and the position in which she was at the time of the accident. *Lakin v. Oregon Pac. R. Co.*, 34 Am. & Eng. R. Cas. 500, 15 Oreg. 220, 15 Pac. Rep. 641.—REVIEWING *Jewell v. Grand Trunk R. Co.*, 55 N. H. 84; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110.

In an action for injuries received from being struck by a locomotive, evidence that the plaintiff was thrown by the blow into a ditch, the water in which was deep enough to drown a man, is admissible as immediately connected with the manner of the infliction of the injury charged; and no specific averment in regard either to the

ditch or water was necessary to authorize its introduction. *International & G. N. R. Co. v. Brett*, 61 Tex. 483.

Where several persons are traveling together, and one of them sues for an injury while getting on the cars, it is competent for him to prove, by another member of the company, information and directions which he got from a train employé as to how to get on the cars, the information being obtained for the benefit of the whole company. *Lucas v. Milwaukee & St. P. R. Co.*, 33 Wis. 41.

The declaration of the person injured, made at the moment of the accident, that she alone was to blame for it, should have been permitted to have been proved as part of the *res gestæ*. *De Mahy v. Morgan's L. & T. R. & S. Co.*, 58 Am. & Eng. R. Cas. 448, 45 La. Ann. 1329, 14 So. Rep. 61.

Where a person is killed by a moving train, which passes partially over him before it is stopped, evidence as to how he was injured is admissible, as a statement of part of the accident, and as tending to show his position when struck. *Oldenburg v. New York C. & H. R. R. Co.*, 29 N. Y. S. R. 836, 9 N. Y. Supp. 419.

In an action by an injured passenger, the evidence showed that he had no external injuries except a slight bruise, but had been in bed ever since the accident, covering a period of several months; and in describing his injuries he stated without objection that he was taken home. *Held*, that it was proper for him to further state that he had a wife and two children, the latter too young to be witnesses, not for the purpose of increasing the damages, but as tending to show why the members of his family were not called as witnesses, and that his alleged illness was not a sham. *Southern Pac. Co. v. Rauh*, 49 Fed. Rep. 696, 7 U. S. App. 84, 1 C. C. A. 416.—DISTINGUISHING *Pennsylvania Co. v. Roy*, 102 U. S. 460.

Plaintiff sued for being ejected from a street-car for a failure to pay additional for packages which he carried, under a rule of the company requiring an extra charge for packages "too large to be carried on the lap of the passenger without incommoding others." *Held*, that evidence of the number of passengers in the car at the time was admissible, although not bearing directly upon the question of the plaintiff's right to ride without paying additional fare, but as being descriptive of the situation. *Morris v. At-*

lantic Ave. R. Co., 40 Am. & Eng. R. Cas. 677, 116 N. Y. 552, 22 N. E. Rep. 1097, 27 N. Y. S. R. 667; reversing 5 N. Y. S. R. 874.

A witness was permitted to testify that he "looked about and saw hair on the ties, —the first tie had a lot of hair on it, and the second one not so much, and so on"—as indicating that the injured cow had been pushed along the railroad track by the company's engine. *Held*, not error. *Central Branch U. P. R. Co. v. Butman*, 22 Kan. 639.

77. Results of subsequent experiments.—Where the point in issue is whether a car moving slowly down an inclined plane with brakes set would, when the brakes were suddenly loosed, jump or spring forward, it is error to exclude from the evidence the result of an experiment made at the same place and under the same conditions. *Chicago, St. L. & P. R. Co. v. Champion, (Ind.)* 32 N. E. Rep. 874.

In an action for an injury at a crossing, while driving a team at a walk, the evidence showed that trains on defendant's road could have been seen when plaintiff was crossing the track of another road a short distance away. *Held*, that evidence of experiments of how long it would take a team of horses to walk the distance between the two tracks was admissible, both for the purpose of showing how fast plaintiff was driving, and how fast the train was running. *Nosler v. Chicago, B. & Q. R. Co.*, 73 Iowa 268, 34 N. W. Rep. 850.—DISTINGUISHING *Klanowski v. Grand Trunk R. Co.*, 64 Mich. 279, 31 N. W. Rep. 275.

After the testimony of defendant's station agent, where the accident occurred, that he had held such position prior to the time of the accident and up to the time of trial, and did not know of any change in the switch in question having been made, one of the plaintiff's attorneys was permitted to testify as to the result of his measurements of the distances between the rails at the switch fourteen months after the accident, and of experiments made by him in placing his foot between the rails, and showing where the foot could be caught and where not, the shoe worn by the intestate being before the jury at the time. *Held*, that the evidence was competent. *Brooke v. Chicago, R. I. & P. R. Co.*, 81 Iowa 504, 47 N. W. Rep. 74.—CRITICISING *Klanowski v. Grand Trunk R. Co.*, 64 Mich. 279, 31 N. W. Rep. 275.

The defendant called a witness who had made an experiment to see how a person placed on the step of a car, as the plaintiff in his testimony described himself to be placed, would fall upon the car being suddenly started, and the witness testified that the falling was in a direction different from that testified to by the plaintiff. *Held*, competent evidence for the jury to consider in determining on the conflict of evidence as to the manner in which the accident happened. *Gilbert v. Third Ave. R. Co.*, 22 *J. & S.* 270, 8 *N. Y. S. R.* 152.

Where evidence was given on the trial of statements made by the deceased, that at the time of the injury his boot froze to the rail, and he was unable to pull it away, the court properly refused to permit a witness to testify that, after the statements were made in his hearing by the deceased, he experimented and found that the weather had the same effect on his boot, it not being shown that the experiment was made under the same conditions that existed when the injury took place. *Lake Erie & W. R. Co. v. Mugg*, 132 *Ind.* 168, 31 *N. E. Rep.* 564.—*FOLLOWING* *Com. v. Pier*, 120 *Mass.* 188; *Eidt v. Cutter*, 127 *Mass.* 522; *State v. Justus*, 11 *Oreg.* 178.

78. Rules and regulations of other companies.—The custom of other railways is legal evidence to go to the jury upon the question of negligence in sending out water trains without a conductor, to be given such weight as the jury see proper to give it. *Gulf, C. & S. F. R. Co. v. Harriett*, 80 *Tex.* 73, 15 *S. W. Rep.* 556.

Where an employé of one company is killed while working at a place where there are joint tracks belonging to several companies, evidence of the rules and regulations of the other roads is admissible, as they necessarily affect the use that defendant company made of the tracks. *Chicago, M. & St. P. R. Co. v. O'Sullivan*, 40 *Ill. App.* 369.

Where one company has the privilege of using a portion of the track of another company at a station, for switching purposes, and is sued for a personal injury while using such track, and charged with negligence in not ringing a bell, evidence is not admissible to show that the company owning the track was in the habit of ringing a bell while running trains on the same track. *Detroit & M. R. Co. v. Van Steinburg*, 17 *Mich.* 99.

Whether a railroad company has been guilty of negligence in the use of certain orders and signals for the movement of its trains cannot be determined by proof that another railroad company has adopted a different order for the operation of its trains. *Hannibal & St. J. R. Co. v. Kanaley*, 39 *Kan.* 1, 17 *Pac. Rep.* 324.

79. Rules of the company.—(1) *Admissible.*—Where an employé sues for a personal injury, and the company defends on the ground that the injury resulted from the negligence of the engineer of the train, who was a fellow-servant with the plaintiff, the latter may prove a rule of the company to either discharge, suspend, or reprimand employés who have been guilty of negligence, which had not been enforced as to the engineer in question. *Atchison, T. & S. F. R. Co. v. Parker*, 55 *Fed. Rep.* 595.

A rule of a company being in evidence which required the conductors of freight cars "to assist in the shifting and making up of trains," parol evidence is admissible to show that by the custom and usage on the road for many years, under this rule, the conductors coupled and uncoupled cars on their trains as part of the duty thereby imposed on them. *Memphis & C. R. Co. v. Graham*, 53 *Am. & Eng. R. Cas.* 396, 94 *Ala.* 545, 10 *So. Rep.* 283.

The allegations of negligence were that defendant, by its servants, carelessly and improperly drove and managed its locomotive, and that defendant was negligent in not providing proper and suitable platforms and railings at the crossing or point where the injury was inflicted. Plaintiff gave in evidence a rule of defendant for the regulation of trains and engines at stations and street crossings. *Held*, that the rule was properly admitted, not for the purpose of founding a substantive cause of action upon its breach, but as tending, with other evidence, to show negligence in driving and managing the engine which inflicted the injury. *Lake Shore & M. S. R. Co. v. Ward*, 135 *Ill.* 511, 26 *N. E. Rep.* 520; *affirming* 35 *Ill. App.* 423.

Evidence of the rule of the railroad company, No. 83, which is a prohibition against making "running switches," was properly admitted, against defendant's objection, where plaintiff offered to follow it up by the introduction of proof showing that, at the time when the injury occurred, the agents of

defendant were making a "running switch." *Baltimore & O. R. Co. v. Kean*, 28 Am. & Eng. R. Cas. 580, 65 Md. 394, 5 All. Rep. 325.

In an action for an injury to a railroad employé, where the defendant alleges that the injury was received in consequence of a violation of a rule governing its employés, evidence of the terms of such rule, and of facts from which knowledge thereof may be inferred, is admissible, without proof of actual notice or knowledge, where the defendant has offered preliminary proof that such rule has been enforced for several years, and along with other rules kept conspicuously posted. *Alcorn v. Chicago & A. R. Co.*, (Mo.) 48 Am. & Eng. R. Cas. 138, 14 S. W. Rep. 943.

(2) *Inadmissible*.—Plaintiff's injuries having been caused by the sudden stoppage of the hand-car on which he was an employé, the foreman applying the brake without notice, and there being no evidence that an extra train was heard or seen approaching, the defendant company cannot be allowed to prove that, by a rule of the company, it was made the duty of the person in charge of the hand-car at once to stop and remove it from the track when a train was seen or heard approaching. *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. Rep. 262.

Where a witness testified that he did not know what the rules of the company were, but proposed to state that formerly he was an officer of the company, and that no conductor or other officer had the right to order an employé to get on or off a moving train, and that if such order was given, the employé would not be required to obey it, such testimony was properly rejected. *Central R. Co. v. DeBray*, 71 Ga. 406.—DISTINGUISHED IN *Georgia R. Co. v. Bryans*, 77 Ga. 429.

Where the proof tended to show that no agent was kept at a station where an accident occurred, evidence of the company's rules relating exclusively to the duty of such agent is improperly admitted. *Hewitt v. Flint & P. M. R. Co.*, 31 Am. & Eng. R. Cas. 249, 67 Mich. 61, 11 West. Rep. 148, 34 N. W. Rep. 659.

The mere supposition or "general understanding" of its employés is not competent evidence of the existence of a rule of a railroad company. *James v. Northern Pac. R. Co.*, 46 Minn. 168, 48 N. W. Rep. 783.

Certain "train rules" made by the defendant and another company, regarding a track used by them jointly, but two hundred miles distant from the place where the injury occurred—*held*, irrelevant and inadmissible. *Moody v. Pacific R. Co.*, 68 Mo. 470.

80. Signals at crossings.*—Where plaintiff, who was driving in a wagon with several other persons, sues for an injury at a crossing, and alleges that obstructions existed, preventing an approaching train from being seen until he was almost upon the track, and the company charges contributory negligence in his failing to stop, look, and listen, it is competent for plaintiff to prove that the other persons in the wagon did not make any outcry indicating an approaching train. *Texas & P. R. Co. v. Nelson*, 50 Fed. Rep. 814, 2 U. S. App. 213, 1 C. C. A. 688.

In an action for negligently injuring plaintiff while crossing its track with his wagon at a place where it intersected a road, evidence that the road was not as wide or in as good condition as it was prior to the construction of the railroad is admissible for the purpose of aiding in the measurement of the vigilance to which the railroad and its employés are to be held in the use of signals and the operation of trains in their approach to and passage over the crossing. *Funston v. Chicago, R. I. & P. R. Co.*, 14 Am. & Eng. R. Cas. 640, 61 Iowa 452, 16 N. W. Rep. 518.

Where cattle lawfully upon a highway are killed by an engine at a crossing, evidence that the employés of the railway omitted to ring a bell or blow a whistle before reaching the crossing, as required by statute, is competent. *Palmer v. St. Paul & D. R. Co.*, 35 Am. & Eng. R. Cas. 447, 38 Minn. 415, 38 N. W. Rep. 100.

In an action for injuries to plaintiff's team by one of its trains by reason of the failure to ring the bell of the locomotive within eighty rods of the crossing, evidence to show connection between such failure to ring the bell and the injury to the team is irrelevant and unnecessary. *Kelly v. Chicago & A. R. Co.*, 88 Mo. 534.

Evidence that a woman, injured by a street-car, was crossing the street at the time of the injury at a place not generally used as a crossing and where it was unusual

* Evidence as to signals at crossings, see note, 32 AM. & ENG. R. CAS. 6.

for a woman to cross, while not competent in an action by her for such injury to show contributory negligence on her part, is admissible for the purpose of showing that a greater degree of care and caution was required of her than would have been required had she crossed at the usual place and the injury had occurred there. *Henry v. Grand Ave. R. Co.*, 113 Mo. 525, 21 S. W. Rep. 214.

Where an injury was caused by backing a freight train on the public street of a city, on a dark night, and no flagman was present at the crossing, that fact is competent to be submitted to the jury, where it is also shown that no one was on the rear end of the train, and no signal or warning was given before backing the train. *Union Pac. R. Co. v. Henry*, 36 Kan. 565, 14 Pac. Rep. 1.

In an action for injuries resulting from a collision at a street crossing, evidence that a flagman had always been kept at the crossing, and that he was absent at the time of the accident, is competent, as bearing upon the question whether, under all the circumstances, defendant ran and managed its train with the requisite care and prudence. *McGrath v. New York C. & H. R. R. Co.*, 63 N. Y. 522.—REVIEWING *Beisiegel v. New York C. R. Co.*, 40 N. Y. 9; *Gripen v. New York C. R. Co.*, 40 N. Y. 34; *Weber v. New York C. & H. R. R. Co.*, 58 N. Y. 451.—APPLIED IN *Heaney v. Long Island R. Co.*, 9 N. Y. S. R. 707. APPROVED IN *Burns v. North Chicago Rolling Mill Co.*, 65 Wis. 312. DISTINGUISHED IN *Nary v. New York, O. & W. R. Co.*, 29 N. Y. S. R. 630, 9 N. Y. Supp. 153. FOLLOWED IN *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219, 44 Am. Rep. 370. QUOTED IN *Heddles v. Chicago & N. W. R. Co.*, 39 Am. & Eng. R. Cas. 645, 74 Wis. 239, 42 N. W. Rep. 237. REVIEWED IN *Pittsburgh, C. & St. L. R. Co. v. Yundt*, 3 Am. & Eng. R. Cas. 502, 78 Ind. 373, 41 Am. Rep. 580; *Semel v. New York, N. H. & H. R. Co.*, 9 Daly (N. Y.) 321; *Wright v. Third Ave. R. Co.*, 27 N. Y. S. R. 523, 5 N. Y. Supp. 707; *Shepard v. New York C. & H. R. R. Co.*, 44 N. Y. S. R. 816, 18 N. Y. Supp. 665.

Railroad companies are not bound to station flagmen at crossings. So where a company is sued for killing a boy at a crossing where there is no flagman, evidence is not admissible that the company kept flagmen at other crossings. *McPhillips v.*

New York, N. H. & H. R. Co., 12 Daly (N. Y.) 365.

Where a company is sued for an injury at a crossing it is competent to prove that the road was not fenced, and had no gate nor flagman at the crossing, though the law did not require such things to be provided; but the evidence is admissible for the purpose of showing all the surrounding facts. *Cumming v. Brooklyn City R. Co.*, 24 N. Y. S. R. 718, 52 Hun 613, 1 Silo. Sup. Ct. 327, 5 N. Y. Supp. 476.

81. Sufficiency of evidence to go to the jury.—If there be any evidence from which the jury may honestly find negligence on the part of the defendant, there is no error in allowing them to consider it, although it may not be of such character as to convince all minds that such negligence was committed. *Baltimore & O. R. Co. v. Keedy*, 49 Am. & Eng. R. Cas. 124, 75 Md. 320, 23 Atl. Rep. 643.

82. Tables of mortality.—Standard life tables may be introduced to show the probable duration of the life of one injured by a railway company, on the question of compensation for permanent injury, or to show, in case of death, the expectancy of life at the time of receiving the injury. *Louisville, N. A. & C. R. Co. v. Miller*, (Ind.) 58 Am. & Eng. R. Cas. 304, 37 N. E. Rep. 343.

83. Upon the question of damages.—Where the action is to recover damages for the construction and operation of a railroad in close proximity to a hotel, evidence of a loss of business or patronage of the hotel is admissible only so far as it aids the jury in determining the weight of direct evidence of a depreciation in the value of the property. *Laflin v. Chicago, W. & N. R. Co.*, 33 Fed. Rep. 415.

Evidence as to the noise of passing trains, and as to the inconvenience and interruption in the use of the property resulting from the ordinary operation of defendant's road—held competent, as bearing upon the question of the diminished value of the property caused by the construction of the road across the same. *Blue Earth County v. St. Paul & S. C. R. Co.*, 10 Am. & Eng. R. Cas. 209, 28 Minn. 503, 11 N. W. Rep. 73.

Where the action is for flooding land and leaving a deposit of sand thereon, evidence of the cost of removing the sand is admissible for the purpose of proving the amount

of damages. *Trinity & S. R. Co. v. Schofield*, 72 Tex. 496, 10 S. W. Rep. 575.

b. Increased Precaution after Accident.

84. In general.*—(1) *Admissible*.—If there be evidence of a condition shortly after an injury, different from that claimed to exist at the time of the injury, it is competent to show that such condition was a changed one, made better or worse after the injury, by repair, accident, or other cause. *Wabash R. Co. v. Kime*, 42 Ill. App. 272.

Evidence that the company, immediately after an accident at a street crossing, adopted certain precautions to prevent similar accidents, is admissible to prove that such precautions would have been proper at and prior to the accident, and that the omission of them was negligence. *Shaber v. St. Paul, M. & M. R. Co.*, 2 Am. & Eng. R. Cas. 185, 28 Minn. 103, 9 N. W. Rep. 575.

In an action for an injury caused by being thrown from a car at a sharp curve, evidence that since the accident the company has altered the curve, is admissible. *Augusta & S. R. Co. v. Rens*, 55 Ga. 126.

Evidence to show that a car used by the defendant, a railroad, and known as the Baldwin locomotive car, because of its dangerous character had been abandoned by the defendant and by railroads generally, is competent to show knowledge, on the part of the defendant, of such dangerous character of the car. *Crane v. Missouri Pac. R. Co.*, 25 Am. & Eng. R. Cas. 440, 87 Mo. 588.

Where a company is charged with negligence in not employing a sufficient number of switchmen at a yard, which leads to an accident, evidence is admissible that the company employed an additional switchman immediately after the accident. *Harvey v. New York C. & H. R. R. Co.*, 19 Hun (N. Y.) 556.

Where a passenger sues for an injury received by reason of a defective sidewalk along the side of defendant's station, evidence that the company subsequently repaired the sidewalk is admissible for the purpose of showing that it controlled it. *Bateman v. New York C. & H. R. R. Co.*, 47 Hun 429, 14 N. Y. S. R. 454.

* Alterations after accident. Additional safeguards. See note, 16 AM. & ENG. R. CAS. 345. Injury to employé by defective appliances. Evidence of substitution of new appliance after the accident, see 48 AM. & ENG. R. CAS. 218, *abstr.*

On a question of negligence, evidence was proper that the next day after the accident the agent of the company telegraphed to the superintendent that the platform should be removed, and it was removed the next day. *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315.—CRITICISED IN *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47.

In an action for death by negligence from cars striking a cart on scales near a railroad track, evidence was proper that after the accident the track was removed to a greater distance. If the track was too near the scales a higher degree of care was necessary to avoid the accident. *West Chester & P. R. Co. v. McElwee*, 67 Pa. St. 311.—CRITICISED IN *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47. FOLLOWED IN *Kelly v. Southern Minn. R. Co.*, 6 Am. & Eng. R. Cas. 264, 28 Minn. 98.

The injuries complained of were caused by the alleged incapacity of a passageway for water, and the court permitted the plaintiff to introduce evidence to prove that the defendant, after the accident occurred, enlarged the capacity of such waterway. *Held*, that this evidence did not, of itself, prove negligence, nor that the defendant had notice of the insufficiency of the waterway prior to the accident, nor that it might have had such notice by the exercise of reasonable diligence, nor that it did not exercise such diligence; but, at most, it only tended to prove, by way of admission on the part of the defendant, that the waterway was originally too small; and the introduction of such evidence for this purpose was not erroneous. *St. Louis & S. F. R. Co. v. Weaver*, 28 Am. & Eng. R. Cas. 341, 35 Kan. 412, 11 Pac. Rep. 408.—DISAPPROVED IN *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202.

(2) *Inadmissible*.—Where a company is charged with negligence which leads to a personal injury, ordinarily, evidence of subsequent additional precautions taken to prevent injuries from the same cause is not admissible. *Cleveland, C., C. & St. L. R. Co. v. Doerr*, 41 Ill. App. 530.—REVIEWING *Hodges v. Percival*, 132 Ill. 53.—*Gulf, C. & S. F. R. Co. v. Compton*, 44 Am. & Eng. R. Cas. 637, 75 Tex. 667, 13 S. W. Rep. 667.

Where a corporation is sued for an injury alleged to have resulted through its failure to provide certain safeguards for the protection of employés, evidence is not admis-

sible to show that it provided the safeguards subsistent to the injury. *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47. —*APPROVING Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465. —*CRITICISING Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *West Chester & P. R. Co. v. McElwee*, 67 Pa. St. 311; *McKee v. Bidwell*, 74 Pa. St. 218; *O'Leary v. Mankato*, 21 Minn. 65; *Phelps v. Mankato*, 23 Minn. 276; *Kelly v. Southern Minn. R. Co.*, 28 Minn. 98. —*REVIEWING Dougan v. Champlain Transp. Co.*, 56 N. Y. 1; *Salters v. Delaware & H. Canal Co.*, 3 Hun 338; *King v. New York C. & H. R. R. Co.*, 4 Hun 776; *Baird v. Daly*, 68 N. Y. 551; *Payne v. Troy & B. R. Co.*, 9 Hun 526; *Sewell v. Cohoes*, 11 Hun 630; *Morrell v. Peck*, 24 Hun 37; *Hudson v. Chicago & N. W. R. Co.*, 59 Iowa 581; *Cramer v. Burlington*, 45 Iowa 627. —*Alcorn v. Chicago & A. R. Co.*, (Mo.) 48 Am. & Eng. R. Cas. 138, 14 S. W. Rep. 943. *Salters v. Delaware & H. Canal Co.*, 3 Hun (N. Y.) 338, 5 T. & C. 559. —*REVIEWED IN Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47; *Payne v. Troy & B. R. Co.*, 9 Hun 526.

In an action for personal injury occasioned by an accident to a bridge on a railway, it is error to admit evidence on the part of the plaintiff going to show that in the reconstruction of the bridge longitudinal braces were used where none had been used before. *Isaacs v. Southern Pac. Co.*, 49 Fed. Rep. 797. —*QUOTING Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465, 16 N. W. Rep. 358; *Terre Haute & I. R. Co. v. Clem*, 123 Ind. 15, 23 N. E. Rep. 965.

Where a street-car company is sued for a personal injury for failing to maintain the street in proper repair, and the company introduces evidence to show that no repairs had been made since the accident, it is not admissible for the plaintiff in rebuttal to prove by a witness the condition of the track shortly before the accident. *Jacques v. Bridgeport Horse R. Co.*, 41 Conn. 61.

Where one of the acts of negligence alleged is permitting a building to remain near a crossing at the time of the accident, which allegation is not well founded, but the jury are not instructed to that effect, it is error to admit evidence of the removal of the building by the railroad company after the accident. *Thompson v. Toledo, A. A. & N. M. R. Co.*, 91 Mich. 255, 51 N. W. Rep. 995.

Where a passenger sues for an injury to his

elbow while resting on the sill of a car window, by striking the boards on the side of a wooden bridge, which had become warped and loose, the fact that the company had subsequently replaced the bridge with an iron one which was wider and safer, cannot be considered upon the question of the company's negligence in maintaining the old bridge. *Dale v. Delaware, L. & W. R. Co.*, 73 N. Y. 468. —*REVIEWED IN Francis v. New York Steam Co.*, 114 N. Y. 380, 21 N. E. Rep. 988, 23 N. Y. S. R. 543.

Where a passenger sues for an injury received by slipping and falling on ice on a station platform, evidence is not admissible to show that the company put sand or ashes on the ice after the accident. (Macomber, J., dissenting.) *Simpson v. Manhattan R. Co.*, 17 N. Y. S. R. 68, 1 N. Y. Supp. 673.

In a suit for damages from an overflow upon the plaintiff's lands, caused by a railway track, it was error to admit evidence against the railway that in reconstructing the track after the overflow the culverts were improved in construction and capacity. *Gulf, C. & S. F. R. Co. v. McGowan*, 73 Tex. 355, 11 S. W. Rep. 336.

85. Diminution of speed.—It is admissible to prove that after a homicide the engines of a company were run more slowly along the street which was the scene of the accident. *Savannah, F. & W. R. Co. v. Flanagan*, 39 Am. & Eng. R. Cas. 661, 82 Ga. 579, 9 S. E. Rep. 471. Contra see *Baird v. Daly*, 68 N. Y. 547. —*REVIEWED IN Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47.

86. Of repairs.—(1) *Admissible.*—Where a company is charged with negligence in allowing its freight yard to be out of repair, whereby the mule of a person delivering freight is injured, it is proper to allow evidence of repairs after the accident. Whether they should have been made before, or were rendered necessary by the accident, was a question for the jury. *Central R. Co. v. Gleason*, 69 Ga. 200.

Where an employé is injured while operating a machine, evidence that it was repaired shortly after the accident is competent as tending to show that it was unsafe at the time of the accident. *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592, 15 Pac. Rep. 484.

Where a company is sued for starting a fire by sparks from its engine, and the evidence tends to show that the burner was in

a defective condition, it is proper to show that a change had subsequently been made, and that the dangerous emission of sparks ceased. *Alpern v. Churchill*, 53 Mich. 607, 19 N. W. Rep. 549.—FOLLOWING *Lehigh Valley R. Co. v. McKeen*, 90 Pa. St. 122.

In an action for injuries resulting from the alleged negligence of a company in neglecting to maintain in a safe condition a highway crossing, in not replacing a plank which had been removed, it was proper to allow plaintiff to prove that after the injury defendant repaired the crossing by replacing the plank. *Kelly v. Southern Minn. R. Co.*, 6 Am. & Eng. R. Cas. 264, 28 Minn. 98, 9 N. W. Rep. 588.—FOLLOWING *West Chester & P. R. Co. v. McElwee*, 67 Pa. St. 311; *O'Leary v. Mankato*, 21 Minn. 65; *Phelps v. Mankato*, 23 Minn. 276.—CRITICISED IN *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47; *Hudson v. Chicago & N. W. R. Co.*, 8 Am. & Eng. R. Cas. 464, 59 Iowa 581. FOLLOWED IN *Kolsti v. Minneapolis & St. L. R. Co.*, 19 Am. & Eng. R. Cas. 140, 32 Minn. 133, 19 N. W. Rep. 655. NOT FOLLOWED IN *Shinners v. Prop'rs of Locks & Canals*, 154 Mass. 168. OVERRULED IN *Morse v. Minneapolis & St. L. R. Co.*, 11 Am. & Eng. R. Cas. 168, 30 Minn. 465. REVIEWED IN *Doyle v. St. Paul, M. & M. R. Co.*, 41 Am. & Eng. R. Cas. 376, 42 Minn. 79, 43 N. W. Rep. 787.

Evidence of subsequent repairs of a gate by defendant is competent to show it was defendant's duty to repair, and if defendant wants it confined to that issue he should ask an instruction so confining it. *Woods v. Missouri, K. & T. R. Co.*, 51 Mo. App. 500.

(2) *Inadmissible*.—Evidence of repair of the track after an accident, when offered in chief by the plaintiff, and not in rebuttal of any proof made by the opposite party, is inadmissible. *Fordyce v. Chancey*, 2 Tex. Civ. App. 24, 21 S. W. Rep. 181.

In an action for an injury to an engineer, caused by a defective track, evidence of repairs to the track, which did not tend to show that the repairs had been made at the place of the accident, was properly excluded. *Knapp v. Sioux City & P. R. Co.*, 71 Iowa 41, 32 N. W. Rep. 18.

In an action by a passenger for injuries sustained by the derailment of the train, evidence that defendant, several months

after the accident, repaired its road in various places by putting in new rails and ties, is inadmissible; and the plaintiff's evidence should be confined to the condition of the roadbed at the place and in the immediate vicinity of the accident at the time it occurred, and he should not be allowed to show that accidents had previously occurred on other parts of defendant's road. *Hipsley v. Kansas City, St. J. & C. B. R. Co.*, 27 Am. & Eng. R. Cas. 287, 88 Mo. 348.—QUOTED IN *Sidekum v. Wabash, St. L. & P. R. Co.*, 30 Am. & Eng. R. Cas. 640, 93 Mo. 400.

Evidence of repairs of a railroad track made six months after an injury charged to result from a defect therein is inadmissible in an action for such injury. *Mahoney v. St. Louis & H. R. Co.*, 108 Mo. 191, 18 S. W. Rep. 895. *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1.—DISTINGUISHED IN *Westfall v. Erie R. Co.*, 5 Hun (N. Y.) 75. FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Parker*, 55 Fed. Rep. 595; *Loftus v. Union Ferry Co.*, 84 N. Y. 455. REVIEWED IN *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47; *Lafflin v. Buffalo & S. W. R. Co.*, 106 N. Y. 136; *McMahon v. New York El. R. Co.*, 18 J. & S. (N. Y.) 507.

87. — NOT PROOF OF ADMISSION OF ANTECEDENT NEGLIGENCE.*—In actions for personal injuries resulting from alleged defects in machinery or appliances, evidence of subsequent repairs is not admissible for the purpose of proving negligence on the part of the defendant, or as an admission of negligence. *Atchison, T. & S. F. R. Co. v. Parker*, 55 Fed. Rep. 595.—FOLLOWING *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. Rep. 591; *Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465, 16 N. W. Rep. 358; *Nalley v. Hartford Carpet Co.*, 51 Conn. 524; *Corcoran v. Peekskill*, 108 N. Y. 151, 15 N. E. Rep. 309; *Terre Haute & I. R. Co. v. Clem*, 123 Ind. 15, 23 N. E. Rep. 965; *Shinners v. Prop'rs of Locks & Canals*, 154 Mass. 168, 28 N. E. Rep. 10; *Hodges v. Percival*, 132 Ill. 53, 23 N. E. Rep. 423; *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1.—*Terre Haute & I. R. Co. v. Clem*, 42 Am. & Eng. R. Cas. 229, 123 Ind. 15, 23 N. E. Rep. 965, 7 L. R.

*Evidence of repairs after accident as tending to prove prior negligence, see notes, 18 AM. ST. REP. 307; 50 AM. REP. 53; 57 Id. 183.

A. 588.—DISAPPROVING *Goshen v. England*, 119 Ind. 368. FOLLOWING *Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465.—FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Parker*, 55 Fed. Rep. 595.—*Hudson v. Chicago & N. W. R. Co.*, 8 Am. & Eng. R. Cas. 464, 59 Iowa 581, 13 N. W. Rep. 735.—REVIEWED IN *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47.—*Morse v. Minneapolis & St. L. R. Co.*, 11 Am. & Eng. R. Cas. 168, 30 Minn. 465, 16 N. W. Rep. 358.—OVERRULING *O'Leary v. Mankato*, 21 Minn. 65; *Phelps v. Mankato*, 23 Minn. 276; *Kelly v. Southern Minn. R. Co.*, 28 Minn. 98.—APPROVED IN *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47; *Shinners v. Prop'rs of Locks & Canals*, 154 Mass. 168; *Lang v. Sanger*, 76 Wis. 71. FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Parker*, 55 Fed. Rep. 595; *Terre Haute & I. R. Co. v. Clem*, 123 Ind. 15; *Clapp v. Minneapolis & St. L. R. Co.*, 36 Minn. 6. QUOTED IN *Isaacs v. Southern Pac. R. Co.*, 49 Fed. Rep. 797. QUOTED AND FOLLOWED IN *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202.—*Alcorn v. Chicago & A. R. Co.*, 53 Am. & Eng. R. Cas. 87, 108 Mo. 81, 18 S. W. Rep. 188.—DISTINGUISHED IN *Schlereth v. Missouri Pac. R. Co.*, 115 Mo. 87.—*Aldrich v. Concord & M. R. Co.*, (N. H.) 58 Am. & Eng. R. Cas. 611. *Missouri Pac. R. Co. v. Hennessey*, 42 Am. & Eng. R. Cas. 225, 75 Tex. 155, 12 S. W. Rep. 608. *St. Louis, A. & T. H. R. Co. v. Jones*, (Tex.) 14 S. W. Rep. 309.—FOLLOWING *Missouri Pac. R. Co. v. Hennessey*, 75 Tex. 155, 12 S. W. Rep. 609; *Gulf, C. & S. F. R. Co. v. McGowan*, 73 Tex. 355, 11 S. W. Rep. 336.—*Texas Trunk R. Co. v. Ayres*, 83 Tex. 268, 18 S. W. Rep. 684.

The cases holding that such evidence is not admissible proceed upon the double ground, (1) that the making of repairs to machinery after an accident has no legitimate tendency to show that the machinery was not ordinarily safe before the repairs were made; (2) that the admission of such evidence for the purpose of showing negligence would have a strong tendency to discourage employers in making alterations or repairs which might be needed, and which would render the machinery safer and accidents less frequent, as it might be taken as an admission of past negligence. *Atchison, T. & S. F. R. Co. v. Parker*, 55 Fed. Rep. 595.

Where stock passes over a fence which the company is bound to maintain, and is killed on the track, evidence that the company subsequently repaired the fence should not be admitted for the purpose of showing that it regarded the fence as insufficient at the time of the injury. *Wabash R. Co. v. Kime*, 42 Ill. App. 272.

Where an engine is derailed and kills a fireman, and there is a conflict of evidence as to whether there was a depression in the track which caused the accident, other evidence by plaintiff that shortly after the accident section men raised up the track at the place of the accident, and tamped dirt under the ties, is admissible to show that the track was depressed, but not as an admission of negligence. *Kuhns v. Wisconsin, I. & N. R. Co.*, 76 Iowa 67, 40 N. W. Rep. 92.

While evidence of additional precautions or subsequent repair is not competent for the purpose of proving antecedent negligence, it is competent for the purpose of showing that the place where the injury occurred was under the control of the defendant, and he may require the court to restrict such evidence to its legitimate effect by a proper instruction. *Skottowe v. Oregon S. L. & U. N. R. Co.*, 51 Am. & Eng. R. Cas. 444, 22 Oreg. 430, 30 Pac. Rep. 222, 16 L. R. A. 593.

And it is not error to allow such testimony to explain a photograph of the place, taken after such alteration, or to show that the defect could have been remedied. *St. Louis, A. & T. R. Co. v. Johnston*, 78 Tex. 536, 15 S. W. Rep. 104.

88. In rebuttal.—Evidence tending to prove repair of the track at the place where the wreck and injury occurred, after its occurrence, is admissible when offered to rebut evidence of defendants' witnesses, that the track had been used after the wreck without having been repaired. *Fordyce, Receiver, v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. Rep. 766.

And when by the testimony of the defendant upon the same subject the testimony to repairs, etc., may become admissible in rebuttal, any error in admitting it when first offered becomes immaterial. *St. Louis & S. F. R. Co. v. George*, 85 Tex. 150, 19 S. W. Rep. 1036. *International & G. N. R. Co. v. Hall*, 1 Tex. Civ. App. 221, 21 S. W. Rep. 1024.

c. Safety of Track, Machinery, and Appliances.

89. In general.* — (1) Admissible. —

Plaintiff's intestate, a brakeman, having been knocked from the top of a freight car by a suspended or projecting supply pipe at a water tank, and the question being whether the pipe was hanging or projecting in dangerous proximity to the track, the fact that no person had ever before been struck or injured by it, though it had been in the same position for several years, and trains were passing under it every day and night, is relevant and admissible as evidence for the railroad company. *East Tenn., V. & G. R. Co. v. Thompson*, 94 Ala. 636, 10 So. Rep. 280.

It being a material question whether the supply pipe, by which a brakeman was knocked from the top of a freight car and killed, hung too low, and evidence having been introduced of its height above the track, evidence of the height of the ordinary freight cars in use on the road is relevant and admissible. *East Tenn., V. & G. R. Co. v. Thompson*, 94 Ala. 636, 10 So. Rep. 280.

Evidence that the defective car was an old one, that the nut was gone from the bolt which fastened the hand-hold, and that the end of the bolt was rusty, is admissible to show the length of time the defect had existed. *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 12 So. Rep. 176.

In an action for damages alleged to have been received through the use of cars with double deadwoods, it was competent to introduce evidence tending to show the advantages or disadvantages of the use of cars constructed in this manner. *Baldwin v. Chicago, R. I. & P. R. Co.*, 50 Iowa 680. —DISTINGUISHING *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa 31; *Muldowney v. Illinois C. R. Co.*, 36 Iowa 462. —DISTINGUISHED IN *Burns v. Chicago, M. & St. P. R. Co.*, 69 Iowa 450.

Where witnesses for the plaintiff had testified that a certain "cattle chute" was constructed dangerously near the track, the evidence offered by the defendant that persons had frequently ridden past it holding to the side of the car, was proper and should have been received. *Allen v. Bur-*

lington, C. R. & N. R. Co., 5 Am. & Eng. R. Cas. 620, 57 Iowa 623, 11 N. W. Rep. 614.

Where the action is for the death of an engineer, by the derailment of his engine, evidence of the condition and appearance of a splice-bar found at the place of the accident is admissible for the purpose of supporting a theory of plaintiff that it had been substituted for the one originally used. *Worden v. Humeston & S. R. Co.*, 76 Iowa 310, 41 N. W. Rep. 26.

In an action by a brakeman for injuries sustained through the proximity of the awning of a station to the ladder of a freight car which he was ascending, testimony that the awning of no other station house on the line was similar to the one which caused the injury is admissible. *Nugent v. Boston, C. & M. R. Co.*, 38 Am. & Eng. R. Cas. 52, 80 Me. 62, 12 Atl. Rep. 797.

In an action to recover for personal injuries, resulting from the breaking of an iron hook and the falling of the mast of a derrick, plaintiff alleged negligence in that the hook was insufficient, and at the trial produced a piece of the hook, and after proving its weakness by experts, exhibited it to the jury. *Held*, no error. *King v. New York C. & H. R. R. Co.*, 72 N. Y. 607. —DISTINGUISHED IN *Derrenbacher v. Lehigh Valley R. Co.*, 4 Am. & Eng. R. Cas. 624, 87 N. Y. 636.

Where plaintiff was injured while upon the top of a car by being struck by the pipe of a water tank, he may state in his evidence the position of the water pipe when it struck him, and that it could not have struck him had it been placed in its usual position when not used for supplying the tender. *Missouri Pac. R. Co. v. Callahan*, (Tex.) 41 Am. & Eng. R. Cas. 85, 12 S. W. Rep. 833.

Where the action is for the death of a track repairer, and the company is charged with negligence in using a switch engine with a square tank instead of a sloping one, which is much safer, evidence that the company had introduced one in its yard with a sloping tank is admissible for the purpose of showing that the company had notice of the fact that they were safer. *Missouri Pac. R. Co. v. Lehmborg*, 75 Tex. 61, 12 S. W. Rep. 838.

A platform used by passengers in entering and leaving the cars was so high as not to be conveniently reached, particularly by

* Injury caused by derailment of cars by defect in the track. Evidence as to condition of the track, see 27 AM. & ENG. R. CAS. 229, *abstr.*

women, without a step, which the company failed to provide. A well-beaten path led from the store of the station agent to this platform, which path was commonly used by the public, and some one had provided a plank reaching from the platform to the path, which was commonly used in reaching the platform, and had been since the depot was built, by the falling of which plank the plaintiff was injured. *Held*, that it was admissible to show how long the plank had been in use, and the extent of its use by the public. *Collins v. Toledo, A. A. & N. M. R. Co.*, 80 Mich. 390, 45 N. W. Rep. 178.

Evidence of the condition of a railroad track and of the stove in a car is admissible, under an allegation in a complaint that plaintiff was injured "by reason of the imperfect and unsafe condition of the roadbed, cars, coaches," etc. *Dunn v. Burlington, C. R. & N. R. Co.*, 35 Minn. 73, 27 N. W. Rep. 448.

Evidence of the condition of a railroad track is admissible under an allegation that a train was run at a dangerous rate of speed, as that depends, in fact, upon the condition and character of the track; and what would be a safe and proper rate of speed over one track might be a very dangerous and unsafe rate upon a different and inferior track. *Dunn v. Burlington, C. R. & N. R. Co.*, 35 Minn. 73, 27 N. W. Rep. 448.

Where a person who is crossing a track is injured by catching his foot between a rail and a guard rail, which detains him until he is struck by an engine, it is proper to show the construction of the guard rail at the place of the accident, and how they were generally constructed, to enable the jury to determine whether there was negligence in the construction of the one causing the injury. *McKinney v. Long Island R. Co.*, 25 N. Y. S. R. 685, 53 Hun 633, 2 Silv. Sup. Ct. 543, 6 N. Y. Supp. 168.

(2) *Inadmissible*.—Where the action is against a company for an injury caused by a defect in its track, evidence that the company ordinarily keeps its track in good condition is not material. *Ft. Worth & D. C. R. Co. v. Thompson*, 2 Tex. Civ. App. 170, 21 S. W. Rep. 137.

Where the injury to a brakeman was caused by the breaking of the hand-hold as he was ascending a car, evidence of the use of "kicking switches," or of the position of the engineer at the time, or that the car

might have been safely coupled by using the engine, is irrelevant, as these matters were not the proximate cause of the injury complained of. *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 12 So. Rep. 176.

Where the injury resulted from the uncoupling of certain cars in a train being switched in the defendant's yards, so that they could not be controlled by the engine, and from a defective brake on one of the detached cars which struck the car on which the plaintiff was engaged at work, it was wholly immaterial whose duty it was to inspect the couplings of the cars, brakes, etc., or how on that occasion the engineer handled his train, and proffered evidence in such respect was properly excluded. *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57, 29 N. E. Rep. 186.

Evidence as to the time when railway companies usually replace certain portions of their machinery is immaterial when it is not shown that the custom has any relation to the avoidance of the kind of injury complained of. *Kitteringham v. Sioux City & P. R. Co.*, 18 Am. & Eng. R. Cas. 14, 62 Iowa 285, 17 N. W. Rep. 585.

It is the duty of companies to use the best devices available to prevent the escape of fire from their locomotives; and when a company is sued for using a defective engine, evidence that defendant's engine had the same appliances as the engines of other railroad companies, is properly excluded as immaterial. *Metzger v. Chicago, M. & St. P. R. Co.*, 76 Iowa 387, 41 N. W. Rep. 49.

Evidence to show that an appliance in general use on railroads known as a "muffler," by which the noise caused by the escape of steam through a safety-valve is to a certain extent suppressed, was not used by the defendant, was inadmissible. *Duval v. Baltimore & O. R. Co.*, 49 Am. & Eng. R. Cas. 313, 73 Md. 516, 21 Atl. Rep. 496.

The admission of evidence against objection as to the location and dimensions of the platform and other surroundings of the depot where the accident occurred, at the time of the trial, in the absence of any showing what changes had been made since the date of the accident, several years before, is error where any change has taken place; but in this case, there being some evidence of how far the differences went and no indication that harm can have come from the admission, the error, if any—*held*,

immaterial. *Michigan C. R. Co. v. Coleman*, 28 Mich. 440.

In an action to recover damages for injuries sustained by being run over while attempting to cross a street, evidence that it had not rained or snowed within two days of the date of accident is inadmissible, even though the undisputed testimony shows that the place where the accident occurred was icy and slippery, the company being under no duty to keep the space between its tracks free from ice and snow. *Silberstein v. Houston, W. S. & P. F. R. Co.*, 40 Am. & Eng. R. Cas. 268, 117 N. Y. 293, 22 N. E. Rep. 951, 27 N. Y. S. R. 330; *reversing* 52 Hun 611, 22 N. Y. S. R. 452, 4 N. Y. Supp. 843.—DISTINGUISHING *Parsons v. New York C. & H. R. R. Co.*, 113 N. Y. 355.

Where an employé sues for an injury caused by the explosion of a boiler, and alleges that the explosion was by reason of defects therein, evidence that the coal furnished was unfit for such a boiler, and could not be used with safety, is not admissible, though it appears that good coal could have been used with safety, and that the unfit coal might have been used if the boiler had been differently constructed. *Davis v. New York, L. E. & W. R. Co.*, 20 Abb. N. Cas. 230, 5 N. Y. S. R. 819.

90. Condition of track at points other than that of accident.—(1) *Admissible.*—Where the negligence complained of is not in respect of a defect in the track at the very place where the car in which the plaintiff was riding was wrecked, but the rapid running of the train over an imperfect track, it is competent for the plaintiff to show the condition of the track over which the train had to pass before reaching the place where the derailment of the car occurred. *Jacksonville S. E. R. Co. v. Southworth*, 135 Ill. 250, 25 N. E. Rep. 1093; *affirming* 32 Ill. App. 307.

Where testimony had already been introduced to the effect that in the vicinity of the place of the accident the ties were in a bad condition and rotten, the further testimony of another witness that he knew there were rotten ties in the track at a distance of more than fifteen rods from the point where the accident occurred was admissible. *Allison v. Chicago & N. W. R. Co.*, 42 Iowa 274.

In an action for the death of an engineer through a defect in the track, it was proper to permit a witness to testify as to a defect which he located about the place of the

accident, though he was not able to locate it at that place precisely. *Worden v. Hume-ston & S. R. Co.*, 76 Iowa 310, 41 N. W. Rep. 26.

Where it is claimed that a passenger was killed through defects in the track, and the company assumes the burden of proof and introduces witnesses who testify that the track, at the place of the accident and in the vicinity, was in excellent condition, the plaintiff may then prove that the condition of the track was bad at the place of the accident and several hundred feet distant. *Ohio Valley R. Co. v. Watson*, 93 Ky. 654, 21 S. W. Rep. 244.—QUOTING *Sidekum v. Wabash, St. L. & P. R. Co.*, 93 Mo. 400, 4 S. W. Rep. 701. RECONCILING *Louisville & N. R. Co. v. Fox*, 11 Bush (Ky.) 495.

In an action for injuries resulting from the precipitation of a night train over an embankment, at a curve, the admission of evidence that the track for thirty-four miles from the curve had many decayed ties and battered rails was not a ground for setting aside the verdict; the same being guarded with proper instructions as to the remote legal bearing upon the question of gross negligence. *Holyoke v. Grand Trunk R. Co.*, 48 N. H. 541.

Evidence that a railroad company used car wheels of too narrow a gauge for the track, and therefore likely to be battered by defective rails, was admissible in proof of gross negligence. *Holyoke v. Grand Trunk R. Co.*, 48 N. H. 541.

Proof tending to show that there were other defects in the roadbed of the company than those particularly alleged, and that such defects had existed for some time, is admissible, where the petition alleges that there was gross negligence on the part of the company. *Texas & P. R. Co. v. De Milley*, 60 Tex. 194.

It is competent in an action for damages caused by a railway wreck to prove the condition of the track immediately before and at the time of the wreck, at other places than where the wreck occurred. *Taylor, B. & H. R. Co. v. Taylor*, 79 Tex. 104, 14 S. W. Rep. 918.—FOLLOWING *Texas & P. R. Co. v. De Milley*, 60 Tex. 194.

It being charged in the complaint that the roughness of the roadbed was one of the contributing causes of the accident, it was proper for the plaintiff to prove that any part of the road on which the train had run on the trip in question was rough or uneven,

but not to prove the general condition of the road in other respects or other localities, unless this was done by the cross-examination, within proper limits, of defendant's witnesses. *Haley v. Jump River Lumber Co.*, 81 Wis. 412, 51 N. W. Rep. 321, 956.

A train left the track through alleged defects in the ties, and killed a passenger. Immediately afterward the track was repaired, new ties being put in so that plaintiff could not show the precise point where the train left the track, or the condition of the track at that point. *Held*, that it was competent to show the condition of the ties near the point of the accident, thus laying the foundation for the inference that if the ties were damaged to such a degree in the immediate vicinity of the accident, they may have been so at the place where the cars left the track. *Murphy v. New York C. R. Co.*, 66 Barb. (N. Y.) 125.

(2) *Inadmissible*.—In an action for personal injuries sustained in an accident, the evidence should be confined to the condition of the road at the place or in the immediate vicinity of the accident, and testimony as to the condition of the track a mile and a half from the place of the accident is incompetent and inadmissible. *Sitekum v. Wabash, St. L. & P. R. Co.*, 30 Am. & Eng. R. Cas. 640, 93 Mo. 400, 10 West. Rep. 277, 4 S. W. Rep. 701.—*QUOTING Hipsley v. Kansas City, St. J. & C. B. R. Co.*, 88 Mo. 348.—*Reed v. New York C. R. Co.*, 45 N. Y. 574; *reversing* 56 Barb. 493.—*DISTINGUISHED IN McGuire v. Ogdensburgh & L. C. R. Co.*, 44 N. Y. S. R. 348, 63 Hun 632, 18 N. Y. Supp. 313.—*Grant v. Raleigh & G. R. Co.*, 108 N. Car. 462, 13 S. E. Rep. 209.

Where a company is sued for an accident resulting from a broken rail, evidence that other parts of the road were in bad condition is inadmissible. *Louisville & N. R. Co. v. Fox*, 11 Bush (Ky.) 495.—*DISTINGUISHED IN Leonard v. Southern Pac. Co.*, 21 Oreg. 555.—*Pattee v. Chicago, M. & St. P. R. Co.*, 34 Am. & Eng. R. Cas. 399, 5 Dak. 267, 38 N. W. Rep. 435.—*QUOTING Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465, 16 N. W. Rep. 358.—*Morse v. Minneapolis & St. L. R. Co.*, 11 Am. & Eng. R. Cas. 168, 30 Minn. 465, 16 N. W. Rep. 358.—*QUOTED IN Pattee v. Chicago, M. & St. P. R. Co.*, 34 Am. & Eng. R. Cas. 399, 5 Dak. 267, 38 N. W. Rep. 435.—*Stewart v. Everts*, 44 Am. & Eng. R. Cas. 313, 76 Wis. 35, 44 N. W. Rep. 1092.

It is not error to confine the testimony of both parties as to the condition of the road, to the immediate vicinity of the accident. *Laughlin v. Grand Rapids St. R. Co.*, 26 Am. & Eng. R. Cas. 377, 62 Mich. 220, 28 N. W. Rep. 873.

Where plaintiff sues for injuries caused by the derailment of a train, evidence in regard to the general defective condition of the railroad on which the wreck occurred is not admissible, even upon the issue of exemplary damages, nor is evidence of previous wrecks elsewhere admissible, the liability of the defendant for damages of any kind being dependent only upon the condition of the road at the time and place of occurrence. *Missouri Pac. R. Co. v. Mitchell*, 41 Am. & Eng. R. Cas. 224, 75 Tex. 77, 12 S. W. Rep. 810.

91. Condition of track at times other than that of accident.—Evidence showing that the defendant's track, at the place where plaintiff was injured, did not conform to the requirements of the city ordinance and its contract with the city, at intervals of from one to five months after the accident, is relevant and admissible for the plaintiff, when there is also evidence showing that the condition of the track has remained unchanged since the accident. *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133, 9 So. Rep. 525.

Where the plaintiff, in an action for injuries sustained by derailment of an engine in his charge, counts upon alleged defects in the track as the cause of the injury, he may be allowed to show that such defects had existed for several weeks before the occurrence of the event which produced the injury. *Kansas City, M. & B. R. Co. v. Webb*, 97 Ala. 157, 11 So. Rep. 888.

Where a defective track is alleged to be the cause of an accident, it is often impracticable to produce evidence of the condition of the track at the precise moment of the accident. It is enough to prove such a state of facts shortly before or after as will induce a reasonable presumption that the condition is unchanged; but evidence of the condition of the track twenty-one months after the accident is not admissible. *Little Rock & Ft. S. R. Co. v. Eubanks*, 31 Am. & Eng. R. Cas. 176, 48 Ark. 460, 3 S. W. Rep. 808.

The testimony of one who examined the track the morning after an accident is inadmissible to show the condition of the track,

testimony of
of the road,
the accident.
R. Co., 26
Mich. 220, 28

injuries caused
evidence in
condition of
track occurred
the issue of
evidence of pre-
the liabil-
pages of any
on the condi-
and place of
Co. v. Mitch-
75 Tex. 77,

at times
dent.—Evi-
dant's track,
injured, did
ts of the city
n the city, at
months after
admissible for
also evidence
the track has
the accident.
Alexander, 93

tion for inju-
of an engine
egged defects
the injury, he
such defects
s before the
ch produced
B. R. Co. v.
888.

alleged to be
often imprac-
the condition
ment of the
rove such a
after as will
tion that the
evidence of
twenty-one
t admissible.
Eubanks, 31
Ark. 460, 3 S.

examined the
cident is ad-
of the track,

etc., and he might also be allowed to testify as to rotten ties seen by him near the track at the place of the accident from one to three weeks after the occurrence. *Chicago, P. & St. L. R. Co. v. Lewis*, 48 Ill. App. 274.

In an action for railway injury, defects in the track at other times and places than those of the accident cannot be shown in proof of negligence contributing to the injury. *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537.—DISTINGUISHED IN *Leonard v. Southern Pac. Co.*, 21 Oreg. 555.

Evidence as to the condition of the roadbed one, two, and three years after the accident is too remote. *Stoher v. St. Louis, I. M. & S. R. Co.*, 31 Am. & Eng. R. Cas. 229, 91 Mo. 509, 10 West. Rep. 54, 4 S. W. Rep. 389.

In an action by a passenger for injuries received through defects in the track, evidence as to the soundness of the ties and the condition of the roadbed at the place of the accident, when the track was repaired about six months thereafter, is competent, as tending to show the condition of the track at the time of the accident. *Stewart v. Everts*, 44 Am. & Eng. R. Cas. 313, 76 Wis. 35, 44 N. W. Rep. 1092.

92. Breaking of rails.—The evidence tending to show that the derailment of the coach in which plaintiff was riding was caused by the breaking of a rail as the coach passed over it, and that this was caused by the defective condition of the rail and the cross-ties under it, it is competent for plaintiff to prove that other rails and cross-ties, at and near the place, were also old, worn, rotten, and decayed. *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 9 So. Rep. 722.

In a suit by a passenger for personal injuries where it was alleged by defendants that the accident was one of that class of accidents springing from natural causes against which no human foresight could guard; that the broken rail causing the accident was, before that time, sound and serviceable, and that the sudden fracture in it was caused by the extreme degree of cold to which it was subjected, and not from any negligence of defendants, and plaintiff contends that the accident was caused by the culpable acts of defendants in running the train at too high a rate of speed over an old and much worn track, causing the rail to break, evidence of the general condition

5 D. R. D.—28.

of the roadbed, etc., at and near the accident, is admissible. *Missouri Pac. R. Co. v. Collier*, 18 Am. & Eng. R. Cas. 281, 62 Tex. 318.

Plaintiff was allowed to introduce in evidence pieces of the broken rail picked up at the place of the accident six months thereafter. The pieces had been exposed to the action of the weather from January to June. Held, that the admission of such evidence and allowing the jury to draw a conclusion therefrom as to the soundness of the rail was erroneous. *Stewart v. Everts*, 44 Am. & Eng. R. Cas. 313, 76 Wis. 35, 44 N. W. Rep. 1092.

93. Defective cross-ties.—One count of the complaint alleging that the injuries resulting from the failure of the railroad company to keep the switch at which the cars were derailed in good and safe condition, and the other containing only general averments of negligence in the conduct and management of the engine and cars, evidence as to the rotten and unsafe condition of the cross-ties within thirty feet of the switch is relevant and admissible for the plaintiff, and is not objectionable on the ground of variance. *Richmond & D. R. Co. v. Vance*, 93 Ala. 144, 9 So. Rep. 574.—FOLLOWING *Louisville & N. R. Co. v. Jones*, 83 Ala. 376.

Where a witness examines the ties of a railroad shortly after an accident, and after the old ties had been replaced by new ones, he may testify to the unsound condition of the ties found lying near the track at the place where the train was derailed, especially when he had already testified to the condition of the track on the morning of the accident. His examination of the ties, being recently after the accident and at the place of derailment, is competent testimony as tending to establish the condition of the ties at the time of the injury of the plaintiff. *Chicago, P. & St. L. R. Co. v. Lewis*, 145 Ill. 67, 33 N. E. Rep. 960.

Evidence that the track where an accident occurred had rotten ties, loose rails, and projecting ends of ties, with holes in the ground between the ties both inside and outside the rails, was properly admitted, as showing such a condition of non-repair as would most probably have occasioned the stumbling of any person, old or young, while engaged in doing the work. *Kehler v. Schwenk*, 151 Pa. St. 505, 25 Atl. Rep. 130.

94. Brakes.—In an action for personal injuries received at a crossing the declaration alleged that the locomotive was not supplied with proper brakes. *Held*, that evidence respecting its brakes as compared with other locomotives belonging to the same company was admissible. *Savannah, F. & W. R. Co. v. Flannagan*, 39 Am. & Eng. R. Cas. 661, 82 Ga. 579, 9 S. E. Rep. 471.

Upon the trial of an action for injuries received by a brakeman, resulting from a defect in a brake, which, if a proper inspection had been made, plaintiff claimed, would have been discovered, plaintiff offered to prove that other brakes on similar cars on the train were in a defective condition, which rendered them useless. This was rejected. *Held*, error; that such evidence was competent as bearing upon the point whether the cars had been properly inspected. *Bailey v. Rome, W. & O. R. Co.*, 139 N. Y. 302, 34 N. E. Rep. 918.

95. Cattle-guards.—Evidence that on a certain day the timbers of a cattle-guard were so rotten that the cross-bars had become loose and out of place, and that the pit had become partially filled up with sand, is admissible to prove that it was in the same defective condition on the day previous. *Miller v. Northern Pac. R. Co.*, 36 Minn. 296, 30 N. W. Rep. 892.

96. Spreading of rails.—Where a passenger sues a railroad for an injury caused by the train leaving the track, and charges that it was through the negligence of the company, without specifying the particular acts of negligence, it is competent to prove that the accident resulted from the spreading of the rails caused by imperfect ties. *Gulf, C. & S. F. R. Co. v. Smith*, 74 Tex. 276, 11 S. W. Rep. 1104.—FOLLOWED IN *Gulf, C. & S. F. R. Co. v. Wilson*, 79 Tex. 371.

It was competent to show that about half an hour before an accident upon a railroad, caused by the spreading of the rails upon the track, a track walker reported to the section boss at work upon the track, the condition of the track—that "the track is spread." The report was by a servant whose duty it was to ascertain the condition of the track, and to report it to other servants, whose duty it was to repair it. *Texas & P. R. Co. v. Lester*, 75 Tex. 56, 12 S. W. Rep. 955.

97. Dangerous switches.—Where an injury occurs by reason of a defective

switch, evidence is admissible that the defects existed some time after the accident, and after a new switch stand had been put in, and other changes made, where the evidence shows that the defect causing the accident had not been changed. *Stodder v. New York, L. E. & W. R. Co.*, 2 N. Y. Supp. 780, 19 N. Y. S. R. 772, 50 Hun 221; affirmed in 121 N. Y. 655, mem., 24 N. E. Rep. 1092.

II. JUDICIAL NOTICE.

98. In general.*—(1) *What will be judicially noticed.*—Courts are bound judicially to know that no care is not due or reasonable care; that when no care whatever has been used in approaching a known or threatened danger, and no effort whatever to ascertain or avoid it, reasonable care has not been exercised, and the party has been guilty of negligence. *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274.

Judicial notice will be taken that a box freight-car in a state of rest at a highway crossing is not *per se* a frightful object to horses of ordinary gentleness; the question is not for the jury. *Gilbert v. Flint & P. M. R. Co.*, 15 Am. & Eng. R. Cas. 491, 51 Mich. 488, 16 N. W. Rep. 868, 47 Am. Rep. 592.—DISTINGUISHED IN *Young v. Detroit, G. H. & M. R. Co.*, 56 Mich. 430; *Peterson v. Chicago & W. M. R. Co.*, 64 Mich. 621. FOLLOWED IN *Fisk v. Chicago, M. & St. P. R. Co.*, 74 Iowa 424.

The court may take judicial notice of the fact that in a large city where two city railroad tracks are laid down in a long avenue, requiring nearly an hour to traverse it, the crossings where the cars stop to take on the passengers are much frequented, even though the street, considered as a whole, may not be. *Haggerty v. Brooklyn City & N. R. Co.*, 6 Abb. N. Cas. 129, 61 N. Y. 624.

A court will take notice that electricity developed to a high degree of intensity is exceedingly, and even fatally, dangerous when brought in contact with persons or animals; but the court has no judicial knowledge of the fact that it is dangerous when used by a street-car company in the ordinary way as a motive power. *Taggart v. Newport St. R. Co.*, 43 Am. & Eng. R. Cas. 208, 16 R. I. 668, 7 L. R. A. 205, 19 Atl. Rep. 326.

* Matters relating to railways which are known judicially, see note, 44 AM. & ENG. R. CAS. 6.

The right to recover damages for causing a death, etc., is given by statute. That the law does not give the remedy sought must be taken notice of by the court, even if the point was not made at the trial or in assignments of error. *Yoakum v. Selph*, 83 Tex. 607, 19 S. W. Rep. 145.

(2) *What must be alleged and proved.*—The courts cannot take judicial knowledge of the rule for the measurement of corn in the shuck, nor declare that a railroad car twenty-six feet long, eight feet wide, and four feet high, cannot hold three hundred bushels of corn in the shuck. *South & N. Ala. R. Co. v. Wood*, 21 Am. & Eng. R. Cas. 39, 74 Ala. 449, 49 Am. Rep. 819.

Where a corporation executes an appeal bond, by an attorney in fact, and it is copied into the record with a scrawl attached, the supreme court will not take judicial notice of the fact that the corporation has a seal further than the scrawl. *Illinois C. R. Co. v. Johnson*, 40 Ill. 35.

It is not a matter of which a court can take judicial knowledge that the tendency of an inclined grade is to accelerate the motion of a car moving down the incline, and that the law of friction operates against the acceleration of its motion, and that in some degree of inclination the friction would equal and neutralize the motion caused by the descending grade. The effect of these causes must be determined by the jury from the evidence introduced on trial. *Chicago, St. L. & P. R. Co. v. Champion*, (Ind.) 32 N. E. Rep. 874.

Courts cannot take judicial notice that a well-known railroad company is popularly known by the initial letters of the words constituting its full name—for example, that "C., B. & Q. R. R. Co." means the Chicago, Burlington and Quincy railroad company. *Accola v. Chicago, B. & Q. R. Co.*, 70 Iowa 185, 30 N. W. Rep. 503.

The court will not take judicial notice of the losses which the Northern Pacific R. Co. had sustained by reason of the Indian reservations, and of the settlements which had been made within the limits of its grant prior to the final location of its line, and from this assume that the selection of the lands aforesaid was in lieu of losses thus sustained. *Elling v. Thexton*, 7 Mont. 330, 16 Pac. Rep. 931.

The question whether the terms of a statute, authorizing a change of name on the part of a railroad company upon the making

of certain subscriptions authorized by the same act, has been complied with or not, is, where pertinent, a proper subject of allegation and proof; and courts will not take judicial notice of a statement in a report of the commissioner of railroads to the effect that the terms of the statute have been complied with, and the name of the company changed. *Cincinnati, W. & B. R. Co. v. Hoffhines*, 40 Am. & Eng. R. Cas. 221, 46 Ohio St. 643, 22 N. E. Rep. 871.—FOLLOWING *Pittsburgh, C. & St. L. R. Co. v. Moore*, 33 Ohio St. 384.

The court, while taking judicial notice of an act of the legislature authorizing the sale of a railroad, will not take such notice as to the fact of the sale. Nor do they judicially know that the corporate existence of a company whose charter has not expired by limitation has ceased, or that the corporation has successors. *Shea v. Knoxville & K. R. Co.*, 6 Baxt. (Tenn.) 277.

A court cannot take judicial knowledge without evidence that a railway was not fenced at a certain point; the burden of proving that it was fenced is on the railroad company in order to establish its defense. *Texas C. R. Co. v. Childress*, 64 Tex. 346.

99. Acts creating railway corporations.—A federal court will take judicial notice of the fact that a railroad company is authorized by an act of congress to build and maintain a bridge over navigable waters. *Pennsylvania R. Co. v. Baltimore & N. Y. R. Co.*, 37 Fed. Rep. 129.

In West Virginia, statutes of that state or of the parent state of Virginia, creating railroad corporations, or licensing and authorizing them to exercise their franchises within the state, are deemed public acts, of which the courts of the state take judicial notice, and the federal courts, when acting within the states, must do likewise. *Martin v. Baltimore & O. R. Co.*, 151 U. S. 673, 14 Sup. Ct. Rep. 533.

Judicial notice is taken of a railway charter granted by special act of the legislature, published as a public act, and referred to in other public acts subsequently passed. *Frazier v. East Tenn., V. & G. R. Co.*, 40 Am. & Eng. R. Cas. 358, 88 Tenn. 138, 12 S. W. Rep. 537. *Woods v. Durrett*, 28 Tex. 429. *Wright v. Hawkins*, 28 Tex. 452. *Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336. *State v. Baltimore & O. R. Co.*, 15 W. Va. 362.

Where in a general act of the legislature

the corporate existence of a railroad in Texas is recognized, the court will take judicial knowledge of the existence of the corporation. *Houston & T. C. R. Co. v. Knapp*, 51 *Tex.* 569.

In an action against a railroad company it is not necessary to aver in the declaration that it is a corporation, nor is it necessary to prove it on the trial, unless with the plea there is filed an affidavit denying the fact. The court will *ex officio* take notice of the fact. *Baltimore & O. R. Co. v. Sherman*, 30 *Gratt. (Va.)* 602.—FOLLOWED IN *Norfolk & W. R. Co. v. Harman*, 83 *Va.* 553, 8 *S. E. Rep.* 251.

The statute N. C. Laws of 1848-49, ch. 82, incorporating the North Carolina R. Co., is a private act; and it is error to permit it to be read and commented on to the court or jury until it has been properly introduced as evidence. *Durham v. Richmond & D. R. Co.*, 108 *N. Car.* 399, 12 *S. E. Rep.* 1040, 13 *S. E. Rep.* 1.

100. Competing lines.—Judicial notice may be taken by the court of the fact that two railroads touching the same points are parallel and competing lines. *Gulf, C. & S. F. R. Co. v. State*, 36 *Am. & Eng. R. Cas.* 481, 72 *Tex.* 404, 1 *L. R. A.* 849, 10 *S. W. Rep.* 81, 2 *Int. Com. Rep.* 335.—QUOTING *East Line & R. R. Co. v. Rushing*, 69 *Tex.* 306.

101. County boundaries.—The supreme court takes judicial cognizance of county boundaries, and that a certain distance from a place named in a county is within that county. *Terre Haute & I. R. Co. v. Pierce*, 19 *Am. & Eng. R. Cas.* 581, 95 *Ind.* 496.—OVERRULING *Louisville, N. A. & C. R. Co. v. Breckenridge*, 64 *Ind.* 113.—*Indianapolis, B. & W. R. Co. v. Lyon*, 48 *Ind.* 119. *Louisville, N. A. & C. R. Co. v. Hixon*, 101 *Ind.* 337.

In a suit for killing live stock, where no witnesses state that the killing was in the county, yet several state that it was on the railroad between two geographical points, the court will take judicial notice of the fact that such points are in the county. *Indianapolis & C. R. Co. v. Case*, 15 *Ind.* 42.

102. Duties of agents and employes.—The court will take judicial notice of the functions of such railway officers as ticket agents and conductors as matters of common experience, and that passengers are supposed, on the same ground, to know these functions and the regulations of the

companies to which they trust themselves. *Dye v. Virginia Midland R. Co.*, 9 *Mackey (D. C.)* 63. *Travers v. Kansas Pac. R. Co.*, 63 *Mo.* 421.

Courts will take judicial notice of the authority of the managing agents of a railroad corporation, and, in the absence of any evidence upon the subject, will presume that its superintendent is empowered to conduct its ordinary transactions, such as the reception of cordwood. *Sacalaris v. Eureka & P. R. Co.*, 16 *Am. & Eng. R. Cas.* 580, 18 *Nev.* 155, 1 *Pac. Rep.* 835.

Courts do not take judicial notice of the duties of railway employes or officers. So an action cannot be maintained against a corporation for medicines furnished an injured employe on the order of a division superintendent, without evidence that he was authorized to give the order. *Brown v. Missouri, K. & T. R. Co.*, 67 *Mo.* 122.—DISTINGUISHED IN *Terre Haute & I. R. Co. v. McMurray*, 98 *Ind.* 358. REVIEWED IN *Louisville, E. & St. L. R. Co. v. McVay*, 98 *Ind.* 391.

103. Existence and location of municipal corporations.—A court will take judicial notice of the fact that land surrounding the harbor of Seattle, in Washington, had been for many years selected for and known as the site of a city, though not all improved, and that it is unfit for agricultural purposes, and therefore not subject to the pre-emption laws, so as to exclude the idea that an individual could acquire title to a farm simply because he lived on it and improved it. *Ex parte Davidson*, 57 *Fed. Rep.* 883.

A court in Connecticut has judicial knowledge that Ansonia in that state is easily accessible from New York city by railway, that there is frequent communication by mail, and that the telegraph may be used and a reply obtained in half an hour and at a trifling expense. *Morgan v. Farrel*, 58 *Conn.* 413, 20 *Atl. Rep.* 614.

Judicial notice will be taken of the location of Fort Scott, and of the boundaries of Bourbon county, and also that a place two miles distant from Fort Scott is within that county. *Kansas City, Ft. S. & G. R. Co. v. Burge*, 40 *Am. & Eng. R. Cas.* 181, 40 *Kan.* 736, 21 *Pac. Rep.* 589.

The courts will take judicial notice of the rights and powers conferred by a general law on towns becoming incorporated thereunder, but not of the fact that a particular

at themselves.
Co., 9 Mackey
as Pac. R. Co.,

notice of the au-
s of a railroad
nce of any evi-
presume that
red to conduct
h as the recep-
s v. Eureka &
R. Cas. 580, 18

notice of the
or officers. So
ined against a
urnished an in-
of a division
dence that he
order. Brown
p., 67 Mo. 122.
Haute & I. R.
8, REVIEWED
Co. v. McVay,

Location of
—A court will
fact that land
attle, in Wash-
years selected
a city, though
it is unfit for
therefore not
laws, so as to
individual could
ply because he
it. *Ex parte*

Judicial knowl-
ate is easily ac-
by railway, that
cation by mail,
be used and a
ur and at a tri-
arrel, 58 Conn.

en of the loca-
e boundaries of
that a place two
tt is within that
S. & G. R. Co.
R. Cas. 181, 40

cial notice of the
ed by a general
orporated there-
that a particular

town has availed itself of the privileges of such law and become incorporated; such incorporation must be proved. *So held*, in proceedings by a town to condemn land across a railroad for the purpose of opening a street. *Hopkins v. Kansas City, St. J. & C. B. R. Co.*, 79 Mo. 98.

Where an injury is simply alleged as having occurred "in the city of Janesville" the court will take judicial notice of the fact that it was in a city of that name in Wisconsin, though there are other cities of the same name in other states. *Woodward v. Chicago & N. W. R. Co.*, 21 Wis. 309.

104. Former adjudications.—A former adjudication in the federal courts on the subject-matter of a controversy cannot be taken notice of in the state courts, unless properly presented by the pleadings and proofs. *Kilpatrick v. Kansas City & B. R. Co.*, 57 Am. & Eng. R. Cas. 398, 38 Neb. 620, 57 N. W. Rep. 664.

105. Geographical position of rail-ways.—Railways are public highways, and it is a matter of history that important lines of railway, once established, have remained as fixed and permanent in their course as the rivers themselves. The locality becomes so notorious and indisputable that courts take notice thereof. *Miller v. Texas & N. O. R. Co.*, 83 Tex. 518, 18 S. W. Rep. 954.

But in order to take notice that the ap-
pellee railway company is a part of a system of railways (e.g., the Southern Pacific system) the court must be aware of the contract through which the system is created. A contractual relation which a railway might enter into with other railways to form a continuous line for the transportation of freight would not be of such historical or commercial notoriety as to render it so indisputable that the courts ought to take judicial knowledge that such was the fact. *Miller v. Texas & N. O. R. Co.*, 83 Tex. 518, 18 S. W. Rep. 954.

Judicial notice will be taken of the geographical position of Hazelrigg Station. *Indianapolis & C. R. Co. v. Stephens*, 28 Ind. 429.

A court will not take judicial knowledge of the fact that the line of a consolidated railroad, if completed according to the original charters, would form a continuous or unbroken line. *Georgia Pac. R. Co. v. Gaines*, 44 Am. & Eng. R. Cas. 1, 88 Ala. 377, 7 So. Rep. 382.

The courts will not take judicial notice whether a railroad company owns and operates a road through a particular county, when there is no law prohibiting it from doing so. *Indianapolis & C. R. Co. v. Stephens*, 28 Ind. 429.—FOLLOWED IN *Indianapolis & C. R. Co. v. Kibby*, 28 Ind. 479.

The court will not take judicial notice that a railroad company under its charter condemned or acquired title to any particular land or strip of land. *Chapman v. Pittsburgh & S. R. Co.*, 9 Am. & Eng. R. Cas. 484, 18 W. Va. 184.

A court will not take judicial notice of the fact that a railroad will not run through or near certain places which have subscribed to its capital stock, where it is simply chartered between certain designated termini. *Phillips v. Albany*, 28 Wis. 340.

106. Manner of operating railways and conducting business.—Courts will judicially know that, as a general rule, trains running upon a railroad are run, directed, and controlled by the owners of the road. *South & N. Ala. R. Co. v. Pilgreen*, 62 Ala. 305.

The manner in which railroad companies conduct their business has been so long followed and with such a degree of uniformity that courts are bound to take judicial notice of its general features. *Atchison, T. & S. F. R. Co. v. Headland*, 18 Colo. 477, 33 Pac. Rep. 185.

It seems that the courts may take judicial notice of the way in which the great railways are managed in the everyday practical running of them—i.e., by overlooking officers at distant places, who by means of the telegraph are advised where trains are, and direct their movements. *Slater v. Jewett*, 5 Am. & Eng. R. Cas. 515, 85 N. Y. 61, 39 Am. Rep. 627.—APPLIED IN *Carr v. North River Constr. Co.*, 17 N. Y. S. R. 945.

And the fact that some company may operate a line of road by telephone, or some other means of communication, does not invalidate the law which is confined to those operated by telegraph, upon account of class legislation, for the law applies to all alike who operate roads by means of telegraphic information. *State v. Indiana & I. S. R. Co.*, 133 Ind. 69, 32 N. E. Rep. 817.

Where a terminal company which owns but twelve miles of track in a city complains that it is assessed much higher per mile for taxation than other companies whose tracks

enter the city, and where the evidence does not show either the actual or the relative values of the different roads, the court will take judicial notice of the fact that most of the other roads are long lines; that the number of trains and the amount of traffic passing over them are limited as compared with the terminal road, and that the assessed valuation per mile placed upon them is the average value of the whole of the line, and not of that portion which is in the city. *St. Louis B. & T. R. Co. v. People ex rel.*, 39 *Am. & Eng. R. Cas.* 562, 127 *Ill.* 627, 21 *N. E. Rep.* 348.

Courts are bound to recognize the essential differences in the natures and modes of travel and transportation upon railroads and ordinary highways; that greater speed in travel and transportation is one of the objects of authorizing conveyance by rail; that locomotives and heavy trains cannot be suddenly stopped or turned out of their course, and that the authority given by law to railroads to cross highways, and fixing no limit to their speed, necessarily gives them the preference at the crossings; otherwise their rate of speed must be so reduced and the regularity of trains so interrupted as to defeat the very object and purpose of railroad transportation. *Lake Shore & M. S. R. Co. v. Miller*, 25 *Mich.* 274.

The court will take notice as part of the general knowledge of the business community that the railroads of the country conduct inspections under a system which all persons so employed as to be interested are presumed to understand. *Smith v. Potter*, 2 *Am. & Eng. R. Cas.* 140, 46 *Mich.* 258, 9 *N. W. Rep.* 273.

The construction and operation of a railroad without blocking its frogs and switches is not negligence *per se* of which a court will take judicial notice, upon proof of the fact of such construction and operation and failure to block the frogs and switches; nor will the court notice the fact that unblocked frogs are inherently unsafe. *Missouri Pac. R. Co. v. Lewis*, 24 *Neb.* 848, 40 *N. W. Rep.* 401, 2 *L. R. A.* 67.

107. Matters affecting jurisdiction of court.—The U. S. supreme court will take judicial notice of matters that affect its jurisdiction, whether raised by the parties or not. *So held*, where an Illinois railroad claimed the right to sue certain Indiana railroads in the federal courts on the ground of diverse citizenship, but where the

bill showed on its face that complainant company was also chartered under the laws of Indiana. *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 116 *U. S.* 472, 6 *Sup. Ct. Rep.* 644.

108. Matters of common knowledge.—No proof is required of facts which everybody is presumed to know. When such facts become material, it is the duty of courts and jurors to take notice of and act upon them, without proof. So in a suit to recover damages for the loss of an arm, etc., no proof to show that such loss would impair the party's ability to pursue his ordinary business is necessary, upon which to base an instruction relating to damages growing out of the want of such ability. *Chicago, B. & Q. R. Co. v. Warner*, 18 *Am. & Eng. R. Cas.* 100, 108 *Ill.* 538.

The fact that railway companies are carriers may be judicially noticed without being expressly pleaded. *Caldwell v. Richmond & D. R. Co.*, 89 *Ga.* 550, 15 *S. E. Rep.* 678.

Courts must take judicial notice of what everybody knows with regard to the incidents of railway travel. *Downey v. Hendrie*, 8 *Am. & Eng. R. Cas.* 386, 46 *Mich.* 498, 41 *Am. Rep.* 177, 9 *N. W. Rep.* 828.

But while judicial notice may be taken of the proper place of the engineer and fireman on a moving train of cars, it is not matter of common knowledge and general notoriety that "the foot-board in front of a shifting engine is the post of duty of the yard master and conductor." *Highland Ave. & B. R. Co. v. Walters*, 91 *Ala.* 435, 8 *Rep.* 357.

The court will take judicial notice of the fact that a man could not strike his head against an obstruction four feet seven inches above the place on which he was sitting, such an accident being only possible in the case of a person nine feet high. *Hunter v. New York, O. & W. R. Co.*, 41 *Am. & Eng. R. Cas.* 248, 116 *N. Y.* 615, 23 *N. E. Rep.* 9, 27 *N. Y. S. R.* 729; *reversing* 42 *Hun* 657, 5 *N. Y. S. R.* 64.

It is a matter of common knowledge that the earnings of a railroad are mainly derived from freight and passenger traffic which neither begins nor ends with that particular road. *Hart v. Ogdensburg & L. C. R. Co.*, 23 *N. Y. Supp.* 639, 69 *Hun* 378, 52 *N. Y. S. R.* 799.

Where a non-resident stockholder seeks to recover dividends declared on a road which was operated within the territory

controlled by the confederate government, the court will take judicial notice of the fact that the money received by the company was confederate currency, and differed in value from United States money. *Kepel v. Petersburg R. Co., Chase's Dec. (U. S.)* 167.

109. Municipal ordinances.—Courts will not take judicial cognizance of municipal legislation. Its existence must be proven, as any other fact. *Laviosa v. Chicago, St. L. & N. O. R. Co., (La.) 4 Am. & Eng. R. Cas.* 128.

Although the courts do not take judicial notice of municipal ordinances and by-laws, all residents within the municipality are charged with knowledge of them; and when any person contracts, within the limits of the municipality, in reference to a matter which is governed by a police regulation, he is charged with knowledge of its provisions. *North Birmingham St. R. Co. v. Calderwood*, 89 *Ala.* 247, 7 *So. Rep.* 360.

110. Of state statutes by federal courts.—Federal courts take judicial notice of all the acts of congress, and the laws of the states in which they sit, and the latter includes the statutes of a territory. *Breed v. Northern Pac. R. Co.*, 35 *Fed. Rep.* 642.

A federal court sitting within the limits of a state will take judicial notice of a state statute giving a right of action for negligently causing death. *Breed v. Northern Pac. R. Co.*, 35 *Fed. Rep.* 642.

And of a public statute of a state, giving county authority to subscribe to the capital stock of a railroad, and to issue its bonds in payment thereof. *Smith v. Tallapoosa County*, 2 *Woods (U. S.)* 574.

111. Private acts.—(1) *Generally.*—Railroad charters are generally treated as private acts of the legislature, of which the courts do not take judicial knowledge. *Conley v. Columbus Tap R. Co.*, 44 *Tex.* 579. *Atchison, T. & S. F. R. Co. v. Blackshire*, 10 *Kan.* 477. *Handy v. Philadelphia & R. R. Co.*, 1 *Phila. (Pa.)* 31.

Judicial notice cannot be taken of the charter of a private corporation, nor of its corporate power or capacity, if it derives existence from such charter—i. e., a special act of incorporation. If it is shown, however, to have been incorporated under the general laws which authorize the formation and define the powers of corporations, these are public laws, of which notice must

be taken, and the power must be referred to such general laws. *Kelly v. Alabama & C. R. Co.*, 58 *Ala.* 489.

While it is true that a legislative act authorizing a private corporation to execute a mortgage on lands and franchises which have been donated to it by the state, being a private act, should be introduced in evidence, yet that it has not can make no difference when such act has been, in another cause, recognized and enforced by a decree of this court. We are bound to take judicial cognizance of our own decisions. *Mower v. Kemp*, 46 *Am. & Eng. R. Cas.* 480, 42 *La. Ann.* 1007, 8 *So. Rep.* 830.

A court cannot take judicial notice of the fact as to whether or not the Northern Pacific railroad company filed its map of the fixed or the general route of its road, on a particular date or at any other time; or whether at that or at any other time it selected the definite route of its road. The court might take judicial notice, perhaps, of an executive act of the secretary of the interior in connection with the filing of such map, but filing it by the company is not such an act as the court will notice judicially. *McKeon v. Northern Pac. R. Co.*, 45 *Fed. Rep.* 464.

(2) *Where act provides for judicial notice.*—Although the legislature may not, by provision inserted in the act, have the power to make that a public law which, in its essential nature, is a private law, yet where the legislature has expressly declared that a railroad charter shall be a public act, the courts are authorized to take judicial notice of its terms. *Case v. Kelly*, 43 *Am. & Eng. R. Cas.* 1, 133 *U. S.* 21, 10 *Sup. Ct. Rep.* 216; affirming 13 *Am. & Eng. R. Cas.* 70. *Peoria, D. & E. R. Co. v. People ex rel.*, 116 *Ill.* 401, 6 *N. E. Rep.* 497. *Cincinnati, H. & I. R. Co. v. Clifford*, 33 *Am. & Eng. R. Cas.* 81, 113 *Ind.* 460, 15 *N. E. Rep.* 524, 13 *West. Rep.* 384. *Hargreaves v. Lancaster & P. J. R. Co.*, 1 *Railw. Cas.* 416.

A charter of a railroad company is a private act, and must be pleaded and proved in chancery courts, notwithstanding the provision of *Ala. Rev. Code*, § 2698, providing that such charters need not be specially pleaded in courts of law. *Perry v. New Orleans, M. & C. R. Co.*, 55 *Ala.* 413.

112. Public statutes.—Courts take judicial notice of a public act incorporating a city. *Nutter v. Chicago, R. I. & P. R. Co.*, 22 *Mo. App.* 328.

Courts will judicially take notice when the general railroad law went into force. *Heuston v. Cincinnati & Ft. W. R. Co.*, 16 *Ind.* 275.

The act requiring railway companies to ring a bell or sound a whistle before passing over a highway with a train is a public statute of which the courts will take judicial notice. The rule is different in respect to a private statute. *Chicago & A. R. Co. v. Dillon*, 32 *Am. & Eng. R. Cas.* 1, 123 *Ill.* 570, 15 *N. E. Rep.* 181, 13 *West. Rep.* 286; *affirming* 24 *Ill. App.* 203.

The court takes notice of public statutes of the state regulating the rate of speed, and they need not be pleaded; but a private statute, or a local custom or by law, if relied upon, must be pleaded. *Horn v. Chicago & N. W. R. Co.*, 38 *Wis.* 463.

113. System of checking baggage.

—The courts may take judicial notice of the system of checking baggage by railroad companies, and of the general practice, in case of through passengers having tickets for an entire route over roads owned and operated by separate but connecting lines, for the first company to check the baggage to its final destination, and to deliver it at the end of its route to the next succeeding carrier, and so on until it reaches the possession of the last carrier. *Isaacson v. New York C. & H. R. Co.*, 16 *Am. & Eng. R. Cas.* 188, 94 *N. Y.* 278, 46 *Am. Rep.* 142; *reversing* 25 *Hun* 350.

114. Tables of mortality. — Courts take judicial knowledge of the American Tables of Mortality in estimating the probable length of human life, and testimony proving such tables is not an error of which either party can complain. *Louisville & N. R. Co. v. Mothershed*, 97 *Ala.* 261, 12 *So. Rep.* 714.

115. Territorial extent of railway system.*—It is a matter of common notoriety and judicial knowledge that the "Missouri Pacific Railway System" operates and controls the Texas & Pacific R. Co., and the former company is estopped from denying it. *Texas & P. R. Co. v. Logan*, 3 *Tex. App. (Civ. Cas.)* 227. *Missouri Pac. R. Co. v. Graves*, 2 *Tex. App. (Civ. Cas.)* 594.—*QUOTING McDonald v. Western R. Corp.*, 34 *N. Y.* 497.—*Missouri Pac. R. Co. v. White*, 3 *Tex. App. (Civ. Cas.)* 200.

* Judicial notice of a designated railroad as part of a railway system, see 55 *AM. & ENG. R. CAS.* 451, *abstr.*

In a suit for damages resulting from injuries received on a railroad chartered in Tennessee, and lying partly in that state and partly in others, the declaration averred a substantial cause of action under the Tennessee statute, but failed to allege that the injuries were committed in that state. *Held*, that it was not necessary to allege that the accident occurred in that state, as the court would take judicial notice that the road lay partly in Tennessee, and if the accident occurred in another state, it might be shown on the trial. *Hobbs v. Memphis & C. R. Co.*, 9 *Heisk. (Tenn.)* 873.

III. PRESUMPTIONS; BURDEN OF PROOF.

1. Presumptions.

116. In general —(1) *Age*.—Under the rule that the damages resulting to a parent for the death of a minor child shall be determined by the age, sex, circumstances and condition of the next of kin, it is sufficient where a mother sues for the death of her boy four years old, and proves her circumstances and condition in life by her own evidence, as the jury may infer her age from her appearance and the fact of her having small children sufficiently near for the purpose of the case, without direct proof as to age. *Moskovitz v. Lighte*, 68 *Hun (N. Y.)* 102.

(2) *Negligence*.—Where there is no evidence from which it can be inferred that there was an order of the board of commissioners allowing stock to run at large, the court may, as matter of law, conclusively infer negligence. *Lyons v. Terre Haute & I. R. Co.*, 101 *Ind.* 419.

The knowledge of the dangerous character of a bridge may be inferred from opportunities of obtaining such knowledge in the exercise of ordinary care. *Wells v. Burlington, C. R. & N. R. Co.*, 2 *Am. & Eng. R. Cas.* 243, 56 *Iowa* 520, 9 *N. W. Rep.* 364.

(3) *Construction of railway*.—Where evidence has been offered that a railroad corporation is building a branch track under the direction of its president, the company, if it be not otherwise shown, will be held as sanctioning the acts done and the purpose in view. *Bangor, O. & M. R. Co. v. Smith*, 47 *Me.* 34.

That a company is engaged in procuring rights of way has no tendency to show that it is building its own road, or that any particular person employed in that work is

doing so as a servant of the company. The general railroad statutes contemplate, what is matter of almost universal experience, that such work is usually done by contractors, and special remedies are provided on that assumption. *Bond v. Pontiac, O. & P. A. R. Co.*, 26 Am. & Eng. R. Cas. 571, 62 Mich. 643, 29 N. W. Rep. 482.

(4) *Carriage of passengers*.—Where one is carried upon a passenger train for many hours, and the conductor of the train has given him a check, which is found upon his person after he has been killed by the carrier's negligence, it will be presumed, in the absence of countervailing evidence, that he was lawfully upon the train as a passenger. *Louisville, N. A. & C. R. Co. v. Thompson*, 27 Am. & Eng. R. Cas. 88, 107 Ind. 442, 57 Am. Rep. 120, 8 N. E. Rep. 18, 9 N. E. Rep. 357.

(5) *Carriage of merchandise*.—If a railroad company received goods for transportation in good order, and delivered them in a damaged condition, the presumption would be against the company, that the goods were damaged in its hands, whether such damage was open or concealed. *Savannah, F. & W. R. Co. v. Hoffmayer*, 75 Ga. 410.

The fact that a consignee has received boxed goods from a carrier and receipted for the same as in good condition only raises a strong presumption that they were not damaged while in the carrier's hands. *Bloomington v. Du Rell*, 1 Idaho (N. S.) 33.

A company is presumed to be able to furnish the cars necessary for the transportation of freight, and where it does not appear that the train dispatcher or station agent was conversant with the general resources of the company, his testimony is inadmissible for the purpose of proving the inability of the company to furnish transportation at the proper time. *Ayres v. Chicago & N. W. R. Co.*, 40 Am. & Eng. R. Cas. 108, 75 Wis. 215, 43 N. W. Rep. 1122.

117. Against violation of law.—In transportation by railroads it will be presumed, in the absence of evidence to the contrary, that the cars were of regulation weight. *Reynolds v. Chicago & A. R. Co.*, 85 Mo. 90.

Where the law requires a railroad company to provide its trains with a certain number of brakes and brakemen, it will be presumed, in the absence of testimony, that the company had complied with this requirement. *Joyner v. South Carolina R.*

Co., 29 Am. & Eng. R. Cas. 258, 26 So. Car. 49, 1 S. E. Rep. 52.

There is no presumption that because an obstruction had been maliciously put upon the track of a railroad at one place, a similar obstruction will afterwards be put at the same place, or, for that matter, on any other part of the road. *Louisville & N. R. Co. v. McKenna*, 18 Am. & Eng. R. Cas. 276, 13 Lea (Tenn.) 280. — *REVIEWING Smith v. Great Eastern R. Co.*, L. R. 2 C. P. 4.

Where the proceeding is to compel the application of certain taxes to the discharge of bonds issued by a county in aid of a railroad, it will be presumed that the proper officers had assessed, collected, and paid over the taxes as required by law. *Hand v. Columbia County Sup'rs*, 31 Hun (N. Y.) 531.

Where in proceedings to condemn land for railroad purposes it appears that one of the subscribers to the capital stock of the petitioner is a corporation, and that its subscription is essential to make up the required amount, in the absence of any proof, it may not be presumed against the act of the corporation and its payment of the percentage required, that it acted beyond its powers. *In re Rochester, H. & L. R. Co.*, 110 N. Y. 119, 13 Cent. Rep. 234, 17 N. E. Rep. 678, 16 N. Y. S. R. 863; *affirming* 45 Hun 126, 9 N. Y. S. R. 560, 19 Abb. N. Cas. 421.

Where different inferences may be drawn from the same state of circumstances, it is the duty of the court to presume in favor of innocence rather than of intentional and guilty misconduct. *So held*, where a contractor sued for damages for fraudulent representations on the part of the defendant concerning the work to be done. *Guidet v. New York, L. E. & W. R. Co.*, 9 N. Y. S. R. 26, 44 Hun 628, *mem.*; *affirmed* in 120 N. Y. 649, *mem.*, 24 N. E. Rep. 1102, *mem.*, 31 N. Y. S. R. 998, *mem.*

At an annual meeting of stockholders a resolution was adopted that thereafter the board of directors should consist of seven instead of thirteen. The articles of association stated that the length of the road and its branches was thirty-five miles. *Held*, that it will be assumed that the main line of the road was not over fifteen miles, since the articles of association did not otherwise state, and thus bring the election of directors within N. Y. Act of 1864, ch. 582, § 3, permitting railroad companies "whose main route of road does not exceed fifteen miles."

to elect seven directors. *Beardsley v. Johnson*, 121 N. Y. 224, 24 N. E. Rep. 380, 30 N. Y. S. R. 691.

The evidence showed that a mail bag was thrown either from the mail car, express car, or baggage car on a train, by a person within the car. The bag could not lawfully have been in any other than the mail car, and no person other than a postal clerk or agent could lawfully enter such car or throw the bag therefrom. *Held*, that in the absence of evidence to the contrary, it will be presumed that the bag was thrown from the mail car by a postal clerk or agent. *Muster v. Chicago, M. & St. P. R. Co.*, 18 Am. & Eng. R. Cas. 113, 61 Wis. 325, 21 N. W. Rep. 223, 49 Am. Rep. 41, n.—DISTINGUISHING *Kirst v. Milwaukee, L. S. & W. R. Co.*, 46 Wis. 489; *Cummings v. National Furnace Co.*, 60 Wis. 603. QUOTING *Scott v. London & St. K. Docks Co.*, 3 H. & C. 596.

118. As to survivorship of persons killed in same accident.—Where two persons, husband and wife, are shown to have perished in the same casualty (the wrecking of a railway train by the giving way of a bridge), nothing appearing to the contrary, it is a presumption of law that they died at the same moment. *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442.

119. From failure to produce best evidence.—A passenger who had bought a commutation ticket over two roads was injured on one of them and sued both, alleging that they were partners or jointly interested. It was admitted that the relation existing between the two companies was defined by a written contract, which they refused to produce upon notice. There was some evidence, but slight, that the two companies were jointly interested. *Held*, that the fact that the companies had in their possession the best evidence of their relation to each other, and refused to produce it, raised a presumption that the evidence was adverse to them; and this, in connection with the slight evidence produced by plaintiff, was sufficient to support a joint verdict against them. *Wylde v. Northern R. Co.*, 53 N. Y. 156, 14 Abb. Pr. N. S. 213.

120. From failure to produce employees as witnesses.—The failure to examine witnesses who are employes will not justify the application of the presumption of negligence, unless they were present or

it be made evident that they had knowledge which the employer desired to conceal. *Peetz v. St. Charles St. R. Co.*, 42 La. Ann. 541, 7 So. Rep. 688.

The failure of defendant to summon a witness who was an employe at the time of the accident, a year preceding the trial, in the absence of any proof that he remained in its employ, or was accessible, or was even living at the time of trial, cannot sustain any presumption against defendant. *Sauer v. Union Oil Co.*, 43 La. Ann. 699, 9 So. Rep. 566.

121. Intent presumed from conduct.—Unlawful intent may be shown by direct evidence, or it may be inferred from conduct which shows a reckless disregard of consequences and a willingness to inflict injury by purposely and voluntarily doing an act with knowledge that some one is unconsciously or unavoidably in a situation to be injured thereby. *Gregory v. Cleveland, C., C. & I. R. Co.*, 31 Am. & Eng. R. Cas. 440, 112 Ind. 385, 14 N. E. Rep. 228.

122. Of competency of employees.—In an action against a railroad for alleged negligence, in the absence of evidence to the contrary, the presumption is that competent and sufficient servants were employed by defendant, and that proper regulations for the management of its business had been established; the burden, therefore, of showing an omission of duty in these respects is upon plaintiff. *Potter v. New York C. & H. R. R. Co.*, 136 N. Y. 77, 32 N. E. Rep. 603, 48 N. Y. S. R. 843; *reversing* 46 N. Y. S. R. 895, 19 N. Y. Supp. 862.

123. Of continuance of a given state of facts.—It is a presumption of law that a state of facts once shown to exist remains for a reasonable time. Therefore, where a company is charged with killing cattle by reason of an alleged defective cattle-guard, it is competent to prove that the cattle-guard was defective some months before the accident, as tending to show that it was so at the time of the accident. *Haskings v. St. Louis, K. C. & N. R. Co.*, 58 Mo. 302.

If there be nothing to raise an inference of a change in the condition of a fence subsequent to an injury to live stock, it is competent to prove a defective condition shortly after the injury, within such time as will tend to establish the condition at the time of the injury. *Wabash R. Co. v. Kime*, 42 Ill. App. 272.

had knowledge
ed to conceal.
Co., 42 La. Ann.

to summon a
at the time of
ing the trial, in
at he remained
ble, or was even
cannot sustain
endant. *Sauer*
699, 9 So. Rep.

d from con-
y be shown by
e inferred from
less disregard
gness to inflict
luntarily doing
some one is un-
a situation to
y v. Cleveland,
Eng. R. Cas.
Rep. 228.

of employees.
road for alleged
of evidence to
on is that com-
ants were em-
at proper regu-
of its business
arden, therefore,
duty in these
Potter v. New
5 N. Y. 77, 32 N.
843; reversing
Supp. 862.

e of a given
sumption of law
own to exist re-
me. Therefore,
ed with killing
leged defective
t to prove that
ve some months
ng to show that
accident. *Has-*
N. R. Co., 58

ise an inference
ation of a fence
live stock, it is
ective condition
ain such time as
condition at the
bash R. Co. v.

The fact that machinery has been used with safety for years, and is not obviously dangerous, will not (especially where the lives of others may depend on its safety) justify a presumption that it will continue safe, and that its use may be continued without examining it to ascertain if its safety may not have been impaired from wear. *Goodsell v. Taylor*, 41 Minn. 207, 42 N. W. Rep. 873.

124. Of lawful incorporation.—In the absence of an averment to the contrary, it must be presumed that a railroad company was organized under the general laws of the state, and therefore possessed of the powers which these laws confer upon such corporations, and subject to the liabilities and restrictions imposed thereby. *Cummins v. Evansville & T. H. R. Co.*, 36 Am. & Eng. R. Cas. 147, 115 Ind. 417, 15 West. Rep. 456, 18 N. E. Rep. 6. *Kostendader v. Pierce*, 37 Iowa 645.

Where a corporation has gone into operation, and rights have been acquired under its charter, every presumption should be made in favor of its legal existence. *Busey v. Hooper*, 35 Md. 15.

125. Of negligence, when accident and injury are shown.—(1) *Generally.**

—As a general rule, proof of an injury occurring as the proximate result of an act which, under ordinary circumstances, would not, if done with due care, have injured any one, is enough to make out a presumption of negligence; and this rule applies even when no special relation, like that of passenger and carrier, exists between the parties. *North Chicago St. R. Co. v. Cotton*, 52 Am. & Eng. R. Cas. 238, 140 Ill. 486, 29 N. E. Rep. 899; affirming 41 Ill. App. 311.—FOLLOWING *Galena & C. U. R. Co. v. Yarwood*, 17 Ill. 509; *Pittsburg, C. & St. L. R. Co. v. Thompson*, 56 Ill. 138. REVIEWING *Byrne v. Boadle*, 2 H. & C. 722.

Where a company is sued for an injury and there is sufficient proof to raise a presumption that it resulted from negligence,

* Presumption of negligence, when occurrence of accident raises, see notes, 44 AM. & ENG. R. CAS. 351; 30 Id. 621; 16 Id. 314; 6 Id. 418; 75 AM. DEC. 267; 83 Id. 589; 50 AM. REP. 553; 20 AM. ST. REP. 490; 30 Id. 736.

When mere happening of accident does not establish presumption of negligence, see note, 2 L. R. A. 820.

Presumption of negligence where injury is shown, but where there is no evidence as to who was at fault, see note, 6 AM. ST. REP. 792.

the presumption can only be rebutted by the company by proof that the injury resulted from circumstances against which human prudence and foresight could not guard. *Bowen v. New York C. R. Co.*, 18 N. Y. 408.

It is not enough for it to insist that it does not know how the accident occurred and that it is impossible for it to find out. *Central R. Co. v. Sanders*, 27 Am. & Eng. R. Cas. 300, 73 Ga. 513.

When a duty is imposed on a person to keep premises in a safe condition, and an accident results from the unsafe condition of the premises, negligence in the person on whom the duty is cast is presumed; and the burden of proof is on him to show that he used reasonable care and diligence. *Cunningham v. Union Pac. R. Co.*, 4 Utah 206, 7 Pac. Rep. 795.

There is no presumption of negligence against a common carrier where the accident is shown to have been occasioned by the act of God: the burden of proving negligence is always upon the plaintiff in such a case. *Gleeson v. Virginia Midland R. Co.*, 28 Am. & Eng. R. Cas. 202, 5 Mackey (D. C.) 356.

The fact that an accident occurred, which resulted in the loss of life, is not *per se* evidence of the liability of the defendant. *Friedman v. Dry Dock, E. B. & B. R. Co.*, 3 N. Y. S. R. 557.

An accident may be of such a character as to show, in a case where machinery is found perfect, that there was no negligence on the part of those handling it. *Cummings v. National Furnace Co.*, 60 Wis. 603, 18 N. W. Rep. 742, 20 N. W. Rep. 665.

(2) *Injuries to passengers, generally.**—Proof of an injury to a passenger upon a car, while in the exercise of ordinary care himself, is *prima facie* evidence of negligence on the part of the company. *New Jersey R. & T. Co. v. Pollard*, 22 Wall. (U. S.) 341. *Vicksburg & M. R. Co. v. Phillips*, 30 Am. & Eng. R. Cas. 587, 64 Miss. 693, 2 So. Rep. 537.—REVIEWED IN *Richmond & D. R. Co. v. Burnsed*, 70 Miss. 437.—*Minster v. Citizens' R. Co.*, 53 Mo. App. 276. *Carpue v. London & B. R. Co.*, 5 Q. B. 747, D. & M. 608, 3 Railw. Cas. 692, 8 Jur. 464, 13 L. J. Q. B. 138.—QUESTIONED IN *Hammack*

* Proof of injury to passengers is *prima facie* evidence of negligence, see notes, 43 AM. DEC. 363; 62 Id. 680; 43 AM. REP. 73; 15 L. R. A. 35. See also 47 AM. & ENG. R. CAS. 492, *abstr.*

v. White, 8 Jur. N. S. 796, 11 C. B. N. S. 588.

Where a passenger rightfully on a train is injured by the breaking down of a bridge, the presumption is that the carrier was guilty of negligence, and the *onus* is upon it to prove the contrary. *Louisville, N. A. & C. R. Co. v. Thompson*, 27 Am. & Eng. R. Cas. 88, 107 Ind. 442, 57 Am. Rep. 120, 8 N. E. Rep. 18, 9 N. E. Rep. 357.

And in order to overcome this presumption the carrier must show that the injury arose from an accident which the utmost care, diligence, and skill could not prevent, or that the injury would not have occurred but for the passenger's own negligence. *Louisville & N. R. Co. v. Ritter*, 28 Am. & Eng. R. Cas. 167, 85 Ky. 368, 3 S. W. Rep. 591.—FOLLOWED IN *Central Pass. R. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. Rep. 441.

There is no presumption of negligence where a passenger is injured by being struck by timber loaded on a freight train which was passing on another track, and which was secured by a chain only, which broke, and not by stanchions, which would have been safer. *Hanson v. Lancashire & Y. R. Co.*, 20 W. R. 297.

(3) *Derailment — Collision.** — Where a passenger is in the use of proper care, and an injury happens to him by the cars running off the track, the cause of the accident not appearing from the attending circumstances, negligence on the part of the company may be assumed, unless the imputation is removed by satisfactory evidence on its part. The rule rests upon the reason that the track and the cars are in the exclusive possession of the company, and it is ordinarily not in the power of the passenger to explain the cause of the accident. *Stevens v. European & N. A. R. Co.*, 66 Me. 74.

And if the company refuses to afford any explanation of the cause of the accident, there is a case for the jury. *Flannery v. Waterford & L. R. Co.*, 11 Ir. R. C. L. 30. *Feital v. Middlesex R. Co.*, 109 Mass. 398.

Where a car is thrown from the track by the breaking of a rail, and causes injury to a passenger, a presumption of negligence arises against the company, which it must

rebut by clear and explicit proof that the accident could not have been avoided by the utmost skill and care; and merely showing that the rail had been laid the morning before the accident is only a circumstance tending to disprove negligence, for the consideration of the jury. *Cleveland, C., C. & I. R. Co. v. Newell*, 23 Am. & Eng. R. Cas. 492, 104 Ind. 264, 54 Am. Rep. 312, 3 N. E. Rep. 836.—FOLLOWING *Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98.—DISTINGUISHED IN *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, 11 West. Rep. 877, 14 N. E. Rep. 391. FOLLOWED IN *Louisville, N. A. & C. R. Co. v. Jones*, 28 Am. & Eng. R. Cas. 170, 108 Ind. 551.

Proof that the derailment would not ordinarily have happened had the track and machinery been in proper condition, and the latter operated with proper care, is sufficient to *prima facie* show negligence, and casts upon the defendant the burden of showing that the injury was caused without its fault. *Seybolt v. New York, L. E. & W. R. Co.*, 18 Am. & Eng. R. Cas. 162, 95 N. Y. 562, 47 Am. Rep. 75; affirming 31 Hun 100.

The presumption of negligence which arises where a passenger is injured by reason of the train leaving the track is rebutted by proof that the accident arose from the wilful and wrongful act of a stranger. *Latch v. Rumner R. Co.*, 27 L. J. Ex. 155.

The presumption is not overcome where the condition of the track at the place of accident, and of the coach in which the passenger was riding, is not shown. *St. Louis & S. F. R. Co. v. Mitchell*, 57 Ark. 418, 21 S. W. Rep. 883.

Where a passenger is injured in a collision caused by a train running against another train standing still at a station, the mere fact of the occurrence of such accident is *prima facie* evidence of negligence. *Skinner v. London, B. & S. C. R. Co.*, 5 Ex. 787, 15 Jur. 299.—QUESTIONED IN *Ham-mack v. White*, 8 Jur. N. S. 796, 11 C. B. N. S. 588.

(4) *Street-car cases*—The happening of an accident to a passenger on a street-car, if the accident is connected with the means of transportation, raises a presumption of negligence on the part of the company. *Clow v. Pittsburgh Traction Co.*, 158 Pa. St. 410, 27 Atl. Rep. 1004. *Hitchcock v. Brooklyn City R. Co.*, 8 N. Y. S. R. 848, 44 Hun 627.

Plaintiff was riding on defendant's street-

* Derailment of cars raises a presumption of negligence, see note, 47 AM. & ENG. R. CAS. 499.

Presumption of negligence where passenger is injured by collision of carriage with other objects, see note, 15 L. R. A. 37.

proof that the
n avoided by
merely show-
the morning
circumstance
e, for the con-
land, C., C. &
Eng. R. Cas.
312, 3 N. E.
hi v. Lowery,
98.—DISTIN-
& P. R. Co. v.
Rep. 877, 14
N. Louisville,
Am. & Eng.

would not or-
the track and
condition, and
er care, is suf-
egligence, and
the burden of
caused without
L. E. & W.
as, 162, 95 N.
ming 31 Hun

igence which
injured by rea-
sack is rebutted
rose from the
f a stranger.
J. Ex. 155.
ercome where
t the place of
in which the
t shown. St.
chell, 57 Ark.

ered in a col-
ing against an-
a station, the
such accident
f negligence.
R. Co., 5 Ex.
NED IN Ham-
96, 11 C. B. N.

happening of an
street-car, if
with the means
presumption of
the company.
Co., 158 Pa. St.
ock v. Brooklyn
44 Hun 627.
ndant's street-

car, which was being driven with unusual speed, and was injured by the pole of a truck which penetrated through the front of the car. *Held*, that proof of the unusual rate of speed at which the car was driven raised a presumption of negligence, which called for an explanation on the part of the company. *Hill v. Ninth Ave. R. Co.*, 34 *Am. & Eng. R. Cas.* 522, 109 *N. Y.* 259, 16 *N. E. Rep.* 61, 14 *N. Y. S. R.* 844, 11 *Cent. Rep.* 921.—DISTINGUISHED IN *Alexander v. Rochester City & B. R. Co.*, 128 *N. Y.* 13.

(5) *Injuries to employes*.—Where there is evidence showing that a coupling-pin fell from a car platform to the wheel of a car of a moving train, and was thence thrown by the rotary motion of the wheel some distance and struck a track repairer, it is fair to infer that the train employes placed the pin on the platform without fastening it; and the company is *prima facie* liable. *Doyle v. Chicago, St. P. & K. C. R. Co.*, 39 *Am. & Eng. R. Cas.* 314, 77 *Iowa* 607, 42 *N. W. Rep.* 555.

The fact that an accident is unusual and extraordinary, whereby a fireman loses his life, does not tend to prove negligence on the part of the railroad company. *Kuhns v. Wisconsin, I. & N. R. Co.*, 70 *Iowa* 561, 31 *N. W. Rep.* 868.—DISTINGUISHING *Tuttle v. Chicago, R. I. & P. R. Co.*, 48 *Iowa* 236.

In an action for injury to an employe from a defect in a roadway which has just come under its control from another company, there can be no presumption that defendant had had sufficient time to remedy the defect. *Batterson v. Chicago & G. T. R. Co.*, 8 *Am. & Eng. R. Cas.* 123, 49 *Mich.* 184, 13 *N. W. Rep.* 508.

(6) *Injuries to animals*.—When stock is killed by a train, negligence is presumed against the company until excused or disproved. *St. Louis, I. M. & S. R. Co. v. Hagan*, 19 *Am. & Eng. R. Cas.* 446, 42 *Ark.* 122.

But the fact that stock is found near a railroad, wounded, creates no presumption that the injury was done by the railroad train, as in cases of killing or mortally wounding stock; but when it is proved that

the injury was done by the train, then the same presumption of negligence arises against the company as in cases of killing. *St. Louis, I. M. & S. R. Co. v. Hagan*, 19 *Am. & Eng. R. Cas.* 446, 42 *Ark.* 122.—FOLLOWED IN *St. Louis & S. F. R. Co. v. Sageley*, 56 *Ark.* 549.

The provision of Miss. Code 1880, § 1059, that in actions against railroad companies for damage to persons or property, proof of injury inflicted by the running of locomotives or cars shall be *prima facie* evidence of negligence, only raises a presumption which may be rebutted by evidence on the part of the railroad company; and when such testimony is introduced, the controversy is to be decided upon the weight of the evidence. *Jones v. Bond*, 40 *Am. & Eng. R. Cas.* 191, 40 *Fed. Rep.* 281.

126. Of right of way, from fact of undisturbed operation of road.—In an action against a company for damages on account of personal injuries received at a trestle across a ravine in a public street, it is immaterial whether a track was rightfully laid in the street or not, since the right to lay it there might have been, and the presumption is that it was, lawfully acquired. *Glass v. Memphis & C. R. Co.*, 94 *Ala.* 581, 10 *So. Rep.* 215.

Where a company has built and is operating its road over a tract of land, and there is on the one hand no evidence that the company owns the land which it occupies with its road, and it is not pretended, on the other hand, by the owner of the tract that the company is a trespasser thereon, it is fair to presume that the company has an easement in the land, acquired either by condemnation or by purchase. *Drake v. Chicago, R. I. & P. R. Co.*, 17 *Am. & Eng. R. Cas.* 45, 63 *Iowa* 302, 50 *Am. Rep.* 746, 19 *N. W. Rep.* 215.—DISTINGUISHING *Livingston v. McDonald*, 21 *Iowa* 160; *Cornish v. Chicago, B. & O. R. Co.*, 49 *Iowa* 378; *Van Orsdol v. Burlington, C. R. & N. R. Co.*, 56 *Iowa* 470.

Where a railroad company used a portion of the levee, with no cross streets over it, exclusively for storing and distributing cars and freight, it will be assumed that it had a right to use it, in the absence of evidence to the contrary. *Rafferty v. Missouri Pac. R. Co.*, 91 *Mo.* 33, 3 *S. W. Rep.* 393.

In the absence of allegations or proof to the contrary, it will be presumed that a railroad which has been built through a

* Presumption of negligence where live stock is injured while in transit. States in which presumption exists, and others in which it is denied, see note, 15 *L. R. A.* 39.

Inference of negligence from lapse of time during which fence is in bad repair, see note, 13 *AM. & ENG. R. CAS.* 561.

city street for a number of years (here forty) has legally acquired a right to be built there; and that, in raising its grade, it had the permission of the city, and had done all the law required of it in not unnecessarily impairing the usefulness of the street. *Uline v. New York C. & H. R. R. Co.*, 23 Am. & Eng. R. Cas. 3, 101 N. Y. 98, 4 N. E. Rep. 536; reversing 31 Hun 85.

127. Setting out fire.*—The American cases, except in those states where it is regulated by statute, generally hold that no inference of negligence against a company arises from the fact alone that a fire is produced by sparks from a locomotive. *Indianapolis & C. R. Co. v. Paramore*, 31 Ind. 143.

And where the negligence is charged, the burden of proof is on the party complaining. *Chicago & E. I. R. Co. v. Ostrander*, 32 Am. & Eng. R. Cas. 361, 116 Ind. 259, 12 West. Rep. 718, 15 N. E. Rep. 227, 19 N. E. Rep. 110.—CRITICISING Pittsburgh, C. & St. L. R. Co. v. Hixon, 79 Ind. 111, 110 Ind. 225.

128. That employees did their duty.—The presumption obtains that trainmen in charge of a train did their duty, where the evidence fails to show anything tending to prove negligence. *Jewett v. Kansas City, C. & S. R. Co.*, 50 Mo. App. 547.

129. That one is employed in the capacity in which he acts.—In the absence of contrary proof it will be presumed that persons employing the carrier acted as the agents of the owner in making the contract of carriage. *Austin v. St. Louis & St. P. Packet Co.*, 15 Mo. App. 197.

Where a man appears on a train in the dress of a brakeman, and assumes to act with the authority of one, and is addressed by other employes as a brakeman, it will be presumed that he was in the employ of the company as such. *Hughes v. New York & N. H. R. Co.*, 4 J. & S. (N. Y.) 222.—FOLLOWED IN *Hoffman v. New York C. & H. R. Co.*, 12 J. & S. 1.

And where a man is on a moving train wearing the cap and badge of a conductor, and assumes the authority of one, and is addressed by other employes as such, it will be presumed that he was employed by the company as a conductor. *Hoffman v. New*

York C. & H. R. R. Co., 12 J. & S. (N. Y.) 1.—FOLLOWING *Hughes v. New York & N. H. R. Co.*, 4 J. & S. 222.

There being no dispute as to the fact of a passenger having been violently ejected from a train, while running at a high rate of speed, by a person representing himself to be a conductor, and possessed of the paraphernalia of such officer at the time, and being actually engaged in taking fares of other passengers, a strong presumption is created that such person was, in fact, a conductor of the train. When this presumption is aided by the positive and uncontradictory testimony of two witnesses, who saw the passenger ejected, very strong circumstantial proof will be required to overcome it and relieve the railroad company from liability. *Lampkins v. Vicksburg, S. & P. R. Co.*, 47 Am. & Eng. R. Cas. 622, 42 La. Ann. 997, 8 So. Rep. 530.

There is no presumption that the interference of a mere local agent of a railroad, between witnesses and those interested in their evidence, is done in the course of his employment or by instruction of the company. *Marsh v. South Carolina R. Co.*, 56 Ga. 274.

130. That owner of road operates it.—If a party finds a corporation organized under the laws of the state in the possession of a railroad partially or fully completed, he is not bound to assume that there may be some other corporation having like powers, which, prior thereto, was in possession or had rights therein. Unless the record in some way notifies him of the title of the other corporation, he is justified in assuming that the company in possession is the only company that ever was in possession, or that ever did work thereon or had any rights thereto. *Blair v. St. Louis, H. & K. R. Co.*, 27 Fed. Rep. 176.

Where a party is injured in attempting to cross a track, and it appears that it is not at a public crossing, the presumption will be indulged that it was on the company's own property, for the purpose of showing the extent of the care that the company must exercise to avoid injury. *Lake Shore & M. S. R. Co. v. Clark*, 41 Ill. App. 343.

When it is admitted that a railroad company is the owner of a railroad then being operated, a presumption arises that the same is operated by the company owning it, and the burden of proof is upon such company to show to the satisfaction of the jury

* Presumption of negligence in action for the destruction of property by fire, see notes, 45 AM. & ENG. R. CAS. 563, 15 L. R. A. 40. See also 35 AM. & ENG. R. CAS. 243, *abstr.*; 43 *Id.* 27, *abstr.*; 54 *Id.* 535, *abstr.* See title FIRES.

& S. (N. Y.)
New York & N.

to the fact of
ejected
at a high rate
presenting himself
of the
at the time,
in taking fares
presumption
was, in fact, a
when this pre-
spective and un-
two witnesses,
d, very strong
e required to
railroad com-
v. *Vicksburg*,
g. R. Cas. 622,
o.

that the inter-
of a railroad,
interested in
e course of his
n of the com-
ina R. Co., 56

and operates
poration organ-
state in the
tially or fully
o assume that
poration hav-
r thereto, was
erein. Unless
ies him of the
he is justified
y in possession
er was in pos-
k thereon or
ir v. *St. Louis*,
176.

attempting to
that it is not at
ption will be
company's own
showing the
company must
e Shore & M.
p. 343.

railroad com-
d then being
ses that the
any owning it,
oon such com-
on of the jury

that such is not the fact. *Peabody v. Oregon R. & N. Co.*, 47 *Am. & Eng. R. Cas.* 598, 21 *Oreg.* 121, 26 *Pac. Rep.* 1053. *Walsh v. Missouri Pac. R. Co.*, 102 *Mo.* 582, 14 *S. W. Rep.* 873, 15 *S. W. Rep.* 757. *Ferguson v. Wisconsin C. R. Co.*, 19 *Am. & Eng. R. Cas.* 285, 63 *Wis.* 145, 23 *N. W. Rep.* 123.

But the use of a railway track by a switch engine in a populous city is not presumptive evidence that the owners of the engine own and operate the track and the approaching sidings. *Calhoun v. Gulf, C. & S. F. R. Co.*, 84 *Tex.* 226, 19 *S. W. Rep.* 341.

Courts will not judicially assume a transfer of one road to another to have been prior to a date given in the testimony for such transfer. *Missouri Pac. R. Co. v. Speed*, 3 *Tex. Civ. App.* 454, 22 *S. W. Rep.* 527.

131. That persons are in possession of the sense of hearing.—In the absence of proof showing that employes of a train were informed of the deafness of one killed upon the track, he must be regarded, so far as the duty of the defendants was concerned, as in the full possession of his faculty of hearing. *Frazer v. South & N. Ala. R. Co.*, 28 *Am. & Eng. R. Cas.* 565, 81 *Ala.* 185, 1 *So. Rep.* 85.

Where a sound is heard by one person, the inference would be that all other persons of good hearing, and having equal opportunity to hear, heard the sound also; and if they should testify that they did not, it would be a question for the jury to determine whether the direct evidence was not rebutted by the circumstantial. *Ford v. Central Iowa R. Co.*, 17 *Am. & Eng. R. Cas.* 599, 69 *Iowa* 627, 21 *N. W. Rep.* 587, 29 *N. W. Rep.* 755.

132. That the common law is in force in other jurisdictions.—The statute law of another state is a fact which must be proved like any other fact. In the absence of anything to the contrary, the presumption is that the common law obtains, and not legislation, similar to that of the state wherein the question arises. *Eichelburger v. Pittsburg, C. & St. L. R. Co.*, (Ohio) 9 *Am. & Eng. R. Cas.* 158.

2. Burden of Proof.

133. In general.—The burden of proving negligence is on the party alleging it. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 *Am. &*

Eng. R. Cas. 603, 27 *Fla.* 1, 9 *So. Rep.* 661. *Chicago, St. P., M. & O. R. Co. v. Elliott*, 55 *Fed. Rep.* 949.

Where a company receives land under a government grant, and sells a portion of it, retaining a vendor's lien thereon, and afterwards sues to enforce the lien, the defendant, having taken possession under the sale, and still holding it undisturbed, has the burden of proof to establish a defense that the company had not complied with all the conditions of the grant, and therefore had not acquired title to the land. *Mathis v. Tennessee & C. R. Co.*, 83 *Ala.* 411, 3 *So. Rep.* 793.

The burden is upon the plaintiff, suing for the killing of his slave by a train upon which the slave was being carried, to show some negligence on the part of the company, unless there be some circumstances, such as running off the track or upsetting of the coach, sufficient to change the *onus*. *Mitchell v. Western & A. R. Co.*, 30 *Ga.* 22.

Where the directors of a corporation meet and take official action, one who claims that such action is invalid for want of proper notice of the meeting has the burden to prove his claim. *Hardin v. Iowa R. & C. Co.*, 40 *Am. & Eng. R. Cas.* 394, 78 *Iowa* 726, 6 *L. R. A.* 52, 43 *N. W. Rep.* 543.

In an action upon a contract to pay rebates upon the breaking of a pool between defendant and other railway companies, it is not necessary for plaintiff to allege or prove the parties to the pool, nor the terms thereof; but it is sufficient, to sustain a verdict for plaintiff, to introduce evidence tending to show the existence of the pool and the breaking thereof. *Marsh v. Chicago, R. I. & P. R. Co.*, 79 *Iowa* 332, 44 *N. W. Rep.* 562.

Plaintiff has the burden of proving that a third person, now dead, was living at the time of certain acts complained of, where the rights alleged as the basis of the action would cease with the death of such person. *Chiffin v. Boston & A. R. Co.*, 157 *Mass.* 489, 32 *N. E. Rep.* 659.

Where a city council has no power to authorize the extension of a street railroad unless it is where such extension is necessary to the enjoyment of a previous valid grant, and the company claims the right to extend on such grounds, the burden is upon it to prove such necessity. *People v. Third Ave. R. Co.*, 45 *Barb. (N. Y.)* 63, 30 *How. Pr.* 121; affirmed (?) 31 *How. Pr.* 637.

It seems, in an action based upon negligence for an injury to an infant, who may or may not have been sui juris when it occurred, and the fact is material upon the question of contributory negligence, that the burden is upon plaintiff to give some evidence showing that the party injured was not, as matter of fact, capable of exercising judgment and discretion. *Stone v. Dry Dock, E. B. & B. R. Co.*, 38 *Am. & Eng. R. Cas.* 489, 115 *N. Y.* 104, 21 *N. E. Rep.* 712, 23 *N. Y. S. R.* 551; *reversing* 46 *Hun* 184, 11 *N. Y. S. R.* 537.

The competency or incompetency of a person to perform a given duty cannot, in the absence of some law so declaring, be made to depend on race or color; but in each case this must depend upon intelligence to know, and ability and disposition to perform, the duties pertaining to any given position. *Missouri Pac. R. Co. v. Christmas*, 65 *Tex.* 369.

Proof of facts which show the non existence of such intelligence, ability, or disposition must be made by the party who asserts its non-existence. The law does not presume it because the person whose qualities are the subject of investigation may be of one or another race or color; nor is a jury at liberty to infer it from such fact. *Missouri Pac. R. Co. v. Christmas*, 65 *Tex.* 369.

134. Actions by employees—Defective machinery.*—The burden is upon the servant who sues his master for damages resulting from the use of defective machinery furnished by the latter, to establish *prima facie* (1) that the machinery was defective; (2) that the defects were the proximate cause of the injuries; and (3) that the master had knowledge of them, or might, by the proper exercise of care and diligence, have acquired such knowledge. *Hudson v. Charleston, C. & C. R. Co.*, 41 *Am. & Eng. R. Cas.* 348, 104 *N. Car.* 491, 10 *S. E. Rep.* 669.

In an action by an employé for a personal injury from being run over by a car while it was being switched, if the negligence of the company in the employment of the foreman or conductor engaged in moving the car, or in furnishing proper appliances, etc., is re-

lied on, the burden of proving such negligence by a preponderance of evidence rests upon the plaintiff. *Chicago & E. I. R. Co. v. Geary*, 17 *Am. & Eng. R. Cas.* 606, 110 *Ill.* 383.

Where an employé is injured by a collision through the alleged defect of a brake-shoe having worn thin, so that the brake was ineffectual, it is incumbent upon him to prove facts permitting the inference that the brake was not effectual. *Smith v. New York C. & H. R. R. Co.*, 118 *N. Y.* 645, 23 *N. E. Rep.* 990, 30 *N. Y. S. R.* 96; *reversing* 45 *Hun* 588, 9 *N. Y. S. R.* 612.

135. As to fact of incorporation.—The defendant is not required to prove the corporate existence of the plaintiff when the plaintiff has not put that fact in issue by affidavit, in accordance with Mo. Act of 1883. *St. Louis, K. C. & C. R. Co. v. North*, 31 *Mo. App.* 345.

136. Authority of officers and agents.—Persons dealing with the officers of a corporation, or with persons assuming to represent it, are chargeable with notice of the purpose of its creation and its powers, and with the authority, actual or apparent, of such officers or agents; and when they seek to charge the corporation with liability upon a contract made apparently in its behalf, the burden is upon them to prove the authority of the person assuming to act as such officer or agent. *Wilson v. Kings County El. R. Co.*, 114 *N. Y.* 487, 21 *N. E. Rep.* 102, 24 *N. Y. S. R.* 81; *affirming* 40 *Hun* 640, 1 *N. Y. S. R.* 759. *Alabama & T. R. Co. v. Nabors*, 37 *Ala.* 489.

The burden of proof is on a person injured while riding upon an engine, to show that the engineer had authority from the company to permit him to ride there, the presumption being that he had no right to be there whether he paid fare or not. *Robertson v. New York & E. R. Co.*, 22 *Barb.* (N. Y.) 91.—REVIEWED IN *Goodrich v. Pennsylvania & N. Y. C. & R. Co.*, 29 *Hun* (N. Y.) 50.

Evidence that a person, wearing the uniform of the railroad company, said to a passenger, "We have telegraphed for an extra train," and then invited him into the waiting-shed, and, as an officer, directed him, when the train arrived at a place other than the platform, to go and take it, is sufficient *prima facie* evidence that such person was what he seemed to be, and the burden is imposed upon the company of

* As between master and servant burden of proof is with party alleging want of due care, see notes, 13 *L. R. A.* 375; 8 *Id.* 636. See also 53 *AM. & ENG. R. CAS.* 225, *abstr.*, and title EMPLOYEES, INJURIES TO.

g such negli-
vidence rests
E. I. R. Co.
Cas. 606, 110

red by a colli-
ct of a brake-
hat the brake
ent upon him
inference that
Smith v. New
N. Y. 645, 23
R. 96; revers-
612.

orporation.
aired to prove
the plaintiff
out that fact in
ance with Mo.
C. & C. R. Co. v.

officers and
with the officers
ersons assuming
ble with notice
on and its pow-
r, actual or ap-
or agents; and
the corporation
ct made appar-
en is upon them
e person assum-
agent. Wilson
14 N. Y. 487, 21
R. 81; affirm-
S. R. 759. Ala-
hors, 37 Ala. 489,
on a person in-
engine, to show
hority from the
o ride there, the
e had no right
aid fare or not.
E. R. Co., 22
ED IN Goodrich
C. & R. Co., 29

wearing the uni-
pany, said to a
graphed for an
ted him into the
officer, directed
ived at a place
o go and take it,
vidence that such
d to be, and the
the company of

disproving it. *Baltimore & O. R. Co. v. Kane*, 69 Md. 11, 13 Atl. Rep. 387, 12 Cent. Rep. 95.

137. Injury to or loss of live stock.*

—The liability of a company for damages resulting from a failure to comply with the statutory requirements, or from other negligence, whether to persons or to live stock or other property, is the same under Ala. Code, §§ 1699, 1700; but where the injury is to either live stock or other property, the burden of showing a compliance with the statutory requirements is upon the company. *Clements v. East Tenn., V. & G. R. Co.*, 77 Ala. 533.—LIMITED IN ALABAMA *G. S. R. Co. v. McAlpine*, 80 Ala. 73.

Proof of loss or injury to live stock while in the hands of the shipper is *prima facie* evidence of negligence; but where the owner agrees to load and unload them, and in fact does so, the burden of proof is upon him to show negligence on the part of the carrier. *Louisville, C. & L. R. Co. v. Hedger*, 9 Bush (Ky.) 645.

Where live stock are shipped under a special contract relieving the company from liability for injury during transportation, the burden of proving negligence causing an injury is upon the shipper. *Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 623.

Especially where, pursuant to the contract, the shipper has charge of the stock during transportation. *St. Louis, I. M. & S. R. Co. v. Weekly*, 35 Am. & Eng. R. Cas. 635, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. Rep. 134. *Clark v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 440.

It is not necessary for the plaintiff, in an action for killing cattle, to prove by positive evidence the place where the cattle entered, but it is sufficient if facts are proved from which the place of entry can be inferred. *Evansville & T. H. R. Co. v. Mosier*, 22 Am. & Eng. R. Cas. 569, 101 Ind. 597.

138. Loss or destruction of merchandise.†—(1) Onus on carrier.—Where

* Burden of proof as to cause of injury to live stock during transportation, see note, 17 L. R. A. 339.

Burden of proof on company to show no obligation to fence, see note, 19 Am. & Eng. R. Cas. 624. See also ANIMALS, INJURIES TO, 405-523.

† Burden of proof in case of loss of goods by carrier, see note, 6 L. R. A. 852.

Burden of proof in actions against carrier where its liability has been limited, see note, 45 Am. & Eng. R. Cas. 367.

Burden of proof to show contract by notice be-
5 D. R. D.—29.

a carrier delivers goods in a damaged condition, the burden is on it to show that they were received in the same condition, or that they were damaged without fault on its part, as by the act of God or the public enemy. *Montgomery & W. P. R. Co. v. Moore*, 51 Ala. 394. *McCoy v. Keokuk & D. M. R. Co.*, 44 Iowa 424.

Where the bill of lading contains an express stipulation that the carrier is "not accountable for rust or breakage," proof of injury to the goods by breakage nevertheless makes out a *prima facie* case of negligence against him, and the onus is then on him to show the exercise of due care and vigilance on his part to prevent the injury; unless the nature of the injury, or of the goods, of itself furnishes evidence that due care and diligence could not have prevented the injury. *Steele v. Townsend*, 37 Ala. 247.—FOLLOWED IN South & N. Ala. R. Co. v. Wilson, 27 Am. & Eng. R. Cas. 41, 78 Ala. 587.

In 1862, while the insurgent authorities had control of the city of New Orleans and its surroundings, the Jackson Railroad Co. gave a receipt for 360 barrels of molasses, which they were to transport to some other point on the line of the road. Some two months and a half thereafter the United States forces captured the city and took possession of the road at New Orleans. The molasses was not transported by the company. The owner sued the company on the receipt for the molasses, which had gone into their possession and had not been accounted for. The company made the defense that at the time they gave the receipt the road was under the control of the insurgent military forces; that the plaintiffs consigned the goods for shipment with a full knowledge of the condition of affairs and took the risk incident thereto. Held, that the burden of establishing these defenses devolved exclusively on the company, failing in which, the plaintiff must recover. *Flash v. New Orleans, J. & G. N. R. Co.*, 23 La. Ann. 353.

(2) Onus on shipper or consignee.—Where an initial carrier is sued for the loss of goods by reason of their being diverted from an all rail route, the burden is upon the plaintiff to show a breach of duty,

tween carrier and shipper, see note, 5 Am. St. Rep. 729. See also CARRIAGE OF MERCHANDISE.

whether, under the pleadings, the company be charged with a wilful act of diverting them, or only with a mere omission of duty in failing to see that they were properly transferred. *Dixon v. Columbus & I. R. Co.*, 4 *Riss. (U. S.)* 137.

Where grain is shipped to a point on a road where there is no depot or agent, and it appears that it was safely transported to the place, and the car containing it put on a side track where it remained for several days unattended, the burden is upon the owner to show that a loss in quantity occurred between the time of delivery to the company and the time of leaving the car on the side track. *South & N. Ala. R. Co. v. Wood*, 16 *Am. & Eng. R. Cas.* 267, 71 *Ala.* 215, 46 *Am. Rep.* 309.—QUOTING *Midland R. Co. v. Bromley*, 33 *Eng. L. & Eq.* 235.—EXPLAINED AND MODIFIED IN *Montgomery & E. R. Co. v. Culver*, 22 *Am. & Eng. R. Cas.* 411, 75 *Ala.* 587.

Where a consignee takes up vegetables and receipts for the same as in good order, the receipt is *prima facie* evidence of the good order of the vegetables at the time of delivery to the consignee. *Ocean Steamship Co. v. McAlpin*, 69 *Ga.* 437.

Where a consignee sues a carrier for the loss of oil shipped, the burden is upon him to establish a loss by competent and admissible evidence; but he is not required to prove it to a mathematical certainty, but simply to such degree as to satisfy the minds of the jury of the loss. *Baltimore & O. R. Co. v. Schumacher*, 29 *Md.* 168.

Where in an action for the loss of goods delivered to a carrier, the Carriers' Act is set up as a defense and the plaintiff replies that the loss arose from the felony of the company's servants, he must prove a state of things rendering such felonious taking more probable than a loss on a mistake; it is not enough for him to disclose a state of facts consistent with the felonious taking. *Gogarty v. Great Southern & W. R. Co.*, 9 *Ir. R. C. L.* 233; *reversing* 8 *Ir. R. C. L.* 344.

130. Plaintiff must make a prima facie case.—(1) *Actions for personal injuries.*—In order to render a company liable for a personal injury to a passenger, caused by his alarm and apprehension of danger leading him to leave a place of safety for one of peril, it is not sufficient, merely, that he became alarmed by reason of appearances produced wholly or in part by the company,

but it must appear that that which produced the alarm, and through it the injury, was negligence of the company or its servants. The burden is upon the plaintiff to prove this negligence. *Chicago, R. I. & P. R. Co. v. Felton*, 33 *Am. & Eng. R. Cas.* 533, 125 *Ill.* 458, 15 *West. Rep.* 41, 17 *N. E. Rep.* 765; *reversing* 24 *Ill. App.* 376. *Moore v. Edison Electric Illuminating Co.*, 43 *La. Ann.* 792, 9 *So. Rep.* 433. *Kyan v. Hudson River R. Co.*, 1 *J. & S. (N. Y.)* 137.

In such an action the burden of proof is upon the plaintiff to establish, by a preponderance of evidence, the material allegations of the complaint. *Ohio & M. R. Co. v. Selby*, 47 *Ind.* 471.

Where a passenger is carried beyond her station and is put off at a strange place, and sues for an injury alleged to have resulted from sickness caused by exposure incident to being so put off, plaintiff must show affirmatively that the sickness resulted from the exposure, and the burden rests upon the plaintiff throughout the trial. Upon an issue of this character the burden of proof never shifts. *St. Louis, A. & T. R. Co. v. Burns*, 71 *Tex.* 479, 9 *S. W. Rep.* 467.

Where an employé sues for personal injuries he must prove enough to show a fair presumption of negligence on the part of the employer and of resulting injury to himself. *Lindall v. Bode*, 72 *Cal.* 245, 13 *Pac. Rep.* 660.

(2) *Other cases.*—Where the general government sues a company for trespass in cutting timber from the public domain, the burden of proof is upon the government to show the trespass. *United States v. Denver & R. G. R. Co.*, 31 *Fed. Rep.* 886.

But where it appears that the company cut timber from public lands, it is for the company to show that it was cut from lands adjacent to its track, and was used at points on its road as authorized by act of congress of March 8, 1875, granting certain roads the right to take material necessary for the construction of their roads from the adjacent public lands. *United States v. Denver & R. G. R. Co.*, 31 *Fed. Rep.* 886.

Where plaintiffs claim an equitable lien upon the rolling stock of a railroad, as against mortgagees, on the ground that they had advanced the money to buy the rolling stock, the burden is upon plaintiffs to show the particular cars or locomotives to which their lien attaches. *Central Trust Co. v.*

Ohio C. R. Co., 36 *Am. & Eng. R. Cas.* 299, 36 *Fed. Rep.* 520.

140. To establish an affirmative defense.*—Where a carrier is sued for unjust discrimination, and the service is charged as being substantially the same, and under the same circumstances and conditions, if the carrier admits the discrimination, the burden is on it to justify it. *Samuels v. Louisville & N. R. Co.*, 30 *Am. & Eng. R. Cas.* 79, 31 *Fed. Rep.* 57.

Where a conductor sues for a balance of wages, and the company admits the balance, but charges that he had been guilty of such flagrant acts of dishonesty or crime in embezzling the funds of the company as to bar a recovery, the company is not bound to establish such defense beyond a reasonable doubt, because it involves a criminal charge, but only by a fair preponderance of evidence. *Davis v. Rome, W. & O. R. Co.*, 56 *Hun* 372, 31 *N. Y. S. R.* 369, 10 *N. Y. Supp.* 334.

It is error to impose upon a defendant in a civil case the burden of proving his defense to the satisfaction of the jury. Preponderance in the evidence is that required by law. *Missouri Pac. R. Co. v. Bartlett*, 81 *Tex.* 42, 16 *S. W. Rep.* 638. — QUOTING *Baines v. Ullmann*, 71 *Tex.* 537.

In an action for injury to a car coupler, where the brakemen were in their proper places, and the usual signals given, and efforts made to couple the cars together, if the claim is made in defense that the train was being operated by unauthorized persons or at an improper time, the burden is on defendant to prove it. *Whalen v. Chicago, R. I. & P. R. Co.*, 38 *Am. & Eng. R. Cas.* 141, 75 *Iowa* 563, 39 *N. W. Rep.* 894.

Under section 1167 of the Tenn. Code, in force in 1869, in an action for damages resulting from an accident, the burden of proof is on the company to show that the precautions therein required were observed. And if the proof does not show that the precautions were observed by the company, it will be responsible for all damages to persons or property occasioned or resulting from any accident or collision that may occur. *Smith v. Nashville & C. R. Co.*, 6 *Coldw. (Tenn.)* 589.

Tenn. Code, section 1169, providing that

* Burden of proof where carrier sets up act of God as excusing failure to carry goods, see note, 97 *Am. Dec.* 410.

where a railroad company is sued for injuring or killing live stock the burden of proof to show that the accident was unavoidable shall be upon the company, and providing that the employes of the road cannot be witnesses for the company, imposes no additional duties on railroad companies above what the common law imposed. *Horne v. Memphis & O. R. Co.*, 1 *Coldw. (Tenn.)* 72. — FOLLOWING *Carpue v. London & B. R. Co.*, 5 *Q. B.* 747; *Skinner v. London, B. & S. C. R. Co.*, 2 *Eng. L. & Eq.* 360; *Ellis v. Portsmouth & R. R. Co.*, 2 *Ired. (N. Car.)* 138. — DISTINGUISHED IN *East Tenn., V. & G. R. Co. v. Mitchell*, 11 *Heisk. (Tenn.)* 400. FOLLOWED IN *Louisville & N. R. Co. v. Connor*, 9 *Heisk.* 19. REVIEWED IN *Burke v. Louisville & N. R. Co.*, 7 *Heisk.* 451.

141. To show negligence of an employe.—When the negligence of the engineer is alleged to be the cause of injury to plaintiff the burden is on the plaintiff to reasonably show such negligence. *Birmingham Mineral R. Co. v. Wilmer*, 97 *Ala.* 165, 11 *So. Rep.* 886.

In an action for damages to the plaintiff, occasioned by a train striking a cow, after the plaintiff has proven the injury and the cause thereof (the cause being such as ordinarily exists only by reason of negligence on the part of the company), it devolves upon the defendant to show that the striking of the cow was not the result of the negligence of its servants. *Louisville, N. O. & T. R. Co. v. Conroy*, 63 *Miss.* 562.

One who sues for damages resulting to him as a passenger on a hand-car, operated by the foreman of a section gang, must show that at the time the foreman was acting within the scope of his authority. If at the time of the injury the foreman was operating the hand-car for his own convenience in the transaction of private business, no liability would attach to the corporation. *Gulf, C. & S. F. R. Co. v. Dawkins*, 77 *Tex.* 228, 13 *S. W. Rep.* 982.

142. Two or more probable causes for the injury.—Where, in an action for negligence, the accident and resulting injury are alleged as having been caused by several concurring negligent acts and omissions of the defendant, each element of negligence must be proved, to warrant a recovery. *Wormsdorf v. Detroit City R. Co.*, 40 *Am. & Eng. R. Cas.* 271, 75 *Mich.* 472, 42 *N. W. Rep.* 1000. — DISTINGUISHED

IN *Thayer v. Flint & P. M. R. Co.*, 93 Mich. 150.

Whenever the fact appears that the injury was occasioned by one of two causes, for one of which the defendant is not responsible, while for the other he is responsible, the plaintiff must fail unless the evidence shows that the injury was produced by the cause for which defendant is responsible; and he must fail also if it appears from the evidence that it is just as possible that the injury was caused by the one as by the other. *Barrett v. Smith*, 27 J. & S. 250, 14 N. Y. Supp. 307, 38 N. Y. S. R. 526. *Searles v. Manhattan El. R. Co.*, 25 Am. & Eng. R. Cas. 358, 101 N. Y. 661, mem., 5 N. E. Rep. 66; reversing (?) 17 J. & S. 425. — FOLLOWED IN *Malone v. Boston & A. R. Co.*, 51 Hun (N. Y.) 532. QUOTED IN *Murtaugh v. New York C. & H. R. R. Co.*, 23 N. Y. S. R. 636. — *Grant v. Pennsylvania & N. Y. C. & R. Co.*, 4 Silv. App. (N. Y.) 302. — FOLLOWING *Searles v. Manhattan R. Co.*, 101 N. Y. 661; *Taylor v. Yonkers*, 105 N. Y. 202.

143. When burden of proof is with plaintiff.—In order to maintain an action for an injury it must be proved that the injury was caused by the negligence of the defendant or his agents. *Norfolk & W. R. Co. v. Ferguson*, 79 Va. 241. *Sheeler v. Chesapeake & O. R. Co.*, 81 Va. 188.

Mere proof that an accident happened to a train does not cast upon the company the burden of showing the real cause of the injury. *Hammack v. White*, 11 C. B. N. S. 594, 31 L. J. C. P. 129. — APPROVED IN *Scott v. London Dock Co.*, 34 L. J. Ex. 17, 220, 13 L. T. 148, 3 H. & C. 596. — *Georgia Pac. R. Co. v. Hughes*, 39 Am. & Eng. R. Cas. 674, 87 Ala. 610, 6 So. Rep. 413. — ADHERING TO *Savannah & M. R. Co. v. Shearer*, 58 Ala. 672; *South & N. Ala. R. Co. v. Sullivan*, 59 Ala. 272. DISAPPROVING *Alabama G. S. R. Co. v. McAlpine*, 75 Ala. 113, 80 Ala. 73; *South & N. Ala. R. Co. v. Bees*, 82 Ala. 340; *Mobile & G. R. Co. v. Caldwell*, 83 Ala. 196; *Louisville & N. R. Co. v. Jones*, 83 Ala. 376. — DISTINGUISHED IN *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514. — *Central R. Co. v. Freeman*, 75 Ga. 331.

In actions based upon the negligence of the defendant, the burden of proof is always on the plaintiff. *Fl. Worth & D. C. R. Co. v. Tomlinson*, 4 Tex. App. (Civ. Cas.) 175, 16 S. W. Rep. 866.

A plaintiff suing for an injury at a high-

way crossing has the burden of proof to show negligence on the part of the company. *Morris v. Chicago, M. & St. P. R. Co.*, 26 Fed. Rep. 22. *Griffith v. Baltimore & O. R. Co.*, 44 Fed. Rep. 574. *Robinson v. Fitchburg & W. R. Co.*, 7 Gray (Mass.) 92. — DISTINGUISHED IN *Pittsburgh, Ft. W. & C. R. Co. v. Ruby*, 38 Ind. 294.

Unless plaintiff is a passenger no *prima facie* presumption of negligence arises from the occurrence of the accident. *Philadelphia, W. & B. R. Co. v. Stebbings*, 19 Am. & Eng. R. Cas. 36, 62 Md. 504.

In an action by one who was struck while delivering freights, by a locomotive engine, the burden of proof is upon the plaintiff to show want of due care on the part of the defendants, as well as ordinary care in himself. *Robinson v. Fitchburg & W. R. Co.*, 7 Gray (Mass.) 92.

In New York where a plaintiff sues for an injury to himself or to his intestate, while attempting to drive across a railroad track at a highway crossing, he must affirmatively show negligence on the part of the company, and that he, or his intestate, as the case may be, was free from contributory negligence. *Spencer v. Utica & S. R. Co.*, 5 Barb. (N. Y.) 337. — DISTINGUISHED IN *Gonzales v. New York & H. R. Co.*, 39 How. Pr. (N. Y.) 407. FOLLOWED IN *Button v. Hudson River R. Co.*, 18 N. Y. 248; *Wilds v. Hudson River R. Co.*, 29 N. Y. 315; *Deyo v. New York C. R. Co.*, 34 N. Y. 9. QUOTED IN *Clark v. Syracuse & U. R. Co.*, 11 Barb. 112. REVIEWED IN *Terry v. New York C. R. Co.*, 22 Barb. 574. — *Beckwith v. New York C. & H. R. R. Co.*, 54 Hun 446, 28 N. Y. S. R. 130, 292, 7 N. Y. Supp. 719, 721; affirmed in 125 N. Y. 759, mem., 27 N. E. Rep. 408, 36 N. Y. S. R. 1010, mem. — QUOTING *Greany v. Long Island R. Co.*, 101 N. Y. 419.

So a passenger suing for an injury while at the station, from an incoming train, must not only show negligence causing the injury, but must show due care on his own part. *Archer v. New York, N. H. & H. R. Co.*, 106 N. Y. 589, 13 N. E. Rep. 318, 11 N. Y. S. R. 32, 885, 9 Cent. Rep. 233; affirming 36 Hun 644, mem.

In Oregon, in actions for negligence, the burden of proof always rests upon the party charging it. He must prove that the act was caused by the wrongful act, omission, or neglect of the defendant, and that the injury of which he complains was not the result of his own negligence and the want

of proper care and precaution. *Walsh v. Oregon R. & N. Co.*, 10 *Oreg.* 250. *Coughtry v. Willamette St. R. Co.*, 21 *Oreg.* 245, 27 *Pac. Rep.* 1031.

144. When proof of accident casts burden on defendant.—When a passenger sues to recover damages for personal injuries received in a railroad accident, caused by a collision, the derailment of the car in which he was riding, or other like occurrence, proof of these facts raises a presumption of negligence, and imposes on the defendant the burden of satisfying the jury that the accident could not have been prevented by the exercise of the highest degree of care, skill, and diligence. *Alabama G. S. R. Co. v. Hill*, 93 *Ala.* 514, 9 *So. Rep.* 722.—*DISTINGUISHING Georgia Pac. R. Co. v. Hughes*, 87 *Ala.* 610; *Louisville & N. R. Co. v. Reese*, 85 *Ala.* 497. *QUOTING Montgomery & E. R. Co. v. Mallette*, 92 *Ala.* 209.—*Bedford, S., O. & B. R. Co. v. Rainbolt*, 21 *Am. & Eng. R. Cas.* 466, 99 *Ind.* 551. *Louisville, N. A. & C. R. Co. v. Snyder*, 37 *Am. & Eng. R. Cas.* 137, 117 *Ind.* 435, 20 *N. E. Rep.* 284, 3 *L. R. A.* 434. *New York, L. E. & W. R. Co. v. Daugherty*, (Pa.) 6 *Am. & Eng. R. Cas.* 139.

This principle applies equally whether the cause of the accident is attributed to the machinery or to the act or omission of the carrier's servants. *Ohio & M. Packet Co. v. McCool*, (Ind.) 8 *Am. & Eng. R. Cas.* 390.—*QUOTING Edgerton v. New York & H. R. Co.*, 39 *N. Y.* 227.

Thus, under a declaration alleging that the defendants are a corporation owning a railroad, and the plaintiff was a passenger thereon, and the defendants, by their agents, assaulted him and expelled him from their cars, if the assault is proved the burden of justifying it rests upon the defendants, as in ordinary cases. *St. John v. Eastern R. Co.*, 1 *Allen (Mass.)* 544.

Although the burden of proof is upon the plaintiff to establish negligence, yet where the injury is admitted, and the derailment and overturning of the car are undisputed facts, and there is evidence tending to show that at the time of the accident the train was running down a steep incline leading to the bed of a river, on a new and curved track, at an unusual and dangerous speed, the burden of proving that the injury was not caused by its want of care is on the railroad company. *Mitchell v. Southern Pac. R. Co.*, 87 *Cal.* 62, 25 *Pac. Rep.* 245.

Whenever a person, not an employé, is injured by the running of railroad cars, the presumption is that the company is at fault, and the onus is on it to rebut such presumption. *Southwestern R. Co. v. Singleton*, 67 *Ga.* 306.

Where the action is based upon negligence, the burden is upon plaintiff to establish such negligence; and while mere proof of an accident is not enough, proof that an accident happened which usually would not have happened if proper care had been exercised, is sufficient to raise a presumption of negligence. *Caldwell v. New Jersey Steamboat Co.*, 47 *N. Y.* 282.—*APPLIED IN Weber v. New York C. & H. R. R. Co.*, 58 *N. Y.* 451; *Murphy v. Coney Island & B. R. Co.*, 36 *Hun (N. Y.)* 199.

145. Where statutory signals were not given.—A failure to give the statutory signal before reaching a crossing will not make a company liable for killing an infant, where it is apparent that the giving of the signal would not have avoided the accident. *Chrystal v. Troy & B. R. Co.*, 124 *N. Y.* 519, 26 *N. E. Rep.* 1103.

But in Tennessee a strict compliance with the statute is necessary to relieve the company from liability. *Louisville & N. R. Co. v. Connor*, 9 *Heisk. (Tenn.)* 20. *Nashville & C. R. Co. v. Thomas*, 5 *Heisk. (Tenn.)* 262.

Where the statute imposes the duty upon a railroad company to ring a bell or sound a whistle upon approaching highway crossings, and it fails to do so, and an injury results, the burden of proof is upon the company to show, in view of the actual condition of things at the time, whether such failure was reasonable and prudent, which is a question for the jury. *Wakefield v. Connecticut & P. R. R. Co.*, 37 *Vt.* 330.

IV. BEST AND SECONDARY EVIDENCE.

146. In general.—Where a company is sued for a delay in transporting an opera troupe, whereby they lost the profits of engagements, it is proper to allow plaintiff to prove by oral evidence that he was to receive a certain per cent. of the box receipts, under a written contract with the opera house, without producing the contract or accounting for its loss further than to show

* Burden of proof, where it is claimed that statutory signals were not given to prevent injuries to stock, because such would have been unavailing, see note, 21 *L. R. A.* 724.

that it was in the hands of an agent who had reported it lost. *Foster v. Cleveland, C. C. & St. L. R. Co.*, 56 *Fed. Rep.* 434.

What goods cost may not be the best proof of what they are worth. So where a carrier is sued for damaging goods the owner may testify as to their true value, though he possess a written, itemized bill of what they cost. *Savannah, F. & W. R. Co. v. Hoffmayer*, 75 *Ga.* 410.

An agreement to allow a copy of a lease of one railroad by another to be used, and dispensing with the production of the original on the trial, has no other effect than to so dispense with the production of the original, and is not in itself intended to go to the jury to prove the existence of the relation of lessor and lessee between the two roads. *Central R. & B. Co. v. Gamble*, 77 *Ga.* 584, 3 *S. E. Rep.* 287.

Parol evidence is admissible to prove the contents of telegrams, without showing the loss or destruction of the telegrams, where it does not appear that the telegrams were in writing. *Terre Haute & I. R. Co. v. Stockwell*, 37 *Am. & Eng. R. Cas.* 278, 118 *Ind.* 98, 20 *N. E. Rep.* 650.

Parol evidence is admissible to show that a railroad company has fraudulently prevented the issuance to it of patents to lands, for the purpose of avoiding taxation. *McGregor & M. R. Co. v. Brown*, 39 *Iowa* 655.

Proof as to the symptoms of disease which afflicted plaintiff, by the second of two physicians attending, is admissible when the absence of the first is satisfactorily accounted for. *International & G. N. R. Co. v. Terry*, 21 *Am. & Eng. R. Cas.* 323, 62 *Tex.* 380.

In an action by an administrator for negligently causing the death of his intestate, upon the question of the identity of a deceased person, killed with the plaintiff's intestate, it was shown that, upon demand for the baggage of the persons who had been killed in the accident, certain boxes had been delivered up by the officials of the company. *Held*, that the inscriptions upon the boxes might be given in evidence without producing the boxes. *Kansas Pac. R. Co. v. Miller*, 2 *Colo.* 442.

147. Proof of express trust.—Express trusts cannot be established by parol evidence. So it is proper to refuse an offer to so prove that the grantee of a right of way held it in trust. *Columbus, H. & G. R. Co. v. Braden*, 110 *Ind.* 558, 9 *West. Rep.* 193, 11 *N. E. Rep.* 357.

148. Proof of written contracts—Bills of lading.—In an action on a subscription to a railroad company, parol evidence is admissible for the purpose of establishing a compliance with conditions by the company, to show that the contract for grading was let, and that a certain town was made a point on such road, prior to the commencement of the suit. The objection that such testimony is secondary and inadmissible, for the reason that the contract and survey themselves are the best evidence, does not apply. *St. Louis & C. R. R. Co. v. Eakins*, 30 *Iowa* 279.

Where plaintiff's evidence showed a contract of shipment to have been in writing, an objection to questions asked him on cross-examination as to an agreement by him to feed and provide for the live stock shipped, was properly sustained. *Missouri Pac. R. Co. v. Fagan*, 35 *Am. & Eng. R. Cas.* 666, 72 *Tex.* 127, 9 *S. W. Rep.* 749.

In an action against a common carrier, founded on the common law liability of such carrier, it is not necessary to produce in evidence a bill of lading of the property lost or injured. *Missouri Pac. R. Co. v. Nicholson*, 2 *Tex. App. (Civ. Cas.)* 147.

149. Parol proof of rules of company.—A witness cannot testify as to the terms of a rule adopted by a railroad company, which is contained in a printed book of rules, unless the book itself is produced, or its absence is accounted for. *Louisville & N. R. Co. v. Orr*, 94 *Ala.* 602, 10 *So. Rep.* 167. *Georgia Pac. R. Co. v. Propst*, 44 *Am. & Eng. R. Cas.* 548, 90 *Ala.* 1, 7 *So. Rep.* 635. *Cincinnati, H. & D. R. Co. v. McMullen*, 38 *Am. & Eng. R. Cas.* 165, 117 *Ind.* 439, 20 *N. E. Rep.* 287. *Sobieski v. St. Paul & D. R. Co.*, 41 *Minn.* 169, 42 *N. W. Rep.* 863. *Price v. Richmond & D. R. Co.*, 38 *So. Car.* 199, 17 *S. E. Rep.* 732.

Parol evidence of a rule prohibiting passengers from standing upon the platform is admissible, where it does not appear that such rule must be or is recorded in the rule book of the railroad. *Yonge v. Kinney*, 28 *Ga.* 111.

Parol evidence that defendant company at the time of an accident was governed by the rules of another company, which managed it, is not admissible, without evidence to show that such facts did not appear by any written order, instruction, or resolution. *Cincinnati, H. & D. R. Co. v. McMullen*, 38

contracts—

tion on a sub-
pany, parol evi-
purpose of es-
conditions by
the contract for
ertain town was
rior to the com-
e objection that
and inadmissi-
contract and sur-
evidence, does
R. R. Co. v.

showed a con-
seen in writing,
asked him on
agreement by
the live stock
ned. *Missouri*
Am. & Eng. R.
W. R. Rep. 749.
common carrier,
law liability of
cessary to pro-
f lading of the
Missouri Pac.
App. (Civ. Cas.)

rules of com-
testify as to the
a railroad com-
a printed book
self is produced,
for. *Louisville*
602, 10 *So. Rep.*
Propst, 44 *Am.*
La. 1, 7 *So. Rep.*
R. Co. v. McMul-
len, 165, 117 *Ind.*
Hieski v. St. Paul
42 *N. W. Rep.*
D. R. Co., 38 *So.*

prohibiting pas-
the platform is
not appear that
ided in the rule
Age v. Kinney, 28

endant company
was governed by
any, which man-
without evidence
not appear by
on, or resolution.
v. McMullen, 38

Am. & Eng. R. Cas. 165, 117 *Ind.* 439, 20
N. E. Rep. 287.

In an action for an injury resulting in death to a brakeman, received while attempting to uncouple a locomotive under the conductor's orders, another brakeman was asked: "Do you know from your experience on this road and other roads, what the general custom is as to the duties of brakemen in obeying the orders of conductors?" *Held*, properly admitted against defendant's objection that the rules defining the duties of brakemen were in print, since it did not appear that the printed rules furnished the brakeman covered the point in question. *Gorman v. Minneapolis & St. L. R. Co.*, 78 *Iowa* 509, 43 *N. W. Rep.* 303.

In an action for the death of an employé, the company offered to prove that he was violating, at the time, a rule of the company, which was printed on a blank application form, and had to be signed by every applicant for employment, and that every employé was supposed to know this rule. *Held*, that the evidence was properly excluded, where no offer was made to produce the writing itself, or to show that the employé had signed it, or that he had actual knowledge of the existence of the writing or the rule. *Missouri Pac. R. Co. v. Lamotte*, 76 *Tex.* 219, 13 *S. W. Rep.* 194.

150. Existence of streets and high-ways.—Where it appears from a plat offered in evidence that a street in a city has been regularly laid out and dedicated to the uses of the public, parol testimony is not competent to prove that such street has been vacated. *Union Pac. R. Co. v. Dyche*, 28 *Kan.* 200.

The existence of public streets and high-ways may be shown by parol in the absence of an objection thereto. *Henry v. Wabash Western R. Co.*, 44 *Mo. App.* 100.

Upon the trial of a cause for the assessment of damages for the taking of land for a railway, the fact of the existence of a highway upon the land, being a collateral matter, may be shown by oral evidence. *Cedar Rapids, I. F. & N. W. R. Co. v. Raymond*, 30 *Am. & Eng. R. Cas.* 345, 37 *Minn.* 204, 33 *N. W. Rep.* 704.

151. Secondary evidence not admissible till proper foundation is laid.—The fact that an original bill of lading, with an indorsement thereon, is in possession of the company is no reason for allowing a plaintiff, suing the company, to

give evidence as to the indorsement, without laying any foundation therefor. Notice to the company to produce the paper should have been first given. *Columbus & W. R. Co. v. Tillman*, 79 *Ga.* 607, 5 *S. E. Rep.* 135.

Where a bill of lading has been executed in duplicate, parol proof of its contents is incompetent until after satisfactory excuse for the non-production of both parts of the instrument itself. Hence, where a duplicate part of a bill of lading was attached to a draft drawn on plaintiff, and paid by him, there was a presumption that it was in his possession or under his control. And although the loss of the other duplicate was proved, plaintiff could not prove its contents by parol until after excusing the non-production of the part attached to the draft; and the fact that his residence was outside of the jurisdiction of the court made no difference. *Alabama G. S. R. Co. v. Mt. Vernon Co.*, 35 *Am. & Eng. R. Cas.* 657, 84 *Ala.* 173, 4 *So. Rep.* 356.

The transfer of a street railway company and its franchise cannot competently be proved by the testimony of a director that he has executed and has knowledge of the transfer of the same to another company. *Ricketts v. Birmingham St. R. Co.*, 37 *Am. & Eng. R. Cas.* 12, 85 *Ala.* 600, 5 *So. Rep.* 353.

Plaintiff suing a common carrier for lost goods consigned to him, which he had never seen, cannot testify as to their quantity and value, as shown by the invoice, without producing the paper or accounting for its absence. *Louisville & N. R. Co. v. Carl*, 91 *Ala.* 271, 9 *So. Rep.* 334.

In an action against a railroad company and a construction company which built its road, as joint defendants, to recover damages to plaintiff's adjacent property by excavations in the streets, oral evidence cannot be received of the fact "that said construction company was under a written contract for the construction of said railway," unless a sufficient excuse is shown for the failure to produce the written contract. *Alabama Midland R. Co. v. Coskry*, 92 *Ala.* 254, 9 *So. Rep.* 202.

Where a witness had applied to a railroad for its copy of a duplicate lease, but not with reference to the case, and failed to get it because it was mislaid, and had never applied to the other party to such lease, who lived in another state, his testimony of the

contents of such lease is inadmissible. *Breed v. Nagle*, 46 Ga. 112.

Before secondary evidence is admissible, absence of the primary must be duly accounted for. This applies to a bond for titles counted on in an action to recover land. *Georgia Pac. R. Co. v. Strickland*, 80 Ga. 776, 12 Am. St. Rep. 282, 6 S. E. Rep. 27.

In a suit against a railroad company, whose superintendent was C. B. Hinckley, it was error to allow parol evidence of the contents of a telegram signed C. B. H., without producing the original, or the foundation being laid for the proof of its contents, or proof that the telegram came from C. B. Hinckley, the superintendent. *Chicago & I. R. Co. v. Russell*, 91 Ill. 298.

Where a profile of work was referred to by parties, when making a contract for grading a railroad, a profile proved by a witness to be made from the same data and measurements, cannot be admitted, unless the absence of the original is first accounted for. *Carrier v. Boston & M. R. Co.*, 31 N. H. 209.

Where a passenger sues for being ejected from a train, the contents of his ticket cannot be proved by parol, unless its non-production is accounted for. *Memphis & C. R. Co. v. Benson*, 31 Am. & Eng. R. Cas. 112, 85 Tenn. 627, 4 Am. St. Rep. 776, 4 S. W. Rep. 5.

In an action under the railroad stock killing law of 1874 (Kan. Comp. Laws 1879, p. 784) it was shown that the demand, alleged to have been made by the plaintiff of the railroad company for the value of the stock alleged to have been killed, was made in writing and only in writing. The demand was proved on the trial of the case only by the introduction in evidence of a copy of the written demand; and this was done over the objections of the defendant, but by the permission of the court, without any foundation for the introduction of secondary evidence having first been laid. *Held*, error. *Central Branch U. P. R. Co. v. Walters*, 24 Kan. 504.

Where the question was whether the defendant or another railroad company is liable for the injuries complained of, in order to prove that defendant railway company was the party liable, plaintiff, with the permission of the court, but over the objections and exceptions of defendant, introduced parol evidence showing that certain "time-checks" were made out in the name

of the defendant, although no evidence was introduced tending to show that these "time-checks" were lost or destroyed, or that any search had ever been made for them, or that any notice had ever been given to either of the railroad companies or to any one else to produce them. *Held*, error. *Chicago, K. & N. R. Co. v. Brown*, 44 Kan. 384, 24 Pac. Rep. 497.

A charter provided that directors should give notice of assessment on stock through certain newspapers. *Held*, that oral evidence of a witness that he had examined such newspapers and found that the notice had been published, and knew the contents of the notice, is not admissible, in the absence of anything to show a fair and diligent search for the papers themselves, and inability to find them. *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

152. Laying foundation for secondary evidence.—Proof that a freight list issued by a connecting carrier is out of the jurisdiction of the court is sufficient to render secondary evidence of its contents admissible. *Schaefer v. Georgia R. Co.*, 66 Ga. 39.

When it is shown that, under the Ill. Act of February 19, 1851, the governor of the state had executed a deed of donated lands to a railroad company, which, owing to its great length, had not been recorded, and was burned, parol proof of its contents is admissible. *Sawyer v. Cox*, 63 Ill. 130.

Where the secretary of a railroad company, in response to a demand for a copy of a written contract of subscription, shown to have been in the possession of the company, answers that it has been lost, proof of his answer is, *prima facie*, sufficient to entitle the party making the demand to give oral proof of its contents, in a suit against the company. *Indianapolis & C. R. Co. v. Jewett*, 16 Ind. 273.

Where it is doubtful whether a message was sent by telephone or telegraph, parol proof of the message is admissible, where it further appears that if it was by telegraph and reduced to writing, it had been lost or destroyed. *Wilson v. Minneapolis & N. W. R. Co.*, 31 Minn. 481, 18 N. W. Rep. 291.

153. Copies of written instruments.—Where a company claims that live stock was shipped under a special written contract, which was signed in duplicate, and shows that its copy had been destroyed, it may put a copy in evidence, after the

plaintiff has failed to produce the original held by him, or in any way account for it. *Cincinnati, N. O. & T. P. R. Co. v. Disbrow*, 76 Ga. 253.

Where a statute provides that the records of a corporation may be proven by sworn copies, it is not bound to produce its original records on notice; nor will a failure to do so make parol evidence of their contents admissible. *Madison, I. & P. R. Co. v. Whitesel*, 11 Ind. 55.

The charter of the Delaware & Hudson Canal Co. making no provision that a certified copy of the bond given by the company to a landowner, for the payment of damages to be assessed, etc., as provided in the twenty-second section of said charter, may be read in evidence, a copy is not admissible in respect to. *Selden v. Delaware & H. Canal Co.*, 29 N. Y. 634.

Where a contract for doing certain work in the construction of a railroad provides that the contractor shall be paid on the final estimate made by the chief engineer, it is error to admit a copy of the final estimate, which is shown to be a copy by the evidence of the engineer, upon notice to the defendant to produce the original, where there is no evidence that defendant ever received it. *Reilly v. Lee*, 16 N. Y. Supp. 313.

Where a company produces certain telegrams on notice, it is not error to admit evidence of the operator who received the telegrams, as to their contents, which in no material respects differ from the copies filed, where it relates to a matter about which there is no controversy. *International & G. N. R. Co. v. Prince*, 44 Am. & Eng. R. Cas. 294, 77 Tex. 560, 14 S. W. Rep. 171.

In an action for personal injuries, an agent of an insurance company testified for the defendant that he solicited from the plaintiff, at a date subsequent to the injury, an application for a policy in the company he represented; that the plaintiff made such application, and he had with him on the witness stand a blank application such as was used by him at the time; that he asked the plaintiff the usual questions, and wrote down the answers on the blank, which the plaintiff afterwards read and signed; that the original blank application thus filed and signed, was at the office of the company in another state; that he had made efforts to get the original from that

office, but instead of the original, what purported to be a copy thereof was sent him, which he produced; and that it was an exact copy of the original signed by the plaintiff. The defendant then offered the copy in evidence, and the judge admitted it. Held, that the plaintiff had no ground of exception. *Williamson v. Cambridge R. Co.*, 30 Am. & Eng. R. Cas. 636, 144 Mass. 148, 10 N. E. Rep. 790.

154. Notice to produce.—Plaintiff could not testify as to the contents of letters written by him to the president of the defendant company, no notice having been given to the defendant to produce the letters themselves. Nor did such testimony, objected to by defendant, become competent upon defendant's testifying, without objection, to such contents. *Tompkins v. Augusta & K. R. Co.*, 21 So. Car. 420.

In an action to recover various items for overcharge of freights and damages to goods shipped, a notice to the company to produce the bills of lading is sufficient to lay the ground for the introduction of secondary evidence as to their contents, that describes them as sundry bills of invoice and bills of lading that had been left in the hands of defendants between certain dates named, and which had never been returned to plaintiff. *International & G. N. R. Co. v. Donaldson*, 2 Tex. App. (Civ. Cas.) 183.

155. Record of judicial proceedings.—In ejectment against a railroad, testimony of a party who acted as attorney for the road is inadmissible to show that the land was condemned for a right of way, where such witness produces copies of the paper in such proceeding, which are not read. *Mobley v. Breed*, 48 Ga. 44.

Parol evidence to prove that the cost of fencing a railroad was included in the assessment of damages for right of way is not admissible. The record is the best evidence of such fact. *Rockford, R. I. & St. L. R. Co. v. Lynch*, 67 Ill. 149.

156. Proceedings of board of directors.—It is not competent to show by parol declarations of individual directors of a corporation for what specific purpose a fund was to be used. *Grayville & M. R. Co. v. Burns*, 92 Ill. 302.

The proceedings of the board of directors of a private corporation may be shown by parol testimony when no record thereof is kept. *Ten Eyck v. Pontiac, O. & P. A. R. Co.*, 37 Am. & Eng. R. Cas. 273, 74 Mich.

226, 41 *N. W. Rep.* 905, 3 *L. R. A.* 378.—**DISTINGUISHING** *Stevenson v. Bay City*, 26 Mich. 44; *Hall v. People*, 21 Mich. 456.

Where the court has ordered the production of certain minutes of the board of directors, and the party in whose behalf the order was made has, in addition, given written notice to the company to produce, and has demanded of the secretary a sworn copy, if they are not produced or the sworn copy furnished, oral evidence may be given of their contents. *Indianapolis & C. R. Co. v. Jewett*, 16 Ind. 273.

157. Where a memorandum was made.—Where oral evidence was given of an offer, read to the witness from a card by the manager of a railway, the words having been taken down by the witness in his pocket-book, which was afterwards lost, and the card having been retained by the manager—*held*, that the evidence was admissible, not as evidence of an offer in writing, but as evidence of a verbal offer of which it was competent for the witness to speak either from a minute in his pocket-book or from recollection. *Blanchard v. Windsor & A. R. Co.*, 10 Nov. Sc. 8.

158. Record of written instruments.—Parol evidence is admissible to show the date of filing articles of association with the secretary of state, notwithstanding Ind. Rev. St., p. 410, § 2, providing that a copy of articles thus filed, certified by the secretary of state, shall be presumptive evidence of the incorporation of the company and of the facts stated therein. The filing is no part of the articles, and indorsement on the articles of the time of filing could be nothing more than *prima facie* evidence of the time. *Johnson v. Cravensville, F., K. & F. W. R. Co.*, 11 Ind. 280.

Where a deed consolidating railroad companies has been recorded on due proof of execution, and the original has been withdrawn from the recorder's office by the party to whom it belongs, a third party wishing to make it available against him may adduce a copy of such record, it being the best evidence attainable. *Hotard v. Texas & P. R. Co.*, 36 La. Ann. 450.—**FOLLOWED IN** *Day v. New Orleans Pac. R. Co.*, 37 La. Ann. 131.

The record of a deed conveying the rights and franchises of a railroad company, which includes the right of way for the road, is competent evidence as to the

right of way without the production of the original deed. *Davis v. Titusville & O. C. R. Co.*, 30 Am. & Eng. R. Cas. 341, 114 Pa. St. 308, 6 Atl. Rep. 736.

159. Parol proof of book entries.—Where an action is brought against a carrier for the loss of cotton by fire, and an agent has testified positively of his own knowledge as to whom the cotton belonged, his evidence is not rendered incompetent by his answering on cross-examination, "My books show how the cotton was owned." *Wilson v. Atlanta & C. A. L. R. Co.*, 16 So. Car. 587.

V. HEARSAY.

160. In general.—(1) *Cases arising out of contract.*—Where plaintiff sues for commissions for procuring cattle to be shipped over defendant's road, under an agreement, letter-press copies of reports of shipments made by a local agent to the general freight agent, made from dray tickets on file, are but hearsay and not admissible as evidence. *St. Louis, L. & W. R. Co. v. Maddox*, 18 Kan. 546.

An action was brought by a company to recover on a subscription to its stock. It being necessary to prove the payment by defendant of one dollar upon each share of stock at the time of his subscription, the plaintiff offered in evidence the declarations of a person then deceased, who was one of the commissioners authorized to receive subscriptions to its stock, and who did take the subscription of the defendant for five shares. The offer was made to prove by a witness, who was the first acting treasurer for the commissioners, that shortly after the date of said subscription the deceased commissioner handed to him five dollars, and said that the defendant "had paid him (the commissioner) the sum of five dollars for and on account of the said subscription of stock at the time of making the subscription." *Held*, that this evidence was not admissible either as the declarations of a party, since deceased, made against his pecuniary interest, or made in the ordinary course of duty. *Western Md. R. Co. v. Manro*, 32 Md. 280.

(2) — *torts, generally.*—Where the only evidence to show that the company used wood for fuel instead of coal, thus increasing the liability of the engine to emit sparks, was testimony that a witness had "learned" that such fuel was used, it is

erroneous to submit to the jury the question whether there was negligence in the use of fuel. Such testimony is mere hearsay, and warrants no submission of any question to be determined by it. *Leland v. Chicago, M. & St. P. R. Co.*, (Iowa) 21 Am. & Eng. R. Cas. 108, 23 N. W. Rep. 390. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 Am. & Eng. R. Cas. 603, 27 Fla. 1, 9 So. Rep. 661.

In an action for double damages for stock killed, where defendant had the right to fence but failed to do so, the testimony of a witness who stated what he had seen and knew in relation to the locality, and the condition of the fence where the stock went upon the railroad track, was not hearsay or based upon the opinion of the witness. *Dunn v. Chicago & N. W. R. Co.*, 7 Am. & Eng. R. Cas. 573, 58 Iowa 674, 12 N. W. Rep. 734.

(3) — *personal injuries*.—For the court to admit hearsay testimony which tends to prove that the servants of the company were negligent in running their train, whereby the injuries complained of were caused, is a material error, for which the judgment founded in part on such testimony must be reversed. *Kansas Pac. R. Co. v. Pointer*, 9 Kan. 620.

Where a boy is injured while attempting to cross a track, it is not competent to prove that his uncle had afterward said that he had often warned the boy to quit playing on the railway tracks at the place where the accident happened. *Kentucky C. R. Co. v. Smith*, 93 Ky. 449, 20 S. W. Rep. 392.

Declarations of the mother of an injured child passenger immediately after the accident are mere hearsay, and no more bind the estate of the child than would declarations of a stranger. *Norfolk & W. R. Co. v. Groseclose*, 88 Va. 267, 13 S. E. Rep. 454.

Where the issue is whether the injury was caused by a blow or by a fall, and plaintiff has called his attending physician as a witness, it is error for a witness for the defendant to testify as to what he heard the physician say was the cause of the injury, where no foundation was laid for it, by calling the physician's attention to it when he was on the witness stand. *Melkowitz v. Manhattan R. Co.*, 43 N. Y. S. R. 354, 62 Hun 622, mem., 17 N. Y. Supp. 112.

Where the action was for wrongful expulsion, there was no error in ruling out

what plaintiff said as to another person's conduct in correcting a mistake as to that person's ticket, or the price of it, it not being said in the presence of the conductor or communicated to him, but being said at or near the ticket office, before the plaintiff entered the car. *Georgia R. Co. v. Homer*, 27 Am. & Eng. R. Cas. 186, 73 Ga. 251.

Hearsay evidence of the fact of the killing of some one upon a certain day is admissible to show the date at which something else occurred, about which the witness has testified; but as evidence of the date of the homicide, or the fact that one has been committed, it is incompetent. *Harris v. Central R. Co.*, 30 Am. & Eng. R. Cas. 581, 78 Ga. 525, 3 S. E. Rep. 255.

Where the action is for the death of a car coupler, evidence on behalf of the plaintiff that the employé was killed by reason of the draw-heads of two cars passing, which only left a space of four or five inches between the cars, and crushed the employé, is not open to the objection that it is but "a supposition and surmise on the part of the witness, and hearsay." *Missouri Pac. R. Co. v. Lamothe*, 76 Tex. 219, 13 S. W. Rep. 194.

(4) *Carriage of live stock and other property*.—Hearsay evidence is not admissible to show who was the freight agent of a company at the time a demand was made for goods shipped. *Spade v. Hudson River R. Co.*, 16 Barb. (N. Y.) 383.

Where a second carrier is sued for a delay in carrying and delivering goods, letters written after the transaction, by the agents of the first carrier in answer to letters written by the defendant's agent, are not admissible in evidence in favor of defendant. *Watte v. New York C. & H. R. R. Co.*, 2 Sike. App. 85, 110 N. Y. 635, mem., 17 N. E. Rep. 730, 17 N. Y. S. R. 162; *affirming* 39 Hun 655, mem.

In an action for the loss of live stock while in the carrier's hands, evidence is not admissible as to what persons at the place of destination told plaintiff such stock would have been worth in the market there if they were such cattle as described. *Southern Pac. R. Co. v. Maddox*, 42 Am. & Eng. R. Cas. 528, 75 Tex. 300, 12 S. W. Rep. 815.

A general managing agent of the shippers, who was residing in Paris at the time certain cotton was destroyed in Texas, was allowed to testify that the cotton was not delivered, and that it was destroyed in Texas during transportation, as far as it

was possible for him to know without actually seeing it burn. *Held*, that the knowledge of the witness was not necessarily founded on pure hearsay, and that the action of the court in admitting the evidence was not necessarily erroneous. *Missouri Pac. R. Co. v. Sherwood*, 55 Am. & Eng. R. Cas. 478, 84 Tex. 125, 19 S. W. Rep. 455.

161. Declarations as to residence.

—Residence is a fact to which a witness may testify, or he may testify to acts and circumstances from which it may be inferred; but it cannot be proved by general reputation, nor by the declarations of associates or neighbors, which are mere hearsay. *East Tenn., V. & G. R. Co. v. Thompson*, 94 Ala. 636, 10 So. Rep. 280.

162. Statements of employees as blinding company.—Statements made by an engineer to third parties as to the condition of the engine at the time of an accident are hearsay and not admissible. *Atchison, T. & S. F. R. Co. v. Parker*, 55 Fed. Rep. 595. *East Tenn., V. & G. R. Co. v. Maloy*, 31 Am. & Eng. R. Cas. 352, 77 Ga. 237, 2 S. E. Rep. 941. *Hendricks v. Sixth Ave. R. Co.*, 12 J. & S. (N. Y.) 8.—DISTINGUISHING *Luby v. Hudson River R. Co.*, 17 N. Y. 131.

So are statements made after the injury occurred, by a servant of the company superior to plaintiff, that it was plaintiff's duty to examine the cars in the manner in which he did. *Howard v. Savannah, F. & W. R. Co.*, 84 Ga. 711, 11 S. E. Rep. 452.

And declarations made after an accident caused by a misplaced switch, by a person purporting to be a brakeman, that he caused it, and that he had opened the switch. *Patterson v. Wabash, St. L. & P. R. Co.*, 18 Am. & Eng. R. Cas. 130, 54 Mich. 91, 19 N. W. Rep. 761.—DISTINGUISHED IN *Keyser v. Chicago & G. T. R. Co.*, 31 Am. & Eng. R. Cas. 399, 66 Mich. 390, 10 West. Rep. 646, 33 N. W. Rep. 867.

And the testimony of a son as to declarations of his father, a section boss, that he had before the accident reported the trestle to the company as dangerous. *Illinois C. R. Co. v. Ruffin*, (Miss.) 3 So. Rep. 578.

And declarations of a car driver after an accident to a person on a street, and after the car had been stopped, but before he had left it, that he could not stop the car because the brakes were out of order. *Luby v. Hudson River R. Co.*, 17 N. Y. 131.—DISTINGUISHED IN *Hendricks v. Sixth Ave. R.*

Co., 12 J. & S. (N. Y.) 8. QUOTED IN *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335; *Adams v. Hannibal & St. J. R. Co.*, 7 Am. & Eng. R. Cas. 414, 74 Mo. 553. REVIEWED IN *Alabama G. S. R. Co. v. Hawk*, 18 Am. & Eng. R. Cas. 194, 72 Ala. 112, 47 Am. Rep. 403; *Waldele v. New York C. & H. R. R. Co.*, 19 Am. & Eng. R. Cas. 400, 95 N. Y. 274.

And statements made by a flagman as to how far back he went from one of the trains which collided, to flag the other. *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339.

Where a company is sued for the death of a brakeman, it is proper to permit another brakeman to testify that the conductor, in the absence of the deceased brakeman, told witness to tell the deceased to uncouple the engine, and that he told the deceased to do so without telling him that the conductor had so ordered. It is for the jury to say whether the deceased might reasonably have understood the order to be from the conductor. *Gorman v. Minneapolis & St. L. R. Co.*, 78 Iowa 509, 43 N. W. Rep. 303.

163. Statements of attending physician.—Where plaintiff has testified positively that he is still suffering pain at the time of the trial, it is harmless error to allow his physician to state that he had recently examined plaintiff and could see nothing except a scar, but that plaintiff still "complains of pains shooting up," as it will be presumed that the jury believed plaintiff, and that a verdict for him was based upon his own statement. *Schuler v. Third Ave. R. Co.*, 44 N. Y. S. R. 774, 17 N. Y. Supp. 834; affirmed in 48 N. Y. S. R. 663, 1 Misc. 351, 20 N. Y. Supp. 683.

In such cases plaintiff's attending physician may testify as to the permanency of the injury, though there is no allegation of permanency in the complaint. *Schuler v. Third Ave. R. Co.*, 44 N. Y. S. R. 774, 17 N. Y. Supp. 834; affirmed in 48 N. Y. S. R. 663, 1 Misc. 351, 20 N. Y. Supp. 683.

In an action for killing plaintiff's intestate, the court permitted a physician to testify to the contents of a telegram sent him by plaintiff, stating that there had been an accident on the defendant's road, and that the deceased had been seriously injured and required the witness's attention. The same witness was also allowed to testify that after driving twelve or thirteen miles he arrived at the home of plaintiff, to which

QUOTED IN
33 Ind. 335;
Co., 7 Am.
REVIEWED
awk, 18 Am.
1112, 47 Am.
k C. & H. R.
s. 400, 95 N.

agman as to
of the trains
er. *Pennsyl-
t. 339.*

or the death
to permit an
the conduc-
ceased brake-
deceased to
he told the
ling him that
It is for the
de might re-
order to be
n v. *Minne-
wa 509, 43 N.*

ending phy-
testified posi-
g pain at the
less error to
that he had
and could see
that plaintiff
ting up," as it
jury believed
for him was
t. *Schuler v.
R. 774, 17 N.
Y. S. R. 663,
83.*

ending physi-
permanency of
o allegation of
t. *Schuler v.
R. 774, 17 N.
Y. S. R. 663,
83.*
plaintiff's tes-
ysician to tes-
ram sent him
had been an
road, and that
ously injured
tention. The
ved to testify
thirteen miles
ntiff, to which

the deceased had been carried, and that after his arrival the deceased stated to him that he had been thrown heavily across the corner of a seat and had thus received an injury from which the witness found him suffering. *Held*, that the contents of the telegram were hearsay and the statements of the deceased were not part of the *res gestae*. *Fordyce v. McCants*, 51 Ark. 509, 11 S. W. Rep. 694.

104. Common notoriety in community.—(1) *Admissible*.—Proof of general notoriety is generally admissible as tending to prove notice of a fact, when notice is a material inquiry; but it is never competent to prove the fact itself. *Louisville & N. R. Co. v. Hall*, 39 Am. & Eng. R. Cas. 298, 87 Ala. 708, 4 L. R. A. 710, 6 So. Rep. 277. *Louisville & N. R. Co. v. Hall*, 48 Am. & Eng. R. Cas. 170, 91 Ala. 112, 8 So. Rep. 371. *Crane v. Missouri Pac. R. Co.*, 25 Am. & Eng. R. Cas. 440, 87 Mo. 588. *Missouri Pac. R. Co. v. Johnson*, 37 Am. & Eng. R. Cas. 128, 72 Tex. 95, 10 S. W. Rep. 325.

Proof of the general reputation of a street-car horse, among the drivers and employes of the company, as unsafe and unreliable, is admissible as tending to show negligence of the company in providing such an animal, and using it after the company knew or should have known the unfitness of the horse for the work. *Wormsdorf v. Detroit City R. Co.*, 40 Am. & Eng. R. Cas. 271, 75 Mich. 472, 42 N. W. Rep. 1000.

Evidence that a consignee was well known in the community is competent, as tending to show whether a carrier exercised proper diligence to find him to deliver goods. *Witbeck v. Holland*, 45 N. Y. 13; *affirming* 55 Barb. 443, 38 How. Pr. 273.

Evidence of general reputation is admissible on the question as to whether a highway is public or private. *Albert v. Gulf, C. & S. F. R. Co.*, 2 Tex. Civ. App. 664, 21 S. W. Rep. 779.

In an action to recover for the killing of one by the explosion of an unsafe engine, the court admitted evidence tending to show that the engine was regarded as dangerous, generally, by the employes of the defendant company in the railroad yards where it was used as a switch engine. The other evidence clearly showed that the steam gauge and stop valves were so out of repair as to be practically useless, and that many of the stay rods inside the boiler

were broken, and that the boiler was in other respects unsafe and insecure. *Held*, that the evidence of the reputed condition of the engine could not have been prejudicial to the defendant. *Toledo, St. L. & K. C. R. Co. v. Bailey*, 145 Ill. 159, 33 N. E. Rep. 1089.—*FOLLOWING* Chicago & A. R. Co. v. Shannon, 43 Ill. 343.

(2) *Inadmissible*.—What citizens of that particular locality, attracted to the culvert where the accident occurred, stated as to the rain, height of water, and its effects, etc., was mere hearsay, and was properly excluded. *Central R. & B. Co. v. Kent*, 84 Ga. 351, 10 S. E. Rep. 965.

In an action to recover damages sustained by a person in a carriage on a highway, by means of a collision with a locomotive of defendants, the carelessness of the driver of the carriage cannot be proved by common reputation. *Baldwin v. Western R. Corp.*, 4 Gray (Mass.) 333.

Evidence of general knowledge and rumor among the employes of a street railway company that a car had been on the road ever since it was built is hearsay and irrelevant in a suit for injuries received by a passenger. *Wormsdorf v. Detroit City R. Co.*, 40 Am. & Eng. R. Cas. 271, 75 Mich. 472, 42 N. W. Rep. 1000.

Where a company sues a county for failing to protect its property from destruction at the hands of a mob, it is proper to exclude evidence as to whether the company's witnesses heard of any difficulties in connection with the road the evening prior to the destruction of the property. *Lake Shore & M. S. R. Co. v. Erie County Sup'rs*, 2 N. Y. S. R. 317, 41 Hun 637, *mem.*

Evidence of general notoriety at a designated place of the customs of a railway company in running its trains is not admissible against one who does not live at that place and is not shown to have had the means of acquiring such general knowledge as may be possessed by residents of the place. *International & G. N. R. Co. v. Hassell*, 21 Am. & Eng. R. Cas. 315, 62 Tex. 256.

Where it is a controverted question whether or not an injured person was an employe of the company at the time of an injury, the general "impression" of employes that he was employe is not admissible. *Texas Mex. R. Co. v. Douglass*, 69 Tex. 694, 7 S. W. Rep. 77.

Evidence of general reputation in the community is not admissible to prove that the appellant was constructing the road. *Missouri Pac. R. Co. v. Owens*, 1 *Tex. App. (Civ. Cas.)* 163.

165. Dying declarations.*—The principle of dying declarations does not apply to civil cases, and in an action against a railroad company to recover damages for the death of a person it is error to admit in evidence a statement made by the injured person shortly before his death, but some time after the accident; such statement not being part of the *res gestæ*, but mere hearsay. *East Tenn., V. & G. R. Co. v. Maloy*, 31 *Am. & Eng. R. Cas.* 352, 77 *Ga.* 237, 2 *S. E. Rep.* 941. *Daily v. New York & N. H. R. Co.*, 32 *Conn.* 356. *Marshall v. Chicago & G. E. R. Co.*, 48 *Ill.* 475.—CRITICISING *Rex v. Woodcock*, 1 *Leach* 500. REVIEWING *Wright v. Littler*, 3 *Burr.* 1244; *Aveson v. Kinnaird*, 6 *East* 195; *Stobart v. Dryden*, 1 *M. & W.* 615; *McFarland v. Shaw*, 2 *Law Repos. (N. Car.)* 102.—*Friedman v. Railroad Co.*, 7 *Phila. (Pa.)* 203.

166. Expressions indicating pain and suffering.†—Evidence of declarations which are of an involuntary nature, indicating pain and suffering, such as sudden or involuntary groans, screams, or sighs, resulting from a touch, movement, or contact with a foreign substance, are competent; but evidence of statements made long after the injury, as to the effect of the injury, or as to the suffering endured therefrom, is not competent. *Olph v. Gardner*, 48 *Hun* 169, 15 *N. Y. S. R.* 544.—DISTINGUISHING *Hagenlocher v. Coney Island & B. R. Co.*, 99 *N. Y.* 136. FOLLOWING *Roche v. Brooklyn City & N. R. Co.*, 105 *N. Y.* 294. QUOTING *Reed v. New York C. R. Co.*, 45 *N. Y.* 574. REVIEWING *Uransky v. Dry Dock, E. B. & B. R. Co.*, 44 *Hun* 119, 7 *N. Y. S. R.* 395.

A witness who is asked to state to the jury the extent of the suffering of the plaintiff in a negligence case, based upon his observation, cannot testify to what the plaintiff said to him about her sleeplessness at night, in response to his inquiries made the next morning, the same being hearsay. *Kelley v. Detroit, L. & N. R. Co.*, 80 *Mich.* 237, 45 *N. W. Rep.* 90.

167. Res inter alios acta.—An express company was sued for legal services, but it appeared that a railroad company was interested also in the result of the services, and the express company offered certain letters written by the railroad company to it, tending to show that the compensation which had been demanded by plaintiff was less than that sued for. None of the writers or recipients of the letters were agents of plaintiff, nor authorized to bind him by any statement made regarding the compensation; neither had he been advised of the contents of the letters. *Hield*, that the letters were *res inter alios acta*, and clearly inadmissible. *Southern Exp. Co. v. Todd*, 56 *Fed. Rep.* 104.

168. Family traditions.—Where a common carrier is sued for the loss of a family portrait, it is error to permit a member of the family to testify as to its value from family tradition that he had derived from his deceased father. *Houston & T. C. R. Co. v. Burke*, 9 *Am. & Eng. R. Cas.* 59, 55 *Tex.* 323, 40 *Am. Rep.* 808.

169. Statements of surgeon attending patient.—In an action for injuries, a written statement made by the attending physician, showing the nature and extent of the injuries, made merely for the information of a relative who has the injured person in charge, is not admissible as evidence, even where it is attached as an exhibit to the physician's deposition, and he swears that it is his opinion that it correctly states the injured person's condition at the time. *Vicksburg & M. R. Co. v. O'Brien*, 119 *U. S.* 99, 7 *Sup. Ct. Rep.* 118.

The physician in such case might have examined the statement for the purpose of refreshing his memory or assisting his recollection of the facts stated in it, but could not adopt it as a whole or part of his evidence. *Vicksburg & M. R. Co. v. O'Brien*, 119 *U. S.* 99, 7 *Sup. Ct. Rep.* 118.

While a plaintiff may prove the nature of a dangerous surgical operation, to which he was subjected in consequence of the injuries received by him, as circumstances to be considered in determining his anxiety and suffering, yet he cannot be allowed to testify to what the surgeon said to him at the time, such declarations being mere hearsay. *Alabama G. S. R. Co. v. Arnold*, 30 *Am. & Eng. R. Cas.* 546, 80 *Ala.* 600, 2 *So. Rep.* 337.

* See also *post*, 171.

† See also *post*, 177.

VI. RES GESTÆ.

170. In general.—(1) *Statements of person injured.**—The statement of a party as to the cause of an injury resulting in his death, not made at the time of the accident, nor necessary or pertinent for medical treatment, is inadmissible as evidence. *Lendberg v. Brotherton Iron Min. Co.*, 75 Mich. 64, 43 N. W. Rep. 675. *Waldele v. New York C. & H. R. R. Co.*, 19 Am. & Eng. R. Cas. 400, 95 N. Y. 274; reversing 29 Hun 35, 61 How. Pr. 350.—REVIEWING *Hanover R. Co. v. Coyle*, 55 Pa. St. 396; *Luby v. Hudson River R. Co.*, 17 N. Y. 131; *Hamilton v. New York C. R. Co.*, 51 N. Y. 100; *Whitaker v. Eighth Ave. R. Co.*, 51 N. Y. 295; *Casey v. New York C. & H. R. R. Co.*, 78 N. Y. 518; *Swift v. Massachusetts Mut. L. Ins. Co.*, 63 N. Y. 186; *Schnicker v. People*, 88 N. Y. 192.—APPLIED IN *De Long v. Delaware, L. & W. R. Co.*, 37 Hun 282. FOLLOWED IN *Martin v. New York, N. H. & H. R. Co.*, 103 N. Y. 626, 9 N. E. Rep. 505, 4 N. Y. S. R. 303. QUOTED AND REVIEWED IN *Barry v. Second Ave. R. Co.*, 41 N. Y. S. R. 342, 16 N. Y. Supp. 518.

When the circumstances in evidence render it probable that a statement of the party injured offered as part of the *res gestæ* was the result of premeditation or deliberate design to effect some particular purpose, it should be excluded. *Pilkinton v. Gulf, C. & S. F. R. Co.*, 70 Tex. 226, 7 S. W. Rep. 805.

(2) *Declarations of agents and employes.*—Entries on the books of the carrier, made by his authorized agent in the regular course of business, and at the time the goods are received, are admissible evidence against the carrier, as forming a part of the *res gestæ* of the fact of delivery. *Louisville & N. R. Co. v. McGuire*, 79 Ala. 395.

Where the owner of live stock sues a carrier for injuries thereto while being carried, it is proper for him to testify that he at first refused to accept them, and told the agent so, and that the latter told him to take them and do the best he could with them; that the company would make it all right. Such statements are admissible as part of the *res gestæ*. *Columbus & W. R. Co. v. Kennedy*, 31 Am. & Eng. R. Cas. 92, 78 Ga. 646, 3 S. E. Rep. 267.

* Declarations of persons injured. Whether admissible as *res gestæ*, see note, 28 AM. & ENG. R. CAS. 561.

Declarations of the agent of a carrier at the shipping point as to the reason for delay in transporting property are admissible as part of the *res gestæ*. *McCotter v. Hooker*, 8 N. Y. 497.

It is not material whether declarations constituting a part of the *res gestæ* were uttered by one or the other of appellant's employes. *McLeod v. Ginther*, 8 Am. & Eng. R. Cas. 162, 80 Ky. 399.

Declarations of railway employes are not admissible against the railway unless made concerning the cause of the wreck, and at the time and place of its occurrence, under circumstances making them part of the *res gestæ*. *San Antonio & A. P. R. Co. v. Robinson*, 73 Tex. 277, 11 S. W. Rep. 327.

Where a company is sued for the death of an engineer, happening by reason of a defect in the track, evidence of what a section foreman said at a time other than the time of the accident, as to the dangerous condition of the track, is not admissible as part of the *res gestæ*. *Worden v. Humeston & S. R. Co.*, 72 Iowa 201, 33 N. W. Rep. 629.

A switchman was called by plaintiff for the purpose of showing a defect in the appliances used for the purpose of reversing the engine, and stated that to his knowledge the reverse lever of that engine had become detached on two other occasions, by which the control of the engine was temporarily lost by the engineer. Upon cross-examination he stated that he could not see the lever "fly back," but that upon each occasion he was with the engine, saw its movements by which it refused to change its course, but accelerated its speed at a time when not required, and demanded of the engineer the cause of the failure to follow his directions, when the engineer said, "it flies back." The trial court refused to strike out the evidence upon motion of defendant. *Held*, no error and no prejudice. *Burlington & M. R. Co. v. Wallace*, 28 Neb. 179, 44 N. W. Rep. 223.

(3) *Showing facts as part of the res gestæ.*—Where an employé sues for an injury occurring while being transported on defendant's train, evidence to show that the engineer was drunk, or under the influence of liquor, at the time of the injury, is admissible as part of the *res gestæ*, and as tending to show that reckless running produced the accident. *Hobson v. New Mexico & A. R. Co.*, (Ariz.) 28 Am. & Eng. R. Cas. 360, 11 Pac. Rep. 545.

Where an engineer sues for an injury caused by jumping from his engine to avoid a pending collision, evidence of the character of the road at the place, its grade, cuts, curves, and the nature of the ground generally, is admissible as part of the *res geste*. *Chicago, B. & Q. R. Co. v. Young*, 26 Ill. App. 115. *Tetherow v. St. Joseph & D. M. R. Co.*, 98 Mo. 74, 11 S. W. Rep. 310.

Evidence as to the rate of speed of the train is usually admitted as part of the *res geste*, its effect being controlled by proper instructions. *Taylor v. St. Louis, I. M. & S. R. Co.*, 83 Mo. 386.

Witnesses may be allowed to testify that no signal was given of the sudden backing of a car. Such evidence is admissible as to the *res geste*, and on the issues of negligence. *Spotts v. Wabash Western R. Co.*, 111 Mo. 380, 20 S. W. Rep. 190.

Where plaintiff was injured by negligent operation of a train at a public crossing, it is not error to admit evidence that there was no light about the place. That fact was part of the *res geste* and otherwise relevant. *Easley v. Missouri Pac. R. Co.*, 113 Mo. 236, 20 S. W. Rep. 1073.

The fact that there was confusion produced among the passengers at the time of an accident to the car may be shown as part of the *res geste*. *Hallahan v. New York, L. E. & W. R. Co.*, 26 Am. & Eng. R. Cas. 169, 102 N. Y. 194, 6 N. E. Rep. 287, 1 N. Y. S. R. 367.

Where a company is sued for an injury resulting from an alleged defect in the track, proof of subsequent repairs to that part of the track is not admissible as part of the *res geste*, nor as an admission of a defect. *Kuhns v. Wisconsin, I. & N. R. Co.*, 76 Iowa 67, 40 N. W. Rep. 92.

A creditor of a company obtained judgment and sued out execution and had it levied on bonds of the company pledged to secure its debt, as well as other property, and the bonds and the other property were all sold at the same time, the creditor becoming the purchaser. The company brought suit to restrain him from transferring the bonds, and at the hearing the sheriff who made the execution sale was dead. *Held*, that the creditor had a right to prove, as part of the *res geste*, that the bonds were not sold under the execution, but under the pledge. *Sickles v. Richardson*, 23 Hun (N. Y.) 559.

A declaration in trespass on the case by a

passenger against a railroad company contained two counts: first, for a failure to transport to his destination; second, for a forcible bringing back to his starting point. The testimony was that, having purchased his ticket with a counterfeit note, the conductor, as instructed, insisted on good money, took from him a hundred-dollar bill, and gave it to the conductor of the returning train, on which the passenger went back. The latter conductor carried the bill beyond the original starting point, where the passenger, getting off, had to telegraph to recover it. *Held*, that the demand for and taking of the hundred dollars by the first conductor was perhaps part of the history of the wrongs complained of, and admissible as part of the *res geste*; but the carrying of it beyond the starting point by the second conductor was not, because all the wrongs complained of ended with the arrival at that point. *Memphis & C. R. Co. v. Chastine*, 54 Miss. 503.

171. Dying declarations.*—Dying declarations are not admissible as evidence, in a civil action for damages against the employer, by the administrator of a deceased employé. *Hood v. Pioneer M. & M. Co.*, 95 Ala. 461.—FOLLOWING *Johnson v. State*, 50 Ala. 458.

In an action for the death of a person at a street crossing, declarations of deceased made some two hours after the accident and shortly before his death, as to the manner in which he was injured, are not admissible as part of the *res geste*, or declarations made *in extremis*. Dying declarations are not admissible in civil actions. *Waldle v. New York C. & H. R. R. Co.*, 19 Hun (N. Y.) 69.

Ordinarily proof of dying declarations is confined to homicide, but is sometimes admissible in civil cases. So the declarations of one who is fatally injured and dies almost instantly, as to the manner of the accident, are admissible in a civil action for causing the death. *Brownell v. Pacific R. Co.*, 47 Mo. 239.—QUOTING *Hanover R. Co. v. Coyle*, 55 Pa. St. 402.—DISTINGUISHED IN *Adams v. Hannibal & St. J. R. Co.*, 7 Am. & Eng. R. Cas. 414, 74 Mo. 553. REVIEWED IN *Leahy v. Cass Ave. & F. G. R. Co.*, 97 Mo. 165, 10 S. W. Rep. 58.

172. Declarations made before the transaction.—(1) *Admissible.*—In an

* See also *ante*, 165.

action by a party injured by a collision with a railway train, against the company operating such train, the plaintiff will have the right to show the position of the defendant's train, and what precaution, if any, the conductor in charge of the train had taken to guard against danger; and the statements or declarations of the conductor a few moments before the collision, being a part of the *res geste*, may be shown for that purpose. *Chicago & E. R. Co. v. Holland*, 30 *Am. & Eng. R. Cas.* 590, 122 *Ill.* 461, 13 *N. E. Rep.* 145, 11 *West. Rep.* 51; *affirming* 18 *Ill. App.* 418.

In an action for injuries sustained at a railroad crossing by collision with a train, it was competent for the plaintiff's mother, who was present when her husband and daughter left home on the evening of the accident, to testify as to what was said as to their destination when about to depart, such evidence being a part of the *res geste*. *Cincinnati, I., St. L. & C. R. Co. v. Howard*, 124 *Ind.* 280, 24 *N. E. Rep.* 892.

When an irregularity exists in the running of trains, and a collision occurs, and the negligence of the engineer and train dispatcher is alleged as causing it, the telegraphic correspondence between the two upon the subject, just prior to the collision, is competent as a part of the *res geste*, and if not in writing may be proved by a listener. *Deverson v. Eastern R. Co.*, 58 *N. H.* 129.

Where a company is sued for the death of a passenger when getting off a train, evidence of remarks by a brakeman while assisting her to alight, urging her to "hurry up," are admissible as part of the *res geste*, and as tending to rebut a charge of contributory negligence. *Waller v. Hannibal & St. J. R. Co.*, 83 *Mo.* 608.

Evidence of what the other passenger told a boy who was injured by jumping from a moving train, as to the train not stopping, was admissible as part of the *res geste*. *Hemmingway v. Chicago, M. & St. P. R. Co.*, 33 *Am. & Eng. R. Cas.* 511, 72 *Wis.* 42, 7 *Am. St. Rep.* 823, 37 *N. W. Rep.* 804.

Where a company sues a county for not properly protecting its property against a mob, an order of a general in charge of military forces, to a captain shortly before cars were burned directing him to guard the property, is properly admitted for the purpose of showing that the captain

came to the place under military orders, and as part of the *res geste*. *Lake Shore & M. S. R. Co. v. Erie County Sup'rs*, 2 *N. Y. S. R.* 317, 41 *Hun* 637.

So evidence of an employé of the company who was doing duty near where the cars were burned, of a request to him to join the mob, and that he was assaulted upon declining to do so, is properly admitted as part of the *res geste*. *Lake Shore & M. S. R. Co. v. Erie County Sup'rs*, 2 *N. Y. S. R.* 317, 41 *Hun* 637.

In an action against a company to recover for rails and other material claimed to have been sold and used in the extension of a track, the company's secretary was called as a witness and on cross-examination stated that, so far as he knew, the company did not procure any iron from plaintiffs to make the extension. This was new matter not connected with anything testified to in his direct examination. He was then shown certain letters written by him to the seller of iron about the time of its delivery, which showed knowledge on the part of the secretary, and urged a prompt delivery of the rails. *Held*, that the letters were properly admitted both as part of the *res geste*, and for the purpose of refreshing the witness's memory. *Scott v. Middleton, U. & W. G. R. Co.*, 4 *Am. & Eng. R. Cas.* 114, 86 *N. Y.* 200; *affirming* 21 *Hun* 231.

(2) *Inadmissible*.—Where an accident is charged as having been produced by a defective locomotive, declarations by engineers as to its defective condition, made at various times ranging from a few hours back to five months before the accident, are not part of the *res geste*, and not admissible against the company. *Louisville & N. R. Co. v. Stewart*, 56 *Fed. Rep.* 808.

Where a company defends an action for killing a person on its track, on the ground of contributory negligence in walking on the track other than at a crossing, it is error to allow a witness to state that a short time before the accident the deceased told him that he was going home by a certain route which would require him to go on the track, as such evidence is not part of the *res geste*. *Chicago & G. T. R. Co. v. Foster*, 46 *Ill. App.* 621.

Statements of agents of a company, as to the condition of the brakes on the cars, or as to the condition of the road at the place where the accident occurred, made some time before and some time after the acci-

company con-
a failure to
second, for a
starting point.
g purchased
note, the con-
d on good
ed-dollar bill,
f the return-
essenger went
carried the
point, where
to telegraph
demand for
dollars by the
rt of the his-
d of, and ad-
este; but the
ting point by
t, because all
ded with the
phis & C. R.

ns.*—Dying
e as evidence,
s against the
ator of a de-
Pioneer M. &
WING Johnson

of a per.on at
as of deceased
r the accident
as to the man-
are not admis-
or declarations
eclarations are
s. *Waldele v.*
o., 19 *Hun* (N.

declarations is
sometimes ad-
the declarations
ured and dies
manner of the
civil action for
ll v. Pacific R.
b Hanover R.
402.—DISTIN-
libal & St. J. R.
14, 74 *Mo.* 553;
ss Ave. & F. G.
Rep. 58.

de before the
ssible.—In an

1.8
2.0
2.2
2.5
2.8
3.2
3.6
4.0

10
11
12
13
14
15
16
17
18
19
20

dent, and at some miles from the place, are not a part of the *res gestæ* and are not competent evidence for a plaintiff in a suit against the company, to prove negligence in the company. *Virginia & T. R. Co. v. Sayers*, 26 *Gratt. (Va.)* 328.

173. Declarations as part of a transaction or occurrence.—(1) *In general.*—In an action by plaintiff to recover damages for the appropriation of a right of way through his farm by defendant, the declarations of plaintiff, made at the time of the appropriation, are competent, and can be offered as original evidence, without calling plaintiff's attention to the same. *Le Roy & Co. v. Butts*, 36 *Am. & Eng. R. Cas.*, 40 *Kan.* 159, 19 *Pac. Rep.* 625.

At the time W. conveyed the land lying between a highway and a railroad track, as a site for a passenger station, he removed the fence dividing it from the public highway, and while doing so declared that the land "was to be thrown out for a common, and for the purpose of going to the station." *Held*, to be admissible as a part of the *res gestæ*, and as proof of W.'s intention in throwing the land open. *Spencer v. New York & N. E. R. Co.*, 62 *Conn.* 242, 25 *Atl. Rep.* 350.

A witness testifying as to a settlement made by him with the officers of a company, for work done by him under contract, in which work plaintiff claimed to be also interested as a contractor, may state what he told the railroad officials as to his contract with plaintiff, and as to the extent of his authority to represent plaintiff in the settlement, such declarations being part of the *res gestæ*, and admissible as original testimony. *Mobile & B. R. Co. v. Worthington*, 95 *Ala.* 598, 10 *So. Rep.* 839.

(2) *Declarations of person injured.*—Contemporaneous declarations by an injured party as to the nature and extent of an injury are admissible, and their exclusion is error, if they could have aided in fixing the defendant's liability. *Gardner v. Bennett*, 6 *J. & S. (N. Y.)* 197.

A declaration of the deceased as to the cause of the injury, made at the time and place thereof, is admissible as a part of the *res gestæ* in an action for damages for the death. *Stoeckman v. Terre Haute & I. R. Co.*, 15 *Mo. App.* 503.

(3) *Declarations of agents and employes.*—Where the acts of the agent will bind the

principal, there his representations, declarations and admissions respecting the subject-matter will bind the principal, where made at the same time and constituting a part of the *res gestæ*. *Coyle v. Baltimore & O. R. Co.*, 11 *W. Va.* 94.

Where a brakeman was guilty of a tort in removing a trespasser from a train, it was competent, in an action against the company, to prove what the brakeman said at the time, as a part of the *res gestæ*, not to establish his authority, but to show his intention. *Marion v. Chicago, R. I. & P. R. Co.*, 64 *Iowa* 568, 21 *N. W. Rep.* 86.

The material issue being whether the assault on plaintiff was justified or even palliated by his own conduct, everything that was said and done by and between the parties, just before and up to the time when he was ejected, or forced to leave the car, is admissible evidence as part of the *res gestæ*. *Alabama G. S. R. Co. v. Frazier*, 93 *Ala.* 45, 9 *So. Rep.* 303.

Where a company directed its servants to set fire to the dry grass, weeds, and other combustible material on the right of way, and the fire spread to the premises of an adjacent owner and destroyed his property, in a suit to recover, statements made by the company's servants while engaged in the act, concerning the same, were admissible against the company, as a part of the *res gestæ*. *Ohio & M. R. Co. v. Porter*, 92 *Ill.* 437.

Where the suit is for damages caused by running a train over plaintiff's wagon and horses while being driven by his servant on a highway, statements made by the servant at the time as to the cause of the accident are a part of the *res gestæ*, and admissible against the plaintiff. *Toledo & W. R. Co. v. Goddard*, 25 *Ind.* 185.

Where a company is sued for damages resulting from an embankment washing away, the declarations made by the company's engineer while actually engaged upon the work, tending to show that it was not properly constructed, are admissible as part of the *res gestæ*. *Brehm v. Great Western R. Co.*, 34 *Barb. (N. Y.)* 256.

A local freight agent is the proper person to inquire of as to baggage sent to his station, and his answer to such inquiries as to a loss is admissible as part of the *res gestæ*. *Curtis v. Avon, G. & M. M. R. Co.*, 49 *Barb. (N. Y.)* 148.

Statements of agents and employes of the

company have been held admissible as part of the *res gestæ* in the following cases:

Statements made by an agent during the progress of his agency, respecting its subject-matter. *Larson v. Metropolitan St. R. Co.*, 110 Mo. 234, 19 S. W. Rep. 416.

Declarations of the engineer by whose negligence plaintiff was injured, made at the time of the injury. *Hanover R. Co. v. Coyle*, 55 Pa. St. 396.—APPROVED IN *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99. CRITICISED IN *Louisville, C. & L. R. Co. v. Goetz*, 14 Am. & Eng. R. Cas. 627, 79 Ky. 442, 42 Am. Rep. 227. DISTINGUISHED AND REVIEWED IN *Barry v. Second Ave. R. Co.*, 41 N. Y. S. R. 342, 16 N. Y. Supp. 518. QUOTED IN *Little Rock, M. R. & T. R. Co. v. Leverett*, 28 Am. & Eng. R. Cas. 459, 48 Ark. 333; *McLeod v. Ginther*, 8 Am. & Eng. R. Cas. 162, 80 Ky. 399; *Brownell v. Pacific R. Co.*, 47 Mo. 239. REVIEWED IN *Leahey v. Cass Ave. & F. G. R. Co.*, 97 Mo. 165, 10 S. W. Rep. 58; *Waldele v. New York C. & H. R. R. Co.*, 19 Am. & Eng. R. Cas. 400, 95 N. Y. 274; *Hawker v. Baltimore & O. R. Co.*, 15 W. Va. 628.

Statements made by the general manager of a railroad, whose duty it was to investigate the cause of a disaster, tending to show what caused the disaster, and made while he is actually engaged in his inquiries. *Kroegg v. Atlanta & W. P. R. Co.*, 77 Ga. 202, 4 Am. St. Rep. 79.—DISTINGUISHED IN *Carroll v. East Tenn., V. & G. R. Co.*, 41 Am. & Eng. R. Cas. 307, 82 Ga. 452. EXPLAINED IN *Chattanooga, R. & C. R. Co. v. Liddell*, 85 Ga. 482.

The sayings of the person who procured a deed in behalf of the company, made at the time the deed was executed, to the effect that he was acting as agent for the company. *Chattanooga, R. & C. R. Co. v. Davis*, 89 Ga. 708, 15 S. E. Rep. 626.

Statements made by the conductor in charge of the train, in an action for delay in carrying goods, relating to the capacity of his engine, tending to explain the delay. *Sisson v. Cleveland & T. R. Co.*, 14 Mich. 489.

On the question whether a shipper's contract was fairly and understandingly executed by the shipper, or whether he was induced to sign the same without examination, under the false assurance of a station agent that it was only a pass, the agent, on his examination in chief, stated certain of his declarations to the shipper, made at the

time and relating to the signing of the alleged contract. On cross-examination an objection was sustained to this question: "Did you tell Black (the shipper) what it was when you had him sign it?" Held, that the court erred in its ruling, and that everything that was said or done at the time by either of the parties relating to the signing was a part of the *res gestæ*, and was proper to be elicited on cross-examination. *Black v. Wabash, St. L. & P. R. Co.*, 25 Am. & Eng. R. Cas. 388, 111 Ill. 351.

174. Declarations made immediately after occurrence in question.—

(1) *Admissible—Person injured.*—The actions, conduct, and, to some extent, the declarations of a person immediately after an injury are competent as part of the *res gestæ*. If the person who claims to have received an injury makes no complaint in reference thereto, that fact becomes pertinent upon the question of fact, and where that evidence is referred to for the purpose of showing that the accident did not occur, evidence that a complaint was made to other persons, becomes pertinent in rebuttal. *Fuller v. Jamestown St. R. Co.*, 75 Hun 273, 26 N. Y. Supp. 1078.

Where a railroad employé receives fatal injuries, statements made by him immediately after he fell are admissible, in a suit against the company, as part of the *res gestæ*. *Louisville & N. R. Co. v. Earl*, 94 Ky. 368, 22 S. W. Rep. 607. *Little Rock, M. R. & T. R. Co. v. Leverett*, 28 Am. & Eng. R. Cas. 459, 48 Ark. 333, 3 S. W. Rep. 50.—QUOTING *Clinton v. Estes*, 20 Ark. 225; *Carr v. State*, 43 Ark. 102; *Flynn v. State*, 43 Ark. 292; *Com. v. Hackett*, 2 Allen (Mass.) 36; *Hanover R. Co. v. Coyle*, 55 Pa. St. 402. REVIEWING *Elkins v. McKean*, 79 Pa. St. 493; *Casey v. New York C. & H. R. R. Co.*, 78 N. Y. 518; *McLeod v. Ginther*, 80 Ky. 399.—*Louisville, N. A. & C. R. Co. v. Buck*, 38 Am. & Eng. R. Cas. 152, 116 Ind. 566, 19 N. E. Rep. 453, 2 L. R. A. 520, 28 Am. Law Reg. (N. S.) 148.—DISAPPROVED IN *Chicago, B. & Q. R. Co. v. Johnson*, 36 Ill. App. 564.—*Missouri Pac. R. Co. v. Bond*, 2 Tex. Civ. App. 104, 20 S. W. Rep. 930.

Testimony that plaintiff immediately after the accident said, "Take these splinters out of my leg; take these splinters out," is admissible. *West v. Manhattan R. Co.*, 24 J. & S. 590, 1 N. Y. Supp. 519.

Action by parents for negligently causing the death of their son. Several witnesses

testified to material statements made by the boy after he was injured, in regard to what he was doing at the time, and how the injury occurred. The declarations were made immediately after the injury and before he was removed from the ground. *Held*, that this testimony was properly admitted as part of the *res gesta*. *Texas & P. R. Co. v. Hall*, 83 Tex. 675, 19 S. W. Rep. 121.

Deceased was heard to cry out by a witness fifty or sixty yards distant. The witness at once ran to the deceased, who then detailed the manner in which he received his injury. This was competent testimony. *Texas & P. R. Co. v. Robertson* 82 Tex. 657, 17 S. W. Rep. 1041.

The plaintiff alighted from one of defendant's trains, on which he was a passenger, on a dark night, and fell against a pile of wood. Within fifteen minutes after the accident, while lying where he fell, and still uttering groans and exclamations of pain, he made a statement to one who assisted him, that the conductor made him get off where he fell. *Held*, that this statement was admissible as *res gesta*. (Collard, J., dissenting.) *International & G. N. R. Co. v. Smith*, (Tex.) 44 Am. & Eng. R. Cas. 324, 14 S. W. Rep. 642.—QUOTING *Pilkinton v. Gulf, C. & S. F. R. Co.*, 70 Tex. 231; *McGowen v. McGowen*, 52 Tex. 657.

(2) *Admissible—Third persons.*—Where an employé is injured while in a place of unknown danger to him, an exclamation on the part of the road master who represents the company, and who placed the servant in the position of danger, immediately after the happening of the accident, to the effect that he expected it, is admissible as part of the *res gesta*. *Elledge v. National City & O. R. Co.*, 100 Cal. 282, 34 Pac. Rep. 720.

On the trial of a suit for damages against a street railway company, for alleged negligence in running a team and car over the plaintiff, a lad aged about seven years, the statements of the driver of the car just after the car was stopped, and while the plaintiff was under it, are proper to be shown in evidence, as part of the *res gesta*. *Quincy Horse R. & C. Co. v. Gnuse*, 137 Ill. 264, 27 N. E. Rep. 190; reversing 38 Ill. App. 212.

The declarations of the engineer, made at the time of the collision, or a few moments afterwards, when there was no time to contrive or devise a falsehood, and during the search for the victims of the accident, are a part of the *res gesta*, and competent as

original evidence in the case. *McLeod v. Gunther*, 8 Am. & Eng. R. Cas. 162, 80 Ky. 399.—QUOTING *Hanover R. Co. v. Coyle*, 55 Pa. St. 402.—REVIEWED IN *Little Rock, M. R. & T. R. Co. v. Leverett*, 28 Am. & Eng. R. Cas. 459, 48 Ark. 333.—*Keyser v. Chicago & G. T. R. Co.*, 31 Am. & Eng. R. Cas. 399, 66 Mich. 390, 10 West. Rep. 646, 33 N. W. Rep. 867.—DISTINGUISHING *Patterson v. Wabash, St. L. & P. R. Co.*, 54 Mich. 91.—*O'Connor v. Chicago, M. & St. P. R. Co.*, 27 Minn. 166, 36 Am. Rep. 829, n., 6 N. W. Rep. 481.

The statement of the engineer, made immediately upon stopping his train after running over certain persons, and while going to the place of the accident, that "they had whistled enough for them," is admissible as part of the *res gesta*. *Hooker v. Chicago, M. & St. P. R. Co.*, 41 Am. & Eng. R. Cas. 498, 76 Wis. 542, 44 N. W. Rep. 1085.

Where the suit is to recover for baggage lost by fire, evidence that the owner went to the station the next morning after the fire, and had a conversation with the baggage agent, who related to him the circumstances of the burning, is competent as part of the *res gesta*. *Illinois C. R. Co. v. Tronstine*, 64 Miss. 834, 2 So. Rep. 255.

Where a female passenger sues an elevated road for personal injuries, alleged to have been caused by the rude and negligent act of a guard, declarations of the guard at the time of the accident that he was "sorry he had done it," are competent for plaintiff as tending to explain the nature of the act complained of. *Koetter v. Manhattan R. Co.*, 36 N. Y. S. R. 611, 59 Hun 623, 13 N. Y. Supp. 458; affirmed in 129 N. Y. 668, mem., 30 N. E. Rep. 65, 42 N. Y. S. R. 946.—QUOTING *Feeney v. Long Island R. Co.*, 116 N. Y. 375, 22 N. E. Rep. 402.

Where a passenger sues for being unlawfully ejected from a train by the conductor and brakeman, a conversation between the plaintiff and the brakeman immediately after he is removed from the car, and while yet on the car platform, tending to illustrate why he was removed, is admissible as part of the *res gesta*. *Bass v. Chicago & N. W. R. Co.*, 42 Wis. 654.

In an action by a husband to recover for loss of services of his wife, who was injured while boarding one of defendant's trains, she was allowed to state that, at the moment of the accident and her exclamation of pain, the brakeman said that she could

go to hell. Defendant's counsel objected to the question as incompetent, improper, hearsay, and immaterial, and excepted when overruled. *Held*, that the evidence was material and competent as a part of the *res gestæ*. *Butler v. Manhattan R. Co.*, 4 *Misc. (N. Y.)* 401; *affirming* 3 *Misc.* 453, 52 *N. Y. S. R.* 498.—DISTINGUISHING *Sherman v. Delaware, L. & W. R. Co.*, 106 *N. Y.* 542. QUOTING *Tilson v. Terwilliger*, 56 *N. Y.* 273.

(3) *Inadmissible — Person injured.*—A statement made by a party who is injured by the negligence of a railway company, immediately after the accident, is not admissible as evidence as part of the *res gestæ*. *Johnston v. Oregon S. L. & U. N. R. Co.*, 23 *Oreg.* 94, 31 *Pac. Rep.* 283.—FOLLOWING *Sullivan v. Oregon R. & N. Co.*, 12 *Oreg.* 392, 7 *Pac. Rep.* 508.—*Cleveland, C. & C. R. Co. v. Mara*, 26 *Ohio St.* 185.

In an action for injuries resulting from ejection from a railroad train, the declarations of the plaintiff immediately after the event, in the absence of the defendant, narrating the occurrence, are not part of the *res gestæ*, and cannot be given in the evidence. *Sullivan v. Oregon R. & N. Co.*, 21 *Am. & Eng. R. Cas.* 391, 12 *Oreg.* 392, 7 *Pac. Rep.* 508. *Chicago W. D. R. Co. v. Becker*, 128 *Ill.* 545, 21 *N. E. Rep.* 524; *reversing* 30 *Ill. App.* 200.—FOLLOWED IN *Hellmuth v. Katschke*, 35 *Ill. App.* 21.

(4) *Inadmissible — Third parties.*—Plaintiff's intestate having been run over and killed by a train belonging to defendant, the declaration of one of the trainmen on the stoppage of the train immediately after the accident, "We have run over a man, and killed him dead as hell," is not admissible for the plaintiff as a part of the *res gestæ*. *Memphis & C. R. Co. v. Womack*, 37 *Am. & Eng. R. Cas.* 308, 84 *Ala.* 149, 4 *So. Rep.* 618.—FOLLOWING *Alabama G. S. R. Co. v. Hawk*, 72 *Ala.* 112; *Tanner v. Louisville & N. R. Co.*, 60 *Ala.* 621.—FOLLOWED IN *Richmond & D. R. Co. v. Hammond*, 93 *Ala.* 181.

Where a company is sued for killing a person, remarks made after the train was stopped, between trainmen to the effect—"If you had stopped the train when I told you, you would not have killed him," and a reply by the other, "It cannot be helped now, it is too late," are not admissible as part of the *res gestæ*. *Adams v. Hannibal & St. J. R. Co.*, 7 *Am. & Eng. R. Cas.* 414, 74 *Mo.* 553.—DISTINGUISHING *Brownell*

v. Pacific R. Co., 47 *Mo.* 243. QUOTING *Luby v. Hudson River R. Co.*, 17 *N. Y.* 133.—APPLIED IN *Kelly v. Chicago & A. R. Co.*, 88 *Mo.* 534. DISTINGUISHED IN *Hampton v. Pullman Palace Car Co.*, 42 *Mo. App.* 134. QUOTED IN *Chillicothe ex rel. v. Raynard*, 80 *Mo.* 185. REVIEWED IN *Alabama G. S. R. Co. v. Hawk*, 18 *Am. & Eng. R. Cas.* 194, 72 *Ala.* 112, 47 *Am. Rep.* 403; *Leahey v. Cass Ave. & F. G. R. Co.*, 97 *Mo.* 165, 10 *S. W. Rep.* 58.

The remark of a guard on an elevated railway train to a female passenger that "you must be injured," made immediately after her fall, and while he was assisting her to arise, is a mere expression of opinion, not part of the *res gestæ* and not admissible in evidence. *De So. v. Manhattan R. Co.*, 39 *N. Y. S. R.* 79, 5 *N. Y. Supp.* 108.

A remark to an injured party by one who had gone to his relief, that his conduct had been imprudent, is not admissible as evidence, not being part of the *res gestæ*. *Gulf, C. & S. F. R. Co. v. Montgomery*, 85 *Tex.* 64, 19 *S. W. Rep.* 1015.

175. Declarations made soon after occurrence in question.—(1) *In general*—*Person injured.*—In an action for personal injuries alleged to have been caused by negligence, plaintiff may not support his own testimony, as to the effect of the injuries, by proof of declarations to the same effect made by him after the accident, and forming no part of the *res gestæ*, to persons other than a physician in attendance upon him professionally. *Kennedy v. Rochester City & B. R. Co.*, 130 *N. Y.* 654, *mem.*, 3 *Silv. App.* 591, 29 *N. E. Rep.* 141, 41 *N. Y. S. R.* 329; *reversing* 54 *Hun* 183, 26 *N. Y. S. R.* 871, 7 *N. Y. Supp.* 221.

Where the action is for frightening plaintiff's team by blowing a whistle, what plaintiff said after the injury was done and he had gone some distance, as to the conduct of the engineer, tending to show malice, is not admissible as part of the *res gestæ*; neither is what the engineer said at the next station admissible against the company. *Newsom v. Georgia R. Co.*, 66 *Ga.* 57.

Statements made by an injured person after he had been carried one or two blocks, in answer to questions by a policeman as to how the injury occurred, are not admissible as part of the *res gestæ*. *Lahey v. Ottmann*, 25 *N. Y. Supp.* 897, 56 *N. Y. S. R.* 109, 73 *Hun* 63.—FOLLOWING *Whitaker v. Eighth Ave. R. Co.*, 51 *N. Y.* 295;

Waldele v. New York C. & H. R. R. Co., 95 N. Y. 274; Martin v. New York, N. H. & H. R. Co., 103 N. Y. 626, 9 N. E. Rep. 505.

Statements made by a passenger after she had fallen in alighting from a car, had recovered herself, obtained the driver's name, gone home, and then gone to her sister's house, cannot be received as part of the *res gestæ*, even under the Georgia statute, which declares that "declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or after-thought, are admissible as part of the *res gestæ*." *Augusta & S. R. Co. v. Randall*, 34 Am. & Eng. R. Cas. 439, 79 Ga. 304, 4 S. E. Rep. 674.—DISTINGUISHING AND LIMITING *Augusta Factory v. Barnes*, 72 Ga. 217.

Where a female passenger sues for a personal injury, evidence of a statement made by her soon after the injury, that the conductor let her fall, is not admissible as part of the *res gestæ*, though made in the presence of the conductor, to which he made no reply. *Chicago, B. & Q. R. Co. v. Johnson*, 36 Ill. App. 564.—DISAPPROVING *Louisville, N. A. & C. R. Co. v. Buck*, 116 Ind. 566.

A declaration of a person who has been fatally injured upon a railroad, made after he has sustained his injuries, explaining the manner in which the accident happened, is not competent evidence in favor of the plaintiff suing the company for wrongfully causing the death. *Martin v. New York, N. H. & H. R. Co.*, 103 N. Y. 626, 9 N. E. Rep. 505, 4 N. Y. S. R. 303.—FOLLOWING *Waldele v. New York C. & H. R. R. Co.*, 95 N. Y. 274.—*Texas & N. O. R. Co. v. Crowder*, 70 Tex. 222, 7 S. W. Rep. 709.—DISTINGUISHED IN *Texas & P. R. Co. v. Barron*, 78 Tex. 421.

Plaintiff, a passenger, when the accident occurred was standing on the front platform of the rear car. A witness testified that plaintiff said, shortly after the accident, that the injury arose from his own fault; that he was to blame for being in an improper place. *Held*, that this testimony was properly left to the jury; that if such declarations were made, it did not follow that plaintiff was not entitled to recover, for it did not appear that he then knew the state of the road or the cause of the injury. *Zemp v. Wilmington & M. R. Co.*, 9 Rich. (So. Car.) 84.

(2) — *Employés*.—Declarations of employés of a company relating to the cause of an accident upon the road, made after the accident occurred, and not as part of the *res gestæ*, are hearsay and not admissible. *St. Louis, I. M. & S. R. Co. v. Sweet*, 57 Ark. 287, 21 S. W. Rep. 587.—REVIEWING *St. Louis & S. F. R. Co. v. Barger*, 52 Ark. 78.—*Weideman v. Tacoma R. & M. Co.*, 7 Wash. 517, 35 Pac. Rep. 414.

A brakeman's admission that he caused a railway accident is inadmissible as *res gestæ* in an action arising therefrom against the company by which he is employed, if his statement was not made in the execution of his duty, or while the act to which it referred was in progress; nor can it bind the company as to the admission of an agent if it does not appear that the act was done in the line of his duty. *Patterson v. Wabash, St. L. & P. R. Co.*, 18 Am. & Eng. R. Cas. 130, 54 Mich. 91, 19 N. W. Rep. 761.

A statement by a railway conductor, made after a wreck of the train under his control, with regard to the cause of the wreck, is not competent; it is not *res gestæ*. *San Antonio & A. P. R. Co. v. Robinson*, 73 Tex. 277, 11 S. W. Rep. 327. *Agassiz v. London Tramway Co.*, 21 W. R. 199.

Where a passenger sues for being wilfully and maliciously removed from a train by the conductor, evidence of what the conductor said after the passenger was removed is not admissible as part of the *res gestæ*; but its admission is not ground for a new trial where it was immaterial and could not have affected the verdict. *Curl v. Chicago, R. I. & P. R. Co.*, 11 Am. & Eng. R. Cas. 85, 63 Iowa 417, 16 N. W. Rep. 69, 19 N. W. Rep. 308.

Where an employé sues for an injury alleged to have been caused by the negligence of his superior servant, an admission made after the injury, by a fellow-servant, tending to show that he was responsible for the injury, is not admissible as part of the *res gestæ*. *Hellmuth v. Katschke*, 35 Ill. App. 21.—FOLLOWING *Chicago W. D. R. Co. v. Becker*, 128 Ill. 545.

The declarations of the servants of the railroad company, while returning to town on the train with the dead body of the de-

* How far declarations of railroad employés made shortly after accident are admissible as part of *res gestæ*, see notes, 95 AM. DEC. 73; 36 AM. REP. 829; 58 Id. 565; 19 L. R. A. 745.

ceased, are not admissible evidence against the company as a part of the *res gestæ* connected with the killing. *Tanner v. Louisville & N. R. Co.*, 60 Ala. 621.—FOLLOWED IN *Memphis & C. R. Co. v. Womack*, 37 Am. & Eng. R. Cas. 308, 84 Ala. 149, 4 So. Rep. 618.

Where a street-car company is sued for an injury to plaintiff's wagon, alleged to have been caused by the negligence of the driver, evidence of a conversation between plaintiff and another driver, a considerable time after the accident, is not admissible as part of the *res gestæ*. *McCabe v. Dry Dock, E. B. & B. R. Co.*, 15 Daly 504, 8 N. Y. Supp. 336, 28 N. Y. S. R. 879.

The sayings of the conductor to the fireman at the next station are inadmissible, particularly when offered as evidence for the company. *Central R. & B. Co. v. Kelly*, 58 Ga. 107. *Sims v. Macon & W. R. Co.*, 28 Ga. 93.

In an action for carrying off plaintiff's slave, the admissions of the conductor, made at a subsequent time, that he knew the negro was plaintiff's slave, are not admissible as a part of the *res gestæ*. *Griffin v. Montgomery & W. P. R. Co.*, 26 Ga. 111.

In an action for double damages for killing stock, declarations made by the section foreman which are not a part of the *res gestæ*, and not coincident with the event in which the suit originated, but a mere narration of a past occurrence, are not admissible in evidence. *Smith v. St. Louis, I. M. & S. R. Co.*, 91 Mo. 58, 3 S. W. Rep. 836.

(3) *A few minutes afterwards*.—In an action for personal injuries sustained by a passenger, a witness for the plaintiff cannot be allowed to testify that the conductor, "a few minutes after the plaintiff had been hurt, asked the engineer why he did not respond to the bell-call; and that the engineer answered, he did respond to all the bell-calls he heard." Such declarations are not part of the *res gestæ*. *Alabama G. S. R. Co. v. Hawk*, 18 Am. & Eng. R. Cas. 194, 72 Ala. 112, 47 Am. Rep. 403.—REVIEWING *Luby v. Hudson River R. Co.*, 17 N. Y. 131; *Adams v. Hannibal & St. J. R. Co.*, 74 Mo. 553.—FOLLOWED IN *Memphis & C. R. Co. v. Womack*, 37 Am. & Eng. R. Cas. 308, 84 Ala. 149, 4 So. Rep. 618; *Richmond & D. R. Co. v. Hammond*, 93 Ala. 181.

In an action for damages caused by the explosion of a boiler, the statements made

by the engineer a few minutes after the explosion, tending to show that the boiler was defective, are not admissible as part of the *res gestæ*. *Houston & T. C. R. Co. v. Hicks*, 2 Tex. Unrep. Cas. 437.

Where a witness has testified to finding an injured child at a turntable, and has described the circumstances and appearance of things, tending to show that it was injured while on the turntable, it is error not to allow the witness to further state what the child said when he reached the place, as to how it was hurt, where it appears that he reached the place a few minutes after the injury. Such statement is admissible as part of the *res gestæ*, whether the child lived or died. *Ferguson v. Columbus & R. R. Co.*, 75 Ga. 637.—FOLLOWING *Augusta Factory v. Barnes*, 72 Ga. 217.

(4) *Five minutes afterwards*.—The declarations of plaintiff's intestate, made within five minutes after receiving the injuries which proved fatal, in reply to a question as to "how it happened," "that it was the carelessness of the foreman, he supposed, in not having out any flagman, and that he himself did not know there was no flagman out when he got on the hand-car," are not a part of the *res gestæ*, nor admissible as evidence on any other principle. *Richmond & D. R. Co. v. Hammond*, 93 Ala. 181, 9 So. Rep. 577.—FOLLOWING *Alabama G. S. R. Co. v. Hawk*, 72 Ala. 112; *Memphis & C. R. Co. v. Womack*, 84 Ala. 149.—*Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 12 So. Rep. 176.—FOLLOWING *Alabama G. S. R. Co. v. Hawk*, 72 Ala. 112. QUOTING *Richmond & D. R. Co. v. Hammond*, 93 Ala. 181.

Where it was claimed that plaintiff was injured through the negligence of defendant's engineer, the declarations of the engineer in explanation of the accident, made about five minutes after the occurrence, are not admissible as part of the *res gestæ*. *Durkee v. Central Pac. R. Co.*, 69 Cal. 533, 58 Am. Rep. 562, 11 Pac. Rep. 130.

Where a street railway company is sued for an injury to a passenger resulting from the negligence of a conductor, the declarations of the company's transfer agent, who is not directly connected with the occurrence, made from two to five minutes thereafter, to the effect that the conductor "would get into trouble," that "he defended the car without my authority," are not admissible as part of the *res gestæ*. *Metro-*

Milan R. Co. v. Collins, 1 *App. Cas. (D. C.)* 383.

(5) *Ten minutes afterwards*.—Where a passenger sues for an injury received in alighting from the train, where it appears that the train remained at the station ten minutes after the accident, a statement made by the conductor when half way to the next station, admitting that the accident was caused by his negligence, is not admissible as part of the *res gesta*. *Chesapeake & O. R. Co. v. Reeves*, (Ky.) 11 *S. W. Rep.* 464. — DISTINGUISHING *McLeod v. Ginther*, 80 Ky. 399. FOLLOWING *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. Rep. 118.

The declarations of a third party relative to the facts connected with an accident resulting in damage to plaintiff, who sues to recover, when made ten minutes after the accident by the narrator, who was present with the plaintiff when the damage was inflicted, are not admissible as part of the *res gesta*. Neither can they be received as implied admissions by the plaintiff, who was present when they were made and did not contradict them, he being unconscious at the time. *Gulf, C. & S. F. R. Co. v. Moore*, 69 *Tex.* 157, 6 *S. W. Rep.* 631.

(6) *Thirty minutes afterwards*.—Statements made by the injured driver of a vehicle, about half an hour after the accident, are inadmissible as part of the *res gesta*. *Pittsburgh, C. & St. L. R. Co. v. Wright*, 5 *Am. & Eng. R. Cas.* 628, 80 *Ind.* 182. *Dietrich v. Baltimore & H. S. R. Co.*, 11 *Am. & Eng. R. Cas.* 115, 58 *Md.* 347.

A report made by an engineer to his chief a half hour after an accident, detailing the manner and cause of it, is not admissible in favor of the company as part of the *res gesta*. *Nashville & C. R. Co. v. Messino*, 1 *Sneed (Tenn.)* 220.

Where a train is thrown from the track by reason of an open switch and kills an engineer, a statement made by a switchman a half hour after the train ran onto the switch, and after he had returned to the place and had seen the dead engineer, that he had left it open, is not admissible as part of the *res gesta*. *Chicago & A. R. Co. v. Fietsam*, 19 *Ill. App.* 55. — FOLLOWING *Chicago & N. W. R. Co. v. Fillmore*, 57 *Ill.* 266.

Plaintiff, a passenger, who left the train late at night, and in so doing (as he alleges) was injured by a fall which broke his leg,

having pulled off his coat, detached his suspenders, bound up his broken limb, crawled through a culvert from one side of the railway to the other, seated himself on the cross-ties, and cried for help, his account of the manner of his leaving the train and receiving the injury, given to a person who reached him about half an hour after first hearing his cries, was no part of the *res gesta*, and, being a mere narrative of a past event, was not admissible evidence in his own behalf. *Savannah, F. & W. R. Co. v. Holland*, 41 *Am. & Eng. R. Cas.* 196, 82 *Ga.* 257, 10 *S. E. Rep.* 200, 9 *S. E. Rep.* 1040.

(7) *From thirty minutes to an hour afterwards*.—Where plaintiff's intestate was run over by one of the defendant's locomotives, and injured so that he afterwards died, what he said to his wife after he had been taken home, between thirty and sixty minutes after the accident, in relation to the cause of his injury and how it occurred, was not admissible in evidence as a part of the *res gesta*. *Armit v. Chicago, B. & Q. R. Co.*, 28 *Am. & Eng. R. Cas.* 467, 70 *Iowa* 130, 30 *N. W. Rep.* 42.

The statements of the engineer in charge of the engine which killed the cattle, made an hour after the accident and several hundred yards from where it occurred, though made while he was on the engine, which was off the track, having been thrown from the track as one of the results of the accident, are no part of the *res gesta*. *Hawker v. Baltimore & O. R. Co.*, 15 *W. Va.* 628. — REVIEWING *Hanover R. Co. v. Coyle*, 55 *Pa. St.* 402; *Bellefontaine R. Co. v. Hunter*, 33 *Ind.* 335.

(8) *Several days afterwards*.—A statement of an employé of defendant in an action for an accident, made the day after the accident, is inadmissible as evidence for the plaintiff. *Baltimore & O. R. Co. v. State*, 75 *Md.* 526, 24 *Atl. Rep.* 14.

A card, making statements in regard to a railroad accident, issued by passengers the day after such accident, is not admissible as part of the *res gesta*. *Macon & W. R. Co. v. Johnson*, 38 *Ga.* 409.

Declarations either of the wife or of the deceased himself, made one or two days after the accident, as to the manner in which it occurred, are not admissible for the defense, as a part of the *res gesta*. *Fitzgerald v. Weston*, 52 *Wis.* 354, 9 *N. W. Rep.* 13.

Nor are statements made by the father of

an injured person several days after the injury, though he was present at the time of the injury. He might testify as to what he saw, but not as to what he said about the injury afterward. *Powell v. Augusta & S. R. Co.*, 77 Ga. 192, 3 S. E. Rep. 757.

Where a company is sued for the death of an employé, killed through alleged defects of a boiler, declarations made several days after the accident by the company's master mechanic, and by the general superintendent of the company's machinery, tracks, and buildings, tending to show the condition of the boiler, are not admissible as part of the *res gestæ*. *Chicago & St. L. R. Co. v. Ashling*, 34 Ill. App. 99.

Where a person sues for an injury while on or near the track through the alleged negligence of an engineer, the latter's statements, made a few days after the accident, are not admissible against the company. *Robinson v. Fitchburg & W. R. Co.*, 7 Gray (Mass.) 92.

Neither are statements made by the president of the company after the injury sued for, to the effect that he thought the company would give the plaintiff something, or pay him something, admissible against the company. *Robinson v. Fitchburg & W. R. Co.*, 7 Gray (Mass.) 92.

Admissions of a conductor, made days after a passenger falls from his train, that he kicked him off, are not part of the *res gestæ*, and do not bind the railroad company. *Moore v. Chicago, St. L. & N. O. R. Co.*, 9 Am. & Eng. R. Cas. 401, 59 Miss. 243.

Declarations of a ticket agent made some days after the sale of the tickets out of which the plaintiff's right of action arose, are not admissible as part of the *res gestæ*. *St. Louis, A. & T. R. Co. v. Mackie*, 37 Am. & Eng. R. Cas. 94, 71 Tex. 491, 1 L. R. A. 667, 9 S. W. Rep. 451.

176. Declarations of bystanders.—Statements made a considerable time after an accident by a person not a party, or the agent of a party, and who is living, and whose testimony can be obtained by reasonable diligence, are not admissible as a part of the *res gestæ*. *Macon & W. R. Co. v. Davis*, 27 Ga. 113. *Lombard & S. S. Pass. R. Co. v. Christian*, 124 Pa. St. 114, 23 W. N. C. 273, 16 Atl. Rep. 628, 46 Phila. Leg. Int. 210, 19 Pittsb. L. J. (N. S.) 404.

The declarations of a mere spectator of a railroad accident, made at the time, are not

admissible as part of the *res gestæ*. *Marsh v. South Carolina R. Co.*, 56 Ga. 274. *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99. *Missouri Pac. R. Co. v. Ivy*, 37 Am. & Eng. R. Cas. 46, 71 Tex. 409, 1 L. R. A. 500, 9 S. W. Rep. 346.

Where the action is against a street-car company for killing a child, evidence that a woman shouted "Murder" just after the child was struck is not admissible as part of the *res gestæ*. *Leahey v. Cass Ave. & F. G. R. Co.*, 97 Mo. 165, 10 S. W. Rep. 58.

Where a passenger sues for an injury received in jumping from a train when he is apparently in imminent danger, the conduct and exclamations of other passengers in the car are admissible as part of the *res gestæ*, as tending to show how the circumstance of apparent danger impressed others, and as tending to show that he was not imprudent in jumping. *Galena & C. U. R. Co. v. Fay*, 16 Ill. 558.—REVIEWED IN *Stein v. Railway Co.*, 10 Phila. (Pa.) 440.

In an action to recover the value of a jack which died while in course of transportation, the evidence showed that a tramp was found in the car in which the animal sued for, and other jacks, were being carried, and that soon after being removed from the car he said, in the presence of the conductor: "If it had not been for lopping them mules over the head I would have froze to death." The jack was afterwards found dead in the car with blood running from its mouth and nose. *Held*, that the declaration of the tramp was no part of the *res gestæ*, and was inadmissible. *St. Louis, I. M. & S. R. Co. v. Weakly*, 35 Am. & Eng. R. Cas. 635, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. Rep. 134.

The injured child's father did not see the accident, but reached the place within two or three minutes after its occurrence. He was asked on the trial what he said to the driver, and answered: "I said to him, 'It was your careless driving,' and took the boy and carried him into the house." The next question was what then occurred, and he answered: "I sent for the doctor." *Held*: (1) that the declaration of the father was not a part of the *res gestæ*, and was inadmissible; and (2) that the evidence failed to show that the driver made no denial of the charge. *Senn v. Southern R. Co.*, 108 Mo. 142, 18 S. W. Rep. 1007.—DISTINGUISHED IN *Schlereth v. Missouri Pac. R. Co.*, 115 Mo. 87.

177. Complaints of pain and suffering.*—Exclamations of physical suffering, if honest, are part of the injury which causes the suffering, but to be admissible as evidence, must have been made at the time of the injury, and not declarations of past suffering, or of causes in the past of such suffering. *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537. *Hagenlocher v. Coney Island & B. R. Co.*, 99 N. Y. 136, 1 N. E. Rep. 536.—FOLLOWING *Caldwell v. Murphy*, 11 N. Y. 416; *Wereley v. Persons*, 28 N. Y. 344; *Matteson v. New York C. R. Co.*, 35 N. Y. 487.—DISTINGUISHED IN *Olp v. Gardner*, 48 Hun 169, 15 N. Y. S. R. 544. EXPLAINED IN *Mosher v. Russell*, 44 Hun 12. FOLLOWED IN *Lewke v. Dry Dock, E. B. & B. R. Co.*, 46 Hun 283, 11 N. Y. S. R. 510; *Roche v. Brooklyn City & N. R. Co.*, 105 N. Y. 294, 11 N. E. Rep. 630, 7 N. Y. S. R. 361. QUOTED IN *Griffith v. Utica & M. R. Co.*, 43 N. Y. S. R. 835, 17 N. Y. Supp. 692.—*Smith v. Dittman*, 11 N. Y. Supp. 769.

The physical and mental condition of a plaintiff after receiving injuries is a proper subject of inquiry. So where a female passenger sues for an injury, and is physically unable to attend as a witness at the trial, it is competent for her to prove by one to whose house she was taken immediately after the accident, as to her appearance and as to complaints of pain and suffering. *De Long v. Delaware, L. & W. R. Co.*, 37 Hun (N. Y.) 282.—APPLYING *Nichols v. Brooklyn City R. Co.*, 30 Hun 437; *Waldele v. New York C. & H. R. R. Co.*, 95 N. Y. 274. REVIEWING *Goodwin v. Harrison*, 1 Root (Conn.) 80; *Reed v. New York C. R. Co.*, 45 N. Y. 579.—*Lewke v. Dry Dock, E. B. & B. R. Co.*, 46 Hun 283, 11 N. Y. S. R. 510.—DISTINGUISHING *Roche v. Brooklyn City & N. R. Co.*, 105 N. Y. 294, 7 Cent. Rep. 702. FOLLOWING *Hagenlocher v. Coney Island & B. R. Co.*, 99 N. Y. 136.

In such a case, whether the party's suffering was real or feigned was a question for the jury. *Houston & T. C. R. Co. v. Shafer*, 6 Am. & Eng. R. Cas. 421, 54 Tex. 641.—APPROVED IN *Texas & P. R. Co. v. Barron*, 78 Tex. 421.

But complaints made which are so far detached from the occurrence as to admit of deliberate design, and of their being the product of a calculating policy on the part

of the complainant, cannot properly be regarded as part of the *res gestæ*. *Kennedy v. Rochester City & B. R. Co.*, 130 N. Y. 654, *mem.*, 3 Silv. App. 591, 29 N. E. Rep. 141, 41 N. Y. S. R. 329; *reversing* 54 Hun 183, 26 N. Y. S. R. 871, 7 N. Y. Supp. 221.

And such complaints are not competent when made after suit for such injuries. *International & G. N. R. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. Rep. 58.

It is error to permit plaintiff to prove that he was examined by a doctor eight months after the accident for the purpose of determining his condition; and to allow the doctor to testify that the plaintiff complained more or less of pain when he pressed him about the neck, or when he attempted to move his head, and that when he pressed upon his head it caused pain, and plaintiff "wincing, twisted, and tried to get away." *Held*, that the court erred in admitting this testimony. *Mosher v. Russell*, 44 Hun (N. Y.) 12.—EXPLAINING *Hagenlocher v. Coney Island & B. R. Co.*, 99 N. Y. 136.—FOLLOWED IN *Crawford v. Delaware, L. & W. R. Co.*, 23 J. & S. (N. Y.) 255.

VII. PAROL EVIDENCE TO VARY A WRITING.

178. In general.—(1) *Contracts, generally.*—Declarations, representations, and expressions of opinion, which precede, but do not enter into or form a part of, the contract as finally consummated, furnish no ground for the recovery of damages to a party deceived or misled by them; for it is his own folly to rely on them when they are not embodied in and made a part of the contract. *Wooters v. International & G. N. R. Co.*, 4 Am. & Eng. R. Cas. 100, 54 Tex. 294. *Humphreys v. New York, L. E. & W. R. Co.*, 43 Am. & Eng. R. Cas. 700, 121 N. Y. 435, 24 N. E. Rep. 695, 31 N. Y. S. R. 299.

Although upon the face of their written contract the relations between the company and M. appeared to be that of employer and independent contractor, yet it was competent to prove by parol evidence that their relation was in fact that of master and servant. *Powell v. Virginia Constr. Co.*, 88 Tenn. 692, 13 S. W. Rep. 691.

S. had established a mechanic's lien for certain ties furnished a railroad company, and afterwards brought suit against the les-

* See also *ante*, 166.

see of the road for certain other ties which he claimed were not included in the former judgment. Upon the issue of the ownership of the ties by the company—*held*, competent to show by the engineer that S. delivered other ties than those embraced in his estimate. *Smyth v. Ward*, 46 Iowa 339.

Where a written contract of shipment required notice of a claim for damages to be given at the place of destination, defendant was properly allowed to show by verbal testimony that defendant's line of railway ended at an intermediate point, and that from there to the point of destination the cattle were carried by a connecting line. *St. Louis, A. & T. R. Co. v. Turner*, 1 Tex. Civ. App. 625, *20 S. W. Rep. 1008.

Where a bond obligated one of the parties, for an agreed consideration, to convey to the other a right of way for a railroad "as it shall be laid out"—*held*, that in the absence of fraud or mistake, parol evidence was not admissible to show that the contract contemplated a line already established at the time of the execution of the instrument. *Applegate v. Burlington & S. W. R. Co.*, 41 Iowa 214.

(2) *Contracts of subscription*.—Parol evidence is not admissible to vary a written contract for subscriptions to railway stock. *Johnson v. Pensacola & G. R. Co.*, 9 Fla. 299. *Connecticut & P. R. R. Co. v. Bailey*, 24 Vt. 465.

As by showing that the subscription was merely colorable. *Downie v. White*, 12 Wis. 176. *Kauffman v. Harstock*, 31 Iowa 472.

Parol evidence of representations of an agent soliciting subscriptions to stock, to the effect that the road should be built in a certain place, cannot be admitted to vary the terms of a written subscription, especially where the articles of association leave the location of the road to the discretion of the directors. *Johnson v. Crawfordsville, F., K. & Ft. W. R. Co.*, 11 Ind. 280.

A written subscription to corporate stock, and a deed conveying land to the corporation in payment of such subscription, constitute the entire contract between the parties, and its terms cannot be varied by any parol agreement or negotiations which accompanied or preceded the making of it.

* Parol evidence to vary terms of bill of lading, see note, 40 AM. & ENG. R. CAS. 90.

Cincinnati, U. & Ft. W. R. Co. v. Pearce, 28 Ind. 502.

Where individuals subscribe to the capital stock of a railroad to secure an extension, the company agreeing to issue to such subscribers its first mortgage bonds to an amount equal to the subscriptions, the time for the delivery of the bonds is when the extension is completed, and it is not competent to prove by parol that the time for delivery was when the subscriptions were paid. *San Antonio & A. P. R. Co. v. Busch*, (Tex. Civ. App.) 21 S. W. Rep. 164.

(3) *Tickets, passes, etc.*—The fact that a passenger bought a ticket over several lines of road, with coupons attached, may be shown by parol, the contents of the ticket not being involved. *Central R. Co. v. Wolff*, 74 Ga. 664.—FOLLOWING *Henderson v. Central R. Co.*, 73 Ga. 718.

The ticket issued to a passenger for his passage from New York to San Francisco, does not preclude the party from showing by parol testimony a contract for such transportation. *Van Buskirk v. Roberts*, 31 N. Y. 661.—FOLLOWING *Quimby v. Vanderbilt*, 17 N. Y. 306.

A printed provision upon the back of a ticket or a pass, not signed by the person who is alleged to be bound by it, can hardly be said to be a written contract, which can only be altered by the evidence of two witnesses, or their equivalent. *Baush v. Camden & A. R. Co.*, 18 Phila. (Pa.) 392; *affirmed by an equally divided court in 28 Am. & Eng. R. Cas.* 142, 7 Atl. Rep. 731.

The contract between a passenger and a sleeping-car company is made up by the ordinary transportation ticket, and the rules and regulations of the company, and not by a "berth check" which the passenger may receive from a conductor upon surrendering his ticket. Therefore, where a dispute arises as to what berth the passenger is entitled to, the "berth check" may be contradicted by parol evidence. *Mann Boudoir Car Co. v. Dupré*, 54 Fed. Rep. 646, 13 U. S. App. 183, 4 C. C. A. 540.—QUOTING *New York, L. E. & W. R. Co. v. Winter*, 143 U. S. 60, 12 Sup. Ct. Rep. 356.

(4) *Records and proceedings at directors' meetings*.—When there is no ambiguity in a recorded vote of the directors of a corporation, parol evidence of the understanding of a majority of the directors as to its meaning or effect is not admissible. *Peterborough R. Co. v. Wood*, 61 N. H. 418.

Testimony by a witness that he became bookkeeper for a corporation at a time when it had no minute book, that he wrote up, in a certain book, minutes of meetings of directors, purporting to have been held in previous years, from memoranda and dictation furnished by the president, and that he did not know of such meetings, though he would have known of them if they were held, and was satisfied that they were not held, is not admissible to rebut, when offered by the corporation, evidence from the book which is identified by the corporation's secretary as the only book in which records of the directors' meetings are kept, of what purports to be a record of a certain meeting of the directors. *McIlhenny v. Binz*, 80 Tex. 1, 13 S. W. Rep. 655.

179. Of contemporaneous oral agreement.—While it is a rule of law that in the interpretation of a written instrument the court is permitted to place itself in the situation of the contracting parties at the time of its execution, and to consider the occasion which gave rise to it, the relative position of the parties, and the obvious design they intended to accomplish, this rule cannot be so extended as to supplement the writing with proof of a contemporaneous oral agreement, which changes its meaning. *Tennessee & C. R. Co. v. East Ala. R. Co.*, 73 Ala. 426. *St. Vrain Stone Co. v. Denver, U. & P. R. Co.*, 18 Colo. 211, 32 Pac. Rep. 827. *Griswold v. Seligman*, 4 Am. & Eng. R. Cas. 371, 72 Mo. 110. *Exhaust Ventilator Co. v. Chicago, M. & St. P. R. Co.*, 69 Wis. 454, 34 N. W. Rep. 509.

Where by the terms of a written agreement of compromise of a pending suit against a town, on bonds issued and delivered by it to a railroad corporation, as security for stock subscribed by the town, and by the railroad corporation assigned to the plaintiff, a judgment for a specified amount, which was less than the face of the bonds, was to be taken by the plaintiff in full satisfaction of the bonds, and no mention was made in such agreement of the stock for the security of which the bonds were issued, a contemporaneous oral agreement to the effect that the town, as a part of the consideration moving the plaintiff to make the compromise, was also to transfer to the plaintiff stock in the railroad corporation amounting to \$8000, would vary and add an important term to the written contract, which the

law does not allow. *Mobile Bank v. Mobile & O. R. Co.*, 69 Ala. 305.

Where C. executed a written contract to a railway company whereby he relinquished to the company a right of way of 100 feet in width over his land, upon the consideration that the company would commence and complete its road in one year from the date of the contract, and in an action thereafter brought by C. against the company for damages sustained by reason of the construction of the road over such right of way, a contemporaneous parol agreement was offered by C. that the company further agreed, as consideration for such right of way, to give him an annual pass for life over its road, and make him a deduction of \$10 on each car shipped by him thereon, and on failure to comply with these conditions to permit him to retain his claim for damages—held, the evidence was inadmissible, as it would have enlarged the written contract, and varied materially its terms. *Cornell v. St. Louis, K. & A. R. Co.*, 25 Kan. 613. *Hoffman v. Bloomsburg & S. R. Co.*, 157 Pa. St. 174, 27 Atl. Rep. 564.—QUOTING *North & W. Branch R. Co. v. Swank*, 105 Pa. St. 561; *Pennsylvania R. Co. v. Shay*, 82 Pa. St. 198.

180. Merger of verbal into written agreement.*—All antecedent and contemporaneous oral agreements of the parties are conclusively presumed to be merged in a written contract covering the subject-matter, when one is made. This presumption is applicable to the contracts of carriers. *Pennsylvania Co. v. Clark*, 2 Ind. App. 146, 27 N. E. Rep. 586. *Turner v. St. Louis & S. F. R. Co.*, 20 Mo. App. 632. *Teebay v. Manchester, S. & L. R. Co.*, L. R. 24 Ch. D. 572, 52 L. J. Ch. 613, 48 L. T. 808, 31 W. R. 739.

In an action against a company, by the assignee of a certificate issued by its engineer to a contractor for work done on the road, proof of an oral agreement between the contractor and the engineer, to the effect that the certificate should be used in paying a debt due from the contractor to a stockholder, who was indebted to the railroad company, is not admissible for the defendant. If such an agreement was made after the issue and delivery of the certificate,

* Carriers of live stock. Merger of oral and written contracts, see 55 AM. & ENG. R. CAS. 324, abstr.

it is without consideration; if made before the issue and delivery of the certificate, and as an inducement to its issue, its effect is to vary the terms of the certificate. *Alabama & M. R. R. Co. v. Sanford*, 36 Ala. 703.

When a freighter acting as a common carrier contracts in writing to transport perishable goods across the country, and the goods become injured by frost, his liability must be measured by the written contract. Evidence of previous conversations and negotiations of the parties leading up to the contract cannot be considered for the purpose of altering its terms. *Carr v. Schafer*, 15 Colo. 48, 24 Pac. Rep. 873.

A. entered into a verbal contract with a company in regard to the carriage of livestock, whereby the latter agreed to allow him the usual rebates in freight. Subsequently, upon the shipment of each car-load a bill of lading was delivered containing no stipulations for such rebates. In an action by A. against the company to recover the amount of the rebates—*held*, that plaintiff could not establish by parol evidence the fact that it was the intention of the parties that the bill of lading should operate only as regards the liability of the company, and that as to all other matters the written contracts were subject to and controlled by the previous parol agreement; and that, therefore, the plaintiff was not entitled to recover the rebates. *Hopkins v. St. Louis & S. F. R. Co.*, 16 Am. & Eng. R. Cas. 126, 29 Kan. 544.—REVIEWED IN *McAbsher v. Richmond & D. R. Co.*, 108 N. Car. 344.

181. Of subsequent oral agreement.—A stipulation in an agreement for the carriage of a mare, that the damages recoverable for the carrier's negligence shall be limited to a specified sum, may be waived by the parties, and it is not error in an action for damages to permit the introduction of testimony tending to prove a subsequent agreement by the company to pay a larger sum in settlement of the plaintiff's claim. *Chicago & E. I. R. Co. v. Katzenbach*, 38 Am. & Eng. R. Cas. 375, 118 Ind. 174, 20 N. E. Rep. 709.

Evidence of conversations between the plaintiffs and the agent of the defendant is admissible to prove that a written contract for transportation was abandoned, and that the cattle were shipped under a parol contract subsequently made. *Toledo, St. L.*

& K. C. R. Co. v. Levy, 127 Ind. 168, 26 N. E. Rep. 773.

Where the plaintiff performed labor on a railroad, under a written contract, which he was induced to sign on account of an oral agreement made at the same time, which provided that certain kinds of earth-work should be measured and paid for as loose rock, and this oral agreement was subsequently adopted and acted upon by the parties—*held*: (1) the subsequent adoption of the oral contemporaneous agreement placed it upon the same footing in respect to the written contract as if it were a new and independent agreement; (2) that it was a sufficient consideration for the new promise, that the party claiming the benefit of it consented to complete the business in faith of it; (3) that whether there had been such an agreement and adoption of it were questions for the jury, as bearing on which the oral agreement and the extra allowance by the defendant under it were legally admissible in evidence. *Courtenay v. Fuller*, 65 Me. 156.

W. received \$70 from a company under a written agreement that it should be applied on any judgment for damages he might recover in an action then pending for the condemnation of a portion of his land for the use of the company as a track for its railroad. Judgment was afterwards entered by consent for \$150 damages, and \$50 costs, in favor of W., which was paid and the land condemned to the company's use. *Held*, that W. might defend in an action afterwards brought against him by the company to recover said sum of \$70, as overpaid by mistake, by alleging and proving that said judgment was entered in pursuance of a subsequent parol agreement by which he was to receive the amount of such judgment in addition to said sum of \$70 previously received by him under the written contract. *Oregonian R. Co. v. Wright*, 10 Oreg. 162.

The subcontractors for the masonry of a portion of a railroad executed a written contract by which it was stipulated that the masonry should be the same as the masonry between I. & M., which was considered second class. The contract specified the prices for second class and box-culvert masonry, but of no other class, and provided that the work should be done as "directed by the chief engineer" of the railway, and should be "paid for as estimated by the

engineer in charge during the month." Masonry of a higher grade and class was required by the engineer than was contemplated by the parties, and for which no price was fixed. Plaintiff alleged that when this exigency arose the contractors instructed the subcontractor that the work could be done as directed by the engineer, and that they would pay him what it was reasonably worth. *Held*, that the subcontractor might prove, by parol, the new and distinct agreement subsequent to the contract under seal, whereby upon a new consideration the original agreement was changed, and he agreed to do additional work, or the same work in a different manner, but that the sealed instrument contained the agreement of the parties so far as it had not been modified by the subsequent parol contract. *McCauley v. Keller*, 40 *Am. & Eng. R. Cas.* 509, 130 *Pa. St.* 53, 18 *Atl. Rep.* 607.

182. To explain latent ambiguity.—Where a promissory note is given for the privilege of advertising in one panel of each of fifteen street-cars, but there is nothing to show how the privilege is to be enjoyed, as to who should determine the design or form of the advertisements put up, or who should select the particular panels in each car, there is a latent ambiguity, and parol evidence is admissible to explain it. *Chase v. Senn*, 7 *N. Y. Supp.* 65.

It is not error to admit testimony as to the consideration recited in a written contract of shipment explaining that the lower rate of freight mentioned as the consideration of said contract was the regular rate charged all persons according to the number and quality of the cars, distance to be transported, etc.; this testimony does not vary or contradict the written contract, but merely explains an ambiguity in it. *Cross, Receiver, v. Graves*, 4 *Tex. App. (Civ. Cas.)* 149, 16 *S. W. Rep.* 102.

When the description in a deed refers to two or more objects, parol evidence is admissible to show which object was meant. *Wead v. St. Johnsbury & L. C. R. Co.*, 64 *Vt.* 52, 24 *Atl. Rep.* 361.

Where a carrier's receipt for goods received contains the words "Care R. R. Agt., Callahan," the words being ambiguous, parol evidence is admissible to explain them—i. e., to show that the words meant that the goods were to be delivered to the agent of another road at Callahan. *Savannah, F. &*

W. R. Co. v. Collins, 77 *Ga.* 376, 4 *Am. St. Rep.* 87, 3 *S. E. Rep.* 416.

Where a superintendent sends a dispatch to a conductor, which is ambiguous or susceptible of more than one meaning, it is to be construed by what it meant to the conductor viewed in the light of surrounding circumstances, and not what the superintendent meant in sending it. Therefore evidence of the meaning of the superintendent is incompetent. *Locke v. Sioux City & P. R. Co.*, 46 *Iowa* 109.

Where goods are shipped by express, addressed to a consignee on the line of a connecting express company, which is named in the shipping address, and marked C. O. D., parol evidence is admissible to explain the letters C. O. D., but not as to other parts of the address, which were familiar, and had a well-defined meaning and not of technical use. *Collender v. Dinsmore*, 55 *N. Y.* 200; *reversing* 64 *Barb.* 457.

When there is no ambiguity in the language of a city ordinance, parol evidence will not be heard as to representations made prior to its passage, or as to the actual intention or understanding of those by whom it was passed, there being no question of fraud or mistake involved. *State ex rel. v. Paris R. Co.*, 55 *Tex.* 76.

A blank receipt of the United States Express Co. for goods to be forwarded, was changed by erasing the words "United States," and inserting over the same the word "Adams," and signed by the agent of the Adams Express Co., which company received the goods described in the receipt; but the clause in the receipt as to the limitation of the company's liability was left unchanged, so that it read, "the United States Express Co. are not to be held liable," etc. *Held*, that the law, in the absence of proof *dehors* the receipt, would not determine whether such limitation clause related to the Adams or the United States Express Co., and that the true intent of the parties giving or receiving such receipt must be determined from circumstances to be proved. *Adams Exp. Co. v. Boskowitz*, 16 *Am. & Eng. R. Cas.* 102, 107 *Ill.* 660.

R., the president of a railroad company, signs his name, without any addition, to a due bill, acknowledging that there is due to S. & S. \$484, in full of labor performed on cottage lot of the railroad company. It being uncertain on the face of the note

whether the labor was performed for R. or the company, parol evidence is admissible to ascertain that fact. *Richmond, F. & P. R. Co. v. Snead*, 19 *Gratt. (Va.)* 354.

Plaintiff's agent at Gravenhurst shipped two car-loads of shingles on the defendants' cars. The shipping bill was in the usual form, and requested the defendants to receive the under-mentioned property, etc., addressed to N. Dymont (the plaintiff), Wyoming, to be sent subject to their tariff, etc. Then, in the appropriate columns, followed the description of a car-load of shingles, giving the number of the car, etc. Then under this were the words, "To Henry James Mitchell," and then another car-load of shingles was described. Parol evidence was admitted at the trial to show that the meaning of the shipping bill was that the first-named car-load was to go to the plaintiff at Wyoming, and the other to Henry James, at Mitchell, and that the agent so told the defendants' station agent when shipping the goods. *Held*, that the evidence was properly admitted. *Dymont v. Northern & N. W. R. Co.*, 11 *Ont.* 343.

183. Where written instrument is not a complete contract.—A contract which is not required by statute to be in writing may be partly expressed in writing and partly in an unwritten understanding between the parties; and if so, such understanding may be proved by parol. *St. Louis, L. & W. R. Co. v. Maddox*, 18 *Kan.* 546. *Fischer v. Merchants' Dispatch Transp. Co.*, 13 *Mo. App.* 133. *McCotter v. Hooker*, 8 *N. Y.* 497. *Terry v. Danville, M. & S. W. R. Co.*, 91 *N. Car.* 236.

When some of the writings fixing the terms of a contract are lost, testimony as to how the parties themselves interpreted, acted on, and treated the contract while the business was in progress, may be looked to, in connection with other evidence, to ascertain its terms and meaning. *Georgia R. & B. Co. v. Smith*, 40 *Am. & Eng. R. Cas.* 123, 83 *Ga.* 626, 10 *S. E. Rep.* 235.

Where, in a special contract in writing between a common carrier and a shipper of live stock, the amount of freight charge is left blank, the blank may be filled by parol evidence showing the actual amount contracted for and paid by the shipper. *Georgia R. & B. Co. v. Reid*, 55 *Am. & Eng. R. Cas.* 363, 91 *Ga.* 377, 17 *S. E. Rep.* 934. *Malpas v. London & S.-W. R. Co.*, 14 *W. R.* 391, 12 *Jur. N. S.* 271, 13 *L. T.* 710, 35

L. J. C. P. 166, 1 *H. & R.* 227, *L. R.* 1 *C. P.* 336.

Parol evidence is admissible to show that a railway company has agreed to carry cattle to a station beyond that mentioned in the consignment note signed by the shipper without noticing its contents. *Malpas v. London & S.-W. R. Co.*, *L. R.* 1 *C. P.* 336, 1 *H. & R.* 227, 12 *Jur. N. S.* 271, 35 *L. J. C. P.* 166, 14 *W. R.* 391, 13 *L. T.* 710.

Where a deed simply conveys a right of way, without specifying its width, parol evidence is admissible to show that the deed was intended only to convey a strip forty feet wide, though the statute provides that companies may take one hundred feet for a right of way. *Indianapolis & V. R. Co. v. Reynolds*, 116 *Ind.* 356, 19 *N. E. Rep.* 141. *Indianapolis & V. R. Co. v. Lewis*, 119 *Ind.* 218, 21 *N. E. Rep.* 660.

Where a letter is not intended to contain a complete statement of the agreement or understanding between the parties, but is made the basis of a more specific oral agreement, this specific agreement can be proved by oral testimony without violating the rule of evidence applicable to cases where the parties have reduced their agreement to writing. *New York, L. E. & W. R. Co. v. Carhart*, 1 *N. Y. S. R.* 426, 40 *Hun* 639, *mem.* *Smith v. Detroit, H. & S. W. R. Co.*, 22 *Am. & Eng. R. Cas.* 9, 56 *Mich.* 529, 23 *N. W. Rep.* 208.

A written contract was entered into to build a bridge which was not described. *Held*, that it might be shown by parol that at the time of the contract the parties referred to a plan or draft of a bridge then in existence. *Sandford v. Newark & H. R. Co.*, 37 *N. J. L.* 1.

Where a contractor and a subcontractor, for the grading of certain sections of a railroad, undertook to reduce the contracts between them to writing, using the printed forms of the railroad company, and the draftsmen filled up the forms so unskillfully that the one contract expressly purported to be between the contractor and subcontractor of the one part and the railroad company of the other part, and both contracts stipulated that the payment of the price of the work to be done by the subcontractor should be made by the company, the railroad company being no party to the transactions, and contained no obligation on the part of the contractor to the subcontractor, in an action at law by the

subcontractor against the contractor on the contracts as oral—*held*, that the writings were incomplete, but might be looked to in connection with the parol testimony to ascertain what the contracts were. *Smith v. O'Donnell*, 8 *Lea* (Tenn.) 468.

184. To show real consideration.—

Where a bill is filed to reform the numbers of land in a deed conveying a right of way to a railway, it is not permissible for the defendant, by his cross-bill, by way of defense, to prove a contemporaneous parol agreement, adding to or changing the consideration expressed in the deed. *Alabama Midland R. Co. v. Brown*, 98 *Ala.* 647, 13 *So. Rep.* 70.

Where a landowner deeds a company a right of way, in the event that the road should pass through his lands, parol evidence is not admissible to vary the absolute terms of the deed, by showing that the conveyance was on the condition that the road pass over a particular portion of the land. *Burch v. Augusta, G. & S. R. Co.*, 80 *Ga.* 296, 4 *S. E. Rep.* 850.

Under a provision in a deed granting a right of way in consideration of the "benefit to be derived from the building of the road and one dollar paid," the grantor may show by parol evidence that the real consideration was a promise by the company to build a depot on the land. *Louisville, St. L. & T. R. Co. v. Neafus*, 93 *Ky.* 53, 18 *S. W. Rep.* 1030.

In an action against a company by the assignee of a certificate issued by its engineer to a contractor, evidence of an oral agreement between the contractor and engineer, to the effect that the certificate should be used in payment of a debt due from the contractor to a certain stockholder who was indebted to the company, is not admissible for the defendant. *Alabama & M. R. Co. v. Sanford*, 36 *Ala.* 703.

A bill of lading is only *prima facie* evidence that the freight rate named therein is a special or reduced rate; and as between the parties it is open to explanation, and is impeachable by parol evidence for error, mistake, or false statement. *McFadden v. Missouri Pac. R. Co.*, 30 *Am. & Eng. R. Cas.* 17, 92 *Mo.* 343, 10 *West. Rep.* 372, 4 *S. W. Rep.* 689.

185. Evidence of usage to vary terms of written instrument.—Evidence of a custom cannot be received to vary or contradict the express terms of a

written contract, but is admissible to add new terms, as to which the writing is silent; as where a railroad company gives a receipt for freight, "to be delivered to R. R. agent" at the terminus of the road, and the agent there deposits it in a warehouse not belonging to the company, evidence of its custom to deposit freight in that warehouse is admissible for the company when sued for the loss of the cotton. *Alabama & T. R. R. Co. v. Kidd*, 29 *Ala.* 221.

Parol evidence is admissible to prove the running time of trains at a certain point, though the company may have a printed time-table showing such time also. *Chicago, B. & Q. R. Co. v. George*, 19 *Ill.* 510.

When a rule adopted and promulgated by a railroad company is explicit in its terms, and reasonable (as prohibiting employes to go in between moving cars for the purpose of coupling or uncoupling them), parol evidence cannot be received to show that it was frequently or habitually violated by the employes. *Memphis & C. R. Co. v. Graham*, 53 *Am. & Eng. R. Cas.* 396, 94 *Ala.* 545, 10 *So. Rep.* 283. *Richmond & D. R. Co. v. Hissong*, 97 *Ala.* 187, 13 *So. Rep.* 209.—MODIFYING *Hissong v. Richmond & D. R. Co.*, 91 *Ala.* 514.

186. To show conditional delivery.

—Parol evidence is admissible to show that a written subscription to stock was delivered to a certain agent of the corporation on condition that it was only to take effect upon the performance of certain conditions by the corporation—not for the purpose of contradicting the written subscription, but for the purpose of determining whether it had ever been so delivered as to become a binding contract. *Ottawa, O. & F. R. V. R. Co. v. Hall*, 1 *Ill. App.* 612.

Where a landowner conveys land to a corporation as a bonus to secure the building of the road, and takes back a bond to secure him against a failure to build the road, and sues to recover the penalty of the bond, parol evidence is not admissible to show that his deed, which was unconditional on its face, was not to take effect if the road was not built. *Blewett v. Front St. Cable R. Co.*, 51 *Fed. Rep.* 625, 7 *U. S. App.* 285, 2 *C. C. A.* 415; *affirming* 49 *Fed. Rep.* 126.

187. To contradict a receipt.—A receipt acknowledging the delivery of goods to a railroad is not conclusive, but may be contradicted by parol evidence. *Purcell v. Southern Exp. Co.*, 34 *Ga.* 315.—DISTIN-

GUISHED IN *Richmond & D. R. Co. v. Shomo*, 90 Ga. 496.

Evidence aside from the receipt will be admissible to show a contract made between a shipper and a railroad, by which the railroad limits its liability for safe transportation of the goods. *Purcell v. Southern Exp. Co.*, 34 Ga. 315.

Where a carrier is sued for a delay in delivering goods, and it is in dispute as to the exact day when they were delivered to a connecting carrier, and a receipt is produced tending to show a delivery to the connecting carrier a day later than defendant company claimed the delivery was made, it is error to exclude evidence offered by defendant to show a custom of companies that receipts for cars received in the afternoon and evening were not delivered until the next day. *Hewett v. Chicago, B. & Q. R. Co.*, 18 Am. & Eng. R. Cas. 568, 63 Iowa 611, 19 N. W. Rep. 790.

So far as a receipt goes only to acknowledge payment, it is merely *prima facie* evidence of the fact of payment, and may be contradicted by oral testimony; but so far as it contains a contract, it stands upon the footing of writings containing contracts, and cannot be contradicted or varied by parol. *Morris v. St. Paul & C. R. Co.*, 21 Minn. 91. *Mills v. Dow*, 133 U. S. 423, 10 Sup. Ct. Rep. 413.

Where an express company sues one of its train messengers for the value of a package alleged to have been lost or stolen while in his hands, and introduces a receipt which he had given, in a regular book kept for the purpose, to a preceding messenger, acknowledging the receipt of the package, it is competent for the defendant to testify in his own behalf that as a matter of fact he never received the package. The weight of such evidence is for the jury, to be determined by the facts of the case, the situation of the parties, and its own reasonableness and intrinsic probability of truth. *Swann v. Southern Exp. Co.*, 53 Miss. 286.

188. To show conditional execution of instrument.—Parol evidence is admissible to show that, previous to the obligors signing a deed, there was an agreement between the parties that all the stockholders of the company should sign it, and that it was signed by them with the understanding or agreement that it should not be delivered until the signatures of all were procured. *Black v. Lamb*, 12 N. J. Eq. 108.

5 D. R. D.—31.

Black v. Shreve, 13 N. J. Eq. 455. (Vredenburg, J., dissenting.)

189. To impeach validity of written instrument.—Where one who has been injured by a railroad accident and settled her claim for damages and given a receipt in full has repudiated and rescinded the settlement for fraud, and brought suit for the original injury, evidence of the representations and promises under which the receipt was obtained ought not to be excluded on the objection that it tended to vary a written contract by parol evidence. *Michigan C. R. Co. v. Dunham*, 30 Mich. 128.

Where it was a question whether a special contract for the transportation of live stock was fairly and understandingly signed, or procured fraudulently, the shipper was asked, "What, if anything, was said about that being a special contract with you at that time?" and also, "Was this paper introduced in evidence, in the contract you made to ship the stock by the railroad company to Chicago?"—to both of which questions the court sustained objections. *Held*, that the court erred in excluding the questions. *Black v. Wabash, St. L. & P. R. Co.*, 25 Am. & Eng. R. Cas. 388, 111 Ill. 351.

190. Of mistake.—The books of a company, although made by a statute *prima facie* evidence, may be rebutted or discredited as to particular entries by internal or external evidence of falsity or error. *Georgia R. & B. Co. v. Smith*, 40 Am. & Eng. R. Cas. 123, 83 Ga. 626, 10 S. E. Rep. 235.

Parol evidence is admissible to show that a resolution of the board of directors, entered upon the record of their proceedings, did not correctly recite the amount of money found due and ordered to be paid to one of its officers. *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 40 Am. & Eng. R. Cas. 525, 37 Kan. 606, 15 Pac. Rep. 544.

VIII. ADMISSIONS; DECLARATIONS.

1. Admissions.

191. In general.—(1) *Actions on contract.*—A request, made by the payer of a disputed claim that the payee will not disclose the settlement, is not competent evidence of the payer's admission of liability. *Gault v. Concord R. Co.*, 63 N. H. 356.

The mere fact that in a contract with a

company the defendant has designated it by a name which is appropriate to a corporate body does not admit its legal corporate existence, unless it be distinctly stated in the contract that it is an incorporated company. *Holloway v. Memphis, E. P. & P. R. Co.*, 23 *Tex.* 465.

An agreement by a company in consideration of landowners withdrawing their opposition to a bill in parliament that the claim of the landowners to compensation shall not be barred by the fact that the company does not propose to take any of their land, does not amount to an admission that the landowners are entitled to compensation in any event. *Caledonian R. Co. v. Walker, L. R. 7 App. Cas.* 259, 46 *L. T.* 826, 30 *W. R.* 569.

(2) *Actions in tort.*—In an action for the wrongful ejectment of a passenger, it is competent for a witness who was present to state what he heard on the occasion of such expulsion, leaving it to others to identify the persons who made the statements. *Indianapolis, P. & C. R. Co. v. Anthony*, 43 *Ind.* 183.

Admissions of the father of a girl that had brought suit for an injury, made before her death, are not admissible against her administrator, in the absence of any showing that the father was interested in the result. *Taylor v. Grand Trunk R. Co.*, 48 *N. H.* 304. *Baltimore City Pass. R. Co. v. McDonnell*, 43 *Md.* 534.

An admission that an office entry of the running of specified trains was "the record of the trains," although its reception in evidence was objected to—*held*, a waiver of such qualifying proof as might otherwise have been necessary preliminary to the introduction of the evidence. *Larson v. St. Paul, M. & M. R. Co.*, 44 *Am. & Eng. R. Cas.* 529, 43 *Minn.* 423, 45 *N. W. Rep.* 722.

192. By parties.—(1) *Generally.*—A letter containing an admission of a party is admissible in evidence against him, although the letter was in reply to another which the party is not called on to produce. *Wiggin v. Boston & A. R. Co.*, 120 *Mass.* 201.

The admissions contained in a letter are to be scanned with care if they are susceptible of more than one construction. *So held*, as to a letter written by plaintiff suing a carrier for damage to furniture, the defendant offering the letter to show plaintiff's own estimate of the amount of his

loss. *Richmond & D. R. Co. v. Kerler*, 88 *Ga.* 39, 13 *S. E. Rep.* 833.

If the defendant was not legally liable by reason of his negligence, his admission, if made, would not create such liability; but such admission, made when the facts were fresh and open to observation, and made against defendant's interest, was evidence to which the jury should give such weight as, in their judgment, it was entitled to, as an admission of the fact of the defendant's carelessness; and defendant's subsequent denial of liability would not tend to lessen the force of such admission of fact as evidence of how he then considered the work had been done. *Swift Electric Light Co. v. Grant*, 90 *Mich.* 469, 51 *N. W. Rep.* 539.

(2) *By persons injured.*—A party's admissions as to the cause of an injury, for which he claims damages, are good evidence against him, and the statements of a companion made in his presence, without contradiction, may have the like force with his own admissions. *Olivier v. Louisville & N. R. Co.*, 47 *Am. & Eng. R. Cas.* 576, 43 *La. Ann.* 804, 9 *So. Rep.* 431.

An admission by a plaintiff suing for a personal injury, tending to show that he alone was to blame for the injury, is admissible against the party, but is not conclusive. Such admission involves a conclusion both of law and fact; and the party may have been mistaken in thinking he was alone to blame, and if the jury so find, he is not bound by the admission. *Daub v. Northern Pac. R. Co.*, 18 *Fed. Rep.* 625.

Statements made by one fatally injured, as to the cause of the injury, so far as they are treated as admissions, should be considered by the jury in connection with all the circumstances under which they were made, and given such weight as the jury believe them entitled to. *Perigo v. Chicago, R. I. & P. R. Co.*, 55 *Iowa* 326, 7 *N. W. Rep.* 627.

The admissions of a person severely injured by a railroad collision, made in broken, disjointed statements immediately after the injury, in reply to questions by the company's agent, are of little weight against him. *Milwaukee & C. R. Co. v. Hunter*, 11 *Wis.* 160.

In an action by the widow of deceased, statements made by him immediately after the accident, that it was caused by his fault, are admissible on behalf of defendant. *Lord v. Pueblo S. & R. Co.*, 12 *Colo.* 390, 21 *Pac. Rep.* 148.

Where a husband sues for an injury to his wife, the admissions of the wife against interest are not admissible to bind the husband; but where other witnesses have testified that the wife made no such admissions, proof that she did is admissible for the purpose of contradicting the witnesses. *Stillwell v. New York C. R. Co.*, 34 N. Y. 29.—FOLLOWING *Brown v. New York C. R. Co.*, 32 N. Y. 603.

193. By officers of company.—(1) *Admissible.*—Corporations may be bound in their ordinary affairs by the acts and admissions of their officers, so far as relates to the business usually transacted through such officers. *Chicago, B. & Q. R. Co. v. Coleman*, 18 Ill. 297.

The president of a corporation is treated by common usage as its head, and admissions made by him in the execution of the duties imposed upon him, and concerning a matter upon which he is called upon to act, and which is within the scope of the authority usually exercised by him, are evidence against the corporation. *Chicago, B. & Q. R. Co. v. Coleman*, 18 Ill. 297.—RECORDED IN *Chicago & N. W. R. Co. v. Boone County*, 44 Ill. 240. REVIEWED IN *Verry v. Burlington, C. R. & M. R. Co.*, 47 Iowa 549.—*Charleston & S. R. Co. v. Blake*, 12 Rich. (So. Car.) 634.—NOT FOLLOWED IN *Smith v. North Carolina R. Co.*, 68 N. Car. 107.

And it is immaterial whether the authority of the president exists by virtue of his office or is implied from the course of business of the corporation. *Chicago, B. & Q. R. Co. v. Coleman*, 18 Ill. 297.

Where an express company is sued for a failure to deliver a trunk, and the evidence shows that it was the trunk of a passenger on an incoming train, which the express company had agreed to accept from the railroad and carry further, and had accepted a railroad check therefor, but denies that the trunk ever came into its possession, admissions made by the president of the express company when the trunk was demanded, admitting that it had been received, are admissible. *Harnett v. Westcott*, 24 J. & S. 213, 3 N. Y. Supp. 7, 18 N. Y. S. R. 962.

In an action for killing plaintiff's husband, proof of a letter from the president to plaintiff, containing an offer of money as a charitable donation, but in no way admitting any legal liability, although strictly im-

proper for irrelevancy, would not be calculated to work harm to defendant, and would not justify a reversal of the cause. *Gavisk v. Pacific R. Co.*, 49 Mo. 274.

Where the secretary of a railroad company, in response to a demand for a copy of a written contract of subscription, shown to have been in the possession of the company, answers that it has been lost, proof of his answer is, *prima facie*, sufficient to entitle the party making the demand to give oral proof of its contents, in a suit against the company. *Indianapolis & C. R. Co. v. Jewett*, 16 Ind. 273.

Where it is shown that the superintendent of a railroad company's buildings and bridges is the proper person to procure releases of damages from employés of the company when injured, it is proper for an employé, who sues the company for damages, to prove that such superintendent had told the employé that he would not be received into the company's hospital unless he signed a release, and that he instructed the superintendent of the hospital not to receive him. *St. Louis, A. & T. R. Co. v. Jones*, (Tex.) 14 S. W. Rep. 309.

(2) *Inadmissible.*—Letters or other documents signed by officers of the defendant pending a proposed compromise or settlement of the matters in dispute with plaintiff, which was never consummated, containing admissions in his favor, in reference to past transactions, are not admissible as evidence against the company, unless it is shown that said officers or agents had authority to make them. *East Tenn., V. & G. R. Co. v. Davis*, 91 Ala. 615, 8 So. Rep. 349.

In order to hold an employer liable for the wilful or malicious act of an employé it must appear that the employer had knowledge of his unfitness, or of his malicious disposition, before the injury complained of; but declarations or admissions of such knowledge, made by the president of a railroad company after the happening of the injury, are not competent to charge the company. *Utter v. Forty-second St. & G. S. R. Co.*, 6 Daly (N. Y.) 227.

In an action against a company for failure to construct a cattle-pass which, it was claimed, it had agreed to do, a letter in relation thereto, written to plaintiff by the superintendent, whose duty was in operating and keeping in repair the road, is not admissible. The cattle-pass, being an inde-

pendent construction, is not properly embraced in repairs. *Livingston v. Iowa Midland R. Co.*, 35 Iowa 555.

In an action for injury to goods, the owner offered to show that the general superintendent of the railroad had admitted that the injury was caused by negligence; that, as nearly as he could ascertain, the goods were in good condition when received by the railroad; and that they must have been injured by the person who took them from the railroad to the owner. The judge, who tried the case without a jury, excluded the evidence, and found that the goods were injured by negligence, but that it was not proved to have occurred while the goods were in the possession of the road. *Held*, that no exception lay to the exclusion of the evidence. *Boston & M. R. Co. v. Ordway*, 140 Mass. 510, 5 N. E. Rep. 627.

Where a company is sued for the loss of cattle shipped, by reason of its local agent not properly securing the car door, a letter written by the assistant superintendent of the road, dismissing the local agent, is not admissible against the company as an admission of negligence. *Betts v. Farmers' L. & T. Co.*, 21 Wis. 80.

194. By agents.—(1) *Admissible.*—Where a general agent of a common carrier, with power to settle and adjust losses, makes a promise to pay for a loss of goods upon a certain contingency, evidence of such promise is proper for the jury in a suit against the carrier. *Merchants' Dispatch Transp. Co. v. Leysor*, 89 Ill. 43.

In an action by a passenger for the loss of his trunk, the admissions of the conductor, baggage master, or station master, as to the manner of the loss, made in answer to inquiries on behalf of the passenger the next morning after the loss, are admissible in evidence against the corporation. *Morse v. Connecticut River R. Co.*, 6 Gray (Mass.) 450.—DISTINGUISHED IN *Verry v. Burlington, C. R. & M. R. Co.*, 47 Iowa 549; *Meyer v. Virginia & T. R. Co.*, 16 Nev. 341; *Smith v. North Carolina R. Co.*, 68 N. Car. 107. FOLLOWED IN *Burnside v. Grand Trunk R. Co.*, 47 N. H. 554. REVIEWED IN *Hampton v. Pullman Palace Car Co.*, 42 Mo. App. 134.—*Gott v. Dinsmore*, 111 Mass. 45.

Testimony of the shipper as to certain sayings of the carrier's agent who represented it in the shipment, was admissible in rebuttal of the testimony of that agent as to a conversation which he had with the ship-

per on the night after the carrier had failed to forward the goods from the initial point. The agent's admissions, when applied to by the shipper, and upon demand being made for the reasons of the carrier's non-compliance with the contract claimed to have been made, the transaction being still in progress, and any representations made by the agent under these circumstances, were admissible against the carrier, especially where the agent telegraphed to the shipper to come to see him in regard to the matter. *Central R. & B. Co. v. Skellie*, 86 Ga. 686, 12 S. E. Rep. 1017.

(2) *Inadmissible.*—The admission of an agent not made at the time of doing an act in the exercise of his authority, nor explanatory of any contemporaneous act in the execution of the agency, is not evidence against his company. *Memphis & C. R. Co. v. Maples*, 63 Ala. 601. *Johnson v. East Tenn., V. & G. R. Co.*, 55 Am. & Eng. R. Cas. 446, 90 Ga. 810, 17 S. E. Rep. 121. *Missouri Pac. R. Co. v. Sherwood*, 55 Am. & Eng. R. Cas. 478, 84 Tex. 125, 19 S. W. Rep. 455.

The admissions or declarations of an agent or employé concerning the infliction of a personal injury upon a passenger on a railway train, made the same night, but after the injury, are not admissible against the railroad company. Neither can the acts of an agent, done after the event to which they relate has transpired, not within the scope of his services, be admitted to bind his principal. *Pittsburgh, C. & St. L. R. Co. v. Theobald*, 51 Ind. 246. *St. Louis & S. F. R. Co. v. Barger*, 52 Ark. 112, 12 S. W. Rep. 156.—REVIEWED IN *St. Louis, I. M. & S. R. Co. v. Sweet*, 57 Ark. 187.

Confessions of a defaulting agent after his discharge from the service of the company, are not admissible as evidence against the surety of such agent in an action on his bond for the faithful performance of his duties as agent. *Pollard v. Louisville, C. & L. R. Co.*, 7 Bush (Ky.) 597.

Admissions of local railroad agents against the company's interest, made at the time a delivery of goods is applied for, may bind the company; but admissions made by a freight agent after goods were delivered, tending to show that they were damaged in the company's hands, are not admissible. *Boston & M. R. Co. v. Ordway*, 140 Mass. 510, 5 N. E. Rep. 627.—DISTINGUISHING *Lane v. Boston & A. R. Co.*, 112 Mass. 455;

Green v. Boston & L. R. Co., 128 Mass. 221.

At the trial of an action for setting back the waters of a stream upon the plaintiff's premises, an admission of the defendant's liability by an attorney, to whom the plaintiff was referred by the defendant's president, is not competent in the absence of proof that the attorney was referred to in such a way as to constitute him an agent of the defendant, with authority to make admissions or promises to the plaintiff; and such proof, if offered at the close of the defendant's case, may, in the discretion of the presiding judge, be rejected as too late. *Proctor v. Old Colony R. Co.*, 154 Mass. 251, 28 N. E. Rep. 13.

195. By employes.—(1) *Generally.*—An employé of a railroad is not its agent for the purpose of making admissions, and his narration of the past occurrence of an accident will not bind the company. *Marsh v. South Carolina R. Co.*, 56 Ga. 274.

Where an injured employé seeks to make his company liable for an injury received through the alleged incompetency of a fellow-servant, what another employé, who was present at the time, said to plaintiff the next morning after the accident, about the incompetency of the servant, is not admissible as an admission binding the company; but where the employé has denied making such statement, proof that he did is admissible for the sole purpose of impeaching him. *Catlin v. Michigan C. R. Co.*, 66 Mich. 358, 9 West. Rep. 857, 33 N. W. Rep. 515.

(2) *Brakeman.*—Statements of a brakeman that a car axle was too short, should not go to the jury to show negligence on the part of the railroad, unless it be shown that it was within his province to look out for the safe condition of the train. *Wright v. Georgia R. & B. Co.*, 34 Ga. 330.

(3) *Conductor.*—The statement of a party, not fully identified as the conductor of the train by which plaintiff was injured, that "the train was behind time and running at a furious rate," is inadmissible. *Memphis & C. R. Co. v. Pillow*, 9 Heisk. (Tenn.) 248.

(4) *Driver.*—In a suit against a street railway company for injuries to a passenger, the testimony of a witness to a conversation between the driver and the superintendent, after the accident, in which the driver stated that he had reported the car as having a bad brake, etc., is inadmissible to bind

the company with notice of the defect claimed. *Wormsdorf v. Detroit City R. Co.*, 40 Am. & Eng. R. Cas. 271, 75 Mich. 472, 42 N. W. Rep. 1000.

(5) *Engineer.*—The admission of an engine driver concerning an accident, made after it occurred, is not evidence against the company. *Chicago, B. & Q. R. Co. v. Riddle*, 60 Ill. 534. *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335.—QUOTING *Luby v. Hudson River R. Co.*, 17 N. Y. 131.—REVIEWED IN *Ohio & M. R. Co. v. Stein*, 133 Ind. 243; *Hawker v. Baltimore & O. R. Co.*, 15 W. Va. 628.

An admission of an engineer concerning an act while he was in the company's service, made after the transaction, and after he has left the service, is not admissible to bind the company. *Card v. New York & H. R. Co.*, 50 Barb. (N. Y.) 39.

It is error to permit a witness to testify that he heard the engineer who was in charge of the locomotive when the plaintiff was hurt say, about seven minutes after the accident, "How in the hell could a drunken man see a drunken man?" Such testimony is inadmissible, either as evidence of a declaration or admission of an employé of the company, or to impeach the engineer as a witness by contradicting him on such immaterial matter. *Vicksburg & M. R. Co. v. McGowan*, 62 Miss. 682.

In an action for an injury at a highway crossing, alleged to have been caused by the failure of the defendant to give the signals required by law, a conversation between the injured party and the engineer of the train, a few minutes after the accident, concerning the giving of the signals and containing admissions by the former, is admissible in evidence. *Grand Rapids & I. R. Co. v. Diller*, 110 Ind. 223, 9 N. E. Rep. 710.

Where a company is sued for a personal injury, alleged to have been caused by the reckless running of a train, evidence that the engineer in charge was heard to say, either before or after the accident, that he would make his engine make her time or blow her to hell, is admissible against the company, for the purpose of showing rashness or unfitness of the engineer, and as tending to show the cause of the disaster. *Nashville & C. R. Co. v. Messino*, 1 Sneed (Tenn.) 220.

(6) *Freight clerk.*—In an action against a carrier for conversion of goods it is competent for plaintiff to prove a conversation which he had with defendant's delivery clerk after the

goods were found, in which the clerk admitted that he failed to deliver the goods when they were demanded, and expressed his belief that he would lose his position as the result of it. The testimony was competent, not as an admission against defendant, but by way of contradicting the clerk, who had testified that he did, in fact, deliver the goods when demanded. *Louisville & N. R. Co. v. Lawson*, 88 Ky. 496, 11 S. W. Rep. 511.

(7) *Night inspector*.—The admissions of a night inspector having charge of a train at an intermediate station as to the cause of delay in the carriage of cattle are not admissible against the company in an action against it for failure to deliver such cattle within a reasonable time. Such an employé has no authority to bind the company by such admissions. *Great Western R. Co. v. Willis*, 18 C. B. N. S. 748, 34 L. J. C. P. 195, 12 L. T. 349.

(8) *Road master*.—An offer to arbitrate a claim against a company by its road master is not admissible against the company as an admission against interest, (1) because an offer to arbitrate is not an admission of liability; (2) because the admission by the road master was not the admission of the company. *Mundhenk v. Central Iowa R. Co.*, 11 Am. & Eng. R. Cas. 463, 57 Iowa 718, 11 N. W. Rep. 656.

Where an injured employé seeks to hold his company liable for a personal injury received at the hands of another employé, on the ground that he was incompetent, of which fact the company had knowledge, evidence of statements made by the company's road master several days after the accident is not admissible to show that the company had knowledge of the servant's incompetency. *McDermott v. Hannibal & St. J. R. Co.*, 2 Am. & Eng. R. Cas. 85, 73 Mo. 516, 39 Am. Rep. 526.—**DISTINGUISHED** IN *Hampton v. Pullman Palace Car Co.*, 42 Mo. App. 134.

196. By contractors.—The account of a laborer for work on a railroad under a contractor, signed by the contractor, is not evidence against the railroad company as its admission, unless the authority to make such admissions is established. *Cosgrove v. Tebo & N. R. Co.*, 54 Mo. 495.

Sayings of the president of the construction company which was building and equipping the railroad, made two or three hours after an accident occurred, at another place,

to a newspaper reporter, that it would be to his interest not to publish too much, that the railroad at the place of the accident had been laid only temporarily, that he had not had time to put the broad-gauge ties on it, and did not want public opinion so strong against him, etc., were not admissible. *Chattanooga, R. & C. R. Co. v. Liddell*, 85 Ga. 482, 11 S. E. Rep. 853.—**EXPLAINING** *Krogg v. Atlanta & W. P. R. Co.*, 77 Ga. 202.

197. Letters written by attorneys.—A letter to the superintendent of a railroad company containing a brief statement of the injuries of a party, alleging that he was damaged \$500, but rather than go to law would settle for \$200 if the matter was closed up at once, written before the commencement of an action against the company by an attorney who afterwards appeared in the cause for the plaintiff, is not evidence of the facts admitted therein, unless it be proved that the plaintiff authorized the letter to be written. *Solomon R. Co. v. Jones*, 34 Kan. 443, 8 Pac. Rep. 730.

198. Offers to arbitrate or settle.—An offer by a railroad company to arbitrate a claim against it for killing live stock is not an admission of its liability. *Mundhenk v. Central Iowa R. Co.*, 11 Am. & Eng. R. Cas. 463, 57 Iowa 718, 11 N. W. Rep. 656.

A party has a right to buy peace rather than litigate for it. So proof that a railroad company has offered a certain sum before suit in satisfaction of a claim for damages against it, is not an acknowledgment of damages to the amount offered. *Waldrop v. Greenwood, L. & S. R. Co.*, 34 Am. & Eng. R. Cas. 204, 28 So. Car. 157, 5 S. E. Rep. 471.

Such an offer by the president of the company is not an admission of liability, though it is made after the president has investigated the matter. *Payne v. Forty-second St. & G. S. F. R. Co.*, 8 J. & S. (N. Y.) 8.

Letters written by the general superintendent of a company, the subject-matter of which is within the general scope of the superintendent's authority, and the contents of which are principally admissions of facts, are admissible in evidence, though they also contain an offer to compromise. *Central Branch U. P. R. Co. v. Butman*, 22 Kan. 639.

Where a company is sued for a personal injury, and calls one of its employés as a witness, it is proper to inquire of the witness, on cross-examination, if he had not offered

plaintiff a sum of money to settle the matter, as such evidence is material to show the relation of the witness to the controversy. *Cambeis v. Third Ave. R. Co.*, 48 N. Y. S. R. 709, 1 Misc. 158, 20 N. Y. Supp. 633.

199. Conduct of party as an admission.—In an action against a carrier of passengers for damages occasioned by his negligence, his conduct subsequent to the time of the plaintiff's injuries may be proved, if it tends to show an admission of negligence. *Martin v. Towle*, 59 N. H. 31.

200. Admissions in pleadings.—The failure of a company to deny the execution of a note purporting to have been signed by the company by its auditor is an admission that the note was so signed; but whether the authority of the auditor to execute the note is also admitted, *quære*, the jury having found that he had such authority. *Dewey v. Toledo, A. A. & N. M. R. Co.*, 50 Am. & Eng. R. Cas. 607, 91 Mich. 352, 51 N. W. Rep. 1063.

In an action for killing a bull, defendant's original answer, admitting in effect that defendant owned and operated the train that killed the bull, is admissible in evidence, and the admission therein is conclusive of the fact admitted, unless shown to have been made under a mistake. *Oregon R. & N. Co. v. Dacres*, 1 Wash. 195, 23 Pac. Rep. 415.

2. Declarations.

201. In general.*—(1) *Admissible.*—In an action by the superintendent of a company to recover the value of his services as superintendent, if the company claim that his salary has been fixed at a stipulated sum, conversations between the plaintiff and directors of the company are admissible to show that he dissented from the amount of salary proposed for him by the directors, and that he did not consider his salary as fixed at a stipulated sum. *Bee v. San Francisco & H. B. R. Co.*, 46 Cal. 249.

Declarations of a decedent, contained in letters shown to have been written by him, are competent to show his marriage. *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442.

Under an issue as to intestate's sanity,

* Admissibility of evidence of conversation at the time of shipment as to how long it would take, see 35 AM. & ENG. R. CAS. 656, *abstr.*

and as to fraud in obtaining from him a release, it is proper to permit plaintiff to testify as to the financial condition of her intestate and to his declaration as to the execution of the release which was being demanded of him. *Price v. Richmond & D. R. Co.*, 38 So. Car. 199, 17 S. E. Rep. 732.

It being charged in the complaint that plaintiff, while being carried on the defendant's railroad, was drenched with water, and that it was done wilfully, and evidence tending to show that it was done by the direct procurement of the brakeman, it was competent to prove a previous declaration by the brakeman of his purpose to do it. *Terre Haute & I. R. Co. v. Jackson*, 6 Am. & Eng. R. Cas. 178, 81 Ind. 19.

Where a witness was detailing the high rate of speed at which the train was running, and for the purpose of making his meaning clearer to the jury, stated an exclamation of a fellow-passenger as to the short time consumed in running between stations—*held*, admissible. *Missouri Pac. R. Co. v. Collier*, 18 Am. & Eng. R. Cas. 281, 62 Tex. 318.

The declarations of a holder of an excursion ticket made to the conductor when he demanded payment of fare, notwithstanding the ticket, are competent when tending to explain the delay of the holder in not presenting the ticket before the limit had expired, and when they tended to show the limit of time in the ticket was not reasonable. *Gulf, C. & S. F. R. Co. v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. Rep. 399.

Where it is sought to show that goods delivered to a carrier were lost through the felonious act of the company's servants, evidence is admissible that the station master consulted the police regarding the disappearance of a porter, and it may be shown what he said on that occasion. *Kirkstall Brewery Co. v. Furness R. Co.*, L. R. 9 Q. B. 468, 22 W. R. 876, 43 L. J. Q. B. 142, 30 L. T. 783.

(2) *Inadmissible.*—The remark of a passenger to the conductor on the train on which he was traveling, made a few minutes before the accident happened, indicating his opinion that the train was moving very rapidly—as asking him if the engineer was not “whooping them up pretty fast that morning”—is not admissible as evidence for the plaintiff. *Alabama G. S. R. Co. v. Hill*, 47 Am. & Eng. R. Cas. 500, 90 Ala. 71, 8 So. Rep. 90.

Instructions given by a purchaser of goods to the vendor as to the manner of marking and shipping them are not admissible for the plaintiff, in an action by the purchaser against the common carrier who undertook to transport them. *Angle v. Mississippi & M. R. Co.*, 9 Iowa 487.

In an action against a county on bonds and interest coupons issued to a railroad company, parol evidence of the statement of the directors of the company, while in session and transacting business in regard to the bonds, is not admissible for the purpose of showing that they were not assigned at the time they purport to have been. *Whittaker v. Johnson County*, 10 Iowa 161.

In the construction of a culvert under a railroad, the engineer of the company declared to a bystander, who was in no way connected with the road, that he thought the culvert would prove insufficient in a flood. Twenty-five years thereafter suit was brought against the lessee of the company for damages for an injury resulting from an overflow of the embankment, and the party to whom these declarations of the engineer were made was permitted to testify thereto. Held, that this was error; that said declarations were inadmissible to bind the defendant in any way whatever. *Baltimore & O. R. Co. v. Sulphur Spring I. S. Dist.*, 2 Am. & Eng. R. Cas. 166, 96 Pa. St. 65, 42 Am. Rep. 529.

202. By employes.*—(1) *Generally.*—Where an employé of a railroad engages another person to work in his place, private instructions given by the former to the latter as to how the work should be executed are not competent evidence to affect the company. *Mayfield v. Savannah, G. & N. A. R. Co.*, 87 Ga. 374, 13 S. E. Rep. 459.

Where an employé sues for a personal injury while coupling cars, a statement by another employé, in the repair department, some time after the accident, and at a different place, to the effect that he knew that the car was out of repair, is not admissible against the company. *Verry v. Burlington, C. R. & M. R. Co.*, 47 Iowa 549.

Where a passenger sues for an injury received in a wreck, evidence that the engineer was warned against his reckless running of the train, at a station before

reaching the place of the accident, is not admissible. *San Antonio & A. P. R. Co. v. Robinson*, 73 Tex. 277, 11 S. W. Rep. 327.

Testimony of a passenger of a conversation between himself and the conductor, relating to the payment of the fare of his servant, is admissible. *Muscogee R. Co. v. Redd*, 54 Ga. 33.

The declaration of the railway conductor as to the time when his train is due at a station on his route, made while he is running the train, is competent evidence. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 2 L. R. A. 75, 9 S. W. Rep. 749.

A statement by the conductor, made shortly after he took up plaintiff's ticket, that the train did not stop at her destination, and that she would have to get off at another station, is a declaration by the company's agent in its interest and is not admissible as evidence of the fact stated. *Sira v. Wabash R. Co.*, 115 Mo. 127, 21 S. W. Rep. 905.

In an action for not delivering cattle within a reasonable time, evidence of a conversation between the plaintiff and the railroad company's night inspector, in which the latter had said that he had forgotten the cattle, was not admitted in evidence. *Great Western R. Co. v. Willis*, 18 C. B. N. S. 748, 34 L. J. C. P. 195.

(2) *Written reports to superiors.*—Where an injured passenger is carried to the next station on the same train injuring him, a report there made by the engineer to his superior, as required by the rules of the company, stating the cause of the accident, is competent evidence as to the cause and circumstances of the accident. (Campbell, C.J., dissenting.) *Keyser v. Chicago & G. T. R. Co.*, 31 Am. & Eng. R. Cas. 399, 66 Mich. 390, 10 West. Rep. 646, 33 N. W. Rep. 867.—DISTINGUISHED IN *Carroll v. East Tenn., V. & G. R. Co.*, 41 Am. & Eng. R. Cas. 307, 82 Ga. 452.

Reports to the general manager of the company touching the facts, circumstances, and results of a railway accident, and who was to blame therefor, made several days after the event, by the superintendent and the conductor, supported by the affidavit of the latter and of several other employes, are not admissible in evidence to affect the company, whether such reports were exacted and made under standing rules requiring the same, or under special orders for the particular occasion; no question of notice to

* Declarations of employes in evidence, see notes, 31 AM. & ENG. R. CAS. 355; 19 *Id.* 410.

the company being involved in the controversy. *Carroll v. East Tenn. V. & G. R. Co.*, 41 *Am. & Eng. R. Cas.* 307, 82 *Ga.* 452, 10 *S. E. Rep.* 163.—DISTINGUISHING *Keyser v. Chicago & G. T. R. Co.*, 66 *Mich.* 390, 33 *N. W. Rep.* 867; *Carlton v. Western & A. R. Co.*, 81 *Ga.* 531; *Krogg v. Atlanta & W. R. Co.*, 77 *Ga.* 202. REVIEWING *Langhorn v. Allnutt*, 4 *Taunt.* 511; *Vicksburg & M. R. Co. v. Putnam*, 118 *U. S.* 545.

A written statement made by the conductor of a car, in the line of his duty, giving details of an accident immediately after it happened, is not admissible in evidence, but the facts must be proved by the conductor or others who witnessed the occurrence; but if the conductor be sworn, he may use the written statement to refresh his memory. *North Hudson County R. Co. v. May*, 27 *Am. & Eng. R. Cas.* 151, 48 *N. J. L.* 401, 5 *Atl. Rep.* 276; *reversed on other grounds in 49 N. J. L.* 445, 9 *Atl. Rep.* 688.

(3) *Statements at the time of an accident.*—The declarations of a servant or agent are not admissible against the master or employer, unless they are a part of the facts and circumstances attending the injury for which it is sought to make the master liable. *Durkee v. Central Pac. R. Co.*, 25 *Am. & Eng. R. Cas.* 350, 56 *Cal.* 388, 38 *Am. Rep.* 59. *Ohio & M. R. Co. v. Stein*, 133 *Ind.* 213, 31 *N. E. Rep.* 180, 32 *N. E. Rep.* 831.—REVIEWING *Bellefontaine R. Co. v. Hunter*, 33 *Ind.* 335.—*Devlin v. Wabash, St. L. & P. R. Co.*, 28 *Am. & Eng. R. Cas.* 524, 87 *Mo.* 545.—REVIEWED IN *Leahey v. Cass Ave. & F. G. R. Co.*, 97 *Mo.* 165, 10 *S. W. Rep.* 58.—*Whitaker v. Eighth Ave. R. Co.*, 51 *N. Y.* 295; *reversing 5 Robt.* 650.—REVIEWED IN *Waldele v. New York C. & H. R. R. Co.*, 19 *Am. & Eng. R. Cas.* 400, 95 *N. Y.* 274.

In an action for running over and killing a person walking upon the track, a switchman was held competent to testify as to statements made to him by the engineer of the train causing the accident, to the effect that a man had been run over and killed, it being part of said engineer's business to inform the switchman of any obstruction on the track, so that he might hold back the following trains until the obstruction was removed. Said switchman was, however, incompetent to testify as to declarations made to him by the engineer as to the manner of killing and the identity of the person killed. Such evidence was obnox-

ious as hearsay evidence. *Baltimore & O. R. Co. v. State*, 19 *Am. & Eng. R. Cas.* 83, 62 *Md.* 479, 50 *Am. Rep.* 233.

In a suit against a corporation to recover exemplary damages for the perpetration of a wilful trespass, the declarations of an employé of the defendant which indicate his own reckless indifference to consequences regarding the trespass are not admissible. *International & G. N. R. Co. v. Telephone & T. Co.*, 69 *Tex.* 277, 5 *S. W. Rep.* 517.—FOLLOWING *Houston & T. C. R. Co. v. Willie*, 53 *Tex.* 319.

H. shipped a car-load of cattle by the defendant from K. to N. O. The train was delayed by being overloaded and having a broken engine, and during such delay W., who had cattle on the same train, applied to a conductor of another train on the same road, which was about to pass them at D., to take the cars containing his and H.'s cattle on to N. O. The conductor responded, "Damn you and your cattle; I am not going to take either." In an action brought by H. against the company for damages occasioned by the delay of the train transporting his cattle, W. was introduced as a witness for the plaintiff to prove the response above quoted. *Held*, that such testimony was irrelevant and inadmissible. *Illinois C. R. Co. v. Haynes*, 63 *Miss.* 485.

(4) *Statements made after the accident.*—Statements made by train employes after an accident are not admissible to show negligence on the part of the company. *Petrie v. Columbia & G. R. Co.*, 27 *So. Car.* 63, 2 *S. E. Rep.* 837. *Vicksburg & M. R. Co. v. O'Brien*, 27 *Am. & Eng. R. Cas.* 232, 119 *U. S.* 99, 7 *Sup. Ct. Rep.* 118.—APPROVING *Hanover R. Co. v. Coyle*, 55 *Pa. St.* 402.—DISTINGUISHED IN *Chicago, M. & St. P. R. Co. v. Artery*, 137 *U. S.* 507.—*Michigan C. R. Co. v. Gougar*, 55 *Ill.* 503. *Treadway v. Sioux City & St. P. R. Co.*, 40 *Iowa* 526. *Union Pac. R. Co. v. Fray*, 29 *Am. & Eng. R. Cas.* 309, 35 *Kan.* 700, 12 *Pac. Rep.* 98. *Williamson v. Cambridge R. Co.*, 30 *Am. & Eng. R. Cas.* 636, 144 *Mass.* 148, 10 *N. E. Rep.* 790. *Michigan C. R. Co. v. Coleman*, 28 *Mich.* 440. *Kelly v. Chicago & A. R. Co.*, 88 *Mo.* 534.—APPLYING *Adams v. Hannibal & St. J. R. Co.*, 74 *Mo.* 553.—*Anderson v. Rome, W. & O. R. Co.*, 54 *N. Y.* 334. *Furst v. Second Ave. R. Co.*, 72 *N. Y.* 542. *Carpenter v. New York, N. H. & H. R. Co.*, 13 *N. Y. S. R.* 718; *affirming 10 N. Y. S. R.* 712. *Barry v. Second Ave. R. Co.*, 41 *N.*

Y. S. R. 342, 16 *N. Y. Supp.* 518; affirmed in 136 *N. Y.* 669, *mem.*, 33 *N. E. Rep.* 336, *mem.*, 50 *N. Y. S. R.* 929.—DISTINGUISHING *Casey v. New York C. & H. R. R. Co.*, 78 *N. Y.* 518; *Hanover R. Co. v. Coyle*, 55 *Pa. St.* 396. QUOTING *Waldele v. New York C. & H. R. R. Co.*, 95 *N. Y.* 274.—*Southerland v. Wilmington & W. R. Co.*, 106 *N. Car.* 100, 11 *S. E. Rep.* 189. *Travis v. Louisville & N. R. Co.*, 9 *Lea (Tenn.)* 231. *Gulf, C. & S. F. R. Co. v. York*, 74 *Tex.* 364, 12 *S. W. Rep.* 68.

But if the employé should be called as a witness and deny the declarations, the evidence might be offered in rebuttal to contradict him. *Dietrich v. Baltimore & H. S. R. Co.*, 11 *Am. & Eng. R. Cas.* 115, 58 *Md.* 347.

203. Of officers acting within the scope of their power.—To render admissible declarations of the president of a street railway company as to the ownership of the lines formerly operated by the company, such declarations must have been made while he was in the performance of his duties as president, or while acting for the company, or while transacting any business contemporaneous with the declarations which they serve to explain. *Ricketts v. Birmingham St. R. Co.*, 37 *Am. & Eng. R. Cas.* 12, 85 *Ala.* 600, 5 *So. Rep.* 353.

Where a railroad company is sued for refusing to accept and pay for coal which it had contracted to buy, declarations made by the president of the company, recognizing the contract, and directing what should be done in the matter, are admissible, where it appears that the contract was in the ordinary course of his business. *Baltimore & O. R. Co. v. Brydon*, 25 *Am. & Eng. R. Cas.* 287, 65 *Md.* 198, 7 *Cent. Rep.* 396, 3 *Atl. Rep.* 306, 9 *Atl. Rep.* 126.

Where a company is sued to recover for services performed in organizing the company, evidence that the president had said that the plaintiff ought to be paid if any one was, is not admissible against the company, without showing some authority beyond that which he was president. *Low v. Connecticut & P. R. R. Co.*, 45 *N. H.* 370.

Where an express company agrees to take up the trunk of a passenger from a railroad company and carry it further, but fails to do so, and, when sued, denies that it ever received the trunk from the railroad, evidence of admissions made by its presi-

dent, when a demand was made for the trunk, that it had been received, is admissible. *Harnett v. Westcott*, 24 *J. & S.* 213, 3 *N. Y. Supp.* 7, 18 *N. Y. S. R.* 962.

Where a canal company is sued for diverting water from plaintiff's mill, declarations made by the supervisor in charge of the canal, in response to complaints by plaintiff, are competent evidence against the company. *Halsey v. Lehigh Valley R. Co.*, 45 *N. J. L.* 26.

A declaration made by the president of the canal company, about the time of the construction under his direction of a certain work for the use of a canal, with regard to the purpose of the company in building it, is competent evidence against the company. *Halsey v. Lehigh Valley R. Co.*, 45 *N. J. L.* 26.

The declarations of a director of a corporation, that a certain person is its agent, do not bind it. *Florida, M. & G. R. Co. v. Varnedoe*, 81 *Ga.* 175, 7 *S. E. Rep.* 129.

Where the action is for causing the death of an employé, through the alleged incompetency of a co-employé, and it appears that he was competent at the time he was employed, but had fallen into habits of intoxication, evidence is admissible, as tending to show knowledge on the part of the company, that the division superintendent had said at one time that the employé must quit drinking; and it is also proper to allow the superintendent to testify that he had accused the employé at one time of being off on a spree, which he did not deny, and that he had reprimanded him for it. *Chapman v. Erie R. Co.*, 55 *N. Y.* 579; reversing 1 *T. & C.* 526.—QUOTED IN *McDermott v. Hannibal & St. J. R. Co.*, 28 *Am. & Eng. R. Cas.* 528, 87 *Mo.* 285.

A depot agent was notified by the superintendent to report for instructions to the assistant superintendent, and, on so reporting, was informed that the latter desired to transfer him to another station on the road; the transfer being made, the depot agent afterward sued the company for increased compensation, as promised by the assistant superintendent. *Held*, that the statements and declarations of the assistant superintendent, while negotiating for the transfer, and up to the completion of the contract, were competent evidence against the company. *Alabama G. S. R. Co. v. Hill*, 76 *Ala.* 303.

204. Of agents while acting within the scope of their authority.*—(1)

Generally.—The sayings of the agents of a railroad company are admissible, and will bind the company only when made in the particular business intrusted to them, and while engaged in that business. *Johnson v. East Tenn., V. & G. R. Co.*, 90 Ga. 810, 17 S. E. Rep. 121. *Huntsville, B. L. & M. S. R. Co. v. Corpening*, 97 Ala. 681, 12 So. Rep. 295. *Verry v. Burlington, C. R. & M. R. Co.*, 47 Iowa 549.—DISTINGUISHING *Morse v. Connecticut River R. Co.*, 6 Gray (Mass.) 450. QUOTING *Lafayette & I. R. Co. v. Ehman*, 30 Ind. 83. REVIEWING *Chicago, B. & Q. R. Co. v. Coleman*, 18 Ill. 297.—*McDermott v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 528, 87 Mo. 285. *Bevis v. Baltimore & O. R. Co.*, 26 Mo. App. 19. *Smith v. North Carolina R. Co.*, 68 N. Car. 107.—FOLLOWED IN *Branch v. Wilmington & W. R. Co.*, 88 N. Car. 573.—*Southerland v. Wilmington & W. R. Co.*, 106 N. Car. 100, 11 S. E. Rep. 189. *Huntingdon & B. T. M. R. & C. Co. v. Decker*, 82 Pa. St. 119.

The conversation of an agent of defendant authorized to make and modify the contract sued on, had at the time concerning it and its terms, is proper evidence for the plaintiff. *Louisville, N. A. & C. R. Co. v. Henly*, 12 Am. & Eng. R. Cas. 301, 88 Ind. 535.

Declarations of an agent of a company, made to a contractor for the construction of the road, while inquiring of him as to the best mode of completing the construction, and while acting within his authority, are admissible in a suit on the contract. *Norwich & W. R. Co. v. Cahill*, 18 Conn. 484.

Where a passenger sues for an injury caused by the train running off the track at a place where it was being repaired, the declaration of the company's agent, who had charge of a gang of men relaying ties, "that there was sufficient time to relay them before the arrival of the train," is admissible against the company as part of the *res gestæ*. *Matteson v. New York C. R. Co.*, 62 Barb. (N. Y.) 364.

Representations and declarations made by the agent of the corporation in the course of the business intrusted to his particular care are binding upon the corporation, notwithstanding they produce evidence to show

that he had no authority to make those declarations or representations. Persons dealing with the corporation by such an agent have a right to suppose that he has authority to speak for it relative to the business intrusted to his special care. *Schlesinger v. Adams Exp. Co.*, 9 Phila. (Pa.) 70.—REVIEWING *Tanner v. Oil Creek R. Co.*, 53 Pa. St. 411.

Evidence of acts and statements of agents and officers of a railroad in regard to the ownership, management, control, or construction of the road, if such acts were performed or the statements made while such officers and agents were engaged for the company, may be admitted; but before they are admissible, it must be proved by other evidence than the officer's or agent's declarations that he was such officer or agent. *Missouri Pac. R. Co. v. Owens*, 1 Tex. App. (Civ. Cas.) 163.

(2) *Claim agent.*—A corporation having invested an agent with general authority to adjust claims against it, the declarations of such agent in the adjustment of a claim are competent evidence against it. *Adams Exp. Co. v. Harris*, 40 Am. & Eng. R. Cas. 151, 120 Ind. 73, 21 N. E. Rep. 340.—FOLLOWED IN *Missouri Pac. R. Co. v. Gernan*, 84 Tex. 141.—*Missouri Pac. R. Co. v. Gernan*, 84 Tex. 141, 19 S. W. Rep. 461.—FOLLOWING *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125; *Adams Exp. Co. v. Harris*, 120 Ind. 73, 21 N. E. Rep. 340.

(3) *Freight agent.*—The statements of a general freight agent of a railway company in regard to goods delivered to him for transportation, made at a time when the duty of the railroad to deliver the goods still existed, are admissible against the company, although made eight months after the delivery of the goods to him. *Burnside v. Grand Trunk R. Co.*, 47 N. H. 554.—FOLLOWING *Morse v. Connecticut River R. Co.*, 6 Gray (Mass.) 450.—DISTINGUISHED IN *Meyer v. Virginia & T. R. Co.*, 16 Nev. 341. REVIEWED IN *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125.

Where a company is sued for the non-delivery of freight, declarations made by the freight agent at the place of delivery, to the effect that he thought it had been delivered to other parties, made in answer to inquiries for the freight, are admissible against the company. *Lane v. Boston & A. R. Co.*, 112 Mass. 455.—DISTINGUISHED IN *Boston & M. R. Co. v. Ordway*, 140

*Declarations of servants and agents, see notes, 30 AM. & ENG. R. CAS. 639; 18 Id. 139; 7 Id. 419.

Mass. 510; *Meyer v. Virginia & T. R. Co.*, 16 Nev. 341. REVIEWED IN *Hampton v. Pullman Palace Car Co.*, 42 Mo. App. 134.

The statements contained in letters written or indorsements and memoranda made upon a freight or expense bill by agents of a railroad company in the course of search for goods lost in transit, and having reference to the search, are the statements of the company, and it is bound by all the inferences which legitimately result therefrom. *Union Pac. R. Co. v. Hepner*, 3 Colo. App. 313, 33 Pac. Rep. 72.

(4) *Local agent*.—The statements of local agents of an express company, of negotiations and appeals made by them to the plaintiff in regard to the giving of a deed to procure the discharge of plaintiff's son from arrest for embezzlement from the company, as showing that plaintiff gave the deed for this purpose, are admissible in an action bringing in question the validity of such deed. *Southern Exp. Co. v. Duffey*, 48 Ga. 358.

(5) *Ticket agent*.—The statements made by a ticket agent selling a limited excursion ticket are competent in evidence against the company on the subject of the movement of the trains, etc., and to show whether the limit of time of the ticket was reasonable under the circumstances. *Gulf, C. & S. F. R. Co. v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. Rep. 399.

(6) *Ticket inspector*.—The declarations of a ticket inspector as to his reasons for rejecting a ticket when presented by a passenger, made in the line of his duty, are admissible to prove the genuineness of such ticket. *Nichols v. Southern Pac. Co.*, 52 Am. & Eng. R. Cas. 205, 23 Oreg. 123, 31 Pac. Rep. 296.

205. Of agents not acting within the scope of their authority.—Declarations of an agent must be within the scope of his authority and while the transaction is yet depending; e. g., a tabulated statement made out by one known as "claim agent," as to the bales, etc., of cotton burned, is not competent against the principal unless it be shown that it was within the extent or scope of his business, and that it was within the discharge of his duty while the obligation of the carrier yet continued. *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. Rep. 455.—REVIEWING *Burnside v. Grand Trunk R. Co.*, 47 N. H. 554, 93 Am. Dec.

474.—FOLLOWED IN *Missouri Pac. R. Co. v. Gernan*, 84 Tex. 141.

The acts or declarations of an agent or officer of a corporation, in recognition of an adverse claim or right, are not admissible as evidence against his principal, unless authorized, or subsequently ratified. *Mobile & G. R. Co. v. Coggsbill*, 85 Ala. 456, 5 So. Rep. 188.

In a suit by a lot owner to recover damages to his lot, caused by the use of a street fronting it for railroad tracks, the statements of the officers of the road as to the intended future use of the street are not admissible in behalf of the company; but an actual direction as to its use might be proper evidence. *Pittsburg, Ft. W. & C. R. Co. v. Reich*, 101 Ill. 157.

The plaintiff having been injured while coupling cars, an agent sent by the company to obtain from him a statement of the circumstances of the accident is not authorized by such agency to bind the company by his own declarations as to such circumstances. Proof of such declarations would be mere hearsay evidence. *Doyle v. St. Paul, M. & M. R. Co.*, 41 Am. & Eng. R. Cas. 376, 42 Minn. 79, 43 N. W. Rep. 787.

Where a company is charged with negligence in destroying plaintiff's goods while in a warehouse, by sparks from an engine, statements made by the station agent, at the time the building was burning, as to what caused the fire, are not admissible against the company. *Meyer v. Virginia & T. R. Co.*, 16 Nev. 341.—DISTINGUISHING *Morse v. Connecticut River R. Co.*, 6 Gray (Mass.) 450; *Burnside v. Grand Trunk R. Co.*, 47 N. H. 554; *Lane v. Boston & A. R. Co.*, 112 Mass. 462.

Where a company is sued for a penalty for delay in shipping local freights, it is error to admit the declarations of a station agent to the effect that the company, during a certain season, used most of its cars for through freights, his agency not extending to a control of through freights. *Branch v. Wilmington & W. R. Co.*, 18 Am. & Eng. R. Cas. 621, 88 N. Car. 573.—FOLLOWING *Smith v. North Carolina R. Co.*, 68 N. Car. 107.

Where a company is charged with negligence in the improper construction of its track so as to back water over plaintiff's lands, declarations made by a section master are not admissible against the company where it appears that his duties only related

to keeping the track in order, and had no reference to whether it was properly constructed or not. *Waldrop v. Greenwood, L. & S. R. Co.*, 34 *Am. & Eng. R. Cas.* 204, 28 *So. Car.* 157, 5 *S. E. Rep.* 471.—APPLIED IN *Schlapbach v. Richmond & D. R. Co.*, 53 *Am. & Eng. R. Cas.* 42, 35 *So. Car.* 517, 15 *S. E. Rep.* 241.

206. Of agents concerning past transactions.—(1) *Generally.*—The rule is well established that the declarations of an agent are only admissible as to matters within the scope of his authority, and only as to transactions then going on, and not as to past events. *International & G. N. R. Co. v. Ragsdale*, 67 *Tex.* 24, 2 *S. W. Rep.* 515. *Bevis v. Baltimore & O. R. Co.*, 26 *Mo. App.* 19. *Coyle v. Baltimore & O. R. Co.*, 11 *W. Va.* 94.

Even though he may continue still to act as agent generally, or in other matters. *McComb v. North Carolina R. Co.*, 70 *N. Car.* 178.—FOLLOWED IN *Stenhouse v. Charlotte, C. & A. R. Co.*, 70 *N. Car.* 542.

Statements subsequently made by agents of a company who were not its agents in the transaction which involved the cause of action, are inadmissible to bind the company. *Rider v. Wabash, St. L. & P. R. Co.*, 14 *Mo. App.* 529.

(2) *Contracts.*—Where one of the parties to a contract is sued by the other for misrepresentations, by which the latter claims to have been deceived in making the contract, the declarations of an agent, made subsequent to the negotiations which culminated in the contract, are inadmissible. *Phelps v. George's Creek & C. R. Co.*, 16 *Am. & Eng. R. Cas.* 600, 60 *Md.* 536.

In an action for breach of a contract alleged to have been made by an agent, it is incompetent to establish such breach by evidence of the declarations of the agent. *Memphis & V. R. Co. v. Cocke*, 64 *Miss.* 713, 2 *So. Rep.* 495.

Evidence of what an agent said in regard to a transaction already passed, but while his agency for similar objects still continued, is not admissible to prove the contract itself, although it is competent to contradict the statement of the agent that no such contract was made. *Stenhouse v. Charlotte, C. & A. R. Co.*, 70 *N. Car.* 542.—FOLLOWING *McComb v. North Carolina R. Co.*, 70 *N. Car.* 178.

If such evidence is, after objection, received generally, without confining it to the

contradiction of the statement of the agent, it is error, and entitles the party objecting to its reception to a new trial. *Stenhouse v. Charlotte, C. & A. R. Co.*, 70 *N. Car.* 542.

The declaration of a depot agent, made in response to plaintiff's inquiry for his goods, that they were burned up in a car a few nights previously, is not admissible as evidence against his principal, the railroad company, when sued for the loss of the goods. *Louisville & N. R. Co. v. Carl*, 91 *Ala.* 271, 9 *So. Rep.* 334.

A statement by an agent that it was reported that there had been a delay in a freight train, and that, if the facts were as represented, the company ought to and would pay the damages, and requesting the party in interest to investigate the facts, is incompetent and irrelevant in a suit against the road for damages from such delay. *Tuggle v. St. Louis, K. C. & N. R. Co.*, 62 *Mo.* 425.

At the trial of an action to recover for the loss of cotton alleged to have been delivered at a depot of defendants, and burned the same day, a declaration of the agent made the next day, that "the railroad company was responsible for the cotton," was received as evidence against defendant. *Held*, error, but no ground for a new trial, the declaration being a mere expression of opinion and irrelevant to the issues. *Patterson v. South Carolina R. Co.*, 4 *So. Car.* 153.

In the trial of an action for damages for requiring a passenger having no ticket to pay more than the ticket rate, evidence of the declaration of the ticket agent at the station where the passenger had tried to buy a ticket, that he was asleep before and on the arrival of the train on which plaintiff took passage, such declaration having been made on the day following, is incompetent. *Forsee v. Alabama G. S. R. Co.*, 63 *Miss.* 66.

(3) *Torts.*—In an action to recover for injuries occasioned by falling through an uncovered bridge in attempting to get on defendant's train, the bridge being under the control of defendants, declarations of the conductor of the train, made after the accident had happened, tending to show that the company had been guilty of negligence, were inadmissible. *Chicago & N. W. R. Co. v. Fillmore*, 57 *Ill.* 265.—FOLLOWED IN *Chicago & A. R. Co. v. Fietsam*, 19 *Ill. App.* 55.

In an action for damages for personal injuries occasioned by the negligence of a railroad company, it is error to permit a witness to testify that a few days after the injury the conductor who had charge of the train at the time of the injury, said that the bell was not rung, and that the train was running at an excessive rate of speed. *Wengler v. Missouri Pac. R. Co.*, 16 Mo. App. 493.

Where a passenger sues for being ejected from a train, the conductor claiming that his ticket did not entitle him to ride to the place where he desired to go, evidence of declarations of the ticket agent, made after the ticket was sold, is not admissible against the company, not being a part of the *res gesta*. *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 388.

207. Of alleged agents where the agency is not proved.—Before the declarations of an agent are admissible, the party offering to prove them must at least give some evidence tending to show that he had power to act for his principal in relation to the matter in hand, and that the same was within the scope of his authority. *Armil v. Chicago, B. & Q. R. Co.*, 28 Am. & Eng. R. Cas. 467, 70 Iowa 130, 30 N. W. Rep. 42. *Cook v. United States Exp. Co.*, 4 Hun (N. Y.) 272.

It is not enough to show that he was known as the general agent of the company. *Lafayette & I. R. Co. v. Ehman*, 30 Ind. 83.—QUOTED IN *Verry v. Burlington, C. R. & M. R. Co.*, 47 Iowa 549.

Or to show that he settled for stock killed and injured along the road, as tending to prove that he had authority to act in regard to the roadbed, ditches, or drainage. *Drake v. Chicago, R. I. & P. R. Co.*, 29 Am. & Eng. R. Cas. 514, 70 Iowa 59, 29 N. W. Rep. 804.

The declarations of an agent, made within the scope of his agency, are admissible against the company; and if such declarations are erroneously admitted without first proving the agency, the error is cured by subsequent proof of the agency. *Toledo, W. & W. R. Co. v. Fisher*, 13 Ind. 258.—FOLLOWING *Wayne County Turnpike Co. v. Berry*, 5 Ind. 286.

Acts done and declarations made by one assuming to act as agent are not competent to prove the agency, unless subsequently brought to the knowledge of the principal and ratified by him. *Huntsville, B. L. &*

M. S. R. Co. v. Corpening, 97 Ala. 681, 12 So. Rep. 295. *Memphis & V. R. Co. v. Cocke*, 64 Miss. 713, 2 So. Rep. 495.

The question for the jury is one of agency on all the evidence in the case, and it is not concluded by the statement of the alleged agent. *Harrison v. Kansas City, C. & S. R. Co.*, 50 Mo. App. 332.

Conversations had after the date of an absolute deed to a railroad company, with persons connected in some way with such company, but not shown to have had authority to speak for or bind it, are not admissible in evidence to prove that the grant was upon condition that a depot should be built on the premises. *Schwalbach v. Chicago, M. & St. P. R. Co.*, 73 Wis. 137, 40 N. W. Rep. 579.

208. Declarations of company's speakers at public meetings.—Promises made by speakers in a meeting brought about by a railroad, for the purpose of securing a right of way from landowners, are admissible to show the inducements to the making of a grant to the road by the plaintiff, where both the plaintiff and the company's agent were at the meeting, and they went immediately from it and executed the deed; the agent may be considered to have adopted the promises which he knew plaintiff had heard made for the company. *Atlanta & L. R. Co. v. Hodnett*, 29 Ga. 461.

Otherwise where the speaker is not shown to have been authorized to speak for the company or those representing it. *First Nat. Bank v. Hurford*, 29 Iowa 579.

209. Statements of pain and suffering made to attending physician.*—In an action for personal injuries, the statements made to an attending physician by the injured party in respect to his injuries and the pain suffered by him are competent evidence in connection with his examination and observation of the patient. *Brusch v. St. Paul City R. Co.*, 52 Minn. 512, 55 N. W. Rep. 57. *Louisville, N. A. & C. R. Co. v. Falvey*, 23 Am. & Eng. R. Cas. 522, 104 Ind. 409, 3 N. E. Rep. 389, 4 N. E. Rep. 908. *Lake Shore & M. S. R. Co. v. Rosenzweig*, 26 Am. & Eng. R. Cas. 489, 113 Pa. St. 519, 6 Atl. Rep. 545.

Even though such statements may have been made after the beginning of the ac-

* When declarations of pain and suffering are admissible in actions for personal injuries, see note, 13 L. R. A. 465. See also ante, 166, 177.

tion for damages. *Cleveland, C., C. & I. R. Co. v. Newell*, 23 *Am. & Eng. R. Cas.* 492, 104 *Ind.* 264, 54 *Am. Rep.* 312, 3 *N. E. Rep.* 836.—QUOTED IN *Bennett v. Northern Pac. R. Co.*, 2 *N. Dak.* 112.

Such statements, made after the act causing the injury, are competent as a basis for the opinion of the physician upon the physical condition of the injured party. *Texas Trunk R. Co. v. Ayres*, 83 *Tex.* 268, 18 *S. W. Rep.* 684.

In an action by the husband for damages sustained from injuries inflicted upon his wife, expressions of pain and suffering, made by the wife to the physicians when they were examining her for the purpose of learning her physical condition, are admissible as evidence. *Matteson v. New York C. R. Co.*, 35 *N. Y.* 487.

So, likewise, declarations as to her health, made by the wife to a neighbor shortly after the injury, are admissible, especially when called out by the defendant on cross-examination. *Matteson v. New York C. R. Co.*, 35 *N. Y.* 487.—FOLLOWED IN *Hagenlocher v. Coney Island & B. R. Co.*, 99 *N. Y.* 136, 1 *N. E. Rep.* 536.

When it is important to show the bodily condition of a person at a certain time, what such person says to an examining physician at such time about the then nature, symptoms, and effects of the malady then upon her is proper evidence. *Earl v. Tupper*, 45 *Vt.* 275.

It is competent to prove expressions of pain and suffering made by the injured person at the time of the pain and suffering, whether at or even after the date of injury, and it was proper for the witness to relate what plaintiff had said as to her condition. It was also proper to prove by physicians and other witnesses the condition of the health of plaintiff before and after the injury, both by describing her appearance and symptoms and by giving her own expressions of pain and suffering at the time. And it was also proper for physicians to testify to knowledge of plaintiff's condition obtained by professional examinations, and to state the conclusions at which they arrived from the knowledge gained by such examinations. *Chicago, St. L. & P. R. Co. v. Spilker*, 55 *Am. & Eng. R. Cas.* 200, 134 *Ind.* 380, 33 *N. E. Rep.* 280, 34 *N. E. Rep.* 218.

It is proper to allow a physician to testify for plaintiff that some weeks after the in-

jury, and after the commencement of the action, the plaintiff still complained of pain about the injured parts. *Murphy v. New York C. R. Co.*, 66 *Barb. (N. Y.)* 125.

Testimony of plaintiff's physician, that when he last examined her, which seemed to have been only a few days before the trial, she still had persistent pain on motion of the injured limb, is not objectionable as involving the assumption that the pain continued at the time of the trial. *Rosevelt v. Manhattan R. Co.*, 13 *N. Y. Supp.* 598, 37 *N. Y. S. R.* 894, 27 *J. & S.* 197; affirmed in 133 *N. Y.* 537, *mem.*, 30 *N. E. Rep.* 1148, *mem.*

Where one suing for a personal injury is examined as a witness himself, and has given evidence as to his feelings, statements made by him to his physician are not admissible. *Barrell v. Pennsylvania R. Co.*, 4 *N. Y. Supp.* 127, 21 *N. Y. S. R.* 109.

210. Statements to attending physician as to nature and cause of injury.*—The representations of a sick or injured person, as to the nature, symptoms, and effects of the disease or injury under which he is suffering at the time, are competent evidence tending to show his actual condition. *Howe v. Plainfield*, 41 *N. H.* 135.

If made to a medical attendant they are of greater weight, but are not rejected when made to another person. *Perkins v. Concord R. Co.*, 44 *N. H.* 223.

Evidence may be given of what an injured person said to his physician as to the character of his injuries, but not what he said as to the cause of the injury. *Illinois C. R. Co. v. Sutton*, 42 *Ill.* 438.

A statement made by the deceased to a physician as to an internal injury received in a railroad collision, which was the subject of the suit, the injury then being healed, and the statement being made six months after the injury and not with reference to treatment by the physician, is not admissible. *Rowland v. Philadelphia, W. & B. R. Co.*, 63 *Conn.* 415, 28 *Atl. Rep.* 102.

211. Expressions indicating present pain and suffering.—Exclamations of pain made by an injured person are competent and relevant testimony in a suit to recover damages for such injuries. *Harris v. Detroit City R. Co.*, 76 *Mich.* 227, 42

* Admissibility of statements of injured party made to physician as to nature and effect of injuries, see note, 2 *AM. ST. REP.* 39.

N. W. Rep. 1111. *Cleveland, C., C. & St. L. R. Co. v. Prewitt*, 54 *Am. & Eng. R. Cas.* 198, 134 *Ind.* 557, 33 *N. E. Rep.* 367. *Lacas v. Detroit City R. Co.*, 92 *Mich.* 412, 52 *N. W. Rep.* 745. *Brown v. Hannibal & St. J. R. Co.*, 66 *Mo.* 588. *Plummer v. Ossipee*, 59 *N. H.* 55. *Kane v. Troy*, 16 *N. Y. S. R.* 341, 1 *N. Y. Supp.* 536. *Schuler v. Third Ave. R. Co.*, 48 *N. Y. S. R.* 663; *affirming* 44 *N. Y. S. R.* 774.—REVIEWING *Roche v. Brooklyn City & N. R. Co.*, 105 *N. Y.* 294, 7 *N. Y. S. R.* 361.—*Bennett v. Northern Pac. R. Co.*, 48 *Am. & Eng. R. Cas.* 182, 2 *N. Dak.* 112, 49 *N. W. Rep.* 408.—QUOTING *Cleveland, C., C. & I. R. Co. v. Newell*, 104 *Ind.* 264, 3 *N. E. Rep.* 836.—*Texas & P. R. Co. v. Barron*, 78 *Tex.* 421, 14 *S. W. Rep.* 698.—APPROVING *Bacon v. Charlton*, 7 *Cush. (Mass.)* 586; *Houston & T. C. R. Co. v. Shafer*, 54 *Tex.* 648. DISTINGUISHING *Texas & N. O. R. Co. v. Crowder*, 70 *Tex.* 222.

Wherever the bodily or mental feelings of an individual are material to be proved, in case of injury, the usual expressions of such feelings, pain, and suffering are original and competent evidence. *Sanders v. Reister*, 1 *Dak. (Bennett)* 145, 46 *N. W. Rep.* 680.—QUOTING *Travelers' Ins. Co. v. Mosley*, 8 *Wall. (U. S.)* 397; *Reed v. New York C. R. Co.*, 45 *N. Y.* 574.

Expressions of present existing pain and of its locality are exceptions to the general rule which excludes hearsay evidence. *Bennett v. Northern Pac. R. Co.*, 48 *Am. & Eng. R. Cas.* 182, 2 *N. Dak.* 112, 49 *N. W. Rep.* 408.

Such expressions of present pain, whether made before or after the suit, may be received as original evidence, whether made to a medical or other attendant. *Towle v. Blake*, 48 *N. H.* 92. *Contra Laughlin v. Grand Rapids St. R. Co.*, 80 *Mich.* 154, 44 *N. W. Rep.* 1049.

And the fact that plaintiff might himself testify in the cause does not change this rule. *Edmunds v. St. Louis R. Co.*, 3 *Mo. App.* 602.

Where a female passenger sues for a personal injury, and testifies at the trial as to her injuries, and the pain she suffered, it is proper for her to prove by a girl who slept in the same room with her that three months after the injury, plaintiff would sit on the side of the bed and complain of pain in the injured parts. (*Pratt, J., dissenting.*) *Nichols v. Brooklyn City R. Co.*, 30 *Hun (N. Y.)* 437; *affirmed in* 100 *N. Y.* 635, *mem.*

—APPLIED IN *De Long v. Delaware, L. & W. R. Co.*, 37 *Hun* 282.

Whether the pain was real or feigned is for the jury to determine. *St. Louis & S. F. R. Co. v. Murray*, 52 *Am. & Eng. R. Cas.* 373, 55 *Ark.* 248, 18 *S. W. Rep.* 50.

Where it appears that plaintiff was severely injured and suffered intense pain, it is proper for him to prove that he said immediately after the accident, "Take these splinters out of my leg; take these splinters out," though the evidence showed that there were no splinters in his leg. It is not admissible for the purpose of showing that there were splinters, but as an involuntary exclamation of suffering. *West v. Manhattan R. Co.*, 16 *N. Y. S. R.* 886.

Declarations of a party with regard to a present and existing pain or suffering, or with regard to the present condition of the body or mind, may generally be shown by any person who heard the same. *Alchison, T. & S. F. R. Co. v. Johns*, 34 *Am. & Eng. R. Cas.* 480, 36 *Kan.* 769, 14 *Pac. Rep.* 237.

Expressions of pain made by a person who is fatally injured, between the time of the injury and when death ensues, indicating where the pain was located, are admissible for the plaintiff. *McKeigue v. Janesville*, 68 *Wis.* 50, 31 *N. W. Rep.* 298. *Gray v. McLaughlin*, 26 *Iowa* 279.

Declarations of the party injured, made some time after the injury, simply to the effect that he is suffering pain, when not made to a physician for the purpose of professional attendance, are not competent as evidence. *Roche v. Brooklyn City & N. R. Co.*, 105 *N. Y.* 294, 11 *N. E. Rep.* 630, 7 *N. Y. S. R.* 361.—DISTINGUISHING *Reed v. New York C. R. Co.*, 45 *N. Y.* 574.—FOLLOWED IN *Olp v. Gardner*, 48 *Hun* 169, 15 *N. Y. S. R.* 544.

So also where at the time of making the declarations the plaintiff showed her arm, which had received the injury, and it was swollen and red. *Roche v. Brooklyn City & N. R. Co.*, 105 *N. Y.* 294, 11 *N. E. Rep.* 630, 7 *N. Y. S. R.* 361.

It seems that the rule is different as to groans, screams, or exclamations, indicative of pain. *Roche v. Brooklyn City & N. R. Co.*, 105 *N. Y.* 294, 11 *N. E. Rep.* 630, 7 *N. Y. S. R.* 361.—FOLLOWING *Hagenlocher v. Coney Island & B. R. Co.*, 99 *N. Y.* 136.—REVIEWED IN *Schuler v. Third Ave. R. Co.*, 48 *N. Y. S. R.* 663.

212. Narrations of past suffering.

—Evidence of declarations which are of an involuntary nature, indicating pain or suffering, such as sudden or involuntary groans, screams, or sighs resulting from a touch, movement, or contact with a foreign substance, are competent; but evidence of statements made long after the injury, as to the effect of the injury, or as to the sufferings endured therefrom, is not competent. *Olph v. Gardner*, 48 Hun 169, 15 N. Y. S. R. 544.

—FOLLOWING *Hagenlocher v. Coney Island & B. R. Co.*, 99 N. Y. 136.—*Goss v. Missouri Pac. R. Co.*, 50 Mo. App. 614.

Declarations as to past sufferings, when not made to a physician for the purpose of professional attendance, are not competent as evidence. *Barrelle v. Pennsylvania R. Co.*, 21 N. Y. S. R. 109, 4 N. Y. Supp. 127.

The trial judge excluded the testimony of the physicians as to what the wife told them of her physical history when they treated her at the hospital. *Held*, proper. *Butler v. Manhattan R. Co.*, 4 Misc. (N. Y.) 401; *affirming* 3 Misc. 453, 52 N. Y. S. R. 498. *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. Rep. 573, 43 N. Y. S. R. 887; *reversing* 31 N. Y. S. R. 982, 10 N. Y. Supp. 521.

213. Statements made in a party's presence.—Where husband and wife were traveling together on a railroad, and she was injured, his narration of how the injury occurred, made in response to an inquiry by a third person, not under such circumstances as called on her to respond to the narration, is not evidence against her in an action by her to recover for the injury. *Keller v. Sioux City & St. P. R. Co.*, 27 Minn. 178, 6 N. W. Rep. 486.

In an action to recover for killing plaintiff's intestate through a collision at a road crossing, the company sought to prove the declarations of a person, who was riding with the deceased at the time, made just after the accident. *Held*, that the evidence was inadmissible, the person injured being in a dying condition, and not capable of assenting to what was said. *Chicago, R. I. & P. R. Co. v. Bell*, 70 Ill. 102.

214. Statements made in party's absence.—In an action by a wife, after the death of her husband, against a railroad corporation, for injuries to her by their locomotive, while traveling in a highway with her husband in a vehicle driven by her, his declarations, made in her absence, as to the cause and circumstances of the accident,

and his previous knowledge of the disposition of the horse, and his statements showing that knowledge, are inadmissible in evidence for defendants. *Shaw v. Boston & W. R. Corp.*, 8 Gray (Mass.) 45.

In a suit on a bond of a railroad agent, statements of the principal at the date of its execution, in the absence of plaintiff or his agent, are inadmissible. *North Mo. R. Co. v. Wheatley*, 49 Mo. 136.

Where a director sues his company for services performed for the company, evidence that it was understood and talked among the directors that the services were to be rendered without compensation, is not admissible without showing that plaintiff was present at the time. *Low v. Connecticut & P. R. Co.*, 46 N. H. 284.

215. Of party as evidence for opposing party.—The statements of one injured by the alleged negligence of a railroad company, made after the accident, are not conclusive respecting the manner in which the accident occurred and the absence of wilful intention to injure him, but may be considered in connection with other circumstances. *Cooper v. Central R. Co.*, 44 Iowa 134.—FOLLOWED IN *Funston v. Chicago, R. I. & P. R. Co.*, 14 Am. & Eng. R. Cas. 640, 61 Iowa 452.—*Funston v. Chicago, R. I. & P. R. Co.*, 14 Am. & Eng. R. Cas. 640, 61 Iowa 452, 16 N. W. Rep. 518.—DISTINGUISHING *Marquette, H. & O. R. Co. v. Kirkwood*, 45 Mich. 51.—FOLLOWING *Cooper v. Central R. Co.*, 44 Iowa 134.—FOLLOWED IN *Schaefer v. Chicago, M. & St. P. R. Co.*, 62 Iowa 624.

Where a party sues for a personal injury, and the company proves statements made by him as to how the accident happened, it is not competent for plaintiff to then prove other declarations made by him near the same time but in other conversation, touching the same subject. *Downs v. New York C. R. Co.*, 47 N. Y. 83.

216. Owner's statements as to value of property.—In an action for damages caused by the laying down tracks through an alley, to lots abutting thereon, the statements of the values of said lots, made by the party whose administrator brings the action, may ordinarily be introduced in evidence by the opposite party;

* Personal injuries. Feigned injury. Evidence of plaintiff's declarations, see 48 AM. & ENG. R. CAS. 112, *abstr.*

but where such statements are either made a long time before or a long time after the laying down of said tracks, and the values of the property in that locality have been fluctuating, it is not error to reject such testimony. *Central Branch U. P. R. Co. v. Andrews*, 30 *Am. & Eng. Cas. R.* 352, 37 *Kan.* 162, 14 *Pac. Rep.* 509.

Where a declaration, imputed to plaintiff as to the value of an animal killed, is shown to have been made in an effort to effect a compromise, the jury should not consider such declaration in estimating damages. *Georgia R. & B. Co. v. Smith*, 85 *Ga.* 530, 11 *S. E. Rep.* 859.

217. Of a party in his own interest.—In an action to recover for loss of goods against an express company, where the defense was a fraudulent concealment of the value of the several packages, the plaintiffs' clerk, who filled up the receipt the company signed, on cross-examination testified that until about a year prior to the date of the shipment the plaintiffs had put a valuation on goods and paid an extra charge thereon, and that he struck out of the receipt the words "valued at," etc. The plaintiffs' counsel then asked the witness, "Why?" and he answered, because he was told by one of the plaintiffs not to give a valuation, and that plaintiff told him he had an understanding with the express companies and with the agent of the defendant company that he was to pay no more valuation charges. *Held*, that such declarations of one of the plaintiffs were clearly inadmissible, not having been made in the presence of the defendant, or constituting any part of the *res gestæ*. *Adams Exp. Co. v. Boskowitz*, 16 *Am. & Eng. R. Cas.* 102, 107 *Ill.* 660.

218. By party injured as to cause and extent of injury.—In a suit by a father for an injury to his minor son, the declarations of the son, made the day following the injury, as to the cause of the accident, were not admissible against the plaintiff. *Ohio & M. R. Co. v. Hammersley*, 28 *Ind.* 371.

Statements as to the happening of an accident, made by the person injured, are not admissible in evidence, unless they are part of the *res gestæ*, though they were made in the presence of defendant's driver who caused the injury. *Lahey v. Ottmann*, 25 *N. Y. Supp.* 897, 56 *N. Y. S. R.* 109, 73 *Hun* 61.

Plaintiff cannot be permitted to prove his

own statements as to the extent of his injuries, made long after the accident. *Wintler v. Central Iowa R. Co.*, 74 *Iowa* 448, 38 *N. W. Rep.* 154.

The admission of the representations of a sick person should be confined to such expressions as furnish evidence of the present condition of the patient, excluding carefully everything in the nature of a narrative of what is past. *Taylor v. Grand Trunk R. Co.*, 48 *N. H.* 304.

On the trial of an action for damages, brought by a widow against a railroad company for injuries causing her husband's death, there being a real controversy as to whether the death was the result of natural causes or of defendant's act, it is error to admit, over defendant's objection, the *post facto* statement of the deceased that "he was knocked up and crippled" by his injuries. *Louisville & N. R. Co. v. Stacker*, 86 *Tenn.* 343, 6 *Am. St. Rep.* 840, 6 *S. W. Rep.* 737.

In an action against a street railroad for the death of a minor child, declarations of the child as to the manner in which he was hurt, made at the scene of the accident, and while surrounded by persons who witnessed the calamity, are admissible as a part of the *res gestæ*. But what the child said after being carried fifty or seventy-five feet, and laid on a cot, and from five to twenty minutes after the accident, was not admissible. *Lahey v. Cass Ave. & F. G. R. Co.*, 97 *Mo.* 165, 10 *S. W. Rep.* 58.—*REVIEWING BROWNELL v. Pacific R. Co.*, 47 *Mo.* 240; *Hanover R. Co. v. Coyle*, 55 *Pa. St.* 402; *Adams v. Hannibal & St. J. R. Co.*, 74 *Mo.* 553; *Devlin v. Wabash, St. L. & P. R. Co.*, 87 *Mo.* 545; *Vicksburg & M. R. Co. v. O'Brien*, 119 *U. S.* 99.

219. Declarations showing notice.—(1) *Admissible.*—The declaration of the yard master, made the night before in passing the switch where the accident happened, that the switch was all right, was admissible for the purpose of showing that he knew its location. *Louisville & N. R. Co. v. Mothershed*, 97 *Ala.* 261, 12 *So. Rep.* 714.

Where the chief civil engineer, having charge of the construction and repairs of a railroad, and the division road master, having charge of a division of the road for the purpose of keeping it in proper condition and repair, have a conversation with regard to the condition and safety of a particular

portion of the road within that division, the declarations of the chief civil engineer, made in such conversation, may be given in evidence, as against the company, for the purpose of showing that the company had notice of the dangerous condition of a particular portion of the road within that division. *St. Louis & S. F. R. Co. v. Weaver*, 28 *Am. & Eng. R. Cas.* 341, 35 *Kan.* 412, 11 *Pac. Rep.* 408.

Where it is sought to prove that a company had knowledge of a certain fraudulent transaction, touching the procurement of a right of way, it is competent to prove knowledge on the part of a director; and the most satisfactory evidence of such knowledge is his own declaration to that effect. *McAulay v. Western Vt. R. Co.*, 33 *Vt.* 311.

Evidence of notice to the conductor of a train is admissible as tending to prove notice to the company. So where it is sought to recover punitive damages for the rude and violent treatment of a passenger by a brakeman, on the ground that the company had retained him in its employ afterward, it is competent to prove that a fellow-passenger called the attention of the conductor to the transaction. *Bass v. Chicago & N. W. R. Co.*, 42 *Wis.* 654, 15 *Am. Ry. Rep.* 45.

Suit by a mother for negligently causing her son's death. The son was fireman on a train of water cars, which collided with a passenger train north of H. and south of A. on the appellant's railway. The appellant offered a witness to prove that at D., a station north of A., he had heard a conversation between the operator and a man who got off the water train, and who was either engineer or fireman, in which the operator informed the party from the water train that he would meet the passenger train at A. Held, that the conversation was competent, and that it was error to exclude it. *Gulf, C. & S. F. R. Co. v. Compton*, 44 *Am. & Eng. R. Cas.* 637, 75 *Tex.* 667, 13 *S. W. Rep.* 667.

(2) *Inadmissible*.—Declarations made by the conductor of the train to a passenger, a moment before the accident, of the bad condition of the road, and his train having run off the track five consecutive times next preceding the present trip, are not admissible in proof of negligence, either as *res gestæ* or as admissions of an agent binding on the principal. *Mobile & M. R. Co. v. Ashcraft*, 48 *Ala.* 15.

The statement of a conductor, drawn out

by plaintiff, that he had informed the latter before requiring her to leave the train that it did not stop at the station to which her ticket entitled her to passage, was a mere declaration of an agent of the company in its interest, and was not evidence of the facts stated. *Sira v. Wabash R. Co.*, 58 *Am. & Eng. R. Cas.* 538, 115 *Mo.* 127, 21 *S. W. Rep.* 905.

Where the action is for the death of an engineer caused by a defect in the track, evidence of what a section foreman said about the dangerous condition of the track, at a time other than that of the accident, is not admissible against the company, as tending to show that it had knowledge of the defective condition of the track through the section foreman. *Worden v. Humeston & S. R. Co.*, 72 *Iowa* 201, 33 *N. W. Rep.* 629.

The declaration of the road master, who had authority to employ and discharge the section foreman, that the latter was not "a good railroad man" is not admissible to prove the fact that the section foreman was incompetent, but is admissible to prove that the company had notice of his incompetency, if such incompetency was established by other evidence, or there was other evidence tending to establish it; and such declaration being admitted, its effect should have been so controlled by an instruction. *McDermott v. Hannibal & St. J. R. Co.*, 28 *Am. & Eng. R. Cas.* 528, 87 *Mo.* 285.—*QUOTING Chapman v. Erie R. Co.*, 55 *N. Y.* 584.—But see *Huntingdon & B. T. M. R. & C. Co. v. Decker*, 82 *Pa. St.* 119.

220. Declarations of strangers.—Declarations of persons not servants or agents of the railroad company are not admissible to bind it. *Atlanta & F. R. Co. v. Kimberly*, 47 *Am. & Eng. R. Cas.* 307, 87 *Ga.* 161, 13 *S. E. Rep.* 277.

Statements made to plaintiff's agent by an agent of a subsequent carrier, as to the fact that the car in question had not arrived at its destination at a certain time, were not competent to bind defendant as to the time when the car was delivered to the subsequent carrier, and should have been excluded as mere hearsay. *Hewett v. Chicago, B. & Q. R. Co.*, 18 *Am. & Eng. R. Cas.* 568, 63 *Iowa* 611, 19 *N. W. Rep.* 790.

The statement of plaintiff's son, made just after his mother had fallen off, that she jumped off, is inadmissible when the boy denies making the statement, and testifies

that he did not see his mother fall. *Smith v. Chicago & A. R. Co.*, 52 Am. & Eng. R. Cas. 483, 108 Mo. 243, 18 S. W. Rep. 971.

A mere declaration of a third party that he is the custodian of an infant is not competent for the purpose of showing him to be such custodian. *Saare v. Union R. Co.*, 20 Mo. App. 211.

In an action for personal injuries, it is not competent for the plaintiff to give in evidence the statements and declarations of a stranger in relation to the departure or movements of the defendant's trains. Such evidence is hearsay. *Haase v. Oregon R. & N. Co.*, 44 Am. & Eng. R. Cas. 360, 19 Oreg. 354, 24 Pac. Rep. 238.

Plaintiff's intestate was driving across a railroad track where gates were maintained, and when his team was on the track, notice was given of an approaching train. He was riding on the spring seat of his wagon with his feet resting on a foot-board. To avoid an impending collision he made an effort to jump from his wagon, but the foot-board gave way under his weight and he fell and was killed. *Held*, that evidence of a third party who had no interest in the affair, to the effect that he had told the deceased before the accident that the foot-board needed repairing, is not admissible against the plaintiff. *McIntosh v. Chicago, M. & St. P. R. Co.*, 36 Fed. Rep. 661.

In an action to recover for a personal injury by being struck by a moving car at a street crossing, the defense was a want of due care by the plaintiff, and that he was intoxicated. The defense offered to prove that just before the accident the plaintiff, in a saloon, called for a drink of liquor and that the bar-keeper told him he had enough, which the court excluded, on objection. *Held*, that the evidence was not admissible, and was properly refused. The fact whether plaintiff was under the influence of liquor was subject to proof the same as any other fact in the case, but could not be proved by the declaration of a third person. *Lake Erie & W. R. Co. v. Zoffinger*, 15 Am. & Eng. R. Cas. 371, 107 Ill. 199.

221. Overtures for settlement.—Confidential overtures of pacification, or offers or propositions between litigating parties, expressly stated to be made confidentially or without prejudice, are excluded as evidence, on the ground of public policy. But the admission of any independent fact

is received, though made during a treaty of compromise. *Perkins v. Concord R. Co.*, 44 N. H. 223.

222. Attempts to bribe witnesses.—On the trial of an action on the case, brought against a city railway company to recover for a personal injury, the court allowed a witness for the plaintiff to testify that a clerk in the employ of the defendant offered him \$300, either to prevent him from appearing as a witness against the company, or to influence his evidence in favor of the company. This was objected to as no part of the *res gesta*. *Held*, that the evidence was proper, though not a part of the *res gesta*. *Chicago City R. Co. v. McMahon*, 8 Am. & Eng. R. Cas. 68, 103 Ill. 485.

IX. DOCUMENTS; WRITINGS; PRINTED MATTER.

223. In general.—Where a corporation is sued on certain drafts, and the complaint alleges that they were drawn on the company and accepted by a certain person as agent, and there is no denial of the execution, acceptance, or of the authority of the agent, the drafts are admissible in evidence without proof of such facts, under the provisions of Tex. Rev. St. art. 2262. *San Antonio & A. P. R. Co. v. Harrison*, 72 Tex. 478, 10 S. W. Rep. 556.

Proof of the signatures of the officers of a corporation to a release purporting to have been executed by the corporation is *prima facie* evidence of the execution and seal. *Josey v. Wilmington & M. R. Co.*, 12 Rich. (So. Car.) 134.

Accounts of sales and prices current sent by a commission merchant to his principal are not evidence of the value or weight of stock in the market. *Hoskins v. Missouri Pac. R. Co.*, 19 Mo. App. 315.—FOLLOWING *Harrison v. Missouri Pac. R. Co.*, 74 Mo. 364.

It is not competent for the company to put in evidence a newspaper account of the accident, prepared from information received on the day and at the place of the accident, where the author of the account is examined, and cannot state from whom he received the information. *Downs v. New York C. R. Co.*, 47 N. Y. 83, 1 Am. Ry. Rep. 542.

A paper shown to be similar to an affidavit of the killing of stock, served on a

railroad company, but not a copy, is not admissible to prove the contents of the affidavit. *Kyser v. Kansas City, St. J. & C. B. R. Co.*, 56 Iowa 207, 9 N. W. Rep. 133.

A ticket issued by a superintendent of the poor, upon which the plaintiff in a negligence case was admitted to the poor-house for treatment for the injuries complained of, and the indorsement thereon of the city physician showing plaintiff's discharge from a hospital, and stating the nature of his disabilities, and that, because of his inability to support himself, he is sent to the poor-house for treatment, are inadmissible as evidence in his favor on the trial of the case. *Fox v. Peninsular W. H. & C. Works*, 92 Mich. 243, 52 N. W. Rep. 623.

After the accident plaintiff was taken to a police station house, accompanied by V., who was a witness; a record was there kept of accidents; the record as to the case was offered in evidence by defendant; it appeared that the police sergeant who made it was dead; the record was excluded. *Held*, no error; that it was not competent original evidence as to the cause of the accident, and was inadmissible to contradict V., as it did not appear that he furnished the information from which it was made, or was cognizant of its contents. *Hoffman v. New York C. & H. R. R. Co.*, 4 Am. & Eng. R. Cas. 537, 87 N. Y. 25, 41 Am. Rep. 337; *affirming* 14 J. & S. 526.

In a suit to recover the price and value of ties furnished, the company offered in evidence a copy of a blank, shown plaintiff by its engineer, for the purpose of proving that the contract was made on behalf of certain contractors named in the blank. The blank contract was not executed by the parties, and was exhibited to plaintiff to inform him of the length and size of the ties. *Held*, that the blank was not admissible as evidence to prove the contract was made by plaintiff with contractors. *Toledo, W. & W. R. Co. v. Chew*, 67 Ill. 378.

224. Absence of attesting witness.

—Where a landowner sues for the cost of building a fence along a right of way, and the company puts in evidence a written release attested by one witness, the absence of the attesting witness must be accounted for before another can be called to prove his signature. *Warner v. Baltimore & O. R. Co.*, 31 Ohio St. 265.

Neither is an admission made by the

landowner that his signature to the release was genuine admissible in evidence, without first calling the attesting witness, or accounting for his absence. *Warner v. Baltimore & O. R. Co.*, 31 Ohio St. 265.

An instrument was offered by the defendant, signed by the plaintiff and the conductor in charge of the train after leaving P., showing the condition of the stock at its date. Defendant also offered to prove the same fact by other testimony. The instrument was signed by a witness not called, nor his absence accounted for. On objection to the instrument for the reason that it was not proved by the subscribing witness, the court properly excluded it. *International & G. N. R. Co. v. McKee*, 82 Tex. 614, 18 S. W. Rep. 672.

225. Bills of lading.—In an action against a company to replevy goods, where the contract of carriage is not denied, the bill of lading for the goods is admissible as evidence. *Chicago, B. & Q. R. Co. v. Gustin*, 35 Neb. 86, 52 N. W. Rep. 844.

Where a suit is based upon a bill of lading there cannot be a recovery without producing the bill of lading, or accounting for its non-production, and then establishing its contents. *Texas & P. R. Co. v. Wheat*, 2 Tex. App. (Civ. Cas.) 146. *Galveston, H. & S. A. R. Co. v. Van Winkle*, 3 Tex. App. (Civ. Cas.) 538.

A bill of lading, not declared upon, is not evidence in an action to recover for goods lost by the carrier, without proof of its execution. *Peck v. Dinsmore*, 4 Port. (Ala.) 212.

Where their execution by the company agents was not denied under oath, and the plaintiff's petition was in part founded upon them, it was not error to admit in evidence the bill of lading for certain goods shipped, and an expense bill or receipt for freight charges on the same goods. And such being the nature of these instruments, they were admissible in evidence without proof of their execution, under Tex. Rev. St. art. 1265. *International & G. N. R. Co. v. Pichard*, 1 Tex. App. (Civ. Cas.) 189.

226. Book entries.—(1) *Admissible.*—Original entries, attested by the man who makes them, and who states that he believes them to be true, may be read to the jury, though such person remembers nothing of the facts which the entries record. *Merrill v. Ithaca & O. R. Co.*, 16 Wend. (N. Y.) 586.

A book of entries by the commissioners who organized a railroad is admissible to show subscriptions to the stock of the company, where it was a part of the duty of the commissioners to make such entries, and they had knowledge of the facts, and they were made at the time the subscriptions were made. *Wood v. Coosa & C. R. R. Co.*, 32 Ga. 273. *Macon & A. R. Co. v. Vason*, 57 Ga. 314.

Such subscription books are in the nature of official registers, and are competent evidence to prove how much per mile had been subscribed to the capital stock. *Monroe v. Ft. Wayne, J. & S. R. Co.*, 28 Mich. 272, 12 Am. Ky. Rep. 273.

If books are kept by the agents of a company, in which are entered the receipt and delivery of property by such company, such books, when shown to belong to the company—of which the use by the agent, in the company's business, is *prima facie* evidence—are also competent evidence, *prima facie*, of the entries therein; and it is not necessary to prove that the entry is in the handwriting of any agent or servant of the company, provided it be made to appear that the entries have been made in the same handwriting for such a length of time as to satisfy a jury that the person making the entries was a recognized agent of the company, and as such authorized to make such entries. *Root v. Great Western R. Co.*, 65 Barb. (N. Y.) 619, 1 T. & C. 10; *affirmed* in 55 N. Y. 636, *mem.*

Where one of connecting lines is sued for a failure to carry goods, it may prove by the agent of the connecting line a delivery of the goods to the connecting line, though the agent never saw the goods, as he may testify from the books of his company as to entries made by him in the usual course of business, the books having been proved to be accurate. *Schaefer v. Georgia R. Co.*, 66 Ga. 39.

In an action for damages caused by a wagon colliding with a moving train, the account books of one who repaired the wagon, showing the cost thereof, and who is dead at the time of the trial, are competent evidence to show the extent of the damage. *Lassone v. Boston & L. R. Co.*, (N. H.) 24 Atl. Rep. 902.

(2) *Inadmissible*.—Books kept by a railroad company solely for its own use in the management of its business are not admissible as evidence, when offered by the com-

pany, in an action against it by a stranger to such company seeking to recover damages sustained by the company's negligence. *Pittsburg & L. E. R. Co. v. Cunningham*, 13 Am. & Eng. R. Cas. 529, 39 Ohio St. 327.

Entries in the books of a corporation are not admissible in evidence against its vice-president, who was shown to have been an active director and a member of its executive committee, where there is nothing to show that the books had been in his custody, or that it had been his duty to inspect them, or that he even knew the existence of the entries. *Bartholomew v. Farwell*, 41 Conn. 107.—REVIEWING *Butler v. Cornwall Iron Co.*, 22 Conn. 336.

Charges for services done or property delivered, under the supposed existence of a special contract, but which afterwards became matter of account, by operation of law, in consequence of a rescission of the contract, cannot be proved by the party's book. There must be a right to charge when the service is done or the goods delivered. *Merrill v. Ithaca & O. R. Co.*, 16 Wend. (N. Y.) 586.—RECONCILED IN *Doolittle v. McCullough*, 12 Ohio St. 360.

Where an express company is sued for breach of a contract to safely carry goods, and it is shown that the receipt given by the company containing the contract is lost and a sworn copy is introduced, which is not admitted by the company as being correct, it is not competent for the company to introduce entries on its books by a clerk receiving the goods to show the real contract; nor is evidence admissible of the custom of the company to make a special entry in cases of the nature of the one in question, but that no such entry was made. (Gray and Leonard, CC., dissenting.) *Reed v. United States Exp. Co.*, 48 N. Y. 462.

227. Certified copies of public records.—(1) *Admissible*.—When an original ancient instrument is lost, a certified copy may be introduced in evidence upon the same proof that would make the original admissible if it could be produced. *Galveston, H. & S. A. R. Co. v. Stealey*, 66 Tex. 468, 1 S. W. Rep. 186.—FOLLOWING *Holmes v. Coryell*, 58 Tex. 687.

Certified copies of articles of association consolidating railroads, from the office of the secretary of state, are admissible to prove the consolidation. *Vance v. Kohlberg*, 50 Cal. 346. *Toledo, W. & W. R. Co. v. Chew*, 67 Ill. 378. *East St. Louis Connecting R.*

Co. v. Wabash, St. L. & P. R. Co., 24 Ill. App. 279; *reversed on other grounds* in 123 Ill. 594, 15 N. E. Rep. 45, 12 West. Rep. 834.

Documents purporting to be transcripts from certain official registers, found in the baggage of a railway passenger who was killed in an accident, are admissible upon the question of his marriage without evidence of their authenticity. *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, 20 Am. Ry. Rep. 245.

A certified copy from the records of a town of what purports to be the location of a railroad in that town, is admissible in evidence for the purpose of showing that such a paper was on record. *Hatch v. Vermont C. R. Co.*, 28 Vt. 142.

(2) *Inadmissible*.—The unsworn certificate of a civil engineer that a paper certified by him is a true copy of a measurement of work done upon the road, made by his predecessor in office, is not legal evidence. *Langford v. Sanger*, 35 Mo. 133.

There is no law in New York requiring or authorizing a subscription to the stock of a railroad corporation, distinct from the articles of association, to be filed with the secretary of state; and therefore a copy certified by the secretary is not admissible without further proof of its genuineness. *Troy & R. R. Co. v. Kerr*, 17 Barb. (N. Y.) 581.

Under N. Y. Act of 1884, ch. 421, copies of official documents filed with the board of railway commissioners may be read in evidence the same as if they were originals, when properly certified; but a report of a railroad company made to the board as required by the act of 1882, ch. 353, as contained in a printed report made by the board to the legislature, is not admissible in evidence without further proof of its authenticity. *Bella v. New York, L. & W. R. Co.*, 6 N. Y. Supp. 552, 24 N. Y. S. R. 921.

Where a company is sued in trespass to try title to land, and waives the filing and notice by plaintiff of certain copies of the conveyances to show common source of title, plaintiff cannot introduce a copy of a recorded patent to show title in himself, without accounting for the absence of the original. *Rio Grande & E. P. R. Co. v. Milmo Nat. Bank*, 72 Tex. 467, 10 S. W. Rep. 563.

228. Entries and memoranda left by a deceased party.—In an action for

calls, in order to prove notice to the defendant, a list indorsed "letters sent out," in the handwriting of the person whose duty it was to fill up and send out the printed notices, such person being dead at the time of the trial, is admissible. *Eastern Union R. Co. v. Symonds*, 5 Ex. 237, 19 L. J. Ex. 287.

It is provided by Conn. Gen. St. § 1094, that "in actions by or against the representatives of deceased persons, the entries, memoranda, and declarations of the deceased, relevant to the matter in issue, may be received as evidence." *Held*, that where a suit was brought and the plaintiff died during its pendency and his executor entered, the case became one of an action by a representative of a deceased person, and that a written memorandum as to the matter in suit, left by the plaintiff, was admissible in evidence; and that it made no difference that the defendant had been defaulted and the case stood on a hearing in damages. *Rowland v. Philadelphia, W. & B. R. Co.*, 63 Conn. 415, 28 Atl. Rep. 102.

But where the plaintiff during his lifetime had given his deposition covering the entire case, which had been introduced by his representative's counsel upon the hearing—*held*, that the written memorandum left by the plaintiff could not be admitted in addition. *Rowland v. Philadelphia, W. & B. R. Co.*, 63 Conn. 415, 28 Atl. Rep. 102.

After the occurrence of the accident which caused the destruction of plaintiff's lumber, B., an engine driver of defendants, and who was in charge of the locomotive on the day the fire occurred, made an entry in what was termed the repairs-book, kept in the defendants' shops: "Bottom rim of bonnet in stack wants making tight. * * * Screen wanted in front of ash pan." At the trial B. was called as a witness on the part of plaintiff, and proved his having made such entry in the usual course of his duties. Per Spragge, C.J.O., and Hagarty, C.J., such entry was properly produced. Per Burton and Patterson, JJ.A., such entry or report could only be receivable as evidence against the company, if at all, upon proof of B.'s death. *Canada C. R. Co. v. McLaren*, 8 Ont. App. 564; *dismissing appeal from* 32 U. C. C. P. 324.

229. Land office records.—A copy of a grant from the register's office affirmatively showing that it was issued under the great seal of the state is admissible in evi-

dence, though the registry does not show the impress of any seal or any scroll to indicate it, the presumption being that it was legally affixed. *Aycock v. Raleigh & A. Air-Line R. Co.*, 89 N. Car. 321.

A land office translation of a copy of a report of the secretary of state for Coahuila and Texas to the political chief of Bexar, of date January 2, 1833, giving a statement of colonial grants made under decrees of March 24, 1825, and April 28, 1832, including the grants whose validity is in litigation, is relevant to support the grants. The translation is from a report transferred from the officer to whom made to the office of the county clerk of Bexar county, and from that office to the land office, from which the translation was certified. *Texas Mex. R. Co. v. Locke*, 74 Tex. 370, 12 S. W. Rep. 80.

A certified translation from the land office of a testimonial of the original of a colonization contract made at Monclova and given by the proper authority is competent as evidence, and if the land in controversy or part of it was within the limits of the colony whose commissioner extended the final title to it, then such document is relevant testimony. *Texas Mex. R. Co. v. Locke*, 74 Tex. 370, 12 S. W. Rep. 80.

That an application to purchase land was more limited than the concession granted upon the application does not affect the validity of the concession, which on its face and by its terms is more extended than the application. The concession conferred the right to have the land titled to the holder. *Texas Mex. R. Co. v. Locke*, 74 Tex. 370, 12 S. W. Rep. 80.

A testimonial of a grant of land bearing date 1834 was deposited in the land office in 1845. The survey was placed upon the map in the land office and upon the map of the district in which it was situated, in 1846. The grant was in the abstracts of title lands printed in 1852 and 1878; possession was held under the grant from 1868; in 1875 the testimonial was withdrawn from the land office by the agent of the grantee; taxes were paid by those holding under the title from 1871. *Held*, that the testimonial was admissible as an ancient instrument. *Texas Mex. R. Co. v. Locke*, 74 Tex. 370, 12 S. W. Rep. 80.

The acknowledgment or proof of execution of a deed of conveyance from a railway company conveying land certificates issued

to it by the state was not necessary to give effect to a conveyance of the same by the president of the company. Such a conveyance of certificates already located, on which patents had not issued, was properly filed in the general land office, and a certified copy thereof under the seal of the general land office is admissible in evidence. *Kimmarle v. Houston & T. C. R. Co.*, 76 Tex. 686, 12 S. W. Rep. 698.

Certified copies of maps in use in the land office, and archives of the office, are competent as evidence showing conflict of surveys placed upon such maps in the land office. Such map not being contradicted or shown to be inaccurate, is sufficient evidence of such conflict. *Houston & T. C. R. Co. v. Bowie*, 2 Tex. Civ. App. 437, 21 S. W. Rep. 304.—*FOLLOWING Cox v. Houston & T. C. R. Co.*, 68 Tex. 226.

230. Letters — Circulars.—(1) *Admissible.*—Where a firm contracted to construct a number of miles of railroad, and on their completion to receive certain stock in payment therefor, and where, before the work was completed, some of the stock was transferred to the firm, who received and disposed of it through their agents, correspondence between such agents and the president of the contracting railroad company was admissible to show the terms upon which it was delivered by the company and received by the firm, in advance of the time contemplated by the contract. *Central R. & B. Co. v. Papot*, 59 Ga. 342.

A letter from the firm to the president of the railroad company, treating a certain part of the work as virtually completed, proposing to deliver it and to receive stock in proportion, and to give bond for the completion of the balance, was admissible. It was not an offer of compromise. *Central R. & B. Co. v. Papot*, 59 Ga. 342.

A letter in reply to a previous letter from one of the plaintiffs, setting forth the nature of their complaint at that time, and put in evidence by them, was properly admitted in evidence on the offer of the defendant, to show the position of the defendant, communicated by it to the plaintiffs, as taken in regard to their complaints as then made; and was proper to be considered by the jury also in connection with the fact that for some twelve months thereafter the plaintiffs continued to prosecute the work under their contract, and the modifications from time to time made therein. Whether

or not this letter was actually received by the plaintiffs was a fact for the jury to find, notwithstanding the plaintiffs denied that they had gotten a reply. It was competent for the jury to infer its receipt from the subsequent conduct and relations of the parties, as well as from the statement of the witness that it had been sent. *Phelps v. George's Creek & C. R. Co.*, 16 Am. & Eng. R. Cas. 600, 60 Md. 536.

In an action against a corporation for services rendered to it under a contract of hiring, which contract is denied by the corporation, a letter to the plaintiff from an agent of the corporation, recognizing him as a servant of the corporation, is competent evidence to establish the contract, and also to corroborate the plaintiff when his testimony has been contradicted by such agent. *Porter v. Richmond & D. R. Co.*, 34 Am. & Eng. R. Cas. 137, 97 N. Car. 46, 2 S. E. Rep. 374.

Letters written by plaintiff's attorney to a railroad company while attempting to compromise a claim against the company for a personal injury caused by falling in the company's station, tending to show that the fall was somewhat different from that claimed at the trial, were competent evidence; and the fact that they were written by the attorney instead of the client affected the weight but not the competency of the evidence; but such letters are not competent to prove an offer to compromise. *Loomis v. New York, N. H. & H. R. Co.*, 159 Mass. 39, 34 N. E. Rep. 82.

A letter to the plaintiff, stating that if he would put himself under the charge of three medical men for six months that the company would pay all expenses, and that if the physicians, or any two of them, would say that they believed plaintiff to be permanently injured defendants would waive every other defense, and, though they thought they had good grounds for further defense, would settle with him on such terms as might be agreed upon, is admissible to show on plaintiff's part that he was claiming in good faith, as he had proved by submitting to the treatment proposed; and the defendants might have used it to show under what circumstances and at whose expense plaintiff had been under treatment. *Clark v. Grand Trunk R. Co.*, 29 U. C. Q. B. 136.

A letter to a plaintiff, stating at the commencement that it was written "without

prejudice," is admissible in evidence when the writers afterwards declared in it their intention to use it as evidence, and to show plaintiff's want of good faith, if the plaintiff is entitled to show a subsequent agreement to repel any such imputation. *Clark v. Grand Trunk R. Co.*, 29 U. C. Q. B. 136.

A letter from the general manager of the company to an attorney for the plaintiffs, written before the commencement of suit, in which he stated, in substance, that the deed did not cover the premises in dispute, and how the mistake in the description might have occurred, and expressed a willingness to pay for the additional land, and take a deed therefor, and re-deed the land originally conveyed, was admitted in evidence on the part of the plaintiffs. *Held*, that the capacity in which the writer was acting was sufficient to warrant the admission of the letter in evidence. *McCammon v. Detroit, L. & N. R. Co.*, 66 Mich. 442, 10 West. Rep. 192, 33 N. W. Rep. 728.

The complaint alleged that plaintiff's ticket had been extended in time under authority of a letter from C., defendant's division passenger agent, and the answer admitted that there had been an agreement to extend as alleged. Plaintiff testified that the station ticket agent asked him if he had not a letter from C., and that plaintiff then presented his letter, whereupon such station agent changed the date of the limit on the ticket. *Held*, that the letter was admissible in evidence and was relevant to the matter in issue. *Spellman v. Richmond & D. R. Co.*, 35 So. Car. 475, 14 S. E. Rep. 947.

A letter written by the general freight manager of the defendant company to the plaintiff, containing some matters clearly irrelevant, but in some things pertinent, was objected to because wholly irrelevant. *Held*, that if any part of the writing was relevant the whole was properly admitted. In order to exclude the irrelevant parts they should have been pointed out by exceptions. *New York, T. & M. R. Co. v. Gallaher*, 79 Tex. 685, 15 S. W. Rep. 694.

(2) *Inadmissible*.—In an action against a company for medical services rendered to one of its servants, who was injured while in its employment and service, a letter from the president of the company, addressed to the plaintiff's attorney, purporting to be a reply to a letter received from him, which is not produced, and referring to plaintiff's ac-

count, is *prima facie* irrelevant and inadmissible, when without date and offered without any evidence identifying the account. *Mobile & M. R. Co. v. Jay*, 65 Ala. 113.

It is error, in an action for loss of goods, to admit letters purporting to be written by an agent of the company, one addressed to plaintiffs, and others addressed to other agents of the company, without proof of their execution, together with the fact of agency, and that the admissions made therein were touching matters within the scope of the agent's duty. *Johnson v. East Tenn., V. & G. R. Co.*, 90 Ga. 810, 17 S. E. Rep. 121.

Defendant railway company cannot introduce in evidence letters written to its agents by agents of a connecting railroad regarding a mistake theretofore committed in transporting freight received from such connecting railroad, thereby causing a delay in delivery for which plaintiff seeks damages. *Waite v. New York C. & H. R. R. Co.*, 35 Am. & Eng. R. Cas. 576, 110 N. Y. 635, mem., 17 N. E. Rep. 730, 17 N. Y. S. R. 162, 2 Sivo. App. 85; affirming 39 Hun 655, mem.

Where a company is charged with a violation of a city ordinance in failing to station a flagman at a crossing, it is error to admit a copy of a letter written by the street commissioner to the company, notifying it of the terms of the ordinance, which he only claimed to have put in an envelope addressed to the company and placed in a letter box where there is no proof of its receipt by the company. In the absence of anything specifying how the notice was to be served, personal notice was necessary. *La Friend v. New York C. & H. R. R. Co.*, 46 N. Y. S. R. 686, 19 N. Y. Supp. 664.

The defense offered in evidence a letter addressed by the general passenger agent of the Gulf, C. & S. F. R. Co. to the conductors on the lines of said railway, notifying them of the theft of the said ticket, and directing them to take up the same if offered for fare, cancel the same, and return it to the office of the writer. Held, that the letter being relevant to no issue in the case, was properly excluded. *Cunningham v. State*, 27 Tex. App. 479, 11 S. W. Rep. 485.

In an action against an express company by a party sending money, to recover for a loss, the company offered in evidence a letter, written by the party to whom the

money was sent, directed to plaintiff, and which a partner of plaintiff had forwarded to an agent of the company. Held, that the statements in the letter could not be used as evidence against plaintiff, if they contained matter inculcating him, or were otherwise material, and that plaintiff's consent that his partner might send the letter to the company was not an adoption by him of its contents. *United States Exp. Co. v. Hutchins*, 67 Ill. 348.

A circular or folder not shown to have been issued by a certain railroad company is inadmissible as tending to show that the company was the lessee of another company. *Atchison, T. & S. F. R. Co. v. Cruzen*, 15 Am. & Eng. R. Cas. 515, 31 Kan. 718, 3 Pac. Rep. 520.

Letters offered in evidence were held inadmissible in the following instances:

A letter which contained the mere statement of a third person, and not the declaration of an officer or agent of the corporation, made in the discharge of the duties of his office or agency. *Alabama & M. R. R. Co. v. Johnson*, 42 Ala. 242.

Letters written by the chief engineer of a company, not being of the *res geste*. *Pensacola & A. R. Co. v. Atkinson*, 20 Fla. 450.

Letters written by the plaintiff to the company, making claim for damages on account of his injuries, which claim was rejected by the company. *Howard v. Savannah, F. & W. R. Co.*, 84 Ga. 711, 11 S. E. Rep. 452.

A letter addressed to a railroad corporation, claiming damages of it, and read at the meeting of the stockholders, who thereupon vote to lay it upon the table. *Robinson v. Fitchburg & W. R. Co.*, 7 Gray (Mass.) 92.

Letters purporting to be written to the plaintiffs by the vendors of lost goods, stating the cost thereof. *Johnson v. East Tenn., V. & G. R. Co.*, 90 Ga. 810, 17 S. E. Rep. 121.

231. Maps, plats, and diagrams.—

(1) *Generally*.—Diagrams and maps, illustrating the scene of a transaction and the relative location of objects, are admissible as evidence, if proved to be correct; and when a party has allowed his own witness to use a diagram in aid of his testimony, he cannot complain that the counsel of the opposite party is permitted to use it in commenting on the testimony of that witness. *East Tenn., V. & G. R. Co. v. Watson*, 90 Ala. 41, 7 So. Rep. 813.

Where a company is sued for building its track so as to cause water to flow back on plaintiff's land, it is proper to allow certain maps and plats of the premises, which had been identified and shown to be substantially correct, to go to the jury to be considered with other evidence. *Kankakee & S. R. Co. v. Horan*, 41 *Am. & Eng. R. Cas.* 13, 131 *Ill.* 288, 23 *N. E. Rep.* 621; affirming 30 *Ill. App.* 552.

In an action for damage to certain city lots by the building of a road, a plat formerly made and filed in the office of the register of deeds, platting a tract of land as an addition to the city, and dedicating to the public streets and alleys, wherein it is recited that the land belongs to the party making the plat, is *prima facie* proof that he was the owner of the land platted and dedicated. *Central Branch U. P. R. Co. v. Andrews*, 41 *Kan.* 370, 21 *Pac. Rep.* 276.

Where a suit is brought for injuries to a wagon and team at a crossing, maps and photographs of the locality, tending to show the distance that an approaching train could be seen, are not admissible. *Missouri, K. & T. R. Co. v. Moore*, 4 *Tex. App. (Civ. Cas.)* 323, 15 *S. W. Rep.* 714.

An *ex parte* map or diagram made by a witness and shown by him to be correct may be given in evidence for the consideration of the jury, not as independent evidence, but to be considered by them in connection with other evidence, so as to enable them to understand and apply it. *Poling v. Ohio River R. Co.*, 38 *W. Va.* 645, 18 *S. E. Rep.* 782.

(2) *Condemnation proceedings*.—In a condemnation proceeding it is proper to allow the landowner, while testifying as a witness, to introduce in evidence, as a part of his testimony, a map or diagram drawn by himself, showing the location of the improvements on the land, such as house, barn, orchard, meadow, and cultivated land, and the relative location of each to the railroad. *Chicago, K. & W. R. Co. v. Dill*, 41 *Kan.* 736, 21 *Pac. Rep.* 778.—QUOTED IN *Ottawa, O. C. & C. G. R. Co. v. Fisher*, 42 *Kan.* 675, 22 *Pac. Rep.* 713. REVIEWED IN *Chicago, K. & W. R. Co. v. Stewart*, 50 *Kan.* 33.

In assessing damages occasioned by the appropriation of a right of way across unplatted land near or adjacent to the platted territory of a city, a map showing how the streets of the city could be extended across such unplatted tract, and also showing its

situation with reference to the city and its streets, may be put in evidence for the purpose of showing the size of the tract of land, its form, shape, and relation to other territory; and it may also be considered to show the actual condition of the land and the right of way, if such facts are shown thereon; but it cannot be considered as showing lots and streets laid off on such land, although the map shows the tract as platted territory. *Ohio Valley R. & T. Co. v. Kerth*, 130 *Ind.* 314, 30 *N. E. Rep.* 298.

(3) *Personal injury cases*.—In determining the location and surroundings of the place where an accident occurred, a map of the city purporting to be made by the city engineer, and proved to have been recognized and used in the city as substantially correct, is properly admitted in evidence. *Nosler v. Chicago, B. & Q. R. Co.*, 73 *Iowa* 268, 34 *N. W. Rep.* 850.

Where a company is sued for killing a child, a recorded plat, according to which the lots had been sold and the town built, is admissible for the purpose of showing that the accident was within the corporate limits and at a street crossing, though the plat was not acknowledged as required by statute. *Chicago, M. & St. P. R. Co. v. McArthur*, 53 *Fed. Rep.* 464, 10 *U. S. App.* 546, 3 *C. C. A.* 594.

In an action for personal injuries, plaintiff introduced a diagram of the accident and proved by a witness that it was correct, except that a "chock-block" as shown on the diagram was not there at the time of the accident. *Held*, that the evidence was competent, and that the plaintiff might show that the accident resulted from the absence of the block. *Stout v. Manhattan R. Co.*, 6 *N. Y. Supp.* 163, 3 *Siv. Sup. Ct.* 413.

232. Memoranda used only for refreshing memory.—Where a company is sued to recover for wood delivered under a contract, but destroyed by fire before it is taken away, entries in the private book of the company, made by its agents in the course of their business, are not admissible in evidence, but might be used as memoranda in refreshing the memory of the witness who made them. *Pittsburgh, C. & St. L. R. Co. v. Noel*, 7 *Am. & Eng. R. Cas.* 524, 77 *Ind.* 110. *Martin v. Union Pac. R. Co.*, 1 *Wyom.* 143.

A memorandum or written statement of fact, made by one of defendant's employes in the performance of his duty, was not

admissible in the defendant's behalf, even though the employé was sick and unable to testify to the fact in person. *Taylor v. Chicago, M. & St. P. R. Co.*, 80 Iowa 431, 46 N. W. Rep. 64.—APPROVING *Hoffman v. Chicago, M. & St. P. R. Co.*, 40 Minn. 60, 41 N. W. Rep. 301.—*Hoffman v. Chicago, M. & St. P. R. Co.*, 40 Minn. 60, 41 N. W. Rep. 301.—APPROVED IN *Taylor v. Chicago, M. & St. P. R. Co.*, 80 Iowa 431.

Memoranda made by an injured person, of directions given him by a physician, are inadmissible against the company injuring him, it not appearing that he needed them to refresh his memory. *Barrelle v. Pennsylvania R. Co.*, 4 N. Y. Supp. 127, 21 N. Y. S. R. 109.

233. Minutes and records of the company.—(1) *Generally.*—Corporation books are evidence of the acts and proceedings of the corporate body, when it appears that they are kept as such by the proper officers, or some person authorized to make entries in their necessary absence. *St. Louis & C. R. R. Co. v. Eakins*, 30 Iowa 279. *Woonsocket Union R. Co. v. Sherman*, 8 R. I. 564.

The acts, resolutions, and proceedings of an incorporated company, through their directory, are competent evidence against the company, and especially a director who was present. *Gatz v. Redd*, 4 B. Mon. (Ky.) 178.

The book of minutes of a railroad company may go to the jury for the purpose of proving what took place at several meetings of stockholders, called for the purpose of procuring a loan for the company, with which an indemnity bond in question was immediately connected. *Black v. Lamb*, 12 N. J. Eq. 108.

The books of minutes containing the resolutions of a board of directors, authorizing an issue of stock, are competent evidence to show authority for such issue. *Boardman v. Lake Shore & M. S. R. Co.*, 4 Am. & Eng. R. Cas. 265, 84 N. Y. 157.

The minutes of a corporation are not evidence of an agreement alleged to have been made by the stockholders as individuals, and not intended to bind the corporation. *Black v. Shreve*, 13 N. J. Eq. 455.

Defendant offered in evidence books or memoranda kept by its own officers or employes, for the purpose of establishing that no car of the defendant was crowded at the time of the accident, and that no informa-

tion was given or reported by the defendant's employes in regard to the accident. *Held*, to have been properly excluded. *Dickson v. Ridge Ave. Pass. R. Co.*, 19 Phila. (Pa.) 430.

(2) *As to corporate existence, organization, etc.*—The books of a corporation are competent evidence to show its organization. *Peake v. Wabash R. Co.*, 18 Ill. 88. *Breedlove v. Martinsville & F. R. Co.*, 12 Ind. 114.—FOLLOWING *Judah v. American Live Stock Ins. Co.*, 4 Ind. 333.

Books of a corporation are competent evidence for the purpose of showing its acts and proceedings; and where certain steps are required to be taken before a corporation had existence, such as the opening of books, subscription of capital stock, and the choice of directors, the production of the corporation books showing the election of officers is *prima facie* evidence that the statutory steps had been complied with, and that the corporation has an existence. *Ryder v. Alton & S. R. Co.*, 13 Ill. 516.

Corporation books, showing subscriptions to capital stock prior to organization, are presumptive evidence that the subscriptions were genuine and made by persons authorized to take stock, so as to enable the company to properly organize. *Lane v. Brainard*, 30 Conn. 565.

When a corporation has proceeded regularly to ascertain its corporators and the owners of shares in its capital, and has entered them in its records, all parties become thereby *prima facie* entitled to the rights thus secured to them. The records are competent and sufficient evidence of them, unless proof be introduced to destroy their effect. *Penobscot R. Co. v. Dummer*, 40 Me. 172.—NOT FOLLOWED IN *Wight v. Springfield & N. L. R. Co.*, 117 Mass. 226.

(3) *As to subscriptions to stock.*—An order of the board of directors of a corporation, assessing subscribers to stock, certified by the secretary of the company, is admissible in evidence in a suit upon a subscription, if no objection be made, though not authenticated as the statute requires; and when so admitted is conclusive of the matters contained in it, the same as if it had been properly authenticated. *Smith v. Indiana & I. R. Co.*, 12 Ind. 61.

Where a subscription to stock is made on condition that a certain number of shares shall be subscribed before the corporation is organized, the records of the corporation

showing that the required number had been subscribed are *prima facie* evidence that the condition had been complied with. *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587.

Books of a corporation are evidence between its members, but not against strangers; but a subscription to the stock of the corporation does not make the subscriber a member, so as to make the book evidence against him. *Chase v. Sycamore & C. R. Co.*, 38 Ill. 215.

In a suit against a railway company to recover a strip of land used for the roadbed, the defense was that the plaintiff had verbally agreed to give the right of way, provided the citizens of the county were under legal obligations to secure the same, and that the company had entered upon the land under that agreement, and cleared a way for a roadbed without objection. *Held*, that the exclusion of a subscription list signed by citizens of the county guaranteeing the right of way to the company was error. *Texas & St. L. R. Co. v. Jarrell*, 60 Tex. 267.

234. Municipal ordinances.—(1) *In general.*—In an action for personal injuries sustained by plaintiff being thrown from his wagon while driving across the track of the defendant street railway company, alleging that the accident was caused by the defendant's negligence in failing to keep its track in a safe and suitable condition, and in allowing its rails to project too far above the surface of the street, in violation of its contract with the city and of a city ordinance, said ordinance and contract are relevant, and admissible as evidence for the plaintiff. *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133, 9 So. Rep. 525.

Notwithstanding an ordinance of a city is not specifically pleaded, it is admissible in evidence as bearing on the question of negligence, but not in actions founded on the ordinance as giving the right of action. But there is no reason for the distinction that the rule is different in different forums—as, for instance, that it is applicable to cases originating in a justice's court, and not to such as are brought in the circuit court. *Judd v. Wabash, St. L. & P. R. Co.*, 23 Mo. App. 56.—FOLLOWING *Robertson v. Wabash, St. L. & P. R. Co.*, 84 Mo. 121.—QUOTED IN *Fusili v. Missouri Pac. R. Co.*, 45 Mo. App. 535.

A municipal ordinance is not admissible in evidence as an element of the plaintiff's

right of recovery, when it is not shown that the grievance complained of occurred within the city. *Eisenberg v. Missouri Pac. R. Co.*, 33 Mo. App. 85.

A municipal ordinance establishing regulations concerning holes, excavations, etc., that are below the grade of the surrounding or adjacent streets, is not admissible as evidence in a suit against a company for damages caused by an excavation on its lot. *Eisenberg v. Missouri Pac. R. Co.*, 33 Mo. App. 85.

(2) *Proof of ordinances.*—A municipal ordinance may be proved by the production of the original book of ordinances, identified as such by the clerk of the corporation and shown to have come from his custody. Notwithstanding the statute of September 19, 1891 (Ga. Acts 1890-91, p. 109), makes an official certified copy evidence, it is not the exclusive evidence. *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. Rep. 49.

An ordinance of an incorporated city of another state may be proved by the production of the books in which it is recorded, but a sworn copy is also competent evidence. So where a witness, in his deposition, testified that he was city clerk of the city for the year in which the ordinance was passed, that he wrote the record as such clerk (of which an exhibit attached to his deposition was a copy), that he compared the exhibit with the record, and that the ordinance was published, etc.—*held*, that the witness stated enough to allow the exhibit to be admitted as a sworn copy. *Louisville, N. A. & C. R. Co. v. Shires*, 19 Am. & Eng. R. Cas. 387, 108 Ill. 617.

Where a company is charged with a violation of village ordinances, and the ordinances are put in evidence, they should be accompanied by proof that they were in force at the time of the alleged violation. *Peoria, D. & E. R. Co. v. Wagner*, 18 Ill. App. 598.

Unless proof is offered that an ordinance has been published as specified by section 492 of the Iowa Code, it is error to admit it as evidence of the municipal regulation of the speed of trains. *Larkin v. Burlington, C. R. & N. R. Co.*, 85 Iowa 492, 52 N. W. Rep. 480.

(3) *Ordinances limiting speed.*—Where a track repairer is injured within the limits of a city, an ordinance limiting the speed of trains in the city to six miles an hour, and requiring that the bell should be rung con-

tinuously while moving, and that in backing a train a man should be stationed upon the car farthest from the locomotive to give danger signals, is properly admitted in evidence. *Kelly v. Union R. & T. Co.*, 35 *Am. & Eng. R. Cas.* 396, 95 *Mo.* 279, 14 *West. Rep.* 721, 8 *S. W. Rep.* 420. *Oldenburg v. New York C. & H. R. R. Co.*, 29 *N. Y. S. R.* 836, 9 *N. Y. Supp.* 419.—FOLLOWING *Briggs v. New York C. & H. R. R. Co.*, 72 *N. Y.* 26.

Where property is injured by a train of cars in a city, in a suit to recover damages on the ground of negligence in running at too great a speed, an ordinance limiting the speed of trains to six miles an hour within the corporate limits is proper evidence. *Union Pac. R. Co. v. Rassmussen*, 25 *Neb.* 810, 41 *N. W. Rep.* 778.—APPLYING *Steves v. Oswego & S. R. Co.*, 18 *N. Y.* 422. DISAPPROVING *Brown v. Buffalo & S. L. R. Co.*, 22 *N. Y.* 191.

Where a company is sued for an injury resulting from the manner of running trains in a city, a copy of the ordinance limiting the speed of trains need not be filed with the complaint to authorize its admission as evidence. An averment of its existence is sufficient; and such ordinance is admissible in evidence, to be considered by the jury, as to whether the company was guilty of negligence. *Madison & I. R. Co. v. Taffe*, 37 *Ind.* 361, 5 *Am. Ry. Rep.* 422.

An ordinance as to rate of speed may be introduced in evidence, though not pleaded, in a case alleging negligence generally, where the plaintiff's cause of action is not founded on the ordinance. *Riley v. Wabash, St. L. & P. R. Co.*, 18 *Mo. App.* 385.—APPLIED IN *Fusili v. Missouri Pac. R. Co.*, 45 *Mo. App.* 535.

As where the cause of action is at common law for killing stock. *Welch v. Hannibal & St. J. R. Co.*, 26 *Mo. App.* 358.—REVIEWING *Robertson v. Wabash, St. L. & P. R. Co.*, 84 *Mo.* 119.

In an action for injuries caused by negligence in the manner of running a train within city limits, a special ordinance limiting the rate of speed at which another company should run its trains is not admissible to charge the defendant with negligence. *Fell v. Burlington, C. R. & M. R. Co.*, 43 *Iowa* 177.

(4) *Ordinances prohibiting blowing of whistle.*—Where a company is sued for personal injuries at a street crossing, and is charged

with negligence in failing to blow a whistle, the company may produce in evidence a city ordinance prohibiting the use of the whistle. *Pennsylvania Co. v. Hensil*, 6 *Am. & Eng. R. Cas.* 79, 70 *Ind.* 569, 36 *Am. Rep.* 188.—DISTINGUISHED IN *Katzenberger v. Lawo*, 90 *Tenn.* 235.

The whistle on the engine not having been blown, it was not an error prejudicial to the defendant to admit in evidence a city ordinance prohibiting the blowing of engine whistles within the city limits, "except as a necessary signal or to prevent accidents." *Heddes v. Chicago & N. W. R. Co.*, 77 *Wis.* 228, 46 *N. W. Rep.* 115.

(5) *Ordinances regulating stops at street crossings.*—A municipal ordinance, prohibiting railroad companies from stopping their cars at a street intersection, so that they will interfere with travel on the cross streets, was properly received in evidence on the question of defendant's negligence, in connection with evidence that a train had stopped in violation of this ordinance, which prevented the plaintiff from seeing the approaching train. *Cumming v. Brooklyn City R. Co.*, 104 *N. Y.* 669, 10 *N. E. Rep.* 855, 5 *N. Y. S. R.* 737, 1 *Silo. App.* 345; affirming 38 *Hun* 362.

(6) *Ordinances requiring flagmen at crossings.*—So also a municipal ordinance properly passed and promulgated, requiring a flagman to be stationed at all street crossings, is competent as evidence. A violation or disregard of the ordinance, while not conclusive proof of negligence, is evidence upon that subject to be submitted to the jury. *McGrath v. New York C. & H. R. R. Co.*, 63 *N. Y.* 522.—REVIEWED IN *Masboth v. Delaware & H. Canal Co.*, 64 *N. Y.* 524; *Wright v. Third Ave. R. Co.*, 23 *N. Y. S. R.* 483.

(7) *Ordinances requiring lights on cars.*—Where a company is sued for a personal injury on a street, a city ordinance requiring cars to be provided with lights, and proof that they were not provided, is competent evidence for the consideration of the jury on the question of negligence. *Whittaker v. New York & H. R. Co.*, 19 *J. & S. (N. Y.)* 287.

235. Pay-roll.—In a controversy as to whether work done by a civil engineer toward the construction of a railroad was performed for and to be paid by the railroad company or certain individuals, the pay-rolls made out by such engineer in the name

of the company, showing the payment of certain sums to himself and others engaged in the work, are competent evidence as tending to prove that the company was his debtor. *Phinney v. Bronson*, 43 Kan. 451, 23 Pac. Rep. 624.

236. Photographs.—Wherever it is proper that the *locus in quo* of any object be described to the jury, it is competent to introduce a photographic view of the same, and to allow the jury to examine it with a magnifying glass. And there is no impropriety in allowing the jury to take such photograph with them to their room. *Barker v. Perry*, 67 Iowa 146, 25 N. W. Rep. 100. *Locke v. Sioux City & P. R. Co.*, 46 Iowa 109, 16 Am. Ry. Rep. 138.—DISTINGUISHING *Hollenbeck v. Rowley*, 8 Allen (Mass.) 473.—FOLLOWED IN *Mann v. Sioux City & P. R. Co.*, 46 Iowa 637.

A photograph of the broken trestle and wrecked train, taken about two hours after the accident occurred, and verified by the testimony of the person by whom it was taken, is admissible as evidence, to aid the jury in understanding and applying the proved facts, on the same principle which regulates the admissibility of maps and diagrams as evidence. *Kansas City, M. & B. R. Co. v. Smith*, 90 Ala. 25, 8 So. Rep. 43.

Plaintiff offered in evidence a photograph representing, as he claimed, the *locus in quo* of the accident, and testified that it represented fairly the locality. On cross-examination he testified that he did not take it and did not know from what point it was taken. *Held*, that the photograph, if a fair representation, was admissible the same as a map or other diagram. *Archer v. New York, N. H. & H. R. Co.*, 106 N. Y. 589, 13 N. E. Rep. 318, 11 N. Y. S. R. 32, 885, 9 Cent. Rep. 233; *affirming* 36 Hun 644, *mem.* *Roosevelt Hospital v. New York El. R. Co.*, 50 N. Y. S. R. 456, 66 Hun 633, *mem.*, 21 N. Y. Supp. 205.

A physician testified that a photograph showing the manner in which the plaintiff's limus had been contracted was taken in his presence, and that it correctly represented the condition of the limbs. *Held*, that the photograph was admissible in evidence. *Alberti v. New York, L. E. & W. R. Co.*, 41 Am. & Eng. R. Cas. 201, 118 N. Y. 77, 23 N. E. Rep. 35, 27 N. Y. S. R. 865, 6 L. R. A. 765; *affirming* 43 Hun 421.

Where the action is for an injury at a crossing a photograph of the scene of the

accident is admissible, though a change had been made before it was taken, as by the erection of a gate by the company. *Stott v. New York, L. E. & W. R. Co.*, 50 N. Y. S. R. 500, 66 Hun 633, *mem.*, 21 N. Y. Supp. 353.

A photograph of a bridge, the scene of the accident—*held*, "admissible for what it was worth," though its correctness was not verified by the photographer or any other witness, the court being "not agreed on the question of its admissibility." *Louisville & N. R. Co. v. Hall*, 48 Am. & Eng. R. Cas. 170, 91 Ala. 112, 8 So. Rep. 371.

A corporation denied that the signatures of its president to certificates of stock were genuine, and offered a photographer and expert in handwriting as a witness, who stated that he had made photographic copies of the president's signature to the certificates sued on, and of others admitted to be genuine, and that they varied in size. *Held*, that the photographs, together with the oral statements of the witness, of his reasons touching the genuineness of the certificates sued on, were not admissible. *Tome v. Parkersburg Branch R. Co.*, 39 Md. 36, 11 Am. Ry. Rep. 285.

237. Plans of construction.—A plan exhibited to the legislature by those applying for an act of incorporation as a railroad company, but not referred to in the act, is not admissible in evidence to control the construction of the provisions of the act of incorporation as to the limits within which the road is to be located. *Boston & P. R. Corp. v. Midland R. Co.*, 1 Gray (Mass.) 340.

238. Pleadings in another action.—The pleadings in a former action against defendant were properly admitted in evidence, as showing that defendant became the owner of the railway before the killing of plaintiff's horses—that being a point in issue. *Martin v. Central Iowa R. Co.*, 59 Iowa 411, 13 N. W. Rep. 424.

When the plaintiff had sued the defendant in another action for the original injury, and the defendant had filed an answer of several paragraphs, among which was one setting up a settlement and release, it was not error to permit the plaintiff in the case at bar to introduce in evidence said paragraph as an admission against the pleader. It was not necessary to introduce the entire answer, as under the Ind. Code each paragraph of answer must be sufficient within

itself, and cannot depend upon another for strength and support. *Kentucky & I. Cement Co. v. Cleveland*, 4 Ind. App. 171, 30 N. E. Rep. 802.

230. Private acts of legislature.—A special statute, amending the charter of a private corporation and ratifying its previous organization thereunder, is competent evidence of its existence as a corporation. *Boykin v. State*, 96 Ala. 16, 11 So. Rep. 66.

If, by special act of the legislature, the name of the corporation is changed, one suing in trespass to try title to land conveyed to him by the new company under its new name, and which was patented to the old sold-out company in its old name, may introduce such special act in evidence to show the identity of the corporations. The preamble of such an act, like that of any other act, general or special, is only competent to show that the legislature, in passing the act, took into consideration the matters recited in the preamble. *Acres v. Moyne*, 59 Tex. 623. — **APPROVING** *Stephenson v. Texas & P. R. Co.*, 42 Tex. 163.

240. Receipts.—Where a carrier settles with the consignee of goods after they are delivered, a receipt given by him "in full for freight and charges" is not evidence that a claim against the carrier for damages was also settled. *Huntley v. Dows*, 55 Barb. (N. Y.) 310.

Where the seller of goods sues the purchaser for the price, a receipt showing that the goods were delivered to a carrier is not evidence that the goods were received by the carrier on account of the purchaser, without anything to show that the seller was authorized to ship the goods by that particular line. *Everett v. Parks*, 62 Barb. (N. Y.) 9.

Receipts given by the employé to the employer, stating that the sums therein mentioned were in full for all demands for work done during regular and irregular hours in the employer's service, are admissible in evidence in an action for such fees, and are *prima facie* evidence of payment as therein expressed; and such receipts are also competent evidence to show the capacity in which the employé acted, and the relation he sustained to the employer. *Leach v. Hannibal & St. J. R. Co.*, 86 Mo. 27.

It was also competent for defendant, on the trial of such cause, to show that the services of plaintiff as notary were performed

during regular business hours while he was in defendant's service. *Leach v. Hannibal & St. J. R. Co.*, 86 Mo. 27.

In an action against a company, on a certificate issued by its engineer for work done by a contractor (which certificate is alleged to have been signed and issued by the engineer as the authorized agent of the corporation, and to have been transferred by the contractor to plaintiff), there being no sworn plea denying the execution of the certificate, the instrument itself is evidence of the existence of the debt, and that it was made on sufficient consideration. *Alabama & M. R. R. Co. v. Sanford*, 36 Ala. 703.

241. Records of judicial proceedings.—An order of court appointing a receiver of the defendant is admissible where the fact of the appointment is put in issue by the pleadings. *Allen v. Central R. Co.*, 42 Iowa 683.

An affidavit of a juror in a condemnation proceeding is admissible to prove the date on which the award was made. *Jamison v. Burlington & W. R. Co.*, 27 Am. & Eng. R. Cas. 413, 69 Iowa 670, 29 N. W. Rep. 774.

Where a company is sued for a breach of a contract to convey water on a certain side of its track, records in other cases in which the company was defendant are properly admitted to show the admission by it of facts material to the case on trial, though the admissions be made by its agents. In the absence of a contrary showing it will be presumed that the admissions were made by authority of the company. *Peden v. Chicago, R. I. & P. R. Co.*, 78 Iowa 151, 4 L. R. A. 401, 42 N. W. Rep. 625.

The appeal bond given by a railroad company, appellant, in which appellant was a party by its corporate name, signed by its president and secretary, is admissible in evidence to prove its corporate existence. *Transier v. St. Louis, K. C. & N. R. Co.*, 54 Mo. 189. — **FOLLOWED** in *Hoelscher v. St. Louis, K. C. & N. R. Co.*, 54 Mo. 212.

Where a father sues for personal injuries to his minor son, it is proper to allege and give in evidence a former suit and judgment in favor of the son in an action by the son, by a guardian *ad litem*, growing out of the same injuries, for the purpose of showing that the injury was caused by the company's negligence; and where the record shows that the negligence was established in the first suit, it is sufficient for the purpose of

the second suit. *Anderson v. Third Ave. R. Co.*, 9 *Daly* (N. Y.) 487.

The verdict of the coroner's jury, finding that the deceased was accidentally killed by one of the defendant's trains, is not admissible as evidence for the defendant in an action to recover damages for the killing. *Memphis & C. R. Co. v. Womack*, 37 *Am. & Eng. R. Cas.* 308, 84 *Ala.* 149, 4 *So. Rep.* 618.

In an action for injuries occasioned by a locomotive to a traveler in the highway, at a place where the county commissioners had authorized the corporation, upon certain conditions, to cross upon a level, the record of the county commissioners, stating that in their opinion no flagman at the crossing was necessary, is not competent evidence of due care on the part of the corporation. *Shaw v. Boston & W. R. Corp.*, 8 *Gray* (Mass.) 45.—QUOTED IN *Bailey v. New Haven & N. Co.*, 107 *Mass.* 496.

Where a carrier is sued for surrendering live stock in course of transportation to one who exhibited no authority except a telegram from a sheriff, directing a seizure of the stock under an attachment in his hands, it is not error to refuse the admission in evidence of the attachment papers under which they were subsequently levied on, after they were surrendered to the person who held the telegram, as the fact that the sheriff held attachment papers would not justify such a surrender. *Nickey v. St. Louis, I. M. & S. R. Co.*, 35 *Mo. App.* 79.

In an action against a railroad company to recover damages, the record of a former suit by the plaintiff against another company for the same cause of action, is not admissible in evidence. *Pennsylvania R. Co. v. Spicker*, 23 *Am. & Eng. R. Cas.* 672, 105 *Pa. St.* 142.

242. Records of signal-service officers.—Where it becomes important to prove the state of the weather at the time plaintiff was injured, a transcript, duly authenticated, from the records of the signal service of the United States, showing the observations as to the state of the weather at the time of the accident, is admissible. *Chicago & N. W. R. Co. v. Traves*, 17 *Ill. App.* 136.

The record of the state of the weather, made by an appointed signal-service officer, is at least a quasi-public record, and is of itself evidence of conditions of the weather in the period embraced by it. *Knott v.* 5 *D. R. D.*—33.

Raleigh & G. R. Co., 32 *Am. & Eng. R. Cas.* 481, 98 *N. Car.* 73, 2 *Am. St. Rep.* 321, 3 *S. E. Rep.* 735.

243. Reports of company's officers.—A copy of a report of a railway company to the state engineer and surveyor, in accordance with 2 *N. Y. Rev. St.* (6th ed.), p. 534, § 45, subd. 102, and p. 552, § 99 (duly certified by the deputy state engineer), under 1 *Rev. St.* (6th ed.), p. 558, § 7, and p. 415, § 7, and Code Civil Pro., § 933, is competent evidence of a material admission made therein by the defendant as a corporation, with respect to the injury complained of. *Leonard v. New York C. & H. R. R. Co.*, 12 *J. & S. (N. Y.)* 575, *mem.*; *affirmed* in 80 *N. Y.* 659, *mem.*—FOLLOWING *Leonard v. New York C. & H. R. R. Co.*, 10 *J. & S.* 225.

Where the issue is as to the value of railroad property for the purpose of taxation, a report made by the president of the company to the stockholders and bondholders, not under oath, containing statements as to the value of the property, is not admissible. *Chicago & N. W. R. Co. v. Boone County*, 44 *Ill.* 240.—RECONCILING *Chicago, B. & Q. R. Co. v. Coleman*, 18 *Ill.* 297.

A report of the president and directors of a railroad company to its stockholders, "with such data relating to the lines controlled by your company as will give you a clear understanding of their physical and financial condition," is not admissible in evidence for the purpose of showing that the first-named company controls the management of the other lines and thus to fix upon it a liability for the negligence of the officers of said lines, when it appears from other portions of the report that the control referred to is that of stockholders. *Moynihan v. Pennsylvania R. Co.*, 8 *Mackey* (D. C.) 573.

244. Rules of the company.—There is no error in admitting in evidence the rules of a company, the same being relevant to the negligence charged in the declaration. *Chattanooga, R. & C. R. Co. v. Whitehead*, 90 *Ga.* 47, 15 *S. E. Rep.* 629. *Louisville & N. R. Co. v. Orr*, 94 *Ala.* 602, 10 *So. Rep.* 167. *Helton v. Alabama Midland R. Co.*, 97 *Ala.* 275, 12 *So. Rep.* 276. *Riley v. Wabash, St. L. & P. R. Co.*, 18 *Mo. App.* 385. *Dugan v. Chicago, St. P., M. & O. R. Co.*, 85 *Wis.* 609, 55 *N. W. Rep.* 894.

In an action for personal injuries sustained by plaintiff while attempting to couple cars, the defendant's evidence tending to show that he was guilty of contributory negli-

gence in attempting to make the coupling in an improper and dangerous manner, a rule of the defendant company forbidding that practice is competent and admissible evidence for it, but not the whole body of its printed rules. *Memphis & C. R. Co. v. Askew*, 90 Ala. 5, 7 So. Rep. 823.

Rules of a company requiring that an employé should be stationed at the end of the car in front, or should move abreast of it when the train was moving backwards, where he could be seen by the engineer and could signal him in case of any obstruction on the track, were admissible in evidence, as showing that the company regarded the moving of the trains backwards as more dangerous and requiring more care than running in the usual manner, although such rules were not public rules, but only intended for the guidance of the agents and officers of the company. *Georgia R. Co. v. Williams*, 74 Ga. 723.

Where it is a controverted question whether a train followed another after a definite interval, it is competent to support the testimony of the trainmen by showing a rule of business of the railroad company forbidding a shorter interval between the departure of trains from a station. *Louisville, N. O. & T. R. Co. v. Crayton*, 69 Miss. 152, 12 So. Rep. 271.

While evidence of such rule of business is competent, its rejection is not reversible error if it could throw no light on the main issue, whether a tort had been committed, but related to subsequent matters relied on in aggravation of damages. *Louisville, N. O. & T. R. Co. v. Crayton*, 69 Miss. 152, 12 So. Rep. 271.

A rule book of an employing company, containing the rules which were in force when an employé was injured, is admissible in evidence without first proving that the employé had knowledge of such rules. *Parker v. Georgia Pac. R. Co.*, 83 Ga. 539, 10 S. E. Rep. 233.—REVIEWED IN *Alcorn v. Chicago & A. R. Co.*, 108 Mo. 81.

When a plaintiff offers in evidence certain printed rules of the defendant, to the reading of which it objects, on the ground that said rules were not the rules in force at the time the cause of action arose, and the plaintiff submits evidence which shows *prima facie* that said rules were then in force, it is not error for the court to permit said rules, together with such evidence, to go to the jury. *Madden v. Chesapeake & O. R. Co.*, 28 W. Va. 610, 57 Am. Rep. 695.

The rules of the company for conductors and drivers were given in evidence; the court allowed a schedule of rules containing these and others which did not bear on the issue to go out with the jury, against a general objection to the paper. *Held*, not to be error, being within the discretion of the court. As the rules which had not been given in evidence could do no harm, judgment would not be reversed for a technical error. *Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. St. 421, 6 Am. Ry. Rep. 100.

Under 14 & 15 Vict. c. 99, § 14, the original by-laws of a railway company, framed under the Railways Clauses Act 1845, are documents of a public nature, and provable as such. *Motteram v. Eastern Counties R. Co.*, 7 C. B. N. S. 58, 6 Jur. N. S. 583, 29 L. J. M. C. 59.

Where the action is to recover for injuries to an employé while riding on a construction train on an uncompleted road, evidence of rules on other completed roads touching the manner of running trains is not admissible. *Carr v. North River Constr. Co.*, 17 N. Y. S. R. 945, 48 Hun 266.—APPLYING *Vose v. Lancashire & Y. R. Co.*, 2 H. & N. 728; *Lake Shore & M. S. R. Co. v. Lavalley*, 36 Ohio St. 221; *Pittsburg, Ft. W. & C. R. Co. v. Powers*, 74 Ill. 344; *Cooper v. Central R. Co.*, 44 Iowa 134; *Slater v. Jewett*, 85 N. Y. 61; *Sheehan v. New York C. & H. R. R. Co.*, 91 N. Y. 332; *Dana v. New York C. & H. R. R. Co.*, 92 N. Y. 639.

245. Standard works of authority.

—In an action for personal injuries, a medical book, although proved to be of standard authority, is not admissible in evidence to prove the nature and probable effect of the injuries. *Gallagher v. Market St. R. Co.*, 67 Cal. 13, 6 Pac. Rep. 869.—REVIEWING *People v. Wheeler*, 60 Cal. 581.

If an extract from a medical book has some bearing upon the extent of the passenger's injuries and their cause, it ought not to be excluded on the ground that it is too indefinite, as that only affects its weight rather than its admissibility. *Quackenbush v. Chicago & N. W. R. Co.*, 34 Am. & Eng. R. Cas. 545, 73 Iowa 458, 35 N. W. Rep. 523.

A printed herd book in which the cattle in question were registered, shown to be a standard authority among cattle breeders, was competent evidence, under section 3653 of Iowa Code, to show the breed and grade

of the cattle. *Kuins v. Chicago, M. & St. P. R. Co.*, 65 Iowa 528, 22 N. W. Rep. 661.

Where the issue is whether a horse died of injuries received while in the carrier's hands, or from the effects of disease, a book treating of the diseases of horses cannot be read as evidence to the jury, though of established reputation. Any matters alleged in the book as facts, when relative to the issue, must be proved as any other fact, but the book itself is not evidence. *Harris v. Panama R. Co.*, 3 Bosw. (N. Y.) 7.

Where a company is sued for diverting water from plaintiff's mill, tables showing the number of horse power obtainable from a specific quantity of water are admissible where it appears that they were generally used by millwrights and considered accurate. Such computations may be treated as common knowledge of millwrights. *Garwood v. New York C. & H. R. R. Co.*, 45 Hun 128, 9 N. Y. S. R. 448.

246. Statutes of a sister state.—Where a foreign corporation is sued in New York for a personal injury happening in the state of its creation, through alleged negligence in running a train, the statutes of the state creating the corporation, relative to the running of trains, are admissible in evidence. *Archer v. New York, N. H. & H. R. Co.*, 106 N. Y. 589, 13 N. E. Rep. 318, 11 N. Y. S. R. 32, 885, 9 Cent. Rep. 233; *affirming* 36 Hun 644, *mem.*—APPLIED IN *Van Raden v. New York, N. H. & H. R. Co.*, 56 Hun 96, 30 N. Y. S. R. 300, 8 N. Y. Supp. 914.

247. Tables of mortality.*—(1) *In general.*—In an action to recover for a personal injury which permanently impairs plaintiff's capacity to earn a livelihood, standard life and annuity tables are proper evidence, but are not absolute guides to the jury. *Vicksburg & M. R. Co. v. Putnam*, 27 Am. & Eng. R. Cas. 291, 118 U. S. 545, 7 Sup. Ct. Rep. 1.—FOLLOWED IN *St. Louis, I. M. & S. R. Co. v. Vickers*, 122 U. S. 360.—*Mary Lee C. & R. Co. v. Chambliss*, 53 Am. & Eng. R. Cas. 254, 97 Ala. 171, 11 So. Rep. 897. *Whelan v. New York, L. E. & W. R. Co.*, 38 Fed. Rep. 15. *Powell v. Augusta & S. R. Co.*, 77 Ga. 192, 3 S. E. Rep. 757. *Ronn v. Des Moines*, 78 Iowa 63, 42 N. W. Rep. 582. *Knaapp v. Sioux City & P. R. Co.*, 71 Iowa 41, 32 N. W. Rep. 18.

* Life tables admissible in evidence, see note, 19 AM. & ENG. R. CAS. 176.

—DISAPPROVING *Nelson v. Chicago, R. I. & P. R. Co.*, 38 Iowa 564. FOLLOWING *McDonald v. Chicago & N. W. R. Co.*, 26 Iowa 124.—FOLLOWED IN *Chase v. Burlington, C. R. & N. R. Co.*, 38 Am. & Eng. R. Cas. 148, 76 Iowa 675, 39 N. W. Rep. 196.—*Mississippi & T. R. Co. v. Ayres*, 16 Lea (Tenn.) 725. *Simonson v. Chicago, R. I. & P. R. Co.*, 49 Iowa 87.—RECONCILED IN *Chase v. Burlington, C. R. & N. R. Co.*, 38 Am. & Eng. R. Cas. 148, 76 Iowa 675, 39 N. W. Rep. 196.

While life tables are admissible to assist the jury in estimating the expectation of life, they are not essential. The jury may make their estimate from the evidence as to the age and health of the person. *Deisen v. Chicago, St. P., M. & O. R. Co.*, 43 Minn. 454, 45 N. W. Rep. 864.

A witness testifying to the probable duration of the life from mortuary tables, should produce them, or they should be offered in evidence. *International & G. N. R. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. Rep. 58.

Tables proved to have been used by life insurance companies by one who has been in the business for years, though not claiming to be an expert as to the tables, are admissible to show the probabilities of the duration of life. *Central R. Co. v. Richards*, 62 Ga. 306.

When a member of a relief association sues to recover weekly benefits, mortality tables are not admissible for the purpose of proving the damage sustained by him. *Baltimore & O. Relief Assoc. v. Post*, 39 Am. & Eng. R. Cas. 283, 122 Pa. St. 579, 15 Atl. Rep. 885.

Where the action is for personal injuries annuity tables are not admissible by way of showing the probable duration of plaintiff's life, in order to make it appear how long he is liable to live to endure the pain and suffering caused by the injury, and thereby to increase the damages. *Chicago, B. & Q. R. Co. v. Johnson*, 36 Ill. App. 564.

(2) *Carlisle tables.*—The Carlisle tables in the Encyclopædia Britannica are admissible as evidence in an action for personal injuries. *Haden v. Sioux City & P. R. Co.*, (Iowa) 48 N. W. Rep. 733.—FOLLOWING *Worden v. Humeston & S. R. Co.*, 76 Iowa 314, 41 N. W. Rep. 26; *Gorman v. Minneapolis & St. L. R. Co.*, 78 Iowa 509, 43 N. W. Rep. 303.—*Donaldson v. Mississippi & M. R. Co.*, 18 Iowa 280. *Chase v. Burlington, C.*

R. & N. R. Co., 38 *Am. & Eng. R. Cas.* 148, 76 *Iowa* 675, 39 *N. W. Rep.* 196.—FOLLOWING *Knapp v. Sioux City & P. R. Co.*, 71 *Iowa* 41. OVERRULING *Nelson v. Chicago, R. I. & P. R. Co.*, 38 *Iowa* 564. RECONCILING *Simonson v. Chicago, R. I. & P. R. Co.*, 49 *Iowa* 88.

They are not conclusive, but may be considered by the jury as data on which they may act. *Central R. Co. v. Crosby*, 74 *Ga.* 737.

Some evidence tending to show that the injuries received were of a permanent character, the Carlisle tables were admissible to show the expectancy of life. *Northeastern R. Co. v. Chandler*, 84 *Ga.* 37, 10 *S. E. Rep.* 586.

The Carlisle and other similar tables, offered for the purpose of showing the "expectation" or probable duration of life, are to be received (if at all) on judicial notice of their genuineness and authoritativeness. No legal proof of genuineness or authoritativeness is required, but it is proper for a court to inform itself in the premises by reference to books or other sources of information. Such tables are not conclusive, but their value in a given case is largely analogical. They must speak for themselves, and not by the mouth of a witness merely testifying to their contents. *Scheffler v. Minneapolis & St. L. R. Co.*, 19 *Am. & Eng. R. Cas.* 173, 32 *Minn.* 518, 21 *N. W. Rep.* 711.

(3) *American mortality tables.*—When properly identified, the American tables of mortality are admissible as evidence to show the probable duration of life. *Richmond & D. R. Co. v. Hissong*, 97 *Ala.* 187, 13 *So. Rep.* 209. *Birmingham Mineral R. Co. v. Wilmer*, 97 *Ala.* 165, 11 *So. Rep.* 886.

In an action for a personal injury, the court properly admitted the American mortality tables to show plaintiff's probable length of life, although plaintiff was engaged in a more hazardous employment than persons with reference to whom the tables were made up. *Birmingham Mineral R. Co. v. Wilmer*, 97 *Ala.* 165, 11 *So. Rep.* 886.

The American tables of mortality are admissible in evidence, but are not conclusive. A witness may testify that he is well acquainted with tables used by life insurance companies, and that the American tables are used for that purpose by nearly all the companies in the United States.

Mary Lee C. & R. Co. v. Chambliss, 53 *Am. & Eng. R. Cas.* 254, 97 *Ala.* 171, 11 *So. Rep.* 897.

(4) *Michigan mortuary tables.*—The mortuary tables of the expectancy of life based upon the American experience are competent to be considered by a jury in a proper case in considering the expectancy of life. These tables are embodied in our statutes, and the courts can take judicial notice of their contents. *Denman v. Johnston*, 85 *Mich.* 387, 48 *N. W. Rep.* 565.

But they are not conclusive evidence; and when offered in connection with proof of the physical condition of deceased at the time of his death, and all testimony which may reasonably affect his duration of life, the jury must determine from all of the testimony before them such probable duration of life had the deceased not died as a result of the injury complained of. *Hunn v. Michigan C. R. Co.*, 41 *Am. & Eng. R. Cas.* 452, 78 *Mich.* 513, 7 *L. R. A.* 500, 44 *N. W. Rep.* 502.

The mortality tables found in *How. St.* p. 1084, are not admissible as evidence of life expectancy where the deceased was under ten years of age. *Rajnowski v. Detroit, B. C. & A. R. Co.*, 74 *Mich.* 20, 41 *N. W. Rep.* 847.

The use of such mortuary tables in trials for negligent injuries not causing death requires great caution on the part of the trial court. The expectancy of life in such table is based upon the lives of healthy persons who are of the ages indicated; and it cannot be said that a person who, prior to the injury complained of, was afflicted with hernia, which had been thereby aggravated, and who was also suffering from internal injuries, as claimed, has an expectancy of life, at the age of 52, of 17 or any other number of years. The tables furnish no other basis of expectancy of such a life. They do form a basis of the expectancy of life of a healthy person of that age, which is stated to be 19.49 years; but other testimony of experts would be required, in such a case, to show what the plaintiff's life expectancy would be, taking into consideration his ailments, and the effect they would probably have to shorten such expectancy. Such testimony must necessarily be problematical, but perhaps it is the best that is attainable to establish the probability. *Denman v. Johnston*, 85 *Mich.* 387, 48 *N. W. Rep.* 565.

Where in an action for death through negligence, certain tables constructed from the official records of the registrar-general for England and Wales, known as the "English tables," were received in evidence to show the average duration of life, based upon experience, at certain ages, which showed a less probable duration of life than the American experience, as shown in *How. St. § 4245—held*, that the error was not one prejudicial to the defendant. *Cooper v. Lake Shore & M. S. R. Co.*, 66 *Mich.* 261, 10 *West. Rep.* 184, 33 *N. W. Rep.* 306.

(5) *Johnson's Encyclopædia*.—Johnson's New Universal Encyclopædia, being a standard work upon matters of science and art, is competent as evidence of the Northampton and American life tables, for the purpose of showing the expectation of life of an individual. *Seagel v. Chicago, M. & St. P. R. Co.*, 83 *Iowa* 380, 49 *N. W. Rep.* 990.

Johnson's New Universal Encyclopædia was properly admitted to prove the expectancy of decedent's life, a witness having testified that he "had something to do with the book," and that his "impression" of it was that it was a standard and scientific work. *Gorman v. Minneapolis & St. L. R. Co.*, 78 *Iowa* 509, 43 *N. W. Rep.* 303.

(6) *Conklin's Handy Manual*.—A book containing tables of expectation of life, entitled "A Million Facts; Conklin's Handy Manual of Useful Information," not being one of those standard works of which courts take judicial notice as a recognized authority, is inadmissible in evidence in the absence of proof of its accuracy. *Galveston, H. & S. A. R. Co. v. Arispe*, 48 *Am. & Eng. R. Cas.* 350, 81 *Tex.* 517, 17 *S. W. Rep.* 47.

248. Tax list as evidence of value.

—The plaintiff testified that a building burned was worth \$3500. It had been put into her tax list by her husband as her agent at a valuation of \$800. *Held*, that this tax list was not admissible in evidence against her to show that the building was worth less than \$3500, nor to contradict the testimony. *Martin v. New York & N. E. R. Co.*, 62 *Conn.* 331, 25 *Atl. Rep.* 239.

249. *Telegrams*.—A telegraph message is not admissible in evidence as a communication of a party offering it, without proof of its authenticity. *Burt v. Winona & St. P. R. Co.*, 31 *Minn.* 472, 18 *N. W. Rep.* 285, 289.

To authorize the introduction in evidence of telegrams from one agent of a company

to another about the loss of certain goods which the company had received for transportation, it must appear that the agent who sent the telegram or the one who received it and gave it currency was the agent at that point to which the goods were consigned, or to which they were actually sent, while in the course of transportation, or that it was within the scope of his duties to investigate the loss or to ascertain the time when the goods were received by the company. No such proof being made as to the business of the agent, it was error to admit telegrams and letters sent by him to another agent of the company, and received by the latter and by him communicated to the plaintiffs. *Johnson v. East Tenn., V. & G. R. Co.*, 90 *Ga.* 810, 17 *S. E. Rep.* 121.

On the question of the authority of a local railroad agent to make a special contract for shipping corn at reduced rates, the company, denying the agent's authority, offered in evidence several telegrams of about the date of the contract, between its general agent and another local agent, tending to show that the former agent had refused to make any reductions for others on freight between the same points. *Held*, that the telegrams were properly excluded, as having passed between persons who were strangers to the contract in question. *Eric & P. Despatch v. Cecil*, 112 *Ill.* 180.

As telegraphic messages are read by sound, as well as automatically recorded in the symbols, entries from a telegraphic train report sheet kept in the office of a railroad train dispatcher stand upon the same footing as if made from oral statements uttered at the indicated station and audible in the dispatcher's office; or, in view of the symbols in which the manipulation of his instrument by the operator who sends the message makes it visible at the receiving station, the entries are as if made from his signals given at the place of sending and visible in the dispatcher's office. They are not, therefore, governed by the rule applied in the case of book charges for goods delivered by a servant whose entries or marks are transferred to his master's account book. *Donovan v. Boston & M. R. Co.*, 158 *Mass.* 450, 33 *N. E. Rep.* 583.—*DISTINGUISHING* *Kent v. Garvin*, 1 *Gray* 148; *Miller v. Shay*, 145 *Mass.* 162.

250. *Time book of foreman*.—Time books kept with the men engaged in work upon a railroad are not admissible in evi-

dence to show the cost or amount of such work until it is shown that they were properly and correctly kept. *Ford v. St. Louis, K. & N. W. R. Co.*, 54 Iowa 723, 7 N. W. Rep. 126.

A city suing a railroad company for failing to keep the street in order along its track, under a contract, called as a witness a foreman who had general charge of the work, under whom were two gang foremen, each having charge of laborers. The foreman kept a time book in which were entered the names of the men employed, and it appeared that he visited the work twice a day and checked on the book the time of each man as reported to him by the gang foremen. The gang foremen testified that they correctly reported the time of the men, but that they did not see the entries. *Held*, that the time book was properly admitted in evidence. *Mayor, etc., of N. Y. v. Second Ave. R. Co.*, 26 Am. & Eng. R. Cas. 546, 102 N. Y. 572, 7 N. E. Rep. 905, 2 N. Y. S. R. 526, 55 Am. Rep. 839; *affirming* 31 Hun 241.

In such a case a written memorandum made by the foreman, of materials used, was put in evidence. He testified that the entries were made from daily information given him by the gang foremen, and that he entered the amounts as reported. The gang foremen testified that they reported the amounts correctly, but neither of them saw the entries made nor recollected the amounts reported. One of the gang foremen testified that he had personal knowledge of the amounts at the times the reports were made, and the other testified that he reported the amount of materials as informed by a carman who brought them to the place, but the carman was not called as a witness. *Held*, that it was properly admitted in evidence. *Mayor, etc., of N. Y. v. Second Ave. R. Co.*, 26 Am. & Eng. R. Cas. 546, 102 N. Y. 572, 7 N. E. Rep. 905, 2 N. Y. S. R. 526, 55 Am. Rep. 839; *affirming* 31 Hun 241.

251. Time-table.—A time-table of 1891, and its rules, are not competent evidence to prove that a bulletin order of 1887 was printed in the time-tables of previous years. *Price v. Richmond & D. R. Co.*, 38 So. Car. 199, 17 S. E. Rep. 732.

252. Train dispatcher's record.—The plaintiff in an action for personal injuries, having objected to the competency, as evidence, of the train sheet kept in the defendant's train dispatcher's office, also

excepted to testimony explaining how it was made and used, and that it was part of a system customarily employed for thirty years. *Held*, that the evidence was competent to show that the sheet was made in the ordinary course of the defendant's business, and to enable the court and jury to interpret it, and that if the plaintiff desired to have its effect limited he should have requested instructions. *Donovan v. Boston & M. R. Co.*, 158 Mass. 450, 33 N. E. Rep. 583.

Where there is no reasonable possibility that any designed untruth had part in placing upon the train sheet kept in the train dispatcher's office of a railroad the statements of which it is the vehicle, and all known circumstances concerning it favor its accuracy, and it is sufficiently identified as genuine, it is competent evidence as an act rather than a declaration, without the production or proof of the death of the operator who sent the messages; and its entries material to the issue are admissible and proper for the jury, notwithstanding the fact that it was made by the servants of the party by whom it was offered. *Donovan v. Boston & M. R. Co.*, 158 Mass. 450, 33 N. E. Rep. 583.

253. Way bills.—The defendant offered in evidence a way bill in the ordinary form, describing the property carried, its destination and value, the names of the shipper, and consignee, and rate of charge. It was for the convenience of the company only, and had not been brought to the knowledge of the plaintiff. *Held*, to be admissible as containing matter to be considered by the conductor in determining whether to interrupt the transportation as requested, as it showed the value of the freight, and how much further it was to be carried, and was, so far as appeared, his only source of information concerning the property. *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. Rep. 870.

254. Written contracts.—(1) *Admissible.*—Where the action is between two companies for a violation of a written agreement, by which one was to maintain a crossing over the track of the other, the agreement itself is admissible in evidence. *New York, C. & St. L. R. Co. v. Grand Rapids & I. R. Co.*, 35 Am. & Eng. R. Cas. 283, 116 Ind. 60, 15 West. Rep. 548, 18 N. E. Rep. 182.

Where a brakeman sues for a personal

injury while uncoupling moving cars, the written contract of employment, in which he acknowledges that he had been made acquainted with the rules of the company, forbidding uncoupling moving cars, and agreeing to assume the risk of forbidden acts, is admissible in evidence, and cannot be said to be incompetent, immaterial, or against public policy. *Sedgwick v. Illinois C. R. Co.*, 31 *Am. & Eng. R. Cas.* 207, 73 *Iowa* 158, 34 *N. W. Rep.* 790.

In an action of trespass to land lying adjacent to a railroad, for acts alleged to have been committed by the contractor for building the road, the contract between the railroad corporation and the defendants, for building the same, is admissible in evidence for the plaintiff. *Bigelow v. Dawson*, 6 *Cush. (Mass.)* 97.

Where the action is by contractors against a company to recover for work done and money furnished, plaintiffs are bound by a stipulation agreeing to waive the benefit of a certain agreement as evidence, or an admission of an account stated between the parties; but such contract is admissible as to any other recital contained in it, showing the relation of the parties. *McLean v. St. Paul & C. R. Co.*, 1 *N. Y. S. R.* 82, 13 *Daly* 446.

The defendant's street railway having been constructed under a contract with the municipal authorities of the city, by which it assumed the duty of keeping the streets occupied by it in a reasonable state of repair for the safe passage of travelers, as the city was bound to do, the contract is admissible as evidence for the plaintiff, in an action to recover damages for personal injuries resulting from the bad condition of the track at a street crossing, not as showing a breach of contract, but a tort committed under the license of the contract. *Elyton Land Co. v. Mingea*, 43 *Am. & Eng. R. Cas.* 309, 89 *Ala.* 521, 7 *So. Rep.* 666.

A patent, to the Western Pacific R. Co. of California, of land granted to said company by congress to aid in building its railroad, is relevant evidence tending to prove the title of the company to the land granted, in an action of ejectment brought by the company or its grantee, without first proving that the land is not mineral. *McLaughlin v. Powell*, 50 *Cal.* 64.

Where the husband and wife were plaintiffs in an action against a railroad company, asking for damages occasioned by ap-

propriating a right of way through their farm, occupied as their homestead, the title being in the wife; and the husband was a witness giving testimony showing the damage to the farm from the appropriation of the right of way; and his attention was directed to an instrument signed by him, which was intended to have conveyed their right of way to the company for a sum much less than the amount he testified the farm had been damaged, and to a statement that he wished the company would pay the sum named for the right of way—both the instrument and statement should have been admitted in evidence. *Ottawa, O. C. & C. G. R. Co. v. Adolph*, 41 *Kan. Co.*, 21 *Pac. Rep.* 643.

At the trial of an action against a railroad its agreement with the owners of land taken by it respecting damages was in evidence, and their signatures were admitted to be genuine. A release to the corporation of such land, purporting to be made on the same date as the agreement, and to be signed by the same owners, and, for the most part, by the same witnesses, and to be acknowledged on the same day before the same magistrate, was offered in evidence for the purpose of showing that the corporation, if the agreement was carried out, was to take a deed of a strip but four rods wide, which fact was conceded in the course of the trial. *Held*, that the release was sufficiently identified to go to the jury, and if not, an objection to its admission became immaterial. *Westcott v. New York & N. E. R. Co.*, 152 *Mass.* 465, 25 *N. E. Rep.* 840.

(2) *Inadmissible*.—Recitals in a mortgage tending to show title or ownership in the mortgagor are not evidence of such ownership as against third persons. *Kankakee & S. R. Co. v. Horan*, 41 *Am. & Eng. R. Cas.* 13, 131 *Ill.* 288, 23 *N. E. Rep.* 621; affirming 30 *Ill. App.* 552.

Where it is only sought to charge a company as warehousemen for the loss of goods after they have arrived at their destination, a contract entered into with the shipper in which the liability of the company as carrier is limited, is immaterial, and its exclusion as evidence is not error. *Union Pac. R. Co. v. Moyer*, 35 *Am. & Eng. R. Cas.* 615, 40 *Kan.* 184, 19 *Pac. Rep.* 639.

Where the company is sued for the breach of a verbal agreement to receive and ship freight on a certain day, a subsequent written contract between the same parties, for

the transportation of the same freight, which does not contain any release of defendant's liability already incurred, or waive any right of plaintiff already accrued, is not admissible in evidence to show a merger of the prior verbal agreement, nor is it admissible to avoid or defeat plaintiff's action, unless it be set up in the answer. *Hoskins v. Missouri Pac. R. Co.*, 19 Mo. App. 315.—FOLLOWING *Harrison v. Missouri Pac. R. Co.*, 74 Mo. 364.

In a right of way condemnation proceeding, a writing entered into by the landowner with certain promoters of the corporation, subscribing for stock, and fixing a value on the right of way, less than that claimed in the condemnation proceeding, is not admissible against the landowner, where it has in no way been recognized by the company after its organization. Even if it was at one time valid, instituting proceedings to condemn the right of way, instead of to enforce the agreement, was a repudiation of the contract. *In re Rochester, H. & L. R. Co.*, 50 Hun 29, 18 N. Y. S. R. 654, 2 N. Y. Supp. 457.

D. sued the T. & St. L. R. Co. for work done in the construction of the road under an alleged contract with the company. The company denied the contract, alleging that they had previously contracted with H. for the construction of the road, and that D. was subcontractor under H.; and on the trial, after proving by parol that they had contracted with H., they offered to read the contract as evidence, but the court refused it. *Held*, that the issue was whether they had contracted with D., and that the terms and stipulations of the contract with H. were not relevant to the issue. *Texas & St. L. R. Co. v. Donnelly*, 46 Ark. 87.

D. contracted by parol with the chief engineer of the company to build two different sections of the road. Afterwards the contract for building one of the sections was reduced to writing and signed by D., in which it appeared that he was contracting with H., to whom the construction of the whole road had been previously contracted by the company. When the original contract was made, the engineer did not disclose H. as his principal. H. paid for the construction of the section embraced in the written contract, and D. sued the company for the construction of the other. The company claimed that the contract was with H., and not with the company,

and upon the trial offered the written contract as evidence, but the court refused it. *Held*, that the written contract was not relevant to the issue; that a subsequently written contract could not control a parol contract previously made in regard to a different subject-matter. *Texas & St. L. R. Co. v. Donnelly*, 46 Ark. 87.

In a suit against an association of railway companies on a contract made by a local agent of one of the companies, the defendant offered in evidence the articles of agreement between the several companies composing the association, for the purpose of showing a want of power in the local agents to make the contract. *Held*, that they were not admissible in evidence against the plaintiff, as the public could not be bound by them, or the rules and regulations they might contain. *Erie & P. Dispatch v. Cecil*, 112 Ill. 180.

Where a brakeman was killed while trying to pass over the end board of a coal car which was fastened by hinges, it appeared that by reason of snow and ice on the bottom of the car the end board rested at an angle of about thirty degrees with the floor, which was the cause of the accident. In support of the defense of contributory negligence the company offered an agreement between the deceased and another company to the effect that the deceased would diligently examine all cars on which he might be called to work, and report such defects and refuse to work thereon until they were made safe. *Held*, that the agreement was not admissible as evidence. *McDermott v. Iowa Falls & S. C. R. Co.*, 85 Iowa 180, 52 N. W. Rep. 181.

X. DEPOSITIONS; TESTIMONY ON FORMER TRIAL.

255. In general.—Upon a bill inequity for an injunction, authorized by N. H. Laws of 1867, ch. 8, to restrain directors of railroads from "pooling" certain earnings of the roads, it is not necessary to prove the election of the directors by the corporate records. The testimony of one of the defendants, in a deposition, that he is an acting director, is competent evidence. *Morrill v. Boston & M. R. Co.*, 58 N. H. 68.

When it is material to the issue to ascertain the fitness of a railway engineer for the performance of his duties, and it was shown that a witness had sworn prior to the trial that he knew nothing about the competency

of the engineer, and who only knew him the day before his death, it was error to permit the deposition of the witness to be read as to his opinion of the competency of the engineer. *East Line & R. R. Co. v. Scott*, 68 Tex. 694, 5 S. W. Rep. 501.

Where the statute provides that when depositions are sent by mail "the postmaster or his deputy mailing the same shall indorse thereon that he received them from the hands of the officer before whom they were taken," an indorsement on a deposition as follows—"Received this package from the hands of W. W. Gray, clerk, the officer before whom the deposition was taken; (Signed) G. S. Smith, P. M.," is sufficient. *Central Tex. & N. W. R. Co. v. Hancock*, (Tex.) 27 Am. & Eng. R. Cas. 325.

Depositions are properly transmitted, under Wis. Rev. St. ch. 176, § 4087, requiring the officer taking them to deliver or transmit them to the clerk of the court before whom the action is depending, securely sealed, where they are taken in an action pending in one county, which had meanwhile been ordered tried in another county, and are delivered by a clerk of the officer taking them to the clerk of the court where the action was first pending, who, having opened them, closed and forwarded them to the clerk of the court to which the action was transferred. *Waterman v. Chicago & A. R. Co.*, 52 Am. & Eng. R. Cas. 592, 82 Wis. 613, 52 N. W. Rep. 247, 1136.

Where an injured passenger is accompanied home by two of the company's servants under the direction of the inspector, and subsequently sues for damages and seeks to administer interrogatories to the company, it may be interrogated as to the name of the inspector and the servants who accompanied her home, and of the driver of the engine drawing the train, but cannot be asked whether any of the servants of the company witnessed the accident, and if so, what were their names. *Potter v. Metropolitan Dist. R. Co.*, 28 L. T. 231.

The deposition of a physician who had examined the plaintiff pending an action for personal injuries, having been read at the trial, he testified on cross-examination that his diagnosis was based on a physical examination, and on statements made by her. He also detailed some of the questions he put to her to test her good faith, and her answers thereto. *Held*, that the admissibility of these questions and answers

was not affected by the fact that they were made after the suit was commenced; and as it was apparent they were introduced for the purpose of showing that the physician's opinion as to her condition was partly based on her statements, and not as direct evidence, the jury could not have been misled. *Kansas City, Ft. S. & M. R. Co. v. Stoner*, 52 Am. & Eng. R. Cas. 462, 51 Fed. Rep. 649, 4 U. S. App. 109, 2 C. C. A. 437.

The refusal to admit as evidence an *ex parte* affidavit and proceedings thereunder, not in the nature of an inquisition, to procure the admission of a person to the insane asylum—*held*, not erroneous in an action by the administratrix of an estate of such person, deceased, against a railway company for damages for injuries resulting in his death, the same fact having been shown by other evidence. *Jeffersonville, M. & I. R. Co. v. Riley*, 39 Ind. 568, 10 Am. Ry. Rep. 325.

Defendant had the evidence of a dying witness taken by a referee, under sections 879, 880, N. Y. Code Civ. Pro. It was late on Saturday night, and the stenographer did not write out his notes, and without objection on the part of counsel for plaintiff, it was agreed that the minutes be written up and subscribed the following Monday, which was done, neither counsel being present, after the testimony had been read over to the witness. *Held*, that the counsel for the plaintiff waived his right to be present, and that the court erred in suppressing it. *Clark v. Manhattan R. Co.*, 1 N. Y. S. R. 163, 1 Sivo. App. 36.

256. Deposition taken in another case.—Where the issue is as to the true value of railroad property for the purposes of taxation, the deposition of the general superintendent of the road, which has been taken in another case and used by the company, is admissible against the company. *Chicago & N. W. R. Co. v. Boone County*, 44 Ill. 240.

Plaintiff's testator brought an action for personal injuries in his lifetime and gave his deposition, the defendant appearing and cross-examining him; but he died pending the action, and plaintiff brought another action after his death to recover damages to the widow and next of kin. *Held*, that the deposition was not admissible as evidence in the second action. *Murphy v. New York C. & H. R. R. Co.*, 31 Hun (N. Y.) 358.

257. Interrogatories objectionable as leading.—Interrogatories which

assume hurt, suffering, or loss of time, where these are involved in the action, are leading. *Chattanooga, R. & C. R. Co. v. Huggins*, 52 Am. & Eng. R. Cas. 473, 89 Ga. 494, 15 S. E. Rep. 848.

The witness in a deposition, in an action by a married woman, being a matron forty years of age, such questions as whether or not the plaintiff suffered an abortion, and whether or not flooding was caused thereby, are not so leading as to require the exclusion of the answers. *Powell v. Augusta & S. R. Co.*, 77 Ga. 192, 3 S. E. Rep. 757.

258. Answers to interrogatories.—An answer to an interrogatory is sufficient where a further or better answer cannot be given without disclosing the contents of privileged reports made to the defendant company by its servants. *London, T. & S. R. Co. v. Kirk*, 51 L. T. 599.

When the answer of a witness in a deposition is evasive, in response to a question pertinent to the issue, and having for its object the ascertainment of the witness's means of knowledge, the deposition should be excluded. *Texas & N. O. R. Co. v. Crowder*, 70 Tex. 222, 7 S. W. Rep. 709.

259. Time to object to deposition.—A deposition which states what an engineer of a railroad said about an accident, made at a subsequent time, is not evidence against the company, and to have it rejected, it is not necessary that objection be made when the deposition was taken. *Chicago, B. & Q. R. Co. v. Lee*, 60 Ill. 501, 12 Am. Ry. Rep. 321.

260. Identity of deponent with person named in commission.—A commission to take depositions of John McKay was returned with testimony given by John Macke. The testimony was admitted, it not appearing but that the words McKay and Macke were *idem sonans*. Held, that there was no error in admitting the testimony. *International & G. N. R. Co. v. Kindred*, 11 Am. & Eng. R. Cas. 649, 57 Tex. 491.

261. Deposition taken before coroner at inquest.—In an action to recover damages for the killing of plaintiff's intestate through alleged negligence, the deposition of a witness, taken before the coroner upon an inquest upon the body of the deceased, the witness being dead, is not admissible in evidence on the question of negligence. *Pittsburgh, C. & St. L. R. Co. v. McGrath*, 115 Ill. 172, 3 N. E. Rep. 439;

affirming 15 Ill. App. 85.—APPROVING *Cook v. New York C. R. Co.*, 5 Lans. (N. Y.) 401; *State v. Turner*, 1 Wright (Ohio) 21.—APPLIED in *Chicago. M. & St. P. R. Co. v. Staff*, 46 Ill. App. 499. FOLLOWED in *Lake Shore & M. S. R. Co. v. Taylor*, 46 Ill. App. 506.

262. Commission to examine opposing party.—Stockholders sued their own company and another to prevent a consolidation, charging that their own company was so largely officered by the other company, and so completely within its grasp, that a legal contract could not be made, and that the contract of consolidation was grossly inequitable. It appeared that the property affected was in New York, but the evidence of past dealings between the companies, which was necessary to prove the allegations of the complaint, was in books and papers in another state. Held, that a motion to take the evidence by open commission in the other state was properly granted. *Hart v. Ogdensburgh & L. C. R. Co.*, 51 N. Y. S. R. 468, 67 Hun 556, 22 N. Y. Supp. 401.

It seems that the depositions of an officer of a company upon examination for discovery can only be read against the company at the trial, if at all, when they have taken part in the examination. *Leitch v. Grand Trunk R. Co.*, 13 Ont. Pr. 369, 12 Ont. Pr. 671.

263. Testimony of witness at former trial.—In an action for the death of an employé, what the company's master machinist testified to at a previous trial of the same cause is not admissible against the company, he being alive and accessible as a witness; but the evidence improperly admitted was not so material as to require a new trial. *Savannah, F. & W. R. Co. v. Flannagan*, 39 Am. & Eng. R. Cas. 661, 82 Ga. 579, 9 S. E. Rep. 471.

In an action for causing the death of a party at a street crossing, it was a theory of the defense that he attempted to cross the track in full view of a rapidly approaching locomotive, and caught his foot in a guard rail. At a second trial plaintiff testified that the position of the locomotive at the time of the injury had not been pointed out to him; whereupon the company proved that he had testified on a former trial that such position had been pointed out to him, and that he had measured it and found it to be 277 feet. Held, that proof of such

APPROVING
5 Lans. (N.
right (Ohio)
& St. P. R.
FOLLOWED
o. v. Taylor,

amine op-
s sued their
to prevent a
eir own com-
by the other
y within its
could not be
of consolida-
It appeared
was in New
dealings be-
was necessary
the complaint,
another state.
e evidence by
er state was
densburgh &
468, 67 Hun

s of an officer
on for discov-
the company
they have taken
itch v. Grand
9, 12 Ont. Pr.

ness at for-
the death of
pany's master
vious trial of
le against the
ccessible as a
nproperly ad-
to require a
W. R. Co. v.
R. Cas. 661, 82

the death of a
as a theory of
d to cross the
y approaching
not in a guard
ntiff testified
motive at the
n pointed out
pany proved
mer trial that
d out to him,
and found it
proof of such

former evidence was admissible, both for the purpose of contradicting plaintiff and for the purpose of showing that the intestate did attempt to cross in front of the approaching engine. *McPhillips v. New York, N. H. & H. R. Co.*, 14 N. Y. Supp. 928; *affirming* 13 N. Y. Supp. 917.

Four bales of cotton were delivered to a railroad company to be shipped; two bales were burned before being loaded, and the shipper brought suit against the company and at the trial gave his evidence in his own behalf. Subsequently he died and his administrator sued the company for a conversion of the other two bales, and at the trial offered the evidence given by the shipper at the first trial. *Held*, that the evidence was properly admitted, it appearing that it was given under oath with opportunity to the company to cross-examine. *Houston & T. C. R. Co. v. Perkins*, 2 Tex. App. (Civ. Cas.) 467.

A railroad company was sued for killing a person at a crossing. A trial was had, the case reversed on appeal, and sent back for a second trial. At the second trial the evidence of a witness at the former trial, as embraced in the bill of exceptions, the witness having become mentally incompetent in the mean time, was offered in evidence. There was no proof that the evidence as contained in the bill of exceptions was substantially the same as that given by the witness. *Held*, that it was not admissible. *Scoville v. Hannibal & St. J. R. Co.*, 94 Mo. 84, 6 S. W. Rep. 654.

The notes of a stenographer, or even his transcript of them contained in a bill of exceptions, written out by himself and supplemented by his testimony that they were correct, are competent evidence as to what a deceased witness swore to on a former trial. *Chicago, R. I. & P. R. Co. v. Harmon*, 16 Ill. App. 31.

XL. WEIGHT AND SUFFICIENCY OF EVIDENCE.

1. In General.

264. Recitals in instruments of conveyance.—The recital of a decree of foreclosure of a railroad, contained in a duly acknowledged master's deed, is *prima facie* evidence of the existence of the decree. *New York & G. L. R. Co. v. State*, 32 Am. & Eng. R. Cas. 186, 50 N. J. L. 303, 11 Cent. Rep. 555, 13 Atl. Rep. 1.

The recitals in the patent from the United States to the Central Pacific R. Co., showing that the line of the railroad was definitely located, and that the company afterwards filed with the register and receiver at Sacramento a selection of the land under the acts of congress, and that such selection was properly certified to or approved by such register and receiver, are sufficient proof of the fact that the land was at the date of its selection surveyed by authority of the United States, and identified as land to which the grant made to the company had then attached, and that the costs of such survey and other fees required by law had been paid by such company. *Jatunn v. Smith*, 95 Cal. 154, 30 Pac. Rep. 200.

265. Certificate of officer.—The certificate of the secretary of an incorporated company, bearing its seal, affords *prima facie* evidence of the facts therein stated. The court is bound to presume from such certificate that legal notice was given to the stockholders of the company of a meeting of which they were entitled to be notified. *New Orleans, J. & G. N. R. Co. v. Lea*, 12 La. Ann. 388.

266. Scintilla of evidence.—A mere scintilla of evidence is not sufficient to sustain the burden of proof. Before the evidence is left to the jury, there may be, in every case, a preliminary question for the presiding judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly find a verdict for the party producing it, upon whom the burden of proof is imposed. *Paine v. Grand Trunk R. Co.*, 58 N. H. 611.

In an action to recover superfluous land acquired by a railway company, and which had been put up for sale at auction, it is not even *prima facie* proof that such sale was by authority of the company, to show by the auctioneer that he had received his instructions from one of the directors, and also from a person who acted as the company's solicitor in former sales. *Moody v. London, B. & S. C. R. Co.*, 1 B. & S. 290, 9 W. R. 780, 31 L. J. Q. B. 54.

267. To show non-delivery of merchandise.—Where a carrier sends packed parcels by railway, and one of such parcels is abstracted from the package in transit, in an action by the carrier against the company for the loss, it is sufficient to prove that the parcel was not in the package when

delivered, and it is not necessary to show that the company had not delivered it to the person for whom it was ultimately destined. *Crouch v. London & N.-W. R. Co.*, 2 C. & K. 789.

268. Annuity tables.—The true method of calculating the value of an unexpired lease is by annuity tables; by multiplying the clear annual value of the lease by the value of one dollar per annum for the unexpired term, at the rate of lawful interest. *West Jersey R. Co. v. Thomas*, 23 N. J. Eq. 431; affirmed in 24 N. J. Eq. 567.

269. Testimony of employes.—In suits against common carriers the testimony in their behalf of their clerks and servants must be received with great caution. *Bond v. Frost*, 8 La. Ann. 297.—FOLLOWING *Riley v. Horn*, 5 Bing. 217, 15 Eng. C. L. 423.

270. Recitals in acts of legislature.—An act of the legislature providing for an increase of the capital stock of a corporation, and permitting an extension of its track, which had been chartered by a previous act, only creates a presumption that the corporation was in existence at the time of the passage of the second act, but is not conclusive evidence of its corporate existence. *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.

271. Actual sale as evidence of value.—The price for which stock was sold is not conclusive evidence of its value at the time of the sale. *Ayres v. Chicago & N. W. R. Co.*, 40 Am. & Eng. R. Cas. 108, 75 Wis. 215, 43 N. W. Rep. 1122.

272. Preponderance of proof.—In civil cases it is not necessary that the plaintiff shall establish his right to recover beyond doubt; such preponderance of evidence as produces reasonable conviction is enough. *Louisville & N. R. Co. v. Jones*, 34 Am. & Eng. R. Cas. 417, 83 Ala. 376, 3 So. Rep. 902.—DISAPPROVED IN *Georgia Pac. R. Co. v. Hughes*, 39 Am. & Eng. R. Cas. 674, 87 Ala. 610, 6 So. Rep. 413.

273. Contradictions in evidence.—A statement in evidence may be so contradictory of general knowledge that no court is bound to believe it. *Gurley v. Missouri Pac. R. Co.*, 104 Mo. 211, 16 S. W. Rep. 11.—APPLYING *Hunter v. New York, O. & W. R. Co.*, 116 N. Y. 615, 23 N. E. Rep. 9.

A court is not bound to believe evidence of details and circumstances of an impossible nature. So a brakeman cannot recover for a personal injury received while sitting on

top of a car, on evidence that he struck the arch of a tunnel, where the facts are that the arch was four feet and seven inches above the top of the car, which would require a man nine feet tall standing to reach the arch when sitting. *Hunter v. New York, O. & W. R. Co.*, 116 N. Y. 615, 23 N. E. Rep. 9; reversing 42 Hun 657, mem.

274. Showing net profits.—Evidence as to the cost of operating most railroads, in the absence of any proof to show the rates of fare per mile on those roads, is no guide to ascertain the net profits of a particular road. *West Jersey R. Co. v. Thomas*, 23 N. J. Eq. 431; affirmed in 24 N. J. Eq. 567.

2. In Actions on Contract.

275. In general.—The provision in the statute that the schedules of rates fixed by the railroad commissioners shall in any action be taken as sufficient evidence that the rates are just and reasonable, does not make such rates conclusive as against judicial inquiry, but makes the schedules competent and adequate evidence of the correctness of the action of the commissioners, in the absence of other proof that they have exceeded their powers, abused their discretion, or invaded some right of the company. *Pensacola & A. R. Co. v. State*, 37 Am. & Eng. R. Cas. 579, 25 Fla. 310, 3 L. R. A. 661, 5 So. Rep. 833, 2 Int. Com. Rep. 522.

Under an allegation in the declaration that some of the grates in question were delivered at their destination in a broken and damaged condition, evidence that "the grates" were delivered in that condition will not justify an inference either that all or any particular number of them were broken and damaged. To base any recovery on this part of the declaration, it ought to appear, approximately at least, how many were so injured, and how much the injury impaired or diminished their value. *Atlanta & W. P. R. Co. v. Texas Grate Co.*, 40 Am. & Eng. R. Cas. 130, 81 Ga. 602, 9 S. E. Rep. 600.

Where a statute provides that calls for payments to subscribed stock shall be made by publication in some newspaper, the affidavit of a bookkeeper in the office of the newspaper is sufficient evidence of the publication of the call. *Andrews v. Ohio & M. R. Co.*, 14 Ind. 169.

Proof that a shipper, while at the point of destination (Chicago), saw and talked

with the station agent there of the delivering road, does not conclusively establish that a contract for notice was reasonable; such proof failing to show that the shipper saw such agent within twenty-four hours after arrival of the cattle there. *Missouri Pac. R. Co. v. Paine*, 1 *Tex. Civ. App.* 621, 21 *S. W. Rep.* 78.

Where title is traced through corporations, which are not parties to the record and with which defendant has no privity, proof of their existence as corporations *de facto*, by their articles of incorporation duly made, is sufficient *prima facie*. *Tarpey v. Deseret Salt Co.*, 5 *Utah* 494, 17 *Pac. Rep.* 631.

Wisconsin Laws 1868, ch. 57, entitled "An Act to Authorize the Chicago & Northwestern Railway Company to Execute a Certain Trust," § 7 of which act provides that a certificate of sale shall be *prima facie* evidence of title in fee in the purchaser, makes the certificate conclusive evidence of title in the purchaser unless the contrary is shown. *Stringham v. Cook*, 75 *Wis.* 589, 44 *N. W. Rep.* 777.

Plaintiff, who was the receiver of an insolvent road, sued to enforce an alleged oral agreement by which he was to furnish certain information to defendants, and they were to furnish funds and buy up the bonds of the road to secure control of it at a foreclosure sale, plaintiff to share equally in the benefits with defendants. Complainant did not show that he possessed any information which was not known to the public, and he and one other witness testified that defendants said that they desired to have him interested in the enterprise because of the great change in the road since he had taken possession of it; but it appeared that he knew that defendants had already been negotiating for the purchase of the bonds. Defendants denied the existence of the contract, and plaintiff's evidence was somewhat contradictory and indefinite, and failed to show sufficient inducement for such a contract; and it appeared that during the time he had written letters inconsistent with his claim. *Held*, that the evidence was not sufficient to show a contract. *Farley v. Hill*, 39 *Fed. Rep.* 513.

A draft on a debtor was given by the plaintiff to defendant company to collect. Their agent, to whom it was sent for collection, absconded and the draft was returned by the company unpaid. The drawer swore that he had paid it, and it was

proved that he had paid to the agent, by a check which was collected, a larger sum than the amount of this draft. The evidence also showed why the draft was not taken up. *Held*, sufficient to justify the jury in finding that the company collected the amount of the draft. *Bardwell v. American Exp. Co.*, 35 *Minn.* 344, 28 *N. W. Rep.* 925.

A suit was brought to recover for loss of freight against the defendants, as trustees of certain mortgages to secure the payment of bonds issued by a railroad company. *Held*, that to show that the defendants acted as such trustees and had the control and management of the road as such was sufficient; it was not necessary to show that they were actually trustees. *Pearson v. Wheeler*, 55 *N. H.* 41.

Plaintiff sued a stockholder of a company for damages for converting to his own use, and delivering to the company, a note and mortgage which he claimed were delivered to defendant as an escrow, only to be delivered to the company on certain conditions. At the trial plaintiff produced a written agreement delivered to him by the company at the time the note and mortgage were made, reciting that they were received in payment of certain shares of stock in the company. *Held*, that this was strong, if not conclusive, evidence that he delivered the note and mortgage to the company. *Patterson v. Ball*, 19 *Wis.* 243.

The defendants were sued on a by-law, alleged to have been made by them, enacting that all persons who at the time of subscribing should pay up their stock in full should be entitled to interest on the amount of their investment. The defendants' book of by-laws was produced, in which this by-law was written out, but not sealed, and in the margin was written "expunged," signed by the president's initials. *Held*, that such proof, even without the entry in the margin, would have been insufficient to show a by-law. *McDonell v. Ontario, S. & H. R. U. Co.*, 11 *U. C. Q. B.* 267.

276. Evidence establishing a mere probability.—Where the evidence leaves it uncertain which of two or more inferences from the facts proved is the true one, or merely establishes a probability, no matter how strong, in favor of one conclusion rather than another, such evidence does not amount to proof. *Briggs v. New York C. & H. R. R. Co.*, 1 *Sheld. (N. Y.)* 433.

Something more must be shown than a probability that a carrier was negligent in injuring a passenger; there must be some element of moral certainty and exclusion of reasonable doubt. *Payne v. Forty-second St. & G. S. F. R. Co.*, 8 J. & S. (N. Y.) 8.—FOLLOWED IN *Magnin v. Dinsmore*, 8 J. & S. 512.

Plaintiff, suing for goods lost while in the carrier's hands, gave evidence that they were boxed and delivered to the company in apparently good order; that two or three days after delivery to the consignee, a box was opened, and then it was discovered that the box had been opened, the goods taken out, and the nails re-driven; but there was no evidence of the care taken of the box from the time of the delivery to the time that it was opened and the loss discovered. *Held*, that the evidence did not warrant a finding that the goods were abstracted while in the company's possession. *Canfield v. Baltimore & O. R. Co.*, 75 N. Y. 144; *reversing* 11 J. & S. 562.

277. Of loss through felony of company's servants.—Evidence that a box shipped by a railway was broken open *en route* and the contents taken, is no evidence of a felony by the servants of the company. *Turner v. Great Western R. Co.*, 34 L. T. 22, 13 Cox C. C. 131.

Proof that goods delivered to a carrier were stolen, and that the company's servants had greater facility of access than other persons, is not evidence for the jury that the goods were lost through the felony of the company's servants. *Turner v. Great Western R. Co.*, 34 L. T. 22, 13 Cox C. C. 131.

In an action for the loss of a traveling case carried as personal luggage, there is evidence to go to the jury of a felonious taking by the company's servant, where it is shown that the passenger was prevented by a servant from carrying the case in the same carriage with himself on the pretense that the luggage van was the proper place for it, and that the interference of such servant was no part of his duty. *Keys v. Belfast R. Co.*, 8 Ir. R. C. L. 167.

In such an action, upon an issue that the loss arose from the felonious act of the carrier's servants, it is sufficient to prove facts which render it more probable that the felony was committed by the servants than by any one else; and it is unnecessary to give evidence sufficient to convict any par-

ticular servant. *Vaughton v. London & N.-W. R. Co.*, L. R. 9 Ex. 93, 43 L. J. Ex. 75, 12 Cox C. C. 580, 22 W. R. 336, 30 L. T. 119.—LIMITED IN *McQueen v. Great Western R. Co.*, L. R. 10 Q. B. 569, 44 L. J. Q. B. 130, 32 L. T. 759, 23 W. R. 698.

278. Receipts.—Where a package of money, in a sealed envelope, is received by a common carrier for transportation, and a receipt is given reciting that the package is "said to contain" a given amount, the recital is not *prima facie* evidence that the package did, in fact, contain the amount named. *Fitzgerald v. Adams Exp. Co.*, 24 Ind. 447.

Where a carrier is sued for an injury to goods while in its hands, a receipt given by an intermediate carrier, without examination, except what was made externally, reciting that the goods were received in apparent good order, is no evidence of their condition as against the shipper. *Hunt v. Michigan S. & N. I. R. Co.*, 37 N. Y. 162, 35 How. Pr. 287.

In an action against a railroad company for the loss of a bale of cotton alleged to have been delivered to it as freight, a verdict for the plaintiff is supported by the weight of evidence where it appears that the cotton was loaded on a dray with directions to the drayman to deliver it to the company; that the defendant's check clerk signed the receipt for the cotton in the drayman's receipt book, but afterwards erased it; that defendant's clerk admitted that he signed the receipt but afterwards erased it on being informed by the head clerk that he had made a mistake, the head clerk testifying that in billing the cotton out of the depot he was unable to find the cotton in question, and then he directed the check clerk to mark off the receipt given, and that if the cotton had been received he would have discovered it. *Savannah, F. & W. R. Co. v. Steininger*, 84 Ga. 579, 11 S. E. Rep. 236.

Where an employé at work upon the construction of a railroad signs pay-roll receipts, such receipts are *prima facie* evidence of all the statements therein, but are open to explanation by the party giving them; and where such a party testifies that he did not read the receipts, or either of them, and had no opportunity so to do, because at the time he signed them there were too many men waiting to be paid off, and there was no time for him to read the receipts, it cannot

be said as a matter of law that the receipts are conclusive evidence against the party giving them. *Solomon R. Co. v. Jones*, 34 *Kin.* 443, 8 *Pac. Rep.* 730.—DISTINGUISHING *McCormack v. Molburg*, 43 *Iowa* 561; *Gullihier v. Chicago*, R. I. & P. R. Co., 59 *Iowa* 416, 13 *N. W. Rep.* 429.

279. Proof of value.—The testimony of the shippers' general manager that the value of all of the cotton, of which that involved in the suit was a part, was in excess of \$23,000, was admissible as tending to prove the value of the cotton lost, but could not be held sufficient to prove such value in the absence of facts showing at least the average weights, value, and quality of the cotton, or showing that such average weights, value, or quality could not be learned. *Missouri Pac. R. Co. v. Sherwood*, 55 *Am. & Eng. R. Cas.* 478, 84 *Tex.* 125, 19 *S. W. Rep.* 455.

The value of four bales of cotton at Rome, Ga., cannot be inferred from the value of six bales (including these four) at Cincinnati, O., or from the value of the other two bales at Rome, it not appearing that these two were of like weight and quality as the four in question. *Simpson v. Cincinnati, N. O. & T. P. R. Co.*, 81 *Ga.* 495, 8 *S. E. Rep.* 524.

3. In Actions for Torts.

280. In general.—In actions against carriers to recover for injuries resulting from negligence, it is sufficient to prove the substance of the issue. *Louisville, N. A. & C. R. Co. v. Thompson*, 27 *Am. & Eng. R. Cas.* 88, 107 *Ind.* 442, 57 *Am. Rep.* 120, 8 *N. E. Rep.* 18, 9 *N. E. Rep.* 357.

While the law does not require positive proof, it does require such proof as will leave no reasonable doubt of the existence of the fact upon which the verdict must rest. *Peck v. Missouri Pac. R. Co.*, 31 *Mo. App.* 123.—REVIEWING *Kenney v. Hannibal & St. J. R. Co.*, 70 *Mo.* 245; *Sheldon v. Hudson River R. Co.*, 29 *Barb.* (N. Y.) 226.—QUOTED IN *Duggan v. Wabash Western R. Co.*, 46 *Mo. App.* 266.

In an action against an elevated railway for causing the death of a female passenger, certain witnesses for the plaintiff testified that she was pushed back by closing the gate as she was attempting to get on the train, and was thus caused to fall. Two other witnesses for the plaintiff testified that the train started with a sudden jerk about

the time she put one foot on the car, causing her to fall between the station and the car. *Held*, that the witnesses simply swore to deductions as to what they saw, and therefore did not necessarily contradict each other. *Schestanber v. Manhattan R. Co.*, 9 *N. Y. S. R.* 215, 44 *Hun* 628; *affirmed in* 112 *N. Y.* 664, *mem.*, 20 *N. E. Rep.* 413, 20 *N. Y. S. R.* 978.

In an action for injuries to a passenger caused by the giving way of the track, the court should explain to the jury the effect upon the question of negligence, of evidence that the company had always employed skilful engineers in the construction of its works, and that the giving way of the track was caused by a storm of unusual violence. *Great Western R. Co. v. Fawcett*, 1 *Moore P. C. C., N. S.* 101, 9 *Jur. N. S.* 339, 11 *W. R.* 444, 8 *L. T.* 31.—QUESTIONED IN *Czech v. General Steam Nav. Co.*, *L. R.* 3 *C. P.* 14, 17 *L. T.* 246.

The testimony that the headlight shone in the door of a house 150 yards up the road, did not tend to show the actual condition of intestate when stricken, or that the engineer could have seen him. *Norwood v. Raleigh & G. R. Co.*, 111 *N. Car.* 236, 16 *S. E. Rep.* 4.

When the negligence of the carrier is established, and is of a character greatly to multiply the chances of the accident which happened, and naturally leading to its occurrence, and when the evidence tends to connect the accident with the negligence, the mere possibility that the accident might have happened even without the negligence will not relieve. *Reynolds v. Texas & P. R. Co.*, 37 *La Ann.* 694.

Where a train is wrecked by a stone rolling from the mountain side to the track and an engineer is killed, proof that the rock rested on the mountain side only fifty feet from the track and was exposed to view, and that plaintiff's witnesses had regarded it as dangerous for a long time, surface water continually washing the earth away which supported it, and that a section foreman on the morning of the accident had remarked that he had observed the dangerous position of the rock before the accident, and had called the attention of the road master to its dangerous condition, as well as other rocks along the mountain, is sufficient to warrant a verdict finding the company negligent, though the defendant introduced evidence to show that some years prior to the acci-

dent it had had the mountain side carefully examined and had all the stones that appeared dangerous removed; that its employes had not regarded the particular stone causing the accident as dangerous. *Little Rock & Ft. S. R. Co. v. Voss, (Ark.)* 18 S. W. Rep. 172.

Where the employé of a telegraph company is injured by a passing train while endeavoring to remove a pole which had fallen across the track, a verdict finding the engineer or fireman of the train guilty of gross negligence in not stopping it is not warranted by proofs showing that the engineer was in his place, and sounded the whistle and applied the brakes before reaching the place of the accident; and that other employes, working with plaintiff, were sufficiently warned to get out of danger; but where there is no evidence to show that the engineer or fireman knew that the pole was on the track. *Chisholm v. Old Colony R. Co.,* 159 Mass. 3, 33 N. E. Rep. 927.

In an action for an injury to abutting property by reason of the construction of a railroad on a public street or highway, the plaintiff's title may be established by proof of adverse possession. *Lawrence R. Co. v. Cobb,* 35 Ohio St. 94.

281. Concerning the giving of signals.—Where a laborer is killed while wheeling dirt near a track, by a train approaching from behind, evidence that no warning signals were given, as required, until the train was within a few feet of the laborer, who could not hear the approach of the train on account of a strong wind and other noises about him, is sufficient to show negligence on the part of the company justifying the court in leaving the case to the jury. *Barber v. Cincinnati, N. O. & T. P. R. Co., (Ky.)* 21 S. W. Rep. 340.

Where it is shown by plaintiff that a track hand was killed by a train that approached him from behind without signals or warning; that the wind and noises about him were such that he could not hear the train, evidence on the part of the company that when first seen he was some ten or fifteen feet from the track, and that, the danger signals being given, he turned, faced the train, and ran onto the track, when it was too late to prevent the accident, will not warrant the court in withdrawing the case from the jury. *Barber v. Cincinnati, N. O. & T. P. R. Co., (Ky.)* 21 S. W. Rep. 340.

282. Preponderance of proof.—

(1) *In general.*—The party upon whom rests

the burden of proof in an action for negligence is not bound to establish a case free from reasonable doubt; he performs his obligation by presenting a preponderance of evidence. *Seybolt v. New York, L. E. & W. R. Co.,* 18 Am. & Eng. R. Cas. 162, 95 N. Y. 562, 47 Am. Rep. 75; *affirming* 31 Hun 100.

By a preponderance of testimony is not meant necessarily a greater number of witnesses, but that the testimony shall fairly predominate—i. e., make the stronger impression on the minds of the jury. *Griffith v. Baltimore & O. R. Co.,* 44 Fed. Rep. 574.

It is error to instruct the jury that plaintiff is not bound to do more by his proof than to raise "a reasonable presumption of negligence" on defendant's part to entitle him to recover. *Richmond & D. R. Co. v. Yeamans,* 86 Va. 860, 12 S. E. Rep. 946.

A verdict cannot be said to be sustained by the weight of evidence, in an action for personal injuries by reason of the sudden stopping of a train, when the allegations of the declaration are merely supported by the testimony of plaintiff and her niece, as against that of the conductor, engineer, fireman, and two passengers in the same coach with plaintiff at the time of the accident. *Chicago & A. R. Co. v. Means,* 48 Ill. App. 396.

(2) *Illustrations.*—In an action for a personal injury at a street crossing, plaintiff testified that he was struck by the train at the crossing, and was rendered unconscious thereby. No one saw him when struck. The company proved that no bones were broken; that he was found about eighty feet from the crossing; that his hat was near the crossing. *Held,* that a verdict for plaintiff was not against the weight of evidence. *Louisville & N. R. Co. v. Roberts, (Ky.)* 8 S. W. Rep. 459.

A lessor company was sued for maintaining an embankment so as to throw water back on plaintiff's road and damage it. An objection was made on appeal that no evidence was given at the trial to show that defendant was the owner of the fee of the road. Plaintiff proved a lease of the road for a long term, in which defendant reserved rent, covenanted for quiet enjoyment, and recited that the road and appurtenances belonged to defendant. *Held,* sufficient evidence of ownership, in the absence of any denial on the part of defendant. *Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. Co.,* 3 Hun (N. Y.) 523, 5 T. & C. 651.

tion for negli-
h a case free
performs his
ponderance of
rk, L. E. &
Cas. 162, 95
affirming 31

imony is not
umber of wit-
y shall fairly
stronger im-
jury. *Griffith*
ed. Rep. 574.
ry that plain-
by his proof
resumption of
part to entitle
D. R. Co. v.
Rep. 946.

o be sustained
an action for
of the sudden
allegations of
supported by
her niece, as
engineer, fire-
he same coach
the accident.
s, 48 Ill. App.

tion for a per-
sising, plaintiff
by the train at
d unconscious
when struck.
o bones were
about eighty
t his hat was
t a verdict for
weight of evi-
Co. v. Roberts,

for maintain-
o throw water
amage it. An
ul that no evi-
to show that
the fee of the
se of the road
ndant reserved
enjoyment, and
urtenances be-
sufficient evi-
bsence of any
t. *Conhocton*
Y. & E. R.
C. 651.

A freight train in the country, away from any public crossing, on a down grade, broke in two, and to prevent a collision between the two sections, the engineer increased his speed, making a suitable gap between the two parts of the train. An elderly lady, while attempting to cross the track between the sections of the train, was killed. It was in evidence that the brakeman on the rear portion of the train saw the woman near the track, but there was no evidence that any one knew she was on the track or in any danger. *Held*, that there was no evidence to sustain an action against the company. *John v. Louisville & N. R. Co.*, (Ky.) 10 S. W. Rep. 417.

In an action by a yard brakeman for falling from a car, there was a conflict of evidence as to which car he fell from. Plaintiff produced two witnesses, one of whom identified the car from general appearance, and the other by its number, which he had forgotten. The company produced the conductor and several other witnesses, who testified to another car from its number, and that it was in good order. *Held*, that a finding that the accident was from the car testified to by the plaintiff's witnesses was against the weight of evidence and could not be supported. *Hotis v. New York C. & H. R. R. Co.*, 15 N. Y. S. R. 525, 53 Hun 634, 2 Silv. Sup. Ct. 598, 6 N. Y. Supp. 605.

A passenger sued a railroad for a personal injury which he claimed was received by suddenly starting the train before he had sufficient time to alight therefrom. The defense was contributory negligence. The company introduced about a dozen witnesses who testified that the train stopped long enough to allow passengers to alight with safety. Two other witnesses testified that the plaintiff was fully off the car before it started. These witnesses were contradicted by the plaintiff and two boys only. *Held*, that the verdict for plaintiff was not warranted by the weight of evidence. *Gulf, C. & S. F. R. Co. v. Williams*, (Tex.) 7 S. W. Rep. 88.

The brakeman of a freight train sued his company for a personal injury which was the result, he claimed, of a missing step to the ladder by which he usually mounted, he not being aware of its absence. Another brakeman and the conductor of the train testified that plaintiff was not in the discharge of his duties at the time. Others testified that after the accident plaintiff had told

5 D. R. D.—34.

them that he had been forward for a drink of water. Plaintiff's medical attendant testified that he said he was injured by jumping from the train. *Held*, that a verdict for plaintiff was clearly against the weight of evidence. *Missouri Pac. R. Co. v. Walker*, (Tex.) 7 S. W. Rep. 791.

283. Taking case from the jury.—

In an action for injuries received from the falling of a building which plaintiff was employed with others to tear down and remove, the plaintiff should be nonsuited when his only evidence tending to show negligence is the fact that the building fell after some of the boards and timbers had been removed. *Weidenan v. Tacoma R. & M. Co.*, 7 Wash. 517, 35 Pac. Rep. 414.

In an action by a brakeman to recover damages caused by the fracture of a brake which plaintiff was using, the alleged negligence on the part of the company was in failing to supply a newer pattern of brake than the one in question. On the trial the plaintiff's own evidence was contradictory as to whether the new style of brake was any safer to use than the old one, although it appeared that the former was undoubtedly more effectual in stopping the train. *Held*, that there was no evidence of negligence to submit to the jury. *Disher v. New York C. & H. R. R. Co.*, 15 Am. & Eng. R. Cas. 233, 94 N. Y. 622, mem.; reversing 24 Hun 486, mem., 12 Wkly. Dig. 277.

284. Making a prima facie case.—

It is sufficient for a plaintiff to show, in the first instance, that the injury resulted from the negligence of the defendant. *Smith v. Occidental & O. Steamship Co.*, 99 Cal. 462, 34 Pac. Rep. 84.

In a suit against the owner of a railroad for negligence in its operation, the defendant is not injured by an instruction that it makes a sufficient *prima facie* case against the defendant to show, that he was the owner of the railroad, without proving affirmatively that the persons in charge were his servants or employés. It is not necessary for the plaintiff to show that the owner had not leased the railroad, or had not in some other way given the entire management of it to another person. *Davis v. Button*, 78 Cal. 247, 20 Pac. Rep. 545, 18 Pac. Rep. 133.

Where the law presumes negligence from some of the facts proved, and where there is scope for a legitimate reasoning by the

jury as to whether the presumption is or is not rebutted by other facts in plaintiff's evidence, it is error to grant a nonsuit. *So held*, where the action was for injuring a man by a running train while lying on the track near a highway crossing, where the evidence showed negligence on the part of the company, but it was somewhat doubtful whether the injured party was intoxicated, or had fallen from a sudden attack of dizziness. *Hankerson v. Southwestern R. Co.*, 59 Ga. 593.—DISTINGUISHED IN *Smith v. Central R. & B. Co.*, 41 Am. & Eng. R. Cas. 490, 82 Ga. 801, 10 S. E. Rep. 111.

Proof that plaintiff's intestate was a postal agent, being carried on defendant's road, and that the car in which the agent and mail were carried ran off the track and killed him, without negligence on his part, makes a *prima facie* case of negligence, and entitles plaintiff to recover, unless the *prima facie* case is rebutted. *Ohio & M. R. Co. v. Voight*, 122 Ind. 288, 23 N. E. Rep. 774.

The person injured, who was a boy only nine years old, testified that he climbed over the draw-head instead of passing through the open space, because he would get mashed if he passed between the cars. *Held*, that this remark did not conclusively show that he appreciated the danger of his act, because his testimony, taken as a whole, rendered the inference permissible that this remark was made in the light of subsequent events, and not because he anticipated what happened. *Schmitz v. St. Louis, I. M. & S. R. Co.*, 46 Mo. App. 380.

In an action for personal injuries caused by the alleged negligence of an employé of defendant, the plaintiff gave evidence of the accident, the injuries sustained, and their extent, and of his earning capacity. *Held*, that the court committed no error in stating that he had made out a *prima facie* case. *Pennsylvania R. Co. v. Fuller*, 3 Pennyp. (Pa.) 176.

285. Weight of evidence for the jury.—The fact that the plaintiff worked habitually with the machinery in question for a period of ten or fifteen months is competent evidence from which the jury may infer that plaintiff was fully acquainted with its dangerous character, but it is not conclusive evidence; the jury are to determine its weight in fixing the extent of plaintiff's knowledge and how far it is qualified by the other circumstances of the case.

McDade v. Washington & G. R. Co., 26 Am. & Eng. R. Cas. 325, 5 Mackey (D. C.) 144.

The ownership by one railroad of the bonded indebtedness, or the greater portion of it, of several other roads which connect with its own, does not of itself conclusively establish such an identity of interest and management as to make it liable to persons injured through negligence of those employed on any of these roads, yet the fact of such ownership, when taken with other circumstances of like character, is evidence from which the jury may presume an identity of interest. *Jones v. Pennsylvania R. Co.*, 8 Mackey (D. C.) 178.—QUOTING *St. Louis Ins. Co. v. St. Louis, V., T. H. & I. R. Co.*, 104 U. S. 146.

Where the testimony of witnesses was conflicting as to whether the cause of the injury was a noise produced inside the box car, or the car itself, the testimony of the plaintiff and of her husband, who was with her at the time of the accident, being confused on this question, it was proper for the jury to decide which testimony should have the greater weight; and if the evidence showed that the horses were frightened by both the noise and the car, a verdict in favor of the plaintiff was supported by the evidence, notwithstanding no recovery could have been had if the accident had happened on account of the noise only. *Cleveland, C., C. & I. R. Co. v. Wynant*, 55 Am. & Eng. R. Cas. 80, 134 Ind. 681, 34 N. E. Rep. 569.

286. Evidence sufficient to go to the jury.—To maintain an action to recover damages for negligence, the plaintiff must prove facts warranting an inference of negligence on the part of defendant; he may not recover upon facts as consistent with care and prudence as with the opposite. *Hayes v. Forty-second St. & G. S. F. R. Co.*, 21 Am. & Eng. R. Cas. 358, 97 N. Y. 259; reversing (?) 26 Hun 534.—QUOTED IN *Hughes v. Cincinnati Southern R. Co.*, 91 Ky. 526.

It is ordinarily sufficient, in an action against a railroad for negligence in not maintaining its roadbed in a reasonably safe condition, to show a state of facts tending to show negligence at the time of the accident, or recently before or after it, and within such reasonable time as will, from the nature and circumstances of the case, induce or justify a reasonable pre-

sumption or inference that the condition of the bed is unchanged. *Stoher v. St. Louis, I. M. & S. R. Co.*, 31 *Am. & Eng. R. Cas.* 229, 91 *Mo. 509*, 10 *West. Rep.* 54, 4 *S. W. Rep.* 389.

A female passenger, sixty-four years old, sued for a personal injury in attempting to get on defendant's train, and she was the only witness examined in the case. She testified that she attempted to get on at the rear of the front car while the conductor was standing on the front platform of the second car, with the gate closed, and looking toward the rear of the train; and that the car started just as she set her foot on the platform, and the gate struck her knee, causing her to fall back on the station platform, by which she was injured. *Held*, sufficient evidence of negligence to justify a submission to the jury, and to sustain a verdict for plaintiff. *Menike v. Manhattan R. Co.*, 28 *J. & S.* 116, 17 *N. Y. Supp.* 954; *affirmed in* 137 *N. Y.* 596, *mem.*, 33 *N. E. Rep.* 743, 51 *N. Y. S. R.* 929.

287. Value of circumstantial evidence.—Direct evidence of the want of exercise of due care on the part of the person injured is not required to be produced. Surrounding circumstances may afford as conclusive proof as such direct evidence. *Stepp v. Chicago, R. I. & P. R. Co.*, 85 *Mo.* 229.

The absence of contributory negligence may be made to appear as well from the circumstances of the case as from evidence directly establishing the fact. In weighing those circumstances it may be assumed that all creatures are desirous of preserving their lives and keeping their bodies from harm. *Morrison v. New York C. & H. R. R. Co.*, 63 *N. Y.* 643; *affirming* 4 *Hun* 424.

Where it is sought to establish the fact that plaintiff's building was fired by sparks by circumstantial evidence alone, the circumstances proved should be so conclusive in their nature as to exclude, to a moral certainty, every hypothesis but the one claimed to be established. *Briggs v. New York C. & H. R. R. Co.*, 1 *Sheld. (N. Y.)* 433.

There was no direct evidence that the foot of the deceased was caught in the switch and was the cause of the fall, but his shoe worn at the time was introduced in evidence, and presented a wrenched appearance. *Held*, that this evidence, considered in connection with the circumstances

under which the accident occurred, was sufficient to support a finding that the deceased fell through having his foot so caught. *Brooke v. Chicago, R. I. & P. R. Co.*, 81 *Iowa* 504, 47 *N. W. Rep.* 74.

The court, in charging the jury with reference to circumstantial evidence, said: "This kind of evidence, when strong and convincing, is often the most satisfactory from which to draw conclusions of the existence or non-existence of a disputed fact." *Held*, that this instruction was not open to the objection that a higher value was placed on presumptions or inferences than on positive and direct testimony. *Wheelan v. Chicago, M. & St. P. R. Co.*, 49 *Am. & Eng. R. Cas.* 693, 85 *Iowa* 167, 52 *N. W. Rep.* 119.

288. To show due care.—Plaintiff, an aged female, deaf, but with good eyesight, sued for an injury at a street crossing and testified that it was her habit to look up and down the track before crossing, but that she could not state positively whether she did or not at the time of the injury; but she produced another witness who stated positively that she did look. *Held*, sufficient to justify a finding that she exercised due care. *Cowan v. Third Ave. R. Co.*, 31 *N. Y. S. R.* 145, 9 *N. Y. Supp.* 610, 56 *Hun* 644, *mem.*; *affirmed in* 132 *N. Y.* 598, *mem.*, 44 *N. Y. S. R.* 934, 30 *N. E. Rep.* 1152.

In an action for causing death at a city street crossing, the court charged the jury that if they believed the stationing of a flagman by the company at the crossing was sufficient to warn persons, negligence could not be imputed to it because of a failure to provide other means for the same purpose. *Held*, that it was proper to refuse a further charge, that in considering the sufficiency of the provision of stationing a flagman, the fact that it did not appear that any previous accident had occurred at the place, must be taken as conclusive proof of such sufficiency. The issue was whether there was negligence causing the death sued for, and lack of proof of former accidents was irrelevant and immaterial. *Quill v. New York C. & H. R. R. Co.*, 11 *N. Y. Supp.* 80, 16 *Daly* 313, 32 *N. Y. S. R.* 612; *affirmed in* 126 *N. Y.* 629, *mem.*, 36 *N. Y. S. R.* 1012, 27 *N. E. Rep.* 410.

289. Sufficiency to sustain verdict.—It is not necessary to establish with absolute certainty the connection of cause and effect between the negligent act and the in-

jury. It is sufficient if the evidence furnishes a reasonable basis for satisfying the minds of the jury that the act complained of was the proximate and operating cause. But this conclusion must not rest on mere conjecture. A recovery cannot be had where the evidence merely shows that it is possible that the injury was produced by a cause for which the defendant would be responsible, but more probable that it was produced by a cause for which he was not. *Orth v. St. Paul, M. & M. R. Co.*, 47 Minn. 384, 50 N. W. Rep. 363.

Where a passenger on a freight train sues for being thrown down by a sudden jerk when about to leave the car, evidence that there were a number of jerks is sufficient to justify a finding that the engineer was negligent in the management of the train. *Chicago & A. R. Co. v. Arnol*, 46 Ill. App. 157.

In an action by a brakeman to recover for injuries alleged to be due to the carelessness and recklessness of an engineer, proof that the engineer was careless in making couplings and in handling his engine, for which he had been reported to the conductor, and that his engines had frequently been in the shops for repairs, which would not have happened under proper management, is sufficient to support a verdict that the engineer was negligent, of which the company had notice. *Houston & T. C. R. Co. v. Patton*, (Tex.) 9 S. W. Rep. 175.

Where the action is to recover for one killed while uncoupling cars, through alleged negligence of the company in failing to have its guard rail and main rail blocked, as required by statute, evidence—held, insufficient to justify a finding for the plaintiff, where there is no evidence whatever to show what the deceased was doing, or how he came to his death, nor as to where he was found dead. *Powell v. Northern Pac. R. Co.*, 46 Minn. 249, 48 N. W. Rep. 907.

In an action for killing horses upon depot grounds through the alleged running of a train at an unlawful rate of speed—to wit, eight miles per hour—where one witness testifies that the train crossed the grounds at the rate of twenty-five miles per hour, but four trainmen and the night operator testified positively that the speed was not to exceed eight miles, but where the one witness is strongly corroborated by the physical circumstances, as the marks on the horses and the manner of their killing,

a verdict for plaintiff will not be disturbed on the ground that it was not supported by the evidence. *Story v. Chicago, M. & St. P. R. Co.*, 79 Iowa 402, 44 N. W. Rep. 690.

Where plaintiff testified she thought it was a brakeman who raised the berth which afterwards fell and crushed her fingers, and letters written by her to the company soon after the accident were put in evidence, in one of which she said she was injured through the negligence of an employé of the company, and in another she stated that it was a newsboy who raised the berth, there was sufficient evidence to sustain a verdict for plaintiff, as the jury might have believed from her testimony that it was a brakeman who negligently raised the berth. (Stiles, J., and Anders, C. J., dissenting.) *Northern Pac. R. Co. v. Hess*, 48 Am. & Eng. R. Cas. 91, 2 Wash. 383, 26 Pac. Rep. 866.

On the second trial of an action to recover damages for injuries sustained by a person upon a railroad track, the engineer testified that he did not see the plaintiff until he was within 50 or 60 feet of him and that he applied the brakes and stopped as soon as he could. Upon cross-examination it was shown that the witness had testified on the first trial that he had discovered the plaintiff about 100 yards ahead of the engine, and that in a deposition which was taken at another time he placed the distance at 75 yards. The mail agent on the train testified that he saw the plaintiff on the track several hundred yards ahead of the train. The jury returned a special finding that the plaintiff was at least 200 yards from the engine when seen by the engineer. Held, that the evidence was sufficient to sustain such a finding. *Sibley v. Ratliffe*, 37 Am. & Eng. R. Cas. 295, 50 Ark. 477, 8 S. W. Rep. 686.

Plaintiff's testator was injured by a fall in the street. He was seen to fall and was picked up senseless at a point where some rails projected beyond a temporary barrier inclosing a place where defendant was having a track laid. There was no evidence of any other possible cause of the fall. There was some evidence that it was dark at that place, and it also appeared that it was not a regular crossing. Held, that the evidence was sufficient to sustain a finding for the plaintiff. *Woodman v. Metropolitan R. Co.*, 38 Am. & Eng. R. Cas. 484, 149 Mass. 335, 4 L. R. A. 213, 21 N. E. Rep. 482.

Plaintiff, a passenger, while seated in the

train reading, was, without warning, struck a violent blow in the face, and the issue was made whether the one striking him was a brakeman of the train. The evidence left no doubt that he was an employé of the company, and there was sufficient evidence to justify a finding that he was acting as brakeman at the time by authority of a superior who had a right to place him in that position. *Held*, sufficient to sustain a verdict for plaintiff. *Conger v. St. Paul, M. & M. R. Co.*, 45 *Minn.* 207, 47 *N. W. Rep.* 788.

Plaintiff was a passenger on a cable car which ran away in descending a grade and turned over at a curve, throwing him down, causing a few cuts on the head which were apparently not very harmful; but in a few days temporary unconsciousness, headache, nervousness, sleeplessness, and some impairment of the mental faculties followed, and seven months thereafter he was stricken with paralysis, which the evidence showed resulted from the rupture of a blood vessel of the brain. He had always been in good health before and free from such troubles; and while there was a conflict of medical expert evidence as to the cause of the paralysis, there was abundant evidence to support a finding that it resulted from the effects of the fall. *Held*, that there was no error in sustaining a verdict for plaintiff. *Bishop v. St. Paul City R. Co.*, 48 *Minn.* 26, 50 *N. W. Rep.* 927.

4. Positive and Negative Evidence.

200. In general.*—The fact that a witness does not observe an object or a sound does not disprove its existence, without more. *Cathcart v. Hannibal & St. J. R. Co.*, 19 *Mo. App.* 113.

Plaintiff was ejected from a train, and evidence was offered tending to show that before his ejection he used vile, obscene, and profane language in a car filled with passengers, including many women and children. Upon his part, he introduced two witnesses, one of whom testified "that he never heard him use half a dozen oaths in his life," and the other that "he never heard him use obscene language in public, but might have heard him make use of an oath some time, but not frequently." *Held*,

that such latter evidence was incompetent. *Atchison, T. & S. F. R. Co. v. Gants*, 34 *Am. & Eng. R. Cas.* 290, 38 *Kan.* 608, 17 *Pac. Rep.* 54.

201. Relative weight of positive and negative testimony.—Positive testimony is always more to be relied upon than negative testimony. If certain witnesses testify to having seen particular things, and others testify that they did not see them, the testimony of those who affirm is more to be relied upon than the testimony of those who deny. *Crew v. St. Louis, K. & N. W. R. Co.*, 20 *Fed. Rep.* 87. *Georgia Pac. R. Co. v. Freeman*, 83 *Ga.* 583, 10 *S. E. Rep.* 277. *Sullivan v. Hannibal & St. J. R. Co.*, 72 *Mo.* 195.

As a general rule, the testimony of one who swears positively that a locomotive whistle was sounded is of much greater value than the statement of a witness that he did not hear it sounded. Such negative testimony by a witness who was not giving heed to the passing locomotive, or the sounding of the whistle thereon, and who is accustomed to the frequent sounding of the same, is ordinarily entitled to but little weight. *Kansas City, Ft. S. & G. R. Co. v. Lane*, 23 *Am. & Eng. R. Cas.* 237, 33 *Kan.* 702, 7 *Pac. Rep.* 587.—QUOTED IN *Missouri Pac. R. Co. v. Pierce*, 39 *Kan.* 391.—*Griffith v. Baltimore & O. R. Co.*, 44 *Fed. Rep.* 574. *Chicago, B. & Q. R. Co. v. Stumps*, 55 *Ill.* 367.—FOLLOWED IN *Chicago, B. & Q. R. Co. v. Stumps*, 69 *Ill.* 409.—*McKeever v. New York C. & H. R. R. Co.*, 88 *N. Y.* 667, *mem.*—FOLLOWING *Culhane v. New York C. & H. R. R. Co.*, 60 *N. Y.* 133.—APPLIED IN *Hoffmann v. Fitchburg R. Co.*, 67 *Hun* 581, 51 *N. Y. S. R.* 245, 22 *N. Y. Supp.* 463. DISTINGUISHED IN *Puff v. Lehigh Valley R. Co.*, 71 *Hun* 577.—*Hinton v. Cream City R. Co.*, 65 *Wis.* 323, 27 *N. W. Rep.* 147.

There is, in such case, no conflict of evidence, as the hearing of it by some is entirely consistent with the failure of others to hear it, or forgetting it afterward. *Horn v. Baltimore & O. R. Co.*, 54 *Fed. Rep.* 301, 6 *U. S. App.* 381, 4 *C. C. A.* 346.

The rule that positive is superior to negative testimony does not apply where, of two parties having equal facilities for seeing or hearing a train, one swears that it occurred, and the other that it did not. The preference that the law gives positive evidence over negative is when one swears positively that a thing happened and the other

* Positive and negative testimony as to giving of signals, see notes, 45 *AM. & ENG. R. CAS.* 162; 19 *Id.* 399.

swears that he was present and did not see or hear it. *Atlanta & W. P. R. Co. v. Johnson*, 66 Ga. 259. *Missouri Pac. R. Co. v. Johnson*, 44 Kan. 660, 24 Pac. Rep. 1116. —FOLLOWING *Kansas City, Ft. S. & G. R. Co. v. Lane*, 33 Kan. 702. —*Renwick v. New York C. R. Co.*, 36 N. Y. 132, 34 How. Pr. 91. —FOLLOWED IN *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657. QUOTED IN *Bunting v. Central Pac. R. Co.*, 6 Am. & Eng. R. Cas. 282, 16 Nev. 277.

Where there is a conflict of testimony, and one testifies positively to a thing within his peculiar knowledge or information, and the testimony of the other is a mere denial of that which is not within his peculiar knowledge or information, the positive testimony will generally prevail over the negative. *Au v. New York, L. E. & W. R. Co.*, 29 Fed. Rep. 72.

Where the action is for killing a child on the track, and a witness testifies that the engineer saw the child in time to have prevented the accident; that the engine was moving slowly, and could have been stopped within four or five feet; and that he called to the engineer when the engine was at least six feet from the child, it is sufficient to support a verdict for plaintiff, though the evidence is substantially denied by the engineer and a switchman. *Ross v. Texas & P. R. Co.*, 44 Fed. Rep. 44.

Where a shipper of goods testifies positively that he took the goods to defendant's station, and not finding the regular agent in, deposited them as directed by the telegraph operator, who was temporarily in charge of the office, and the telegraph operator simply denies any such conversation, and that she does not remember having seen the plaintiff, both witnesses being equally credible, the evidence of the shipper, being positive, should be given the greater weight. *Ralph v. Chicago & N. W. R. Co.*, 32 Wis. 177.

In an action for an injury resulting through an alleged defect in the track, the company introduced but one witness, the section boss, who testified that he had examined the track a day or two before, and found no defect, except one tie which was a little decayed, but not rotten. As against this, plaintiff proved by six or seven disinterested witnesses that the ties at the place were very rotten; that the rails were old and much worn, with their flanges broken down. *Held*, that the prepon-

derance of evidence was with the plaintiff. *Newman v. Alabama G. S. R. Co.*, 38 Fed. Rep. 819.

A refusal to instruct the jury that the positive testimony of two witnesses that a warning of the approach of a car was given by the brakeman upon it "will outweigh the negative testimony of four that they did not hear it, provided the witnesses are all equally credible"—*held*, not to be error because it ignored the consideration of what opportunity each witness had of hearing the alleged warning, and because two witnesses did not testify positively that the brakeman gave such warning, nor was the negative testimony confined to four witnesses. *Berg v. Chicago, M. & St. P. R. Co.*, 2 Am. & Eng. R. Cas. 70, 50 Wis. 419, 7 N. W. Rep. 347.

A witness, M., testified that he told the deceased, as he was starting, that the train was coming, and that he replied, "I can make it." Several other witnesses, who were present and would have seen M. had he been there to say this to the deceased, testified that they did not see him, and that they remained there all the time from the arrival of the deceased to his death. *Held*, that this court cannot say, as a matter of law, that the jury were bound to believe the testimony of M. as against the other testimony. *Winstanley v. Chicago, M. & St. P. R. Co.*, 35 Am. & Eng. R. Cas. 370, 72 Wis. 375, 39 N. W. Rep. 856.

292. Attention of witness specially called.—As against positive affirmative evidence of credible witnesses of the ringing of a bell or the sounding of a whistle, there must be something more than the testimony of one or more that they did not hear it. It must appear that their attention was directed to the fact at the time. *Culhane v. New York C. & H. R. R. Co.*, 60 N. Y. 133, 10 Am. Ry. Rep. 142.—APPLIED IN *Greany v. Long Island R. Co.*, 24 Am. & Eng. R. Cas. 473, 101 N. Y. 419, 5 N. E. Rep. 425; *Chapman v. New York C. & H. R. R. Co.*, 14 Hun (N. Y.) 484; *Hoffmann v. Fitchburg R. Co.*, 67 Hun 581, 51 N. Y. S. R. 245, 22 N. Y. Supp. 463. DISTINGUISHED IN *Puff v. Lehigh Valley R. Co.*, 71 Hun 577. FOLLOWED IN *McKeever v. New York C. & H. R. R. Co.*, 88 N. Y. 667.

Where plaintiff's witnesses, whose attention was called to the subject at the time, swear that they did not hear the bell, while defendant's witnesses swear positively that

h the plaintiff.
R. Co., 38 Fed.

jury that the
witnesses that a
car was given
will outweigh
ur that they did
witnesses are all
to be error be-
eration of what
d of hearing the
e two witnesses
t the brakeman
as the negative
witnesses. *Berg*
Co., 2 Am. &
7 N. W. Rep.

that he told the
g, that the train
replied, "I can
witnesses, who
ve seen M. had
o the deceased,
e him, and that
e time from the
is death. *Held*,
as a matter of
d to believe the
the other tes-
icago, M. & S.
K. Cas. 370, 72
5.

ness specially
affirmative
ses of the ring-
ing of a whistle,
more than the
that they did not
t their attention
the time. *Cul-*
R. R. Co., 60 N.
2.—APPLIED IN
Co., 24 Am. &
419, 5 N. E. Rep.
k C. & H. R. R.
; *Hoffmann v.*
581, 51 N. Y. S.
463. *DISTIN-*
n Valley R. Co.,
N. McKeever v.
o., 88 N. Y. 667.
es, whose atten-
ect at the time,
r the bell, while
positively that

it was rung, the question is one of fact for a jury. *Salter v. Utica & B. R. R. Co.*, 59 N. Y. 631. *Moore v. New York C. & H. R. R. Co.*, 75 Hun 381, 27 N. Y. Supp. 449, 57 N. Y. S. R. 695.

When witnesses testify that they did not hear the whistle or bell of a locomotive sounded until it appeared at a certain point; that they were giving particular attention, were listening for such signals, and would have heard them if given—their testimony is more than merely negative, and therefore cannot be disregarded. *Quigley v. Delaware & H. Canal Co.*, 142 Pa. St. 388, 21 Atl. Rep. 827. *Longenecker v. Pennsylvania R. Co.*, 105 Pa. St. 328.

293. Attention of witness not specially called.—The testimony of a person that he did not hear a familiar sound, like the ringing of a bell, when he admits that he was not listening or thinking of the matter, is entitled to very little, if any, weight. *Chicago, R. I. & P. R. Co. v. Givens*, 18 Ill. App. 404. *Hoffmann v. Fitchburg R. Co.*, 67 Hun 581, 51 N. Y. S. R. 245, 22 N. Y. Supp. 463.

The fact that the witnesses who testified affirmatively that the bell was rung were the engineer and other employés of the company was not sufficient in itself to discredit their testimony, although a fact to be considered by the jury, so as to change the above rule. *Hoffmann v. Fitchburg R. Co.*, 67 Hun 581, 51 N. Y. S. R. 245, 22 N. Y. Supp. 463.—*APPLYING Culhane v. New York C. & H. R. R. Co.*, 60 N. Y. 133; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *McKeever v. New York C. & H. R. R. Co.*, 88 N. Y. 667.—*Fowler v. New York C. & H. R. R. Co.*, 74 Hun 141, 26 N. Y. Supp. 218, 56 N. Y. S. R. 307.

A passenger sued for injuries received in the press of the crowd in passing a gate to a train, and the plaintiff and another witness testified that but one of the five gates was open. The company produced several witnesses who testified that all the gates were open, but it seemed that they had other duties which engaged their attention and somewhat interfered with their observation. The company failed to call certain gatekeepers and policemen stationed at the gates claimed not to have been open. *Held*, that a verdict finding that but one gate was open should not be disturbed. *Taylor v. Pennsylvania Co.*, 50 Fed. Rep. 755.

The issue was whether a certain car carried a light, and witnesses swore that they

were looking toward the place where the driver swore the light was, not for the purpose of ascertaining if there was a light, not having the subject in their minds, but simply looking to see all that could be seen. *Held*, that their evidence was more than mere negative testimony that they did not see a light. The question was whether their evidence was true, and whether it convinced the jury that they would have seen the light if there had been one there. *Whittaker v. New York & H. R. Co.*, 19 J. & S. (N. Y.) 287.

294. Witness in a position to hear or observe.—As a general rule, the testimony of one who was in such a position as to know, and who can swear positively that a locomotive whistle was sounded at and before reaching a crossing of a public road, is of much greater weight than a statement of a witness who was not in such a position as to be able to state positively that no whistle was sounded. *Missouri Pac. R. Co. v. Pierce*, 39 Kan. 391, 18 Pac. Rep. 305.—*QUOTING Kansas City, Ft. S. & G. R. Co. v. Lane*, 33 Kan. 702.

Where witnesses swear that they heard the ringing of the engine bell, and others swear that they were in a position to hear it if it had rung, and that they did not hear it, there is sufficient conflict in the evidence to be left to the jury. *Bunting v. Central Pac. R. Co.*, 6 Am. & Eng. R. Cas. 282, 16 Nev. 277.—*FOLLOWING Cohen v. Eureka & P. R. Co.*, 14 Nev. 386. *QUOTING Renwick v. New York C. R. Co.*, 36 N. Y. 132; *Dublin, W. & W. R. Co. v. Slattery*, L. R. 3 App. Cas. 1155.—*Moran v. Eastern R. Co.*, 48 Minn. 46, 50 N. W. Rep. 930. *Weber v. New York C. & H. R. R. Co.*, 67 N. Y. 587, mem.—*FOLLOWING Salter v. Utica & B. R. R. Co.*, 59 N. Y. 631; *Hackford v. New York C. & H. R. R. Co.*, 53 N. Y. 654.—*Puff v. Lehigh Valley R. Co.*, 71 Hun (N. Y.) 577.—*DISTINGUISHING Culhane v. New York C. & H. R. R. Co.*, 60 N. Y. 133; *McKeever v. New York C. & H. R. R. Co.*, 88 N. Y. 667; *Hoffman v. Fitchburg R. Co.*, 51 N. Y. S. R. 245.—*Menard v. Boston & M. R. Co.*, 150 Mass. 386, 23 N. E. Rep. 214.

The fact that other persons, in a different position from plaintiff, could hear the bell and see the train is not conclusive. The duty was to warn persons approaching on the highway, and the fact that a person there listened and looked and was unable to see or hear the train is some evidence

at least that the necessary warning was not given. *Crawford v. Delaware, L. & W. R. Co.*, 13 N. Y. S. R. 298.

A witness may be in any conceivable attitude of attention or inattention, which will give his evidence value or leave it with little or no value; but where his position is such that the sound would have been liable to attract his attention if a bell on a train had been rung, his failure to hear it is some evidence that it did not ring. *Menard v. Boston & M. R. Co.*, 150 Mass. 386, 23 N. E. Rep. 214.

295. Negative in form, positive in fact.—Where one or more witnesses swear positively to a fact, such as that a bell was rung, or warnings given by the voice crying out, and one or more witnesses having equal means of information and equal opportunity of knowing the fact, whether it occurred or not, and who bestowed equal attention upon the subject, swear that it did not occur, both sets of witnesses are to be treated as giving positive testimony. *Georgia Pac. R. Co. v. Freeman*, 83 Ga. 583, 10 S. E. Rep. 277.

Testimony of witnesses, who at the time of an accident at a railroad crossing were within thirty yards of it, that they were in a situation to have heard a bell ring or whistle sound, if there had been any rung or sounded, and that they did not hear any, cannot be regarded as negative testimony. *Rockford, R. I. & St. L. R. Co. v. Hillmer*, 72 Ill. 235.—**DISTINGUISHING** *Chicago & R. I. R. Co. v. Still*, 19 Ill. 499. **QUOTING** *Chicago, B. & Q. R. Co. v. Cauffman*, 38 Ill. 426.—*Chicago, B. & Q. R. Co. v. Lee*, 87 Ill. 454, 18 Am. Ry. Rep. 378. *Ohio & M. R. Co. v. Mueller*, 46 Ill. App. 103.—**APPLYING** *Frizell v. Cole*, 42 Ill. 362.

Where one witness swears that an agent of a railway company purchased wood for the company, and the agent swears that he did not purchase it, there is no negative testimony by either witness. The testimony of the witness that he did not make the purchase is as much positive evidence as if he had testified that he did. *Great Western R. Co. v. Hanks*, 25 Ill. 241.

296. Evidence of custom or habit.—Where the employé whose business it was to place a stool used for the purpose of assisting lady passengers to enter the train was not produced or accounted for, there was no error in rejecting evidence that it was the custom and habit of the company

to have the stool in its proper place up to the time of the starting of the train, there being positive evidence in behalf of the plaintiff that it was out of place when he was injured, and only negative evidence to the contrary in behalf of the defendant. *Atlanta & W. P. R. Co. v. Holcombe*, 88 Ga. 9, 13 S. E. Rep. 751.

The testimony of a fireman on a locomotive, whose duty it is to ring the bell when the engine is in motion, "that although he had no independent recollection of ringing it on a certain occasion, yet it was his uniform and invariable habit to ring it, so that it had become second nature with him to do so, and that from these facts he was able to state positively that he did ring it on the occasion referred to," is competent and sufficient evidence to justify the jury in finding that the bell was rung, notwithstanding the testimony of other witnesses that they were in a position to have heard it if it had been rung, and that it was not rung. *Evison v. Chicago, St. P., M. & O. R. Co.*, 45 Minn. 370, 48 N. W. Rep. 6.

297. Failure to recollect.—Evidence of the recollection of a merchant as to what was said by him to the company's agent about the terms of shipment of goods, is entitled to greater weight than the recollection of the agent, both because he had a more direct personal interest in the transaction than had the agent, and because he did not engage in so many shipments of a nearly uniform character as the agent. *Johnson v. New York C. R. Co.*, 39 How. Pr. (N. Y.) 127.

298. Weight for jury.—Positive testimony as to the giving of statutory railway signals near a highway crossing cannot, as matter of law, control negative testimony on the same subject. If such proofs conflict their weight is for the jury. *Rhoades v. Chicago & G. T. R. Co.*, 21 Am. & Eng. R. Cas. 659, 58 Mich. 263, 25 N. W. Rep. 182. *Perkins v. Buffalo, R. & P. R. Co.*, 10 N. Y. Supp. 356. *Greany v. Long Island R. Co.*, 24 Am. & Eng. R. Cas. 473, 101 N. Y. 419, 5 N. E. Rep. 425; affirming 31 Hun 173.—**APPLYING** *Culhane v. New York C. & H. R. R. Co.*, 60 N. Y. 133.—*Roberts v. Chicago & N. W. R. Co.*, 35 Ill. 679.

Where the issue is whether a bell was rung on an engine approaching a highway crossing, as required by statute, and four witnesses testify that it was not rung and the engineer and fireman testify that it was

place up to the
in, there being
of the plaintiff
en he was in-
vidence to the
defendant. *At-*
Combe, 88 Ga.

on a locomo-
the bell when
at although he
tion of ringing
it was his uni-
ring it, so that
e with him to
cts he was able
ring it on the
competent and
y the jury in
rung, notwith-
ther witnesses
to have heard
that it was not
P., M. & O.
V. Rep. 6.

ect.—Evidence
ant as to what
company's agent
it of goods, is
han the recol-
cause he had a
in the transac-
because he did
ents of a nearly
nt. *Johnson v.*
v. Pr. (N. Y.)

—Positive tes-
timony railway
ing cannot, as
tive testimony
ch proofs con-
y. *Rhoades v.*
Am. & Eng. R.
W. Rep. 182.
R. Co., 10 N. Y.
Island R. Co., 24
N. Y. 419, 5 N.
Hun 173.—*Ap-*
rk C. & H. R.
erts v. Chicago

her a bell was
ing a highway
tute, and four
not rung and
ify that it was

rung, the jury are justified in giving more weight to the evidence of the four than to the evidence of the two trainmen, not merely because of their greater number, but because the four seemed to be free from bias, while the two trainmen are under a great inducement to relieve themselves, by their own evidence, of a charge of negligence. *Chicago, B. & Q. R. Co. v. Triplett*, 38 Ill. 482. *McGrath v. New York C. & H. R. R. Co.*, 1 T. & C. (N. Y.) 243.

An instruction that affirmative testimony as to the ringing of the bell or sounding of the whistle is entitled to more weight than negative testimony ignores the fact that in weighing such testimony the comparative credibility and means of knowledge of the witnesses should be considered, and is properly refused. *Pence v. Chicago, R. I. & P. R. Co.*, 42 Am. & Eng. R. Cas. 126, 79 Iowa 389, 44 N. W. Rep. 686. *Olsen v. Oregon S. L. & U. N. R. Co.*, 9 Utah 129, 33 Pac. Rep. 623.

Plaintiff sued to recover for personal injuries, which he claimed to have sustained by reason of slipping upon the ice upon defendant's stairs. The defendant denied that there was any ice on the stairs, and insisted that the slipping was an ordinary accident. The defendant produced a greater number of witnesses than the plaintiff, who testified positively that there was no ice, while plaintiff's witnesses testified positively that there was. *Held*, that the jury had a right to believe the plaintiff's witnesses against the larger number produced by the defendant, and the trial court having denied a motion for a new trial, who had the witnesses before him and could see their manner of testifying, the appellate court should not interfere. *Belcher v. Manhattan R. Co.*, 1 N. Y. Supp. 349.

299. Insufficient to go to jury.—The negative testimony of plaintiff that she did not hear any whistle or bell, as against the positive affirmative testimony of six witnesses who did hear, is merely a scintilla of evidence, which is not enough to make out a charge of negligence against the railroad company. *Hauser v. Central R. Co.*, 147 Pa. St. 440, 23 Atl. Rep. 766. *Sutherland v. New York C. & H. R. R. Co.*, 9 J. & S. (N. Y.) 17.—**CRITICISED** in *Leonard v. New York C. & H. R. R. Co.*, 10 J. & S. 225.

Where the only negligence charged is a failure to blow a whistle on a train, and

there is affirmative evidence of credible witnesses that the whistle was blown, and the plaintiff only produces witnesses who were paying no attention to the signals, who merely testify that they did not hear them, it is error for the court to refuse to instruct, at the request of the company, that the negative evidence should not be considered. *Tolman v. Syracuse, B. & N. Y. R. Co.*, 27 Hun (N. Y.) 325.—**QUOTING** *Culhane v. New York C. & H. R. R. Co.*, 60 N. Y. 133.

EXAMINATION.

By consignee, before receipting for goods, see CARRIAGE OF MERCHANDISE, 428; EXPRESS COMPANIES, 40.

For color blindness, see EMPLOYES, 3.

Of cars by employes, rule requiring, see EMPLOYES, INJURIES TO, 454.

—experts, see WITNESSES, 152-158.

—garnishees, see ATTACHMENT, ETC., 60.

—jurors, on the voir dire, see TRIAL, 35.

—machinery, duty of carrier as to, see CARRIAGE OF PASSENGERS, 194.

—officers of claimant company, see CLAIMS AGAINST UNITED STATES, 16.

—parties, before trial, see DISCOVERY, ETC., 8-10.

—proposed route, by commissioners, see LOCATION OF ROUTE, 8-12.

—roadbed, duty to make, see CARRIAGE OF PASSENGERS, 166, 167.

—witness, as to value, see EMINENT DOMAIN, 635.

—witnesses, generally, see WITNESSES, 44-93.

Physical, of person suing for injuries, see PHYSICAL EXAMINATION.

EXCAVATIONS.

Beneath right of way, enjoining, see MINES AND MINING, 8.

Defective, notice of defect to employe, see EMPLOYES, INJURIES TO, 231.

Duty of company as to safety of, see EMPLOYES, INJURIES TO, 50.

—to keep premises free from, see LICENSEES, INJURIES TO, 12.

In banks of streams, see FLOODING LANDS, 9.

—city streets, liability to abutters, see STREETS AND HIGHWAYS, 172.

—or about track, liability for, see STREET RAILWAYS, 179.

Liability for the collection of surface water in, see WATERS AND WATERCOURSES, 20.

Near track, injuries to animals caused by, see ANIMALS, INJURIES TO, 75.

Under track, injuries to persons making, see STREET RAILWAYS, 478.

— — — when negligence, see STREET RAILWAYS, 354.

1. Right to make.— Under the provisions of § 50, ch. 54, W. Va. Code 1887, a railroad company, with the assent of the municipal authorities, may construct and operate its railroad along a public street of a city, in a cut or excavation below the common level of the remaining portion of the street, in such manner as will appropriate a portion of the street to the exclusive use of the railroad company, provided such excavation does not occupy the entire street, or such considerable portion thereof as would substantially prevent the use of the street by the general public, and provided, further, that it does not unnecessarily impair the usefulness of the street as a highway for the general public. *Arbenz v. Wheeling & H. R. Co.*, 40 Am. & Eng. R. Cas. 284, 33 W. Va. 1, 5 L. R. A. 371, 10 S. E. Rep. 14.—DISTINGUISHING *Stevens v. Erie R. Co.*, 21 N. J. Eq. 259.

When a natural person or a corporation is authorized to disturb the surface or bed of a highway, whether by way of privilege or duty, it must be done with ordinary diligence to prevent accidents from its impaired condition, to persons traveling on the street. It is a duty to guard against persons or vehicles falling into the excavation, by fencing or by placing lights. *Flynn v. New York El. R. Co.*, 17 J. & S. (N. Y.) 60.

A railroad company authorized by act of congress to lay a track in the District of Columbia, and to cross or intersect any of the roads or streets of the district, cannot enjoin the commissioners of the district, or contractors working under them, from proceeding to construct a sewer under the railroad tracks, where it is only charged that the contractors are doing their work so carelessly as to interfere with the rights of the company, and that the excavations would endanger the tracks and prevent their use, unless the company used great care and expense in protecting the tracks at the excavations. It is the duty of the contractors to do their work in a manner so as not to unnecessarily interfere with the rights of the company, but they cannot be enjoined where they are acting by lawful authority. *Baltimore & P. R. Co. v. Denison*, 3 MacArth. (D. C.) 245.

2. Duty to guard by fence, etc.—

It is the duty of a company, when, in order to construct its roadbed, it makes an excavation across a public highway, to so protect and guard the same as to prevent injury to persons passing and exercising ordinary care. *Shonhoff v. Jackson Branch R. Co.*, 97 Mo. 151, 10 S. W. Rep. 618.

Excavations adjoining a public road need not be fenced by the owner of the land unless they are so near to the road as to be dangerous to passers-by. *Binks v. South Yorkshire R. Co.*, 3 B. & S. 244, 32 L. J. Q. B. 26, 11 W. R. 66, 7 L. T. 350.

Giving protection to travelers on the street is a thing separate from doing the work that makes the highway unsafe. The obligation to do the work skilfully does not involve the obligation to warn passers-by, as they would be injured by falling into an excavation skilfully made as much as if it were negligently made. And the fact that the right to excavate is exercised by means of a contract does not lessen the obligation as to passers-by. The obligation is imperative so long as the excavation exists; and therefore notice that it is not sufficiently protected, is not necessary to make the parties excavating legally liable for injuries. *Flynn v. New York El. R. Co.*, 17 J. & S. (N. Y.) 60.

3. Personal injuries.—At common law a landowner is not liable to a person who has strayed off the highway and fallen into an excavation on his land, such excavation being near to, but not substantially adjoining, the highway. *Hardcastle v. South Yorkshire R. Co.*, 4 H. & N. 67, 5 Jur. N. S. 150, 28 L. J. Ex. 139.

Railroads owe a duty to their employes in protecting them from unnecessary excavations and pitfalls near the track. *Ragon v. Toledo, A. A. & N. M. R. Co.*, 91 Mich. 379, 51 N. W. Rep. 1004.

And the employé does not necessarily assume the risk of danger from such excavation. *Ragon v. Toledo, A. A. & N. M. R. Co.*, 91 Mich. 379, 51 N. W. Rep. 1004.

It being the duty of the section foreman to keep the railroad track in repair, etc., to that extent he represents the company, who are liable for his acts of negligence. *So held*, in an action by a brakeman for personal injuries caused by an excavation near the track. *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495, 8 Am. Ry. Rep. 450.

4. Taking away lateral support.

—If a person, by carelessness in making an excavation in his own ground, causes the fall of or injury to a house erected on the land adjoining, he is liable in damages for the injury. *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117, 14 Am. Ry. Rep. 330.—QUOTED IN *Chicago, St. L. & P. R. Co. v. Barnes*, 2 Ind. App. 213; *Selleck v. Lake Shore & M. S. R. Co.*, 93 Mich. 375.

Damage done to the house of a party by reason of the excavation of a street by a railroad company, made under lawful authority, is not *damnum absque injuria*, and he may recover therefor without showing that the power delegated to the company has been illegally or negligently exercised. *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117, 14 Am. Ry. Rep. 330.—APPROVED IN *District of Columbia v. Baltimore & P. R. Co.*, 4 Am. & Eng. R. Cas. 179, 1 Mackey (D. C.) 314.

Where the defendants, in constructing their railroad, make an excavation upon their own land, but so near the line of the plaintiffs' land adjoining that the soil of the plaintiffs, without any artificial weight being placed thereon, slides into the excavation, they are liable for the injury that the plaintiffs have thereby suffered. *Richardson v. Vermont C. R. Co.*, 25 Vt. 465.—REVIEWED AND APPROVED IN *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504.

In such a case evidence of the cost of retaining walls is proper to show whether or not the damage could have been repaired and plaintiff's lot preserved at a reasonable cost. *Kopp v. Northern Pac. R. Co.*, 41 Minn. 310, 43 N. W. Rep. 73.

The right to remove the lateral support of adjacent property, carrying buildings, is subject to the qualification that the excavator shall use ordinary care to cause no unnecessary damages to such buildings. *Larson v. Metropolitan St. R. Co.*, 110 Mo. 234, 19 S. W. Rep. 416.

Where the owner of land on which such an excavation is proposed, notifies the adjacent owner of a building that the excavations will be made "in sections," but afterwards adopts a more hazardous mode of removing the soil, from which damage results, without reasonable notice of the change of plan—*held*, evidence to support a charge of negligent excavation. *Larson v.*

Metropolitan St. R. Co., 110 Mo. 234, 19 S. W. Rep. 416.

EXCEPTIONS.

Bill of, on appeal, see APPEAL AND ERROR, 114, 136.

In bills of lading, see BILLS OF LADING, 62-72, 102, 150; CARRIAGE OF MERCHANDISE, 430-484.

—deeds, see DEEDS, 38.

Of homestead rights, in grant, see LAND GRANTS, 95.

—land included in Mexican grants, see LAND GRANTS, 86.

—mineral land from grant or patent, see LAND GRANTS, 48, 66, 80; PUBLIC LANDS, 34.

Right to take, see TRIAL, 57.

Sufficiency of, on appeal, see ELEVATED RAILWAYS, 187.

Taking and filing, see EMINENT DOMAIN, 934.

To evidence, see TRIAL, 52-61.

—power of city to grant right of way, see STREETS AND HIGHWAYS, 75.

—refusal to charge as requested, see TRIAL, 178.

—rule as to assumption of risks, see EMPLOYEES, INJURIES TO, 185, 208, 295.

—exonerating carrier where passenger retains custody of baggage, see BAGGAGE, 80.

—company from liability for acts of receiver, see RECEIVERS, 183.

—forbidding collateral attack on judgments, etc., see EMINENT DOMAIN, 866; JUDGMENT, 34-36.

—making principal liable for negligent or wilful acts of agent, see AGENCY, 82, 85.

—of res adjudicata, see JUDGMENT, ETC., 15.

—requiring extraordinary care, see CARRIAGE OF PASSENGERS, 149.

—safe machinery, see EMPLOYEES, INJURIES TO, 95, 131.

—that degrees of negligence are not to be compared, see CONTRIBUTORY NEGLIGENCE, 10.

—working after knowledge of danger is assumption of risk, see EMPLOYEES, INJURIES TO, 225.

—superior-servant or vice-principal rule, see FELLOW-SERVANTS, 102-105.

—the fellow-servant rule, see FELLOW-SERVANTS, 47-72, 111-113, 131.

Under statute of limitations, see LIMITATIONS OF ACTIONS, 66-73.

Waiver of notice by filing, see EMINENT DOMAIN, 300.

EXCESSIVE.

Charges, see **CHARGES**, 26-58; **TICKETS AND FARES**, 130-135, 141.

Damages, see **ANIMALS**, **INJURIES TO**, 593, 594; **APPEAL**, ETC., 126; **ASSAULT**, 20, 21; **BAGGAGE**, 126; **CARRIAGE OF PASSENGERS**, 640-651; **CHILDREN**, **INJURIES TO**, 192, 193; **COLORED PERSONS**, 13; **CROSSINGS**, **INJURIES**, ETC., AT, 365; **DEATH BY WRONGFUL ACT**, 427-436; **DERAILMENT**, 7; **EJECTION OF PASSENGERS**, 124-136; **EMINENT DOMAIN**, 806-809, 837, 838, 927, 1268; **EMPLOYEES**, **INJURIES TO**, 760-781; **FALSE IMPRISONMENT**, 21; **FIRES**, 336; **FLOODING LANDS**, 91; **NEW TRIAL**, 28-86; **STATIONS AND DEPOTS**, 145; **TRIAL**, 198.

Payments, see **PAYMENT**, 6.

Speed, see **CABLE RAILWAYS**, 10; **CARRIAGE OF PASSENGERS**, 198; **CROSSINGS**, **INJURIES**, ETC., AT, 320, 356; **DEATH BY WRONGFUL ACT**, 197, 261; **ELECTRIC RAILWAYS**, 21; **NEGLECT**, 27-31, 41, 42, 70; **STREET RAILWAYS**, 480, 481; **TRESPASSERS**, **INJURIES TO**, 34, 35.

Use of steam, see **FIRES**, 54.

Violence in expelling passenger, see **EJECTION OF PASSENGERS**, 88, 115; **STREET RAILWAYS**, 524.

Width of grip-slot, see **CABLE RAILWAYS**, 18.

EXCHANGE.

Of bonds, see **BONDS**, 15.

— **municipal aid bonds for railroad stock**, see **MUNICIPAL AND LOCAL AID**, 275.

EXCITEMENT.

Public, when ground for change of venue, see **TRIAL**, 15.

EXCLUSION.

Of evidence, discretion of court as to, see **ANIMALS**, **INJURIES TO**, 528.

— **when ground for reversal**, see **APPEAL AND ERROR**, 38, 68; **EMINENT DOMAIN**, 808.

— **negroes from cars set apart for white persons**, see **COLORED PERSONS**, 6, 7.

— **objectionable people from station**, see **STATIONS AND DEPOTS**, 55-57.

— **witnesses from court room**, see **WITNESSES**, 48.

EXCLUSIVE.

Franchise, violation of, see **BRIDGES**, ETC., 91, 92.

Grant, charter not, unless expressly made so, see **CHARTERS**, 48.

Possession by company of land taken, see **EMINENT DOMAIN**, 134.

Power of congress to regulate commerce, see **INTERSTATE COMMERCE**, 3, 220.

— **legislature to condemn property for public use**, see **EMINENT DOMAIN**, 59.

Privileges of hackmen at stations, see **DISCRIMINATION**, 30; **HACKS**, ETC., 1-3.

— **railways in streets**, see **STREETS AND HIGHWAYS**, 98-101.

— **street railways**, grants of, by cities, see **STREET RAILWAYS**, 44-57.

— **telegraph companies**, see **TELEGRAPH LINES**, 4-6.

— **rapid transit acts do not grant**, see **ELEVATED RAILWAYS**, 9.

Right of company to its tracks, see **STREET RAILWAYS**, 240.

— **way**, see **CROSSINGS**, **INJURIES**, ETC., AT, 11; **RIGHT OF WAY**, 22.

Use of street, company when entitled to, see **STREET RAILWAYS**, 448-450.

— **track and premises**, right to, see **TRESPASSERS**, **INJURIES TO**, 21.

EXCURSION TICKETS.

Generally, see **TICKETS AND FARES**, 69-84. **Requirements of Interstate Commerce Act as to**, see **INTERSTATE COMMERCE**, 178.

EXCUSES.

For breach of contract to locate station, see **STATIONS AND DEPOTS**, 42.

— **delay by carrier**, see **CARRIAGE OF LIVE STOCK**, 13, 14, 127, 128; **STRIKES**, 1-3.

— **loss or injury to goods**, evidence of, see **CARRIAGE OF MERCHANDISE**, 752.

— **maintenance of nuisance after injunction**, see **NUISANCE**, 25.

— **non-construction of culverts**, see **CULVERTS**, 8.

— **non-delivery**, burden on carrier to show, see **CARRIAGE OF MERCHANDISE**, 292.

— **of supplies**, see **CLAIMS AGAINST UNITED STATES**, 4.

— **non-performance**, see **CONTRACTS**, 74.

— **overshooting station**, see **CARRIAGE OF PASSENGERS**, 264.

— **violation of injunction**, see **INJUNCTION**, 60, 61.

Unlawful purpose of shipper no excuse for carrier's negligence, see **CARRIAGE OF MERCHANDISE**, 182.

See also **DEFENSES**.

EXECUTED CONTRACTS.

Doctrine of ultra vires as applied to, see **ULTRA VIRES**, 23-26.

EXECUTION.

- Against corporation a prerequisite to creditors' action against stockholders, see STOCKHOLDERS, 26, 40.
- defaulting officials, see WESTERN & ATLANTIC R. Co., 4.
- Conflict as to possession of property levied on, see RECEIVERS, 42.
- Contract to locate station not binding on purchaser at, see STATIONS AND DEPOTS, 40.
- Enforcement of awards by, see ARBITRATION AND AWARD, 17.
- judgment by, see also JUDGMENT, ETC., 46.
- for land damages by, see EMINENT DOMAIN, 854.
- Levying on wife's property for husband's debt, see HUSBAND AND WIFE, 9.
- Of bill of lading, by carrier's agent, see BILLS OF LADING, 3-8.
- construction contracts, see CONSTRUCTION OF RAILWAYS, 15.
- contracts, see CONTRACTS, 11.
- contract as "agent for" principal, see AGENCY, 25.
- of shipment, see CARRIAGE OF LIVE STOCK, 94.
- deeds, see DEEDS, 3.
- of trust, see DEEDS OF TRUST, 2.
- leases, agreements for, see LEASES, ETC., 9.
- by directors, see LEASES, ETC., 24.
- mortgages, see MORTGAGES, 61.
- mortgage, setting out in bill to foreclose, see MORTGAGES, 194.
- municipal aid bonds, see MUNICIPAL AND LOCAL AID, 305-308.
- negotiable paper, generally, see BILLS, NOTES, ETC., 4.
- by agents, see BILLS, NOTES, ETC., 12.
- petition for local aid, see MUNICIPAL AND LOCAL AID, 81-90.
- written instrument, parol evidence to show condition, see EVIDENCE, 188.
- Payment of, by receivers, see RECEIVERS, 87.
- Priority between lien of, and mortgage, see MORTGAGES, 123.
- Staying, until assessment and payment of damages, see EMINENT DOMAIN, 1031.
- I. PROPERTY SUBJECT TO EXECUTION. 541
- II. LEVY AND SALE..... 545
- III. SUPPLEMENTARY PROCEEDINGS;
ANALOGOUS WRITS..... 550
- I. PROPERTY SUBJECT TO EXECUTION.
1. In general.*—A railroad is not in all respects a highway *publici juris*, but it is

* Execution against corporate property, see note, 20 AM. & ENG. R. CAS. 577.

the subject of private property, and in that character is liable to be sold, unless the sale be forbidden by the legislature; not the franchise, but the land itself constituting the road. *State v. Rives*, 5 *Ired. (N. Car.)* 297.—COMMENTING ON RALEIGH & G. R. CO. *v. Davis*, 2 Dev. & B. (N. Car.) 451.

A chartered railroad, with all rights and privileges that properly appertain to it as an instrument of transportation (excluding, of course, the franchise of the corporation to be a body politic), is property subject to be applied to the payment of its just debts, and the whole may be sold for the purpose, in Georgia, under a judgment at law. *Atlanta v. Grant*, 57 *Ga.* 340.

But the judgment, and the execution founded thereon, must be specially moulded, in substantial compliance with sections 3082, 3562, 3639 of the code; if not in all cases, certainly in a case where the railroad, in pursuance of the charter, has been located and partially constructed in three counties. *Atlanta v. Grant*, 57 *Ga.* 340.—QUOTED IN *Georgia v. Atlantic & G. R. Co.*, 3 Woods (U. S.) 434.

A street railway company is a "corporation authorized to receive toll" within the meaning of Mich. Comp. L. § 3436, which provides for the sale on execution of the property and franchises of such a corporation. *McKee v. Grand Rapids & R. L. St. R. Co.*, 41 *Mich.* 274.

Under the Pa. Act of 1836, relating to execution and sequestration against corporations, executions may issue against solvent corporations the same as individuals; and the same of all provisions providing for delivering possession to the purchaser of property at sheriff's sale. *Oakland R. Co. v. Keenan*, 56 *Pa. St.* 198.

A railroad with its appurtenances necessary to the exercise of its franchises cannot be levied on and sold under a judgment against the corporation. *Youngman v. Elmira & W. R. Co.*, 65 *Pa. St.* 278.—QUOTED IN *Gooch v. McGee*, 83 *N. Car.* 59, 35 *Am. Rep.* 558.

Statutes which exempt railroad property from execution have no extraterritorial force. *Carson v. Memphis & C. R. Co.*, 88 *Tenn.* 646, 13 *S. W. Rep.* 588.

What property of a railroad can be taken in execution, see note, 24 *AM. & ENG. R. CAS.* 5.

Levying on property of one of three roads operated in partnership, see 26 *AM. & ENG. R. CAS.* 614, *abstr.*

Railways subsidized by the province, under the "Quebec Railway Act 1869," are liable to seizure and sale by ordinary process of law. *Wason Mfg. Co. v. Lewis & K. R. Co.*, 7 *Quebec L. R.* 330. — FOLLOWING *Drummond County v. South Eastern Counties R. Co.*, 22 *L. C. J.* 25.

Section 11 of Quebec Act, 43 & 44 Vict. c. 49, which provides that nothing in the act shall affect suits then pending, applies also to proceedings in execution; and therefore the property of a railroad company governed by that act was not precluded thereby from being attached in execution of the respondent's judgment against the company. *Redfield v. Wickham*, 13 *App. Cas.* 467. — REVIEWING *Gardner v. London, C. & D. R. Co.*, *L. R.* 2 Ch. 201; *In re Bishop's Waltham R. Co.*, *L. R.* 2 Ch. 382; *Drummond County v. South Eastern Counties R. Co.*, 24 *L. C. J.* 276.

The railway undertaking in suit, which had become a dominion railway before the respondent's writ of *fi. fa.* issued, and was governed by Dominion Act, 46 Vict. c. 24, could be seized and sold, subject to its mortgages, for the debts of the company to which it belonged. *Redfield v. Wickham*, 13 *App. Cas.* 467. — QUOTED IN *Wallbridge v. Farwell*, 18 *Can. Sup. Ct.* 1.

2. Personal property.—All the personal property of a railroad company, cars, rails, etc., necessary to carry on its operation, are exempt from levy on *fi. fa.* for an ordinary debt. *Covey v. Pittsburg, Ft. W. & C. R. Co.*, 3 *Phila. (Pa.)* 173. — QUOTING *Pennock v. Coe*, 23 *How. (U. S.)* 117.

The personal property of a railway company, after it is reduced to possession by a trustee or mortgagee of the company, under a mortgage or trust deed, is no longer subject to be taken on execution subsequently issued against the company. *Palmer v. Forbes*, 23 *Ill.* 301.

3. Real estate—Right of way.—The tangible property and estate of a corporation are subject to sale under execution in the same manner that those of an individual are; where, therefore, by the charter of an incorporated railroad and banking company, the corporation was authorized to purchase the lands necessary for the site of the road and the requisite depots, stations, and buildings, and to possess and hold the same in fee simple, the real estate of the corporation, so purchased for the site of the road and for the other purposes specified, was subject

to sale under execution, and might be assigned by the corporation. *Arthur v. Commercial & R. Bank*, 17 *Miss.* 394. — DISAPPROVED IN *Gooch v. McGee*, 83 *N. Car.* 59, 35 *Am. Rep.* 558.

The real estate acquired by a public corporation in the exercise of a delegated right of eminent domain, and necessary for uses in which the public is concerned, cannot be sold under execution apart from the franchise and its incidents, so as to give the purchaser a title to the property divested of all the duties and obligations assumed by the company. *Gooch v. McGee*, 83 *N. Car.* 59, 35 *Am. Rep.* 558. — DISAPPROVING *State v. Rives*, 5 *Ired. (N. Car.)* 297; *Arthur v. Commercial & R. Bank*, 17 *Miss.* 394. QUOTING *Coe v. Columbus, P. & I. R. Co.*, 10 *Ohio St.* 372; *Plymouth R. Co. v. Colwell*, 39 *Pa. St.* 337; *Youngman v. Elmira & W. R. Co.*, 65 *Pa. St.* 278; *Foster v. Fowler*, 60 *Pa. St.* 27. REVIEWING *Ammant v. New Alexandria & P. Turnpike Road*, 13 *S. & R. (Pa.)* 210; *Gue v. Tide Water Canal Co.*, 24 *How. (U. S.)* 257.

Lands held by a railroad, which are essential to its existence, cannot be sold under execution; but lands held by a railroad company may be sold subject to the company's easement, or right of way, over the same. *Oakland R. Co. v. Keenan*, 56 *Pa. St.* 198.

Lands purchased by a railroad company, beyond what are actually dedicated to corporate purposes, are bound by the lien of judgments against the corporation, and are liable to be levied in execution and sold by the sheriff, as are the lands of any other debtor. But the purchaser at such sale takes only that which is not necessary for the full enjoyment and exercise of the corporate franchise, no matter how acquired by the corporation. *Plymouth R. Co. v. Colwell*, 39 *Pa. St.* 337. — QUOTED IN *Gooch v. McGee*, 83 *N. Car.* 59, 35 *Am. Rep.* 558.

A railroad company having abandoned the use of a portion of their road for any purpose of public service and for use as a roadbed, and using it only in the exercise of means and measures to get rid of its character as a railroad—viz., to take up and carry away the rails and to get terms with the town as to obligations touching street bridges, but without any intention of ever using it for the purpose of a public railroad—held, that the fee being in the company, the portion so abandoned was subject to

might be as-
thurs v. Com-
94.—DISAP-
N. Car. 59,

public cor-
regated right
ary for uses
d, cannot be
m the fran-
to give the
divested of
assumed by
83 N. Car.
OVING State
; Arthur v.
Miss. 394.
& I. R. Co.,
Co. v. Col-
v. Elmira
ster v. Fow-
Ammant v.
Road, 13 S.
Water Canal

ch are essen-
sold under
a railroad
to the com-
ay, over the
n, 56 Pa. St.

d company,
eated to cor-
the lien of
ion, and are
and sold by
of any other
t such sale
necessary for
cise of the
ow acquired
R. Co. v.
O IN Gooch
Rep. 558.
abandoned
ad for any
for use as a
he exercise
t rid of its
take up and
terms with
ching street
ion of ever
blic railroad
e company,
subject to

levy of execution, so far as the question of discontinuance and abandonment was concerned. *Benedict v. Heineberg*, 43 Vt. 231.

A railroad right of way cannot be sold on execution to one who does not own the franchise. *East Ala. R. Co. v. Doe*, 20 Am. & Eng. R. Cas. 566, 114 U. S. 340, 5 Sup. Ct. Rep. 869.—QUOTED IN *Ft. Worth & R. G. R. Co. v. Jennings*, 46 Am. & Eng. R. Cas. 574, 76 Tex. 373, 13 S. W. Rep. 270, 8 L. R. A. 180.

4. Canal basin — Tank house. — A canal basin is not a legitimate incident to a railroad having no authorized canal connection, and is not protected from levy and sale on execution against the company. *Plymouth R. Co. v. Colwell*, 39 Pa. St. 337.

Under an execution issued by a justice of the peace, the officer is only authorized to seize and sell goods and chattels of the company, and cannot levy upon fixtures presumed to be annexed to the realty, such as locomotives, cars, and tank houses. *Titus v. Ginheimer*, 27 Ill. 462.

5. Franchise.—Neither the franchise and privileges of a railroad company, nor any lands, easements, or things essential to the existence of the corporation, or necessary to the enjoyment of its franchise, can be sold on execution or order of court to satisfy a judgment at law against it. *Aliter* as to locomotives, cars, and other personal property. *Louisville, N. A. & C. R. Co. v. Boney*, 39 Am. & Eng. R. Cas. 168, 117 Ind. 501, 20 N. E. Rep. 432, 3 L. R. A. 435.

The franchise of a corporation cannot be levied on for a debt, or pass by bankruptcy sale, in the absence of power given either by the charter of the corporation or by the general law. *New Orleans, S. F. & L. R. Co. v. Delamore*, 34 La. Ann. 1225.

The franchise in a railroad erected by an incorporated railroad and banking company cannot be sold or assigned without the consent of the power which granted it; it is a mere easement, not the subject of sale. If the road be sold or assigned, the franchise does not pass with it, nor is the corporation thereby dissolved, though it might be a ground of forfeiture if insisted on by the state. *Arthur v. Commercial & R. Bank*, 17 Miss. 394.

The Pa. Act of April 7, 1870, authorizing executions against corporations, supplies §§ 72, 73 of the Act of June 16, 1836, authorizing sequestration. The franchises and property of a corporation may be seized and

sold out and out under a *fi. fa.* *Philadel-
phia & B. C. R. Co.'s Appeal*, 70 Pa. St. 355.

The rule of law which exempts from sale on a *fi. fa.* the property necessary to the exercise of the franchises of a corporation, does not apply where it is found as a fact by commissioner and court that the corporate property remained intact, and nothing was sold which was immediately and reasonably necessary to the operation of the franchise. *Appeal of Philadelphia & R. R. Co.*, (Pa.) 3 Atl. Rep. 838.

By the laws of Texas in 1861 (Pasch. Dig. art. 4912), a railroad and its franchises and chartered rights were subject to sale as an entire thing, under execution issued on judgments against the railroad company which owned it. *Stevenson v. Texas & P. R. Co.*, 12 Am. & Eng. R. Cas. 393, 105 U. S. 703.

The road and franchises of a railroad company are liable for the payment of judgments recovered against the company. *Winchester & S. R. Co. v. Colfelt*, 27 Gratt. (Va.) 777, 17 Am. Ry. Rep. 121.

6. Money payable in condemnation proceedings.—Money payable by a railroad company for damages to a homestead, by reason of a condemnation of right of way over it, is exempt from execution or attachment. *Kaiser v. Seaton*, 14 Am. & Eng. R. Cas. 405, 62 Iowa 463, 17 N. W. Rep. 664.—DISTINGUISHING *Chicago & S. W. R. Co. v. Swinney*, 38 Iowa 182.

Where a right of way is condemned over land subject to a life estate, the life tenant is entitled to a life estate also in the money paid for the right of way; and a judgment creditor of a remainderman is not entitled to share in the money. *Kansas City, S. & M. R. Co. v. Weaver*, 28 Am. & Eng. R. Cas. 247, 86 Mo. 473.

7. Property in mortgagee's hands.—A railroad company mortgaged to certain municipalities all its present and after-acquired property to secure a loan. A statute was passed declaring the mortgage valid, and excepting it from the operation of the chattel mortgage law. The company purchased a lot of rails which, by agreement with the vendors, were to be laid on the road. The bills of lading were indorsed to two of the municipalities, which paid the charges from the money secured by the mortgage, and had the rails in their possession, ready to place on the track, when they were seized under an execution against the

railroad. *Held*, that the municipalities had acquired the possession and the property in the rails, and they could not be held under the execution. *Lanark v. Cameron*, 9 U. C. C. P. 109.

Railroad trust or mortgage bonds held by the company or its agents, for the use of the company, before delivery, are not subject to execution as property of the company; nor can they be subjected to sale by proceedings in aid of execution. *Means v. Cincinnati & C. R. Co.*, 2 *Disney (Ohio)* 465.

8. Property in hands of new company as successor.—A statute to enable a railroad company to transfer its property to a new company provided that after the new company took possession of the road, or any part thereof, all the property, personal and real, of the old company should vest in the new, wherever situated. After the new company took possession a sheriff levied a *fi. fa.* against the old company, on iron which had been ordered by the old company, and was lying at a shipping point. *Held*, that the statute operated to pass the title to the new company, and the iron could not be held under the writ. *Buffalo & L. H. R. Co. v. Corbett*, 8 U. C. C. P. 536.

9. Property of military and post road.—Where a railroad is chartered by act of congress and is made a military and post road for the benefit of the United States, whatever is necessary and useful in operating the road belongs to and goes with the franchise, and no territory or other jurisdiction, less than the general government, can in any way invade or impair such privileges and immunities. *Northern Pac. R. Co. v. Shimmell*, 24 *Am. & Eng. R. Cas.* 1, 6 *Mont.* 161, 9 *Pac. Rep.* 889.

If an office safe at a depot, in which the company's agent deposits and keeps his daily receipts and valuable papers, is useful and facilitates the skilful operation of such road, it can no more be seized on execution than could a section of the roadbed or a water tank. *Northern Pac. R. Co. v. Shimmell*, 24 *Am. & Eng. R. Cas.* 1, 6 *Mont.* 161, 9 *Pac. Rep.* 889.

10. Rolling stock—Engines—Cars.—An executive officer may levy upon and sell a locomotive upon an execution he holds against the railway company, and such company cannot enjoin the sale. *Midland R. Co. v. Stevenson*, 50 *Am. & Eng. R. Cas.* 663, 130 *Ind.* 97, 29 *N. E. Rep.* 385.

The rolling stock and equipments of a

railroad company may not be seized in execution, after the company has become insolvent or has mortgaged its stock and equipments; but in such cases the equity that would restrain a sale springs out of the insolvency, or the trusts created by the mortgage. *Loundenslager v. Benton*, 4 *Phila. (Pa.)* 382, 3 *Grant's Cas.* 384.

Where, however, there is a question in a case whether the company had power to mortgage, the court, without deciding it on a motion for a special injunction, will enjoin creditors and the sheriff from proceeding to sell property covered by the mortgage, but directing that the lien of the *fi. fa.* shall continue till further order. *Loundenslager v. Benton*, 4 *Phila. (Pa.)* 382.

A freight car is realty while on a railroad or any of its side tracks, turntables, or premises, for use, and, like timber, fruit trees, and buildings, only becomes personalty when detached from the realty by the owner. The plaintiff in execution, or officer, cannot disavow it, and thereby change its character. *Titus v. Mabey*, 25 *Ill.* 257.

11. Shares of stock—Bonds.—Shares of stock held in a railroad may be seized and sold under execution, though no certificates have been issued therefor. *European & N. A. R. Co. v. McLeod*, 16 *New Brun.* 3.

When a company received a number of its own mortgage bonds from a debtor in the payment of his debt, not for the purpose of canceling the same, but with the intention of again putting them in circulation as securities, they were the property of the company, and, as such, subject to the levy of an execution against its property. (Wright, J., dissenting.) *Hetherington v. Hayden*, 11 *Iowa* 335.

Where a debtor holds stock standing in his own name upon the books of a corporation, a judgment creditor may proceed by *fi. fa.* and sale under the Pa. Act of March 29, 1819, or by attachment execution under the act of June 16, 1836. But where stock held by defendant in his own name is subject to a charge or lien upon the title, a proceeding by attachment is preferable. *Weaver v. Huntingdon & B. T. M. R. & C. Co.*, 50 *Pa. St.* 314.

The sale of railroad stock, upon an execution against the railroad company, does not, under the Vt. Comp. St. ch. 83, § 9, p. 476, and No. 22 of Laws of 1852, p. 18, exempt it from subsequent attachment and

seized in execution, become interests in stock and the equity of the stock is out of the reach of the creditor by the execution. *Wentworth v. Phillips*, 4 Phila.

A question in a case had power to decide it on its merits, will enjoin proceedings to proceed to mortgage, but the *fi. fa.* shall not be dissolved. *Lourens v. Lander*

On a railroad turntable, or timber, fruit comes personal property by the execution, or otherwise change of ownership. *Ill. 257*.

Bonds.—Shares may be seized though no certificate therefor. *Euro-Leod*, 16 *New*

A number of persons a debtor in a suit for the purpose, but with the consent of the property of the subject to the execution of its property. *Wetherington v.*

Stock standing in the name of a corporation may proceed by execution under the Act of March 1852, but where stock in name is substituted, a preferable. *Wheat v. M. R. & C. Co.*

Stock, upon an execution, does not. *Ch. 83, § 9*, p. 18, 1852, p. 18, execution and attachment and

execution in other suits against the corporation, nor from the levy of an *alias* execution, issued for the unsatisfied balance of the judgment upon which the stock has already been sold; neither is there any distinction in this respect between debts against the corporation, which accrued before and those which accrued after the first sale of the stock upon execution. *Chandler v. Henry*, 30 *Vt.* 330.

An execution cannot be levied on shares of stock of an incorporated company, which have been pledged or mortgaged by the defendant in execution, as security for a debt, and transferred on the books of the company to the pledgee or the mortgagee; and a purchaser at sheriff's sale, under such levy, acquire no title to the shares. *Nabring v. Bank of Mobile*, 58 *Ala.* 204.

A city agreed to loan a railroad £100,000 in its loan fund debentures, secured by a mortgage on all the property of the company, which by a subsequent statute was declared valid as to both the present and after-acquired property of the company. It was afterward agreed to be advanced to the company in sums as the work progressed. In compliance with a requisition of the company, the city authorities directed their bankers to deliver to the company a large part of said bonds. As soon as delivered the sheriff seized them under execution against the company at the suit of the bankers. *Held*, in a suit to require the bonds to be delivered up, that so far as the debentures were required for the construction of the road, they were impressed with a trust to be applied by the company to this purpose only, and could not be seized. *Brockville v. Sherwood*, 7 *Grant's Ch. (U. C.)* 297.

12. Tracks—Side tracks.—There is no law in Michigan authorizing the levy of an execution on the track or roadbed of a railway company; if any levy can be made upon the corporate property, aside from such goods and chattels as may be found and seized by the sheriff, it is only on the franchise of earning tolls as provided by the corporation laws. *Hackley v. Mack*, 60 *Mich.* 591, 27 *N. W. Rep.* 871.

Railroad contractors laid down a side track for their own convenience in handling material, and at the request of the company consented that it should remain a while, the materials to be returned to the contractors when called for. *Held*, that the side track was but a personal chattel,

5 *D. R. D.*—35.

and liable to be seized and sold under execution against the contractors. *Fifield v. Maine C. R. Co.*, 62 *Me.* 77.—CRITICISING *Russell v. Richards*, 10 *Me.* 429. REVIEWING *Hunt v. Bay State Iron Co.*, 97 *Mass.* 282.

13. English Railway Companies Act of 1867.—The protection from seizure in execution by a judgment creditor, given by the Railway Companies Act of 1867, § 4, to the rolling stock and plant of a railway, after such railway is open for public traffic, continues, although the railway is afterwards closed for traffic. *Midland Waggon Co. v. Potteries, S. & N. W. R. Co.*, 6 *Q. B. D.* 36, 50 *L. J. Ex. D.* 6, 43 *L. T.* 511, 29 *W. R.* 78, 3 *Ry. & C. T. Cas.* xvii.

A dock company constructing a short railway to connect its dock with other railways is a "company" within the Railway Companies Act of 1867, § 3, and the railway plant belonging to it is protected from seizure under execution by section 4 of such act. *Great Northern R. Co. v. Tahourdin*, 20 *Am. & Eng. R. Cas.* 562, *L. R.* 13 *Q. B. D.* 320, 53 *L. J. Q. B. D.* 69, 50 *L. T.* 186, 32 *W. R.* 559.

II. LEVY AND SALE.

14. In general.—The roadbed, rails, and right of way of a railroad are real property, and must be considered as such when levied upon under execution. *Hart v. Benton-Bellefontaine R. Co.*, 7 *Mo. App.* 446.—APPROVING *Farmers' L. & T. Co. v. Hendrickson*, 25 *Barb. (N. Y.)* 493.

A creditor of a railroad who issues execution and has it levied on property of the railroad, thereby affirms the company's title. *Robinson v. Atlantic & G. W. R. Co.*, 66 *Pa. St.* 160.—DISTINGUISHED IN *Hills v. Parker*, 111 *Mass.* 508.

Under the Tex. Act of Dec. 19, 1857, the railroad track, franchise, and chartered powers and privileges of a railway company were deemed an entire thing, and a levy was held to embrace the whole roadbed and track, whether situated in one county or not, and the same could be advertised and sold at the court house door of the county of the principal office. *Central & M. R. Co. v. Henning*, 52 *Tex.* 466.

A writ of *fi. fa.* against a railway company, which was directed to a sheriff, before he became a director in the company, was properly directed and returnable by

him, and his becoming a director before the return of the writ did not invalidate it. *Smith v. Spencer*, 12 U. C. C. P. 277.—FOLLOWED IN *Fraser v. Hickman*, 12 U. C. C. P. 584.

Execution issued against a railroad company, and the officer levied on a safe in the possession of a local agent. The officer left the safe in the possession of the agent, taking a receipt therefor, which recited the levy. *Held*, that the possession of the agent is the possession of the officer, who remained constructively in possession, and therefore the company might maintain replevin therefor, and the officer would be liable for nominal damages, where he only set up the defense that he had not made a levy, and therefore had not deprived the company of possession. *Chicago & W. M. R. Co. v. Reid*, 74 Mich. 366, 41 N. W. Rep. 1083.—FOLLOWING *Mayhue v. Snell*, 37 Mich. 305.

15. Sheriff's refusal to levy—Return of writ.—Where the amount of the mortgages on a railroad exceeds the entire value of the mortgaged property, only nominal damages can be recovered against the sheriff for refusing to levy upon and sell the property on executions against the company. *Coopers v. Wolf*, 15 Ohio St. 523.

A sheriff's return to an execution against a railroad company, reciting that he had levied "upon all the right, title, interest, and claim" of the company in a certain county, "and upon all the property, real, personal, and mixed, including locomotives and cars," is conclusive evidence that he seized the locomotives and cars themselves; and when sued for trespass he cannot be heard to say that he only levied upon the right, title, and interest of the company therein. *Hardesty v. Pyle*, 15 Fed. Rep. 778.

The return by a sheriff of an execution against a railroad company is not vitiated by his becoming a shareholder and director in the company after the execution came to his hands. *Fraser v. Hickman*, 12 U. C. C. P. 584.—FOLLOWING *Ray v. Blair*, 12 U. C. C. P. 257; *Smith v. Spencer*, 12 U. C. C. P. 277.—*Ray v. Blair*, 12 U. C. C. P. 257.—FOLLOWED IN *Fraser v. Hickman*, 12 U. C. C. P. 584.

16. Priority over other claims and liens.—A sale under an execution against a railroad company will give a title paramount to that of the holder of an unre-

corded mortgage, where the execution creditor at the date of the levy of his execution has no notice of the existence of the mortgage. *Stevenson v. Texas & P. R. Co.*, 12 Am. & Eng. R. Cas. 393, 105 U. S. 703.—FOLLOWING *Grace v. Wade*, 45 Tex. 522; *Grimes v. Hobson*, 46 Tex. 416; *Catlin v. Bennett*, 47 Tex. 165; *Mainwarring v. Templeman*, 51 Tex. 205.

A levy of execution on the franchises and property of a street railway company was given priority over a mortgage dated a year and a half earlier and given to secure bonds which were only meant to be sold in the market, but which, without corporate authority or ratification, had been turned over to the mortgagee, who knew they had never been sold, as collateral security for the private debts of the company's treasurer, who had a controlling interest in its property. *McKee v. Grand Rapids & R. L. St. R. Co.*, 41 Mich. 274.

The holder of a decree against an insolvent railway corporation, who, as director of a new corporation, with full knowledge consents to the subsequent acceptance of a deed from a receiver to it, free from all encumbrances, under the statute, and votes to execute a mortgage for the security of bondholders, which shall be a first lien—*held*, not entitled, on petition, to execution and sale of land of the company, with priority. *Freehold & N. Y. R. Co. v. Hodgson*, 29 Am. & Eng. R. Cas. 393, 39 N. J. Eq. 518.

At the time a receiver was appointed at the suit of trust creditors to take possession of a railroad and carry it on, there were a number of executions against the company in the hands of the sheriff; and there were funds derived from income and from other sources in the hands of, or due to, the company. *Held*, that the execution creditors were entitled to have these funds and balances applied to the satisfaction of their debts in preference to the trust creditors, and if these funds or balances had been applied, under an order of court, to other debts, they would be replaced out of the revenues coming to the receiver since his appointment. *Gilbert v. Washington City, V. M. & G. S. R. Co.*, 1 Am. & Eng. R. Cas. 512, 33 Gratt. (Va.) 645.—QUOTING *Gilman v. Illinois & M. Tel. Co.*, 91 U. S. 603. REVIEWING *Chinnery v. Blackman*, 3 Dougl. 391.

The defendant railroad and the orators

execution credi-
his execution
of the mort-
P. R. Co.,
105 U. S. 703.
45 Tex. 522;
416; Catlin v.
Harrington v. Tem-

franchises and
company was
dated a year
to secure bonds
be sold in the
corporate au-
then turned over
they had never
ty for the pri-
treasurer, who
its property.
L. St. R. Co.,

against an insol-
ho, as director
full knowledge
acceptance of a
ge from all en-
e, and votes to
be security of
e a first lien—
a, to execution
pany, with pri-
R. Co. v. Hodg-
93, 39 N. J. Eq.

s appointed at
take possession
a, there were a
the company
and there were
and from other
ue to, the com-
ation creditors
unds and bal-
uction of their
rust creditors,
s had been ap-
ourt, to other
ed out of the
iver since his
ashington City,
m. & Eng. R.
45.—QUOTING
Co., 91 U. S.
v. Blackman.

and the orators

under a partnership arrangement were oper-
ating three lines of road. Defendant
B. obtained a judgment against the defend-
ant railroad for injuries received through its
neglect, not knowing of the partnership.
He levied his execution on an engine, ten-
der, and baggage car, owned by the three
companies, and the same were sold to his
agent, L.; and he had also levied upon an-
other engine owned by the same companies,
and had advertised it for sale, when he was
enjoined. A bill having been brought, set-
ting up the superior rights of partnership
creditors—held, that although the rights of
partnership creditors, as a rule in equity,
are superior to those of the individual
creditors, yet the court will not enjoin,
where equities are equal; or where, as in
this case, it does not clearly appear by alle-
gation or proof, that the partnership in-
debtedness existed at the time the property
was seized on execution; or especially
under the special provisions of the statute
(Vt. R. L. § 3443), whereby a passenger, in-
jured through the negligence of a railroad
company, has a right in attaching cars, en-
gines, etc., superior to the general equity of
the partners. *Lamoille Valley R. Co. v.
Bixby*, 16 Am. & Eng. R. Cas. 474, 55 Vt.
235.

**17. Sale and disposition of prop-
erties.**—A contractor for the construction
of a roadbed for a railroad company ac-
quires, under the statute, a lien upon so
much of the roadbed as is constructed by
him, which may be foreclosed; but there is
no statutory provision for the sale of the
road as an entirety, or the franchise, or
anything that would destroy or impair the
use of the franchise; and while the corpora-
tion remains solvent payment must be en-
forced out of other property or funds in
such appropriate manner as a court of
equity may determine. *Louisville, N. A.
& C. R. Co. v. Boney*, 39 Am. & Eng. R.
Cas. 168, 117 Ind. 501, 20 N. E. Rep. 432, 3
L. R. A. 435.—FOLLOWED IN *Farmers' L.
& T. Co. v. Canada & St. L. R. Co.*, 47 Am.
& Eng. R. Cas. 271, 127 Ind. 250.

A recovery was had for the amount of
coupons due the plaintiff on first mortgage
bonds given by the company. The sheriff
sold, under the execution, a lot of railroad
ties, and made the amount of the judgment,
out of which it was held the court might
order a deduction of two and a half per
cent.—the government tax—if it satisfac-

torily appeared that such tax had been paid
by the company to the government, subse-
quent to entering the judgment, and that
the sheriff, having the same in hand, should
refund the same. *New Jersey W. L. R. Co.
ads. Beardsley*, 35 N. J. L. 479.

The Pa. Act of 1870 does not repeal any
of the preliminaries before levy and sale,
required by section 75 of the act of 1836, in
proceeding against a corporation, but is "in
addition" thereto. The preliminaries re-
quired by the former act are still essential
to the validity of a levy and sale. *Fox v.
Hempfield R. Co.*, 2 Abb. (U. S.) 151, 3
Pittsb. (Pa.) 289.

An execution having been issued on a
judgment against a railway company, upon
petition the court ordered inquiries and a
sale of the company's lands in default of
payment. *In re Hull & H. R. Co.*, L. R. 2
Eq. 262, 35 L. J. Ch. 838, 14 W. R. 758, 14
L. T. 855.

**18. Manner of making sale—Valid-
ity.**—The proper method for a judgment
creditor of a corporation to compel pay-
ment of his debt is to seize disconnected
property belonging to the company, to se-
quester its earnings, or, if necessary, re-
sort to a sale of the entire road and its
franchises; but the road cannot be cut up
and sold in parcels or sections. *Georgia v.
Atlantic & G. R. Co.*, 3 Woods (U. S.) 434.
—QUOTING *Macon & W. R. Co. v. Parker*,
9 Ga. 377; *Atlanta v. Grant*, 57 Ga. 340.

A railway cannot be seized and sold in
part, even on a judgment by bondholders,
except in accordance with the dispositions
of the special statute authorizing the crea-
tion of the mortgage or hypothec. A rail-
way is an indivisible thing, and can only be
sold as a whole. *Stephen v. La Banque
d'Hochelaga*, 2 Montr. L. R. 491.—FOLLOW-
ING *Drummond County v. South Eastern
Counties R. Co.*, 24 L. C. J. 276.

Where a railroad which passes through
several counties is mortgaged, and the
mortgage is recorded in but one of the
counties, it has priority of lien in that county
over a subsequent judgment, but not in the
other counties; but the judgment creditor
cannot have a sale of that part of the road
only, where the mortgage lien does not
attach. The proper proceeding is to sell
the road as a whole and bring the money
into court to be distributed according to
priority of liens, and the portion of the
road subject to the respective liens. *Lud-*

low v. Clinton Line R. Co., 1 *Flipp.* (U. S.) 25.

Where a number of shares of railway stock were seized and advertised to be sold in one lot, neither the defendant nor any one interested in the sale requesting the sheriff to sell the shares separately, and such shares were sold for an amount far in excess of the judgment debt for which the property was taken into execution, such sale in the absence of proof of fraud or collusion was held good and valid. *Connecticut & P. R. R. Co. v. Morris*, 14 *Can. Sup. Ct.* 318; *affirming* 2 *Montr. L. R.* 303.

19. Appraisers.—Persons residing and having taxable estates in a town which, in its corporate capacity, is a stockholder in a railroad company, are not incompetent, from interest, to act as appraisers in the levy of an execution against such company. *Fletcher v. Somerset R. Co.*, 74 *Me.* 434.—**DISTINGUISHING** *Boston v. Tileston*, 11 *Mass.* 468.

20. Delivery to purchaser.—Where railroad contractors lay down a side track for their own convenience in handling material, but leave it, at the request of the railroad company, until demanded, and the same is levied upon and sold as the property of the contractors, a sufficient delivery may be made by the officer and received by the purchaser without taking any possession of the materials composing the track, except such as may be had without disturbing their position as a track. *Fifield v. Maine C. R. Co.*, 62 *Me.* 77.

Where, under the charter of a railroad, private persons are authorized to own their own cars, each owner is deemed in possession of his own cars. Therefore when a private car was left on a siding in charge of an agent of the company, and in the meantime the car was sold, and the purchaser continued the agent in charge—*held*, not such change of possession as to avoid a sheriff's sale under execution against the former owner. *Trunick v. Smith*, 63 *Pa. St.* 18.

21. Effect of sale, some property remaining unsold.—When the franchises, track, etc., of a company are sold under execution, as allowed by art. 4914, *Pasch. Tex. Dig.*, the directors become trustees by virtue of the subsequent art. 4916; and all unsold property of the company passes to such trustees for the benefit of any creditors of the company. Stock-

holders of the company can have no priority over the creditors. *Good v. Sherman*, 37 *Tex.* 660.

22. Enjoining sale, generally.—The general rule is that persons who are not parties to a suit cannot have a stay of execution upon petition or motion, but must file an original bill; but an exception to the rule exists in favor of creditors who are allowed to prove debts, and persons belonging to a class on whose behalf a suit is brought, as they are already regarded as *quasi* parties. *Anderson v. Jacksonville, P. & M. R. Co.*, 2 *Woods (U. S.)* 628.

But the exception to the above rule would not include a state, and the trustees of an internal improvement fund created by the state, who are not parties to a suit against a railroad that has been aided by such fund. They cannot be heard on petition for a stay of proceedings under execution. *Anderson v. Jacksonville, P. & M. R. Co.*, 2 *Woods (U. S.)* 628.

Where a decree has been taken for the payment of money against a railroad company, by consent, on condition that plaintiffs will dismiss certain other litigation, and that defendants will pay the amount of the judgment in instalments at stated times, and it appears that the other litigation has been dismissed, the defendants, after failing to make the payments, cannot be heard on a petition for a stay of execution. *Anderson v. Jacksonville, P. & M. R. Co.*, 2 *Woods (U. S.)* 628.

A stockholder in a street-car company furnished the company several cars, and after he had become a director in the company, arrangement was made to pay him for the cars in instalments, and a certain sum for their use. The first instalment not being paid he brought suit, and by agreement took judgment for the whole amount of his debt due and to become due, and he had execution issued thereon. A dissatisfied stockholder filed a bill, among other things charging fraud and collusion between the officers of the company and the judgment creditor, and prayed, among other things, for an injunction against the execution. *Held*, that in the absence of any proof of fraud or corruption on the part of the defendants, or any advantage to the corporation from a stay of proceedings, the relief could not be granted. *Ward v. Salem St. R. Co.*, 108 *Mass.* 332.

23. — by mortgagee. — An injunction may be allowed restraining the removal and sale on execution of portions of the mortgaged property of a railroad company, on the application of the mortgagees, when the whole of the property mortgaged is admitted to be inadequate security for the payment of the mortgage debts. The remedy of the judgment creditor in such case is, in equity, to subject the interest of the mortgagor to the payment of his judgment; or where the nature of his claim is such as to entitle him to have it paid out of the earnings of the company, by proceedings to appropriate so much thereof as may be necessary to the payment of the judgment. *Lane v. Baughman*, 17 Ohio St. 642. — FOLLOWING *Coe v. Knox County Bank*, 10 Ohio St. 412. QUOTING *Coe v. Columbia, P. & I. R. Co.*, 10 Ohio St. 372.

A railroad corporation executed a mortgage for money borrowed upon its road and equipments. The loan was for a long period, but the interest was to be paid semi-annually. The corporation had by the terms of the mortgage, the possession and use of the road until default in payment of interest. There had been no default, and a creditor recovered judgment and levied an execution upon a part of the equipments of the road. The mortgagee filed a petition to obtain a perpetual injunction, upon the ground that the use and possession of the road were indispensable to enable the corporation to raise money wherewith to pay the interest as it became due. *Held*, that such an averment did not show a sufficient ground for an injunction. *Coe v. Knox County Bank*, 10 Ohio St. 412. — FOLLOWED IN *Coe v. Peacock*, 14 Ohio St. 187; *Lane v. Baughman*, 17 Ohio St. 642.

Where there is a question whether the company had power to mortgage, the court, without deciding it on a motion for a special injunction, will enjoin creditors and the sheriff from proceeding to sell property covered by the mortgage, but directing that the lien of the *fi. fas.* shall continue until further order. *Loudenschlager v. Benton*, 3 Grant's Cas. (Pa.) 384.

24. Arresting sale. — Affidavit of illegality. — A sale under an execution not moulded as required by Ga. Code, § 3082, 3563, 3639, about to be made by the sheriff, may be arrested by an affidavit of illegality interposed by the corporation through its proper officers. *Atlanta v. Grant*, 57 Ga. 340.

Such a sale, though consummated without legal resistance, would be void; and, consequently, the rights of other creditors, or of the stockholders, would not be lost. And if an injunction, at the instance of one or more of these, could be granted at all to prevent the intended sale, a necessary condition would be that the executive officer of the corporation had been requested to interpose an affidavit of illegality, and had refused to do so; or that such request had been omitted for some sufficient reason. *Atlanta v. Grant*, 57 Ga. 340.

25. Redemption. — Land was sold under execution and purchased by a third person. After the lapse of one year from the day of the sale, the purchaser conveyed by quit-claim deed to another, the latter holding the title for the benefit of a railroad company which had instituted proceedings for the condemnation of the land. Subsequently a sheriff's deed was executed to the purchaser at the execution sale. The report of the commissioners in the condemnation proceedings showed a receipt for the money awarded therein, given by the purchaser at the execution sale while he held the sheriff's certificate of purchase and subsequent to his quit-claim deed for the benefit of the railroad company. *Held*, that this payment by the railroad company to the purchaser under execution could not be regarded as a redemption from the execution sale, in the interest of the judgment debtor, who had himself no right of redemption remaining, but it was to secure a good title to the land in the railroad company. *Chicago, B. & Q. R. Co. v. Chamberlain*, 84 Ill. 333, 16 Am. Ry. Rep. 466.

26. Rights of purchasers. — Land which has been vested in a railroad company for the use of the road, if sold by execution, belongs to the purchaser until the charter of the company would by the limitation of its charter have expired. *State v. Rives*, 5 Ired. (N. Car.) 297. — DISAPPROVED IN *Gooch v. McGee*, 83 N. Car. 59, 35 Am. Rep. 558.

A railroad contracted by articles for land and entered under the articles. Having failed to pay the purchase money, the court decreed specific performance, with leave for the vendor to issue execution if the purchase money should not be paid at the time fixed in the decree. The money not being paid, execution was issued, under which the old track was sold. Before the sale the

company had laid a track on a strip of the land. *Held*, that the sale vested the whole interest of the company, legal and equitable, including the strip occupied by the track, in the sheriff's vendee, subject to no easement by the company. *Pittsburg & S. R. Co. v. Jones*, 59 Pa. St. 433.

Under a judgment against a county its stock in a company was sold by the marshal. *Held*, that the vendee obtained the stock only, not a right to the interest on the bonds. *Pittsburg & C. R. Co. v. Allegheny County*, 63 Pa. St. 126.

Where one is a debtor to a railroad company for a subscription to its stock, to a greater amount than his claim against said company, he cannot ask the payment of his debt in the distribution of the proceeds of a sheriff's sale of the property and franchises of the road, on a judgment of another creditor. The sale by the sheriff of the railroad property and franchises did not pass to the purchaser the debts or mere choses in action due to the company from others. *Hogg's Appeal*, 88 Pa. St. 195.—FOLLOWING *Bayard's Appeal*, 72 Pa. St. 453.

27. Purchasers take subject to existing liens.—A purchaser at an execution sale of the property and franchises of a railroad company under a judgment recovered by a holder of a part of a series of trust mortgage bonds for interest upon the bonds held by him, takes only the equity of the company and is not entitled to the property, rights, etc., of the company freed from the lien of the mortgage. *Com. v. Susquehanna & D. R. R. Co.*, 36 Am. & Eng. R. Cas. 269, 122 Pa. St. 306, 15 Atl. Rep. 448.—EXPLAINING *Chicago & V. R. Co. v. Fosdick*, 106 U. S. 47.

A judgment creditor of a railroad sued out execution, and, at a sale thereunder, bought the road. At the time the state held a statutory lien thereon to secure certain bonds and a guaranty of others, of which the creditor had full knowledge. *Held*, that he bought the interest of the company only, and held the property subject to the lien of the state. *Florida v. Anderson*, 91 U. S. 667.

28. Ejectment by purchaser.—Where a company contracted for land, and built its track over it, and, failing to pay the purchase money, the vendor had the same sold under execution—*held*, that the execution vendee could recover the land of the company in ejectment, but a court could

stay execution of the judgment until the company could have the damages assessed. *Pittsburg & S. R. Co. v. Jones*, 59 Pa. St. 433.—APPLIED IN *Jacksonville, T. & K. W. R. Co. v. Adams*, 28 Fla. 631.

29. Title of purchaser from a purchaser.—The legal title apparent by the record being in the purchaser at an execution sale, a subsequent purchaser from him cannot be held to an inquiry as to notice to the purchaser at the execution sale. *Stevenson v. Texas & P. R. Co.*, 12 Am. & Eng. R. Cas. 393, 105 U. S. 703.

III. SUPPLEMENTARY PROCEEDINGS; ANALOGOUS WRITS.

30. Supplementary proceedings.—An order directing an execution against a railroad company, with a provision reciting that it should be levied upon the property of certain stockholders, does not render such stockholders judgment debtors within the meaning of Iowa Rev. 1860, ch. 126; and after a return of the execution they cannot be compelled to disclose property in the summary manner provided by that statute. *Bailey v. Dubuque Western R. Co.*, 13 Iowa 97.

The provisions of N. Y. Code, § 292, relating to "proceedings supplementary to execution," are not applicable to judgments against railroad corporations. *Hinds v. Canandaigua & N. F. R. Co.*, 10 How. Pr. (N. Y.) 487. *Sherwood v. Buffalo & N. Y. C. R. Co.*, 12 How. Pr. (N. Y.) 136.—APPLYING *Morgan v. New York & A. R. Co.*, 10 Paige (N. Y.) 290.—FOLLOWING *Hinds v. Canandaigua & N. F. R. Co.*, 10 How. Pr. 487.

In such case resort must be had to a proceeding in equity against the corporation, which is still preserved under the provisions of N. Y. Code, § 471. *Hinds v. Canandaigua & N. F. R. Co.*, 10 How. Pr. (N. Y.) 487.—FOLLOWING *Morgan v. New York & A. R. Co.*, 10 Paige (N. Y.) 290.

So long as corporation funds in the hands of a stockholder have not been declared dividends, the same are subject to execution against the corporation; and the execution creditor is entitled to the proceedings supplementary to execution provided for by Oregon Code, to enforce payment of the demand. *Hughes v. Oregonian R. Co.*, 11 Oreg. 158, 2 Pac. Rep. 94.

The action known under the old system of practice as a creditor's bill cannot now

ent until the
ages assessed.
59 Pa. St. 433.
F. & K. W. R.

from a pur-
parent by the
r at an execu-
aser from him
as to notice to
sale. *Steven-
Am. & Eng.*

PROCEEDINGS; RE

ceedings.—
tion against a
vision reciting
n the property
es not render
debtors within
1860, ch. 126;
execution they
close property
vided by that
Western R. Co.

Code, § 292, re-
plementary to
e to judgments
ns. *Hinds v.*
to *How. Pr.*
Buffalo & N. Y.
Y.) 136.—AP-
k & A. R. Co.,
OWING *Hinds*
Co., to *How.*

be had to a pro-
ne corporation,
r the provisions
Is v. Cananda-
wo, Pr. (N. Y.)
p. New York &
90.

nds in the hands
been declared
object to execu-
; and the exe-
to the proceed-
vision provided
orce payment of
egonian R. Co.

the old system
bill cannot now

be resorted to as such, but the proceedings supplemental to execution, established by Wisconsin Code, are a substitute therefor, and constitute the only manner of obtaining the relief formerly had under a creditor's bill. *Graham v. La Crosse & M. R. Co.*, 10 Wis. 459.

Upon an application to examine an officer of a judgment debtor railroad corporation there should be distinct evidence that the person named is an officer of the corporation, and what office he holds. No order can be made that such officer do produce the books, etc., of the corporation. *Jukes v. Winnipeg & H. B. R. Co.*, 5 Man. 14.

Under section 52 of the Administration of Justice Act 1885, an order may be made for the examination of an officer of a judgment debtor railway corporation, and for production by the corporation of books, papers, and documents. The provision of said section for the examination of the judgment debtor includes a corporation foreign or domestic. *Mann v. Winnipeg & H. B. R. Co.*, 7 Man. 457.

31. Elegit.—Where the land, including the line of a railway company, is delivered under an elegit to a judgment creditor, he is entitled to a receiver of the earnings, and is not accountable as a mortgagee in possession if he has not obtained beneficial possession. *Kingston v. Cowbridge R. Co.*, 41 L. J. Ch. 152.

A scheme of arrangement under the Railway Companies' Act 1867, between a railway company and unpaid vendors of land and other mortgagees does not operate to give an elegit creditor priority over the holders of debenture stock who had taken such stock under the scheme in satisfaction of their mortgages; the elegit creditor not being bound by the scheme is entitled to no other rights than those which he had before the scheme was made. *Steven v. Mid-Hants R. Co.*, 29 L. T. 318.

32. Sequestration.—The return of the previous execution unsatisfied is sufficient to warrant the issuing of a sequestration; and the truth of such return is not the subject of review in this court. *Reid v. North-Western R. Co.*, 32 Pa. St. 257.

The act of April 22, 1858, providing that a sequestration shall not issue against an unfinished railroad, is not retroactive in its operation. Nor it is no ground for refusing a writ of sequestration, that the defendant corporation may have no assets that are

subject to such writ. *Reid v. North-Western R. Co.*, 32 Pa. St. 257.

Old or new rails and chairs lying along the track of a railroad, in readiness for repairs or reconstruction, are not liable to levy and sale on execution. The remedy against a railroad corporation is by a sequestration, under sections 73, 74, and 75 of the Pa. Act of June 16, 1836. *Corey v. Pittsburg, Ft. W. & C. R. Co.*, 3 Phila. (Pa.) 173.

EXECUTORS AND ADMINISTRATORS.

Extent of recovery by, for causing death, see DEATH BY WRONGFUL ACT, 378.

Nominal damages only, when recoverable by, see DEATH BY WRONGFUL ACT, 420.

Power of, to transfer stock, see STOCK, 32.

Right of, to appeal in condemnation proceedings, see EMINENT DOMAIN, 875.

— — — **sue for causing death,** see DEATH BY WRONGFUL ACT, 375-390.

Suits by, against elevated railways, see ELEVATED RAILWAYS, 82-84.

When entitled to receive land damages, see EMINENT DOMAIN, 428.

— **limitation begins to run for or against,** see LIMITATIONS OF ACTIONS, 32.

— **may sue,** see ELEVATED RAILWAYS, 82-84.

— **proper parties plaintiff,** see PARTIES TO ACTIONS, 4.

1. Where and by whom letters may be granted.*—Where a party domiciled in the state of New York was killed by a railroad in upper Canada, having trifling personal effects of a less value than £5—held, that the surrogate court of the county where he was killed had jurisdiction to grant administration of his effects, so as to permit a suit for his death. *Grant v. Great Western R. Co.*, 7 U. C. C. P. 438.

2. Sufficiency of the letters.—Letters of administration are sufficiently authenticated by the probate judge's teste and signature, under Colo. Rev. St. p. 529, § 50, providing that when such judge shall perform the duties of clerk of his court, all process issued shall be in the name of the judge thereof, as by chapter 90, §§ 42, 47, and others. Letters of administration are included under the term "process." *Denver, S. P. & P. R. Co. v. Woodward*, 4 Colo. 1. See also *Denver, S. P. & P. R. Co. v. Woodward*, 4 Colo. 162.

* Claim for damages for causing death not assets entitling parties to letters, see note, 19 AM. & ENG. R. CAS. 190.

3. Attacked collaterally.—The order appointing an administrator of the deceased cannot be collaterally attacked in a suit brought by the administrator for the wrongful death of his decedent. *Chilton v. Union Pac. R. Co.*, 8 Utah 47, 29 Pac. Rep. 963.

Where a petition praying the appointment of an administrator alleges that the deceased was an inhabitant of the county, which is necessary to give the court jurisdiction, and the court, upon proper allegations and proofs, finds such to be the fact, and issues letters of administration, the adjudication finding that the deceased was an inhabitant of the county is conclusive, and cannot be inquired into collaterally. *Holmes v. Oregon & C. R. Co.*, 7 Sawy. (U. S.) 380.

Proceedings of a county court in matters of probate and administration are not conclusive as to the jurisdiction of the court, and such jurisdiction may be collaterally called in question under proper pleadings; but the burden is upon the party raising the issue to show want of jurisdiction. *Jacobs v. Louisville & N. R. Co.*, 10 Bush (Ky.) 263.

Where letters of administration on the estate of one killed by a railroad in Illinois were granted by the clerk of a court in Iowa, on his own authority, it will be regarded as only a ministerial act, and may be inquired into collaterally. *Illinois C. R. Co. v. Cragin*, 71 Ill. 177.

In an action brought by the personal representative of a deceased minor to recover damages for his intestate's death the company objected that the letters of administration were not properly granted, on the ground that there was no estate to administer. The record of the probate court showed that the minor left, among other things, "an estate of personal articles."

The minor's father, upon examination, gave testimony which tended to show that his child died without leaving any estate. Held, that the jury having passed upon the facts in issue, including the right of the plaintiff to maintain the action, the evidence of the father was not conclusive as against the general findings of the jury, and that it could not be said as a matter of law that the letters of administration were granted without jurisdiction. *Union Pac. R. Co. v. Duenden*, 34 Am. & Eng. R. Cas. 88, 37 Kan. 1, 14 Pac. Rep. 501. — **DISTINGUISHED IN** *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Am. & Eng. R. Cas. 184, 43 Kan. 1.

4. Who may object to appointment.*—A railroad cannot be heard before the ordinary to object to the appointment of an administrator of a person whose sole estate consists of a claim of damages against the company, for the reason that suit for such damages will be brought against the company. *Augusta & S. R. Co. v. Peacock*, 56 Ga. 146.

5. Foreign executors and administrators.†—An executor or administrator under letters granted at the domicile of the deceased may receive and discharge debts voluntarily paid to him in another jurisdiction, may transfer negotiable choses in action so as to enable the transferee to sue in his own name in the courts of another state, may receive the dividends on and sell and transfer stock in a railroad corporation of another state. *In re Cape May & D. B. Nav. Co.*, 51 N. J. L. 78, 16 Atl. Rep. 191.

The foregoing principle applies in the construction of section 39 of the N. J. Corporation Act, and an executor having letters of probate granted at the testator's domicile is the holder of stock within the meaning of that section, and on producing before the inspectors of an election for directors an exemplified copy of such letters is entitled to vote on stock standing in the testator's name on the company's books. *In re Cape May & D. B. Nav. Co.*, 51 N. J. L. 78, 16 Atl. Rep. 191.

Gen. Laws N. H. ch. 201, § 16, enables foreign executors and administrators to compel unwilling bailees and corporations holding property of the deceased in this state to recognize their title without the expense and inconvenience of administration here. *Lucy v. Manchester & L. R. Co.*, 26 Am. & Eng. R. Cas. 74, 63 N. H. 588, 3 Atl. Rep. 618.

6. Revocation of letters.—The mere fact that suit has been brought against a party by the administrators of the estate of a decedent gives such party no such interest in the estate as entitles him to have the letters of administration revoked on the ground that they were illegally granted. If the court had no jurisdiction to grant the letters, that may be set up in the action itself as a matter of defense, since, in such case, the plaintiffs will have no legal capac-

*Right of railroad to object to granting of letters, see note, 19 AM. & ENG. R. CAS. 190.

†Suit by foreign administrators, see note, 19 AM. & ENG. R. CAS. 190.

ity to sue. *Kent v. Pennsylvania R. Co.*, 6 Mackey (D. C.) 335.

A railroad company against whom an action is being prosecuted by an administrator to recover damages for an injury causing the death of the intestate has such an interest as to make it a competent party to petition the court for a revocation of the letters of administration. *Jeffersonville R. Co. v. Swayne*, 26 Ind. 477.

7. Assets.—Railroad stock is personal assets. *South-Western R. Co. v. Thomason*, 40 Ga. 408.

Money paid to an administrator by a railroad company upon whose road the intestate was killed, as compensation therefor, is assets in the hands of the administrator, which he is bound to administer. *Goltra v. People*, 53 Ill. 224.

An administrator is an owner of property belonging to the estate he represents, within the meaning of section 1289 of the Iowa Code, providing for the liability of railroad companies to the owner of stock injured. *Morrison v. Burlington, C. R. & N. R. Co.*, 84 Iowa 663, 51 N. W. Rep. 75.

Defendant and the treasurer of a railroad company were joint executors of an estate. Defendant loaned his co-executor certain funds of the estate and received as collateral security a bond of the railroad company. The transfer of the bond was fraudulently made, but defendant had no actual knowledge of the fact. Held, that defendant as co-executor was charged with knowledge of the lack of authority to so transfer the bond, as joint executors are deemed as one person with respect to the title whereby they hold, and the railroad company could recover the bond from defendant. *Troy & A. H. R. Co. v. Smith*, 33 N. Y. S. R. 203, 57 Hun 594, 11 N. Y. Supp. 261.

8. Power to compromise claims or suits for damages for death.—An executor has authority, with the approval of the probate court, to compromise an action for damages for injuries resulting in the death of his testator owing to the negligence of the defendant. *Hartigan v. Southern Pac. Co.*, 86 Cal. 142, 24 Pac. Rep. 851.

A personal representative may compromise a suit against a railroad company for negligently causing the death of his intestate, without an order of the probate court, required by Ill. Rev. St. ch. 3, § 83, requiring an administrator to secure an order of the probate court, authorizing him to settle

or compound claims due the estate. Under the statute the amount recoverable in such suit is for the exclusive benefit of the widow and next of kin, and therefore the claim is not "due the estate" within the meaning of the above section. *Washington v. Louisville & N. R. Co.*, 34 Ill. App. 658.

A claim for damages or injuries resulting in death may be settled and released by the executor or administrator of the deceased, either before or after bringing an action therefor. *Parker v. Providence & S. Steamboat Co.*, 17 R. I. 376, 22 Atl. Rep. 284.

Such settlement binds the parties interested in the claim—i. e., the husband, widow, children, or next of kin of the deceased. *Parker v. Providence & S. Steamboat Co.*, 17 R. I. 376, 22 Atl. Rep. 284.—QUOTING *Greenlee v. East Tenn., V. & G. R. Co.*, 5 Lea (Tenn.) 418. REVIEWING *Stephens v. Nashville, C. & St. L. R. Co.*, 10 Lea 448.

9. Power to execute release for right of way.—An executor has no power, as such, to execute to a railroad company a release to a right of way over lands belonging to his testator's estate, and cannot be held liable, as such, for money received by him for such release, in an action against him by the devisee. *Hankins v. Kimball*, 57 Ind. 42.

10. Power to sell and transfer stock.—In the absence of ancillary administration or statutory prohibition, the domiciliary administrator appointed in another state has authority to sell and assign stock of the decedent in a corporation in New Hampshire, and the corporation may voluntarily consent to its transfer by accepting the outstanding certificate and issuing a new one to the purchaser. *Luce v. Manchester & L. R. Co.*, 26 Am. & Eng. R. Cas. 74, 63 N. H. 588, 3 Atl. Rep. 618.

Under Pa. Act of April 8, 1871, authorizing the transfer of stock "whenever a duly authenticated copy of the will or other grant of authority under which such transfer is proposed to be made, shall have been filed in the office of the register of wills of the county," a foreign executor may transfer stock, and the company is not obliged to see that the will gives the executor the power to assign or dispose of the stock. It is presumed that it does. *Williams v. Pennsylvania R. Co.*, 9 Phila. (Pa.) 298.—DISTINGUISHING *Bayard v. Farmers' & M. Bank*, 52 Pa. St. 232.

11. Actions by executors and administrators, generally.—A statute of Massachusetts, providing that when administration is taken in that state upon the estate of a non-resident, the estate found there shall be applied first to the payment of debts of creditors of that state, will not prevent the administrator from also qualifying in Rhode Island, where the decedent lived, and bringing suit there for the wrongful death of the decedent by a railroad company in Massachusetts. *O'Reilly v. New York & N. E. R. Co.*, 42 *Am. & Eng. R. Cas.* 50, 16 *R. I.* 388, 29 *Cent. L. J.* 210, 6 *L. R. A.* 719, 17 *Atl. Rep.* 906.

12. Actions to recover for injuries to the estate.—The right to damages for trespass to a testator's lands during his lifetime is a chose in action for which his executor may sue. *Pittsburgh, Ft. W. & C. R. Co. v. Swinney*, 97 *Ind.* 586.—EXPLAINING *Taylor v. Fickas*, 64 *Ind.* 167, 31 *Am. Rep.* 114.

The next of kin of a deceased life tenant have no right of action against a railroad company for damages to the rental value of the estate during the life tenancy, though they own the fee. Such right of action passes to the personal representative of the life tenant. *Paret v. New York El. R. Co.*, 46 *N. Y. S. R.* 29, 18 *N. Y. Supp.* 580.

A wife who, in the lifetime of her husband, receives injury while a passenger on a railway, by reason whereof her husband incurs expenses and suffers loss, may, on her husband's death, as his executrix, sue the company upon its contract to carry safely, to recover compensation for such expenses and loss to her testator's personal estate. *Potter v. Metropolitan R. Co.*, 32 *L. T.* 36; affirming 30 *L. T.* 765.

A widow cannot sue as administratrix in respect of damage to her late husband's estate arising from the tortious injury to his person, whereby he was prevented from following his occupation and was made to incur expenses for medical attendance. *Pulling v. Great Eastern R. Co.*, 6 *Am. & Eng. R. Cas.* 408, *L. R.* 9 *Q. B. D.* 110, 51 *L. J. Q. B. D.* 453, 30 *W. R.* 798.

In a suit by an executrix against railroad and construction companies for damages from their having removed a stock gap from their right of way, leaving growing crops of the estate exposed to cattle and other animals, testimony as to cost of fencing the right of way, the amount of fencing neces-

sary, and the cost of keeping up the same, was not admissible, she having made no *profert* in her declaration of her letters testamentary, and not having submitted them to the court, and not having submitted a copy of the will to show how long she was entitled to hold the land as executrix, and it not appearing whether the land may not have been devised to a particular child or children. *Chattanooga, R. & C. R. Co. v. McLendon*, 86 *Ga.* 517, 12 *S. E. Rep.* 941.

After a horse was killed by a railroad company the owner died, leaving plaintiff his sole executrix without bond, and in control of all his estate, but not as the absolute owner of all his property, a part of which was to go to children upon obtaining their majority. *Held*, that the administratrix could not maintain an action in her own name and right for the killing of the horse. *Texas & N. O. R. Co. v. Oates*, 2 *Tex. App. (Civ. Cas.)* 543.

13. Actions to recover money paid into court for right of way.—A deed to a railroad company recited that, "in consideration of the location and construction of" its railway, right of way was granted "so long as it shall be required for the uses of said" company. The latter mortgaged the right of way; the railroad was never constructed, and, upon foreclosure, the mortgaged premises were sold to T., who conveyed to A. Subsequently another company condemned the right of way and paid the money into court, when suit was brought by A. against the administrator of the estate of the grantor, to recover the money so paid into court. *Held*, that the administrator is, and A. is not, entitled to recover. *Ingalls v. Byers*, 20 *Am. & Eng. R. Cas.* 345, 94 *Ind.* 134.—REVIEWED IN *Columbus, H. & G. R. Co. v. Braden*, 110 *Ind.* 558, 9 *West. Rep.* 193, 11 *N. E. Rep.* 357.

EXEMPLARY DAMAGES.

See AGENCY, 92, 93; ANIMALS, INJURIES TO, 583; ASSAULT, 18, 19; CARRIAGE OF PASSENGERS, 634-639; CHILDREN, INJURIES TO, 191; CROSSINGS, INJURIES, ETC., AT, 364; DAMAGES, 20-38, 80; DEATH BY WRONGFUL ACT, 147, 418-423; DERAILMENT, 7; EJECTION OF PASSENGERS, 112-119, 126; EMINENT DOMAIN, 1084; EMPLOYEES, INJURIES TO, 754; FALSE IMPRISONMENT, 20; STREET RAILWAYS, 531; TRESPASS, 18.

EXEMPTION.

- From liability by contract, burden of proof as to, see **LIMITATION OF LIABILITY, 38.**
- for baggage in custody of passenger, see **BAGGAGE, 79-87.**
 - injuries caused by fires, see **FIRES, 200.**
 - negligence, when none allowed, see **CARRIAGE OF MERCHANDISE, 481-484.**
 - right to contract for absolute, see **CARRIAGE OF MERCHANDISE, 678.**
 - to persons riding on passes, see **PASSES, 20-39.**
 - taxation, see **TAXATION, 137-244, 385.**
 - contract for, when void, see **MUNICIPAL CORPORATIONS, 5.**
 - effect of consolidation on, see **CONSOLIDATION, ETC., 28.**
- In charter, from future legislation, not implied, see **CHARTERS, 28.**
- Of lands from taxation, "until sold or conveyed," see **TAXATION, 80.**
- property from attachment, see **ATTACHMENT, 35-39.**
 - states from suits, see **STATES, 3.**
- What conferred by charter, see **CHARTERS, 60, 75, 76.**

EXHIBITION.

- Of corporate books, mandamus to compel, see **STOCKHOLDERS, 7.**
- ticket, before entering train, see **TICKETS AND FARES, 36.**
 - by commuter, see **TICKETS AND FARES, 62.**
 - wounds to the jury, see **EVIDENCE, 41; TRIAL, 44.**

EXHIBITS.

- Annexed to pleadings, see **PLEADING, 6.**

EXPECTANCY.

- Of life, proof of, see **DAMAGES, 62; DEATH BY WRONGFUL ACT, 283, 284.**
- by mortality tables, see **EVIDENCE, 82, 247.**
 - when a matter of expert testimony, see **WITNESSES, 132, 148.**
 - pecuniary benefit from person killed, see **DEATH BY WRONGFUL ACT, 44, 401, 406.**

EXPENSES.

- Allowance to mortgage trustees for, see **MORTGAGES, 145, 157.**
- receiver for, see **RECEIVERS, 151.**
- Apportionment of, see **CROSSING OF STREETS, ETC., 101.**

Caused by delay, when recoverable, see **CARRIAGE OF MERCHANDISE, 125, 786.**

— non-delivery of goods, as damages, see **DAMAGES, 11.**

Estimating, in foreclosure suit, see **MORTGAGES, 204.**

In obtaining loans, when exempt from taxation, see **TAXATION, 178.**

Incurred by plaintiff, when included in damages, see **CATTLE-GUARDS, 34.**

Indemnity to directors for, see **DIRECTORS, ETC., 47.**

Medical and funeral, when recoverable, see **DEATH BY WRONGFUL ACT, 413, 414; MEDICAL SERVICES.**

Of company while contesting foreclosure, adjustment of, see **MORTGAGES, 233.**

— constructing and maintaining street or highway crossings, see **CROSSING OF STREETS, ETC., 78-83.**

— cure, as an element of damage, see **EMPLOYEES, INJURIES TO, 758.**

— foreclosure sales, see **MORTGAGES, 247.**

— future recovery from effects of injury, when allowable, see **DAMAGES, 47.**

— keeping track in repair as an item of damages, see **CROSSING OF RAILROADS, 43-45.**

— nursing injured child, see **CHILDREN, INJURIES TO, 184.**

— physician, nursing, etc., when recoverable, see **DAMAGES, 90.**

— receivership, adjusting on foreclosure, see **MORTGAGES, 232.**

— recovery of escaped slave, liability of carrier for, see **CARRIAGE OF SLAVES, 13.**

— removing property, evidence of, see **EMINENT DOMAIN, 611.**

— reorganization, liability for, see **REORGANIZATION, 15.**

— repairing bridges, see **BRIDGES, ETC., 35.**

— search for lost baggage, when recoverable, see **BAGGAGE, 124.**

— vexatious litigation as damages, see **ANIMALS, INJURIES TO, 585.**

Reimbursement for, see **CONSTRUCTION OF RAILWAYS, 54.**

Resulting from injury, damages for, see **CARRIAGE OF PASSENGERS, 626; DAMAGES, 73.**

EXPERIMENTS.

Evidence founded on, discretion as to admission of, see **APPEAL AND ERROR, 16.**

In presence of jury, see **TRIAL, 43.**

Made by witnesses, evidence of, see **ANIMALS, INJURIES TO, 422.**

Subsequent to accident, admissibility of evidence of results of, see **EVIDENCE, 77.**

EXPERTS.

- Competency of, see WITNESSES, 73, 140-151.
 Examination of, see WITNESSES, 152-158.
 In handwriting, see WITNESSES, 187, 188.
 Opinions of, see ELEVATED RAILWAYS, 115-126.
 — ordinary witnesses on questions proper for, see WITNESSES, 95.

EXPERT TESTIMONY.

- As to origin and cause of fire, see FIRES, 226.
 — sufficiency of culverts, see CULVERTS, 24.
 — fences, see ANIMALS, INJURIES TO, 421.
 In actions for flowing lands, see FLOODING LANDS, 74.
 — elevated railway cases, see ELEVATED RAILWAYS, 115-126.
 — stock-killing cases, see ANIMALS, INJURIES TO, 418-421.
 — suits for failure to build cattle-guards, see CATTLE-GUARDS, 29.
 — injuries to employes, see EMPLOYES, INJURIES TO, 586.
 Instructions as to, when not reversible error, see APPEAL AND ERROR, 77.
 Weight of, generally, see WITNESSES, 195-198.
 — when for jury, see DEATH BY WRONGFUL ACT, 302.
 What questions call for, see WITNESSES, 131-145.

EXPIRATION.

- Of charter, as ground for dissolution, see DISSOLUTION, ETC., 2.
 — — — of abatement, see ABATEMENT, 9.
 — compulsory powers in England, see EMINENT DOMAIN, 1096.
 — free pass, see PASSES, 8.
 — limited ticket, see TICKETS AND FARES, 88-95.
 — mechanics' lien, see LIENS, 28-30.
 — mileage ticket, condition as to time of, see TICKETS AND FARES, 101.
 — reasonable time to call for baggage, see BAGGAGE, 69, 70.
 — tenancy during pendency of condemnation proceedings, effect of, see EMINENT DOMAIN, 152.
 — ticket, expulsion of passenger because of, see EJECTION OF PASSENGERS, 35.
 — time allowed by charter within which to build road, see STREETS AND HIGHWAYS, 131.

- Of time for completion of road, power to take lands after, see EMINENT DOMAIN, 74.
 — of permissive occupation, ejectment after, see EJECTMENT, 8.

EXPLANATION.

- Of latent ambiguities, by parol, see EVIDENCE, 182.
 — previous testimony, see WITNESSES, 76, 78.

EXPLOSIONS.

- Carriage of dangerous explosives, see CARRIAGE OF MERCHANDISE, 194-198.
 Of boiler, liability to employe for, see FELLOW-SERVANTS, 22.
 Storage of explosives with other goods, liability of carrier, see CARRIAGE OF MERCHANDISE, 370.
 While road is in hands of contractor, liability for, see INDEPENDENT CONTRACTORS, 21.

1. Generally.*—If a railroad company stores explosives in a building which has a defective flue, and it takes fire and burns by reason of such defective flue, and causes an explosion which injures adjoining property, the company is liable. *Denver, S. P. & P. R. Co. v. Conway*, 8 Colo. 1, 54 Am. Rep. 537, 5 Pac. Rep. 142.

Where by placing dynamite near a railroad track the company exposed its servants engaged in operating the road to a danger which they ought not to have been subjected to, it will be liable for injuries sustained by reason of an explosion. *Tissue v. Baltimore & O. R. Co.*, 112 Pa. St. 91, 3 Atl. Rep. 667.

2. Fog signals—Torpedoes.—It is negligence for the servants of a railroad company wantonly and needlessly, without notice, warning, or other precaution, to place and leave exposed to observation, at a point or place on its railroad where the public, including children, are and have been permitted by the company to travel and pass, an apparently harmless, but in fact highly explosive and dangerous, object, like a signal torpedo, easily picked up and handled by children and likely to attract them, and known to such servants to be such. *Harriman v. Pittsburgh, C. &*

* Liability of carrier for injury to adjacent property caused by explosion, see note, 30 AM. & ENG. R. CAS. 176.

St. L. R. Co., 32 *Am. & Eng. R. Cas.* 37, 45 *Ohio St.* 11, 12 *N. E. Rep.* 451.

Where a child of tender years is injured by the explosion of such torpedo, which exploded while being handled by him, in ignorance of its dangerous or harmful character, the negligence of such servants in placing and leaving such torpedo on the road was the proximate cause of the injury. *Harriman v. Pittsburgh, C. & St. L. R. Co.*, 32 *Am. & Eng. R. Cas.* 37, 45 *Ohio St.* 11, 12 *N. E. Rep.* 451.

The company intrusting to its servants the management and control of a train of its cars, and the custody of such torpedoes, is responsible for their negligence in placing and leaving such torpedoes on its track, at such point where the public, including children, were permitted to pass over the same, and is liable for the injury resulting from the explosion of such torpedo, notwithstanding such negligent acts of the servants were wanton, reckless, and needless. *Harriman v. Pittsburgh, C. & St. L. R. Co.*, 32 *Am. & Eng. R. Cas.* 37, 45 *Ohio St.* 11, 12 *N. E. Rep.* 451.

A complaint against a company for injuries to a boy nine years old, by an explosion of a torpedo which he picked up on the track, charged that the road carried such torpedoes, which were highly explosive, for signals, but wantonly placed them on the road where persons were in the habit of passing, and where children were accustomed to go, and the boy was injured while ignorant of the danger. *Held*, that the complaint was sufficient on demurrer. *Harriman v. Pittsburgh, C. & St. L. R. Co.*, 32 *Am. & Eng. R. Cas.* 37, 45 *Ohio St.* 11, 12 *N. E. Rep.* 451.

A fireman took torpedoes that belonged to the company, and in charge of the conductor, which were intended only to be used for signals, and placed them on the track on the Fourth of July, out of a patriotic desire to assist in celebrating that day, and one exploded and injured plaintiff, who was standing about the station, but not on any business connected with the railroad. The torpedoes were taken without the knowledge or consent of the conductor. *Held*, that the company was not liable. *Chicago, B. & Q. R. Co. v. Epperson*, 26 *Ill. App.* 72.

Plaintiff, while standing on the platform at one of defendants' stations, had his eye injured by the explosion of a fog signal, which had been placed on the track. The

only evidence given was that certain servants of defendants had these fog signals in their possession for lawful purposes, but that no one, to the knowledge of several of the defendants' employes who were called as witnesses for the plaintiff, placed this one on the track, and that it was wholly unnecessary for defendants' purposes; and it appeared not impossible that it might have been obtained from defendants' servants by some third party, or might have been put there by a servant of defendants for a frolic. *Held*, that a nonsuit was properly directed. *Jones v. Grand Trunk R. Co.*, 45 *U. C. Q. B.* 193.—QUOTING *Cornman v. Eastern Counties R. Co.*, 4 H. & N. 781; *Daniel v. Metropolitan R. Co.*, L. R. 3 C. P. 222; *Metropolitan R. Co. v. Jackson*, L. R. 3 App. Cas. 197.

3. Machinery—Engines.—(1) *Injuries to passengers and licensees.*—A stranger rightfully in a depot, not holding any relation of trust and confidence to the company, may recover for an injury occasioned by a boiler explosion. The fact of the explosion is *prima facie* evidence of negligence by the company. But in such cases the person is not entitled to the same degree of care due passengers. *Illinois C. R. Co. v. Phillips*, 55 *Ill.* 194, 2 *Am. Ry. Rep.* 374.—DISTINGUISHING *Illinois C. R. Co. v. Reedy*, 17 *Ill.* 580; *Illinois C. R. Co. v. Phelps*, 29 *Ill.* 447; *Illinois C. R. Co. v. Goodwin*, 30 *Ill.* 117. FOLLOWING *Illinois C. R. Co. v. Phillips*, 49 *Ill.* 234.

To overcome such presumption it must be shown that the materials used in its construction were of the kind usually employed, and that it had been subjected to and withstood the usual tests, and was used with judgment and skill by persons of experience. *Illinois C. R. Co. v. Phillips*, 49 *Ill.* 234.—FOLLOWED IN *Illinois C. R. Co. v. Phillips*, 55 *Ill.* 194; *Kranz v. White*, 8 *Ill. App.* 583.

The leaving of a boiler and pile-driver unattended for more than half an hour, in the condition shown by the evidence, was culpable negligence on the part of the servants of a company, and it was for the jury, and not the court, to say whether such negligence was the cause of the explosion, and whether leaving such boiler unattended in the vicinity of a place where they knew people would be passing was a want of ordinary care towards them. Nor could the court say, as a matter of law, that the

explosion was due to unforeseen causes, and would have happened had the man in charge remained in attendance. *Davis v. Chicago & N. W. R. Co.*, 15 *Am. & Eng. R. Cas.* 424, 58 *Wis.* 646, 17 *N. W. Rep.* 406, 46 *Am. Rep.* 667.—QUOTING *Baltimore & O. R. Co. v. State*, 33 *Md.* 542; *Isabel v. Hannibal & St. J. R. Co.*, 60 *Mo.* 475; *Griffiths v. London & N. W. R. Co.*, 14 *L. T.* 797; *Sutton v. New York C. & H. R. R. Co.*, 66 *N. Y.* 244; *Philadelphia & R. R. Co. v. Hammell*, 44 *Pa. St.* 379.—FOLLOWED IN *Harriman v. Pittsburgh, C. & St. L. R. Co.*, 32 *Am. & Eng. R. Cas.* 37, 45 *Ohio St.* 11. REVIEWED IN *Virginia Midland R. Co. v. White*, 84 *Va.* 498, 5 *S. E. Rep.* 576.

R., a passenger on a railroad car, was injured by the explosion of the boiler of the locomotive used to push the train, and sued the railroad company for negligence. At the trial he rested by proving the explosion. The employes of the defendant testified to due care in managing the boiler at the time of the explosion, that the boiler had recently been repaired and tested and found safe, and that the explosion resulted from a hidden flaw in the iron of the boiler, which could not be seen. The jury were instructed that they might infer negligence, upon the theory that the explosion would not have taken place unless the boiler had been in a defective condition, or unless there had been some omission or mismanagement on the part of those in charge of it at the time. *Held*, no error. *Robinson v. New York C. & H. R. R. Co.*, 20 *Blatchf. (U. S.)* 338, 9 *Fed. Rep.* 877.

(2) *Injuries to employes.*—In an action by an employe for injuries caused by the explosion of an engine, the onus of proving negligence is on the plaintiff, and it is not enough to prove the fact of injury from the explosion; but the rule is different when the action is brought by a passenger. *Louisville & N. R. Co. v. Allen*, 28 *Am. & Eng. R. Cas.* 514, 78 *Ala.* 494.—FOLLOWED IN *Mobile & B. R. Co. v. Holborn*, 84 *Ala.* 133.—*Toledo, W. & W. R. Co. v. Moore*, 77 *Ill.* 217.

Where an explosion happens through the negligent management of an engine and kills the engineer, his personal representative cannot recover if the deceased knew or had reason to believe the boiler was unsafe and still used it after such knowledge. *Toledo, W. & W. R. Co. v. Moore*, 77 *Ill.* 217.

The rule requiring employers to furnish a reasonably safe place for employes to work, does not make a railroad company an insurer against the breaking of machinery or the explosion of boilers while used by an employe in the service of the company, provided such machinery is apparently in a safe condition and the injury results from latent defects unknown to the company, or which, in the exercise of ordinary care and skill, might have been known. *Racine v. New York C. & H. R. R. Co.*, 70 *Hun (N. Y.)* 453. *Hard v. Vermont & C. R. Co.*, 32 *Vt.* 473.

In an action to recover for the death of a fireman killed by the explosion of a locomotive, it was shown that the engine had been purchased in 1869 as a second class engine, and that the agents entrusted with the power of making the purchase failed to ascertain its age, use, or condition. It was proved that at the time of the explosion the engine was in a defective condition, and that the defective condition of the engine had been brought to the knowledge and attention of the employes of the defendant whose business it was to repair it. *Held*, that upon this proof there was evidence legally sufficient upon which the court below was justified in submitting the case to the jury, although on the part of the defendant it was proved that every precaution was taken, and that the engine was repaired and was supposed to be in a good, safe condition. *Cumberland & P. R. Co. v. State*, 44 *Md.* 283, 45 *Md.* 229.

4. *Magazines in city limits.*—M., in constructing a railroad tunnel, was compelled to use explosives in blasting rock, for the safe keeping of which he constructed a magazine near the eastern end of the tunnel, within the limits of Jersey City. The magazine exploded, doing great damage to property, and in an action for damages—*held*, that the legislative authority to the corporation to build its road did not include authority to use, at whatever hazard to the persons or property of others, dangerous materials, even though necessary to the convenient prosecution of the work; and that M. was liable for the injury, although no negligence or want of skill in prosecuting the work was proved, and he had shown that the work was done in the most careful manner. *McAndrews v. Collier*, 42 *N. J. L.* 189.—QUOTING *Tinsman v. Belvidere Del. R. Co.*, 26 *N. J. L.* 148.

5. Nitro-glycerine, etc., in car.—An employé who knew the dangerous character of the work cannot recover of the company where a switchman was ordered to switch a car loaded with nitro-glycerine, which, owing to the negligence of the servants of the consignor, exploded and injured the plaintiff. *Foley v. Chicago & N. W. R. Co.*, 6 Am. & Eng. R. Cas. 161, 48 Mich. 622, 42 Am. Rep. 481, 12 N. W. Rep. 879.

The defendant company received at its yards at Council Bluffs a car of giant-powder. It was placed upon a side track to await orders as to its future disposition, and while there took fire and exploded, whereby the plaintiff's property was injured. There was no evidence of negligence on the part of the defendant; all the light the jury had upon the subject was that the car exploded, and the plaintiff's property was injured. *Held*, that the burden was on the plaintiff to show that the place where the car was stored was an improper place; and that there was no evidence of negligence to go to the jury. *Walker v. Chicago, R. I. & P. R. Co.*, 30 Am. & Eng. R. Cas. 173, 71 Iowa 658, 33 N. W. Rep. 224.

6. — or in warehouse.—Where there is nothing to excite the suspicion of a common carrier as to the contents of a package carried by him, it is not negligence on his part to introduce the package, when appearing to be damaged, into his place of business for examination, and to handle it in the same manner as other packages of similar outward appearance are usually introduced for examination, and handled. *Parrott v. Wells*, 15 Wall. (U. S.) 524; affirming 1 Sawy. 423, 2 Abb. 197.

The defendants, who were expressmen engaged in carrying freight between New York and California, received at New York a box of nitro-glycerine to be carried to California. The box was received in the usual course of business. On arrival at San Francisco its contents were found to be leaking. The box was then taken by defendants for examination to the premises occupied by them, which were leased from the plaintiff. While making the examination, the nitro-glycerine exploded, injuring the premises occupied by defendants, and also the adjoining premises of the plaintiff. The defendants had no knowledge of, and no reason to suspect, the dangerous character of the contents of the box. They repaired the premises occupied by themselves,

and the plaintiff sued them for the injury to the adjoining premises. *Held*, that the defendants were not liable. *Parrott v. Wells*, 15 Wall. (U. S.) 524; affirming 1 Sawy. 423, 2 Abb. 197.

Common carriers are not chargeable, in cases free from suspicion, with notice of the contents of packages carried by them; nor are they authorized in such cases to require information as to the contents of the packages offered, whether explosive or not, as a condition of carrying them. *Parrott v. Wells*, 15 Wall. (U. S.) 524; affirming 1 Sawy. 423, 2 Abb. 197.

The measure of care against accidents by explosives which a carrier must take to avoid responsibility is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own. *Parrott v. Wells*, 15 Wall. (U. S.) 524; affirming 1 Sawy. 423, 2 Abb. 197.

EXPOSURE.

After expulsion from train, damages for, see EJECTION OF PASSENGERS, 109, 110.

Of cattle in stock yard during storm, see CARRIAGE OF LIVE STOCK, 40.

— to danger—contributory negligence, see ANIMALS, INJURIES TO, 217.

— employee to unnecessary risks or undue danger, see FELLOW-SERVANTS, 60, 80.

— premises to fire, when contributory negligence, see FIRES, 114-117.

Voluntary, as a defense to action on insurance policy, see ACCIDENT INSURANCE, 10.

EXPRESS.

Admissions in pleadings, effect of, see PLEADING, 92.

Agreement, subrogation by, see SUBROGATION, 1.

Cars, riding in, see CARRIAGE OF PASSENGERS, 52, 82, 498.

Contracts, limitation of liability by, see LIMITATION OF LIABILITY, 2-4.

— right to stop over by virtue of, see TICKETS AND FARES, 48.

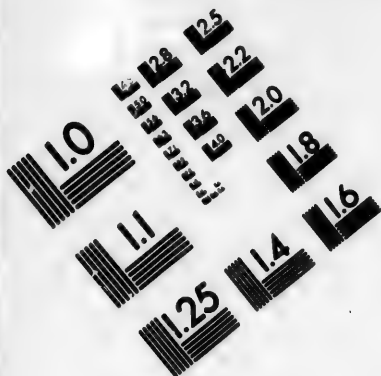
Messengers, how far deemed passengers, see CARRIAGE OF PASSENGERS, 53.

— limiting liability as towards, see CARRIAGE OF PASSENGERS, 340.

— not fellow-servants with engineer, see FELLOW-SERVANTS, 279.

Trust, proof of, by secondary evidence, see EVIDENCE, 147.

— trustee of, when proper party to sue, see PARTIES TO ACTIONS, 3.



1.8
2.0
2.2
2.5
2.8
3.2
3.6
4.0
4.5
5.0
5.6
6.3
7.1
8.0
9.0
10.0
11.2
12.5
14.0
16.0
18.0
20.0
22.5
25.0
28.0
31.5
36.0
40.0
45.0
50.0
56.0
63.0
71.0
80.0
90.0
100.0

10
11
12
13
14
15
16
17
18
19
20
22
25
28
31
36
40
45
50
56
63
71
80
90
100

EXPRESS COMPANIES.

Are not subject to Interstate Commerce Act, see INTERSTATE COMMERCE, 23.

Conviction of agent of, for illegal transportation of liquor, see INTOXICATING LIQUORS, 5.

Discrimination in carrying express goods, see DISCRIMINATION, 61.

State laws imposing taxes on, see COMMERCE, 12.

Taxation of, and of stock in, see TAXATION, 71, 105.

— foreign, see INTERSTATE COMMERCE, 214.

I. RIGHTS AND LIABILITIES, GENERALLY.

ALLY 560

1. Nature and Conduct of the Business, Generally..... 560

2. Privileges upon Railroad Trains..... 561

3. Agents, and Liability for Their Acts..... 566

4. Collections..... 568

II. RIGHTS AND LIABILITIES AS CARRIERS.

RIERS..... 569

1. In General..... 569

2. For Loss or Injury..... 574

3. Delivery by the Company... 577

4. Liability as Warehouseman 584

5. Limitation of Liability.... 585

6. Connecting Lines..... 595

III. ACTIONS BY AND AGAINST..... 598

I. RIGHTS AND LIABILITIES, GENERALLY.

1. Nature and Conduct of the Business, Generally.

1. General nature of express business.*—An express company may be defined to be a common carrier that carries at regular and stated times, over fixed and regular routes, money and other valuable packages, which cannot be conveniently or safely carried as common freight; and also other articles and packages of any description which the shipper desires, or the nature of the article requires should have safe and rapid transit and quick delivery, transporting the same in the immediate charge of its own messenger on passenger steamers and express and passenger railway trains, which it does not own or operate, but with the owners of which it contracts for the carriage of its messengers and freights; and within

cities and towns or other defined limits, it collects from the consignors and delivers to the consignees at other places of business the goods that it carries. *Pacific Exp. Co. v. Seibert*, 44 Fed. Rep. 310.—APPLYING In re Express Cos., 1 Int. Com. Com. 367. QUOTING *Retzer v. Wood*, 109 U. S. 185, 3 Sup. Ct. Rep. 164.

The express company known as Wells, Fargo & Co. is not a corporation with banking powers, within the purview of and prohibition contained in U. S. Rev. St. § 1924; and if this were otherwise, it is not prevented by said section from doing an express business in Washington territory, even if in so doing it makes use of the telegraph or bills of exchange to facilitate the transfer of money from place to place. *Wells v. Northern Pac. R. Co.*, 10 Sawy. (U. S.) 441, 23 Fed. Rep. 469.

The express business is an "industrial pursuit" within the meaning of U. S. Rev. St. § 1889, and may therefore be carried on in Washington territory by a corporation formed there under a general law, or by a corporation otherwise duly formed or incorporated elsewhere. *Wells v. Northern Pac. R. Co.*, 10 Sawy. (U. S.) 441, 23 Fed. Rep. 469.

By various statutes of New York, an express company organized as a joint-stock company has all the powers of a corporation, except that it has no right to adopt and use a common seal. *Waterbury v. Merchants' Union Exp. Co.*, 3 Abb. Pr. N. S. (N. Y.) 163.

2. Filing statement required by statute in Indiana.—A statement filed by an express company in the recorder's office, under Ind. Act of March 5, 1855, showed that the business of the company was managed, and its property and effects were owned, by five trustees, the names of four of whom, and their respective places of residence, were given; and it was stated that there was one vacancy, and that "the persons interested as *cestui que trust* are the stockholders of said company, who change from day to day, and of whom it is impossible to make an accurate statement, owing to the frequency of such changes." Held, that this was a substantial compliance with the requirement of section 2 of said act, that the statement so filed shall show the full name of every member of such company and his proper place of residence. *Barney v. Daniels*, 32 Ind. 19.

* Nature of express business, see note, 23 AM. & ENG. R. CAS. 572.

Such statement must show the entire amount of capital employed by the company in the express business, and not simply the probable amount employed in its business in the state. *Barney v. Daniels*, 32 Ind. 19.

If merely the amount of capital employed in the business of the company in the state be shown, this insufficiency of the statement is a good defense to a suit by the company against an agent thereof, in the county where such statement is filed, and the sureties upon his bond given for the faithful performance of his duties as agent, to recover money received by him in the course of his business as agent. *Barney v. Daniels*, 32 Ind. 19.

But the company may still maintain an action against the agent himself to recover for money received in the course of his agency to the use of the company. *United States Exp. Co. v. Lucas*, 36 Ind. 361.

The filing of such statement, by any such company, in the recorder's office, gives the recorder authority to have the same published at its expense. *Fargo v. Ledger-Standard Co.*, 59 Ind. 496.

3. Obstruction of sidewalks with merchandise.—Occupants of places of business upon a public street have a right to use the sidewalk in front of their premises in receiving and sending out merchandise. But this right must be exercised with a due regard to the rights of pedestrians and in a reasonable manner; and what is a reasonable manner must always depend upon the circumstances. No precise rule can therefore be laid down as to the length of time a person, in such use of a sidewalk, may allow his property to remain thereon without incurring the charge of negligence; the question is for the jury. *Vallo v. United States Exp. Co.*, 147 Pa. St. 404, 23 Atl. Rep. 594.

4. Duty to restore stolen property to owner.—Where property held as collateral security for a debt is stolen and delivered to an express company, the possession by such company is unlawful, and when a demand is made for the property by the lawfully authorized agent of the one from whose possession it was stolen, they should surrender it, and if they fail to do so they become liable for the value of the property. *United States Exp. Co. v. Meints*, 72 Ill. 293.

5. Right to carry letters or other mailable matter.—The Act of Congress of March 3, 1845, § 9, making it unlawful to regularly carry by any private express mailable matter, is not violated by an express that carries an unstamped letter of advice, which accompanies a package of money being transmitted. *United States ex rel. v. United States Exp. Co.*, 5 Biss. (U. S.) 91.

Packages of bonds and deeds are mailable matter, under the Act of Congress of March 3, 1845, and any contract, either express or implied, by an express company, for their transportation is void, and the company cannot charge freight therefor. *Hill v. Mitchell*, 25 Ga. 704.

6. Unlawful transportation of game.—An express company which transports game in violation, and with the knowledge, of the Illinois game law, is amenable to the penalties prescribed in section 2 thereof. *American Exp. Co. v. People*, 133 Ill. 649, 24 N. E. Rep. 758, 9 L. R. A. 138, 31 Cent. L. J. 271.

2. Privileges upon Railroad Trains.

7. Duty of railway company to furnish express facilities.*—Railroads are bound to carry the express matter of regularly organized express companies, and to provide the necessary facilities therefor. *Wells v. Oregon R. & N. Co.*, 16 Am. & Eng. R. Cas. 71, 9 Sawy. (U. S.) 370, 18 Fed. Rep. 517.—FOLLOWING *Southern Exp. Co. v. St. Louis, I. M. & S. R. Co.*, 10 Fed. Rep. 210.—QUOTED IN *Wells v. Oregon R. & N. Co.*, 9 Sawy. (U. S.) 601, 19 Fed. Rep. 20.—*Wells v. Northern Pac. R. Co.*, 10 Sawy. (U. S.) 441, 23 Fed. Rep. 469.—FOLLOWING *Wells v. Oregon R. & N. Co.*, 8 Sawy. 600.

A railroad company as a common carrier is as much bound to carry for another common carrier, doing business as an express company, as it is to carry for other persons, though the employes of the express company accompany the goods, and have the care thereof. *Dinsmore v. Louisville, C. & L. R. Co.*, 2 Flipp. (U. S.) 672, 2 Fed. Rep. 465.

* Common carrier relation of express and railroad companies, see note, 23 AM. & ENG. R. CAS. 571.

Duty of railroad to furnish express facilities, see notes, 18 AM. & ENG. R. CAS. 466; 16 Id. 93; 3 Id. 601.

Usage to furnish express facilities, see note, 23 AM. & ENG. R. CAS. 577.

Railroad companies are compellable by law to admit the agents of express companies, with their safes, on their trains. *Alsop v. Southern Exp. Co.*, 40 Am. & Eng. R. Cas. 1, 104 N. Car. 278, 6 L. R. A. 271, 41 Alb. L. J. 167, 10 S. E. Rep. 297.

The Northern Pacific railway company being bound to furnish express facilities to Wells, Fargo & Co., on its road running through Washington, Dakota, Montana, and Minnesota, cannot excuse itself for not doing so on the ground that said express company has not complied with the laws of said territories and state on the subject of express companies; and if this were otherwise, the presumption is that the express company has complied with the law, and the burden of proof is on the railway company to show the contrary. *Wells v. Northern Pac. R. Co.*, 10 Sawy. (U. S.) 441, 23 Fed. Rep. 469.

8. Right of railroad company to engage in express business.*—A railroad company cannot assume to itself the exclusive right or privilege of carrying on the express business over its own lines, or any portion of them. *Southern Exp. Co. v. Louisville & N. R. Co.*, 4 Fed. Rep. 481.

If a railroad company possesses the right to engage in the express business at all, it must do so upon terms of perfect equality with all other express companies; and when application is made a court will see that it does not take to itself any privileges in this regard that it does not extend to other express companies. *Southern Exp. Co. v. Memphis & C. R. Co.*, 2 McCrary (U. S.) 570, 8 Fed. Rep. 799.

Where a consolidated railroad company continues to allow an express company to do business over its road for some months after it took possession, some understanding or agreement will be implied, and the express company will be entitled to some notice of an intended change in rates, etc., growing out of the intention of the railroad company to do its own express business. *Southern Exp. Co. v. Louisville & N. R. Co.*, 4 Fed. Rep. 481.

A common carrier is not bound to permit

a business which interferes with his own interests as an express business, to be transacted on his vehicles; and though he waives his rights, in that respect, in regard to one person, he is not bound to waive them in regard to another person. *The D. R. Martin*, 11 Blatchf. (U. S.) 233.

Where a railroad company undertakes to defend a bill in equity, which seeks to compel it to transport the freight of an express company, on the ground that the railroad company is doing all the express business itself over its own road, the burden is on it to show that such is the fact. *International Exp. Co. v. Grand Trunk R. Co.*, 37 Am. & Eng. R. Cas. 622, 81 Me. 92, 16 Atl. Rep. 370.

And such a defense is not made out by merely showing that the company had employed another express company to do the business over its road, where the alleged contract of employment is not produced, nor all of its terms stated, and where the company in its first answer denied plaintiff's demand because "it would be inconvenient to them to accommodate two express companies." *International Exp. Co. v. Grand Trunk R. Co.*, 37 Am. & Eng. R. Cas. 622, 81 Me. 92, 16 Atl. Rep. 370.

Mass. St. 1867, ch. 339, making it the duty of railroad companies "to give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of merchandise," does not make it unlawful for a railroad company to exclude existing express companies and carry on the express business itself. *Sargent v. Boston & L. R. Corp.*, 115 Mass. 416. —NOT FOLLOWED IN *Wells v. Oregon R. & N. Co.*, 8 Sawy. (U. S.) 600, 15 Fed. Rep. 561.

9. Discrimination between express companies.*—(1) *General rules.*—The right of express companies to do business over railroads rests entirely on contract, subject to legislative regulation only, and the courts have no power to say that railroads shall permit express companies to do business on their roads; or, having admitted one, that they shall admit others on equal terms. *Memphis & L. R. R. Co. v. Southern Exp. Co.*, 23 Am. & Eng. R. Cas. 545, 117 U. S. 1, 6 Sup. Ct. Rep. 542; reversing 2 McCrary (U. S.) 570, 8 Fed. Rep.

* Whether railroad company can engage in express business, see notes, 16 AM. & ENG. R. CAS. 94; 23 ID. 570.

Instrumentalities by which a railway company may transact its transportation business, including that of the express department, see note, 23 AM. & ENG. R. CAS. 573.

* Discrimination by railroad companies between express companies, see notes, 16 AM. & ENG. R. CAS. 94; 11 AM. ST. REP. 653.

799.—APPLIED IN *United States v. Delaware, L. & W. R. Co.*, 40 Fed. Rep. 101. APPROVED IN *Little Rock & M. R. Co. v. East Tenn., V. & G. R. Co.*, 47 Fed. Rep. 771. FOLLOWED IN *Ilwaco R. & N. Co. v. Oregon S. L. & U. N. R. Co.*, 57 Fed. Rep. 673; *Delaware, L. & W. R. Co. v. Central S. Y. & T. Co.*, 43 N. J. Eq. 77.

Contracts between railroad companies and express companies permitting the latter to do business over the railroads, must be so framed as to adjust the rate of compensation to the number of persons and quantity, and perhaps quality, of matter transported, and to the length of the haul, so as not to discriminate in favor of one or more companies or persons doing an express business and against others. *Texas Exp. Co. v. Texas & P. R. Co.*, 4 Woods (U. S.) 370, 6 Fed. Rep. 426.

A contract by a railroad company allowing one express company so much space in its cars as to disable it from furnishing necessary facilities for other express companies having equal claims on the railroad company, is illegal and void. *Texas Exp. Co. v. Texas & P. R. Co.*, 4 Woods (U. S.) 370, 6 Fed. Rep. 426.

A railroad company must serve different express companies equally, and neither directly nor indirectly favor one or hinder the other. Whatever terms or favors it extends to one it must extend to the other. *Wells v. Oregon & C. R. Co.*, 16 Am. & Eng. R. Cas. 87, 18 Fed. Rep. 667, 9 Sawy. (U. S.) 426.

Whether an express company doing business over a line of railway or steamboats is entitled to the services of the pursers and conductors thereon as its messengers depends on circumstances; but when one express company doing business over any such line of transportation is allowed such service, the same thereby becomes an express facility as to all other express companies doing business thereon, and cannot lawfully be withheld from them. *Wells v. Oregon R. & N. Co.*, 9 Sawy. (U. S.) 601, 19 Fed. Rep. 20.—QUOTING *Wells v. Oregon & C. R. Co.*, 9 Sawy. (U. S.) 432, 1 West Coast Rep. 250.

In the absence of a usage to that effect, or of some statute requiring them so to do, it is not the duty of railroad companies to furnish facilities for the transportation of express matter to all alike who demand them. *Pfister v. Central Pac. R. Co.*, 70 Cal.

169, 11 Pac. Rep. 686.—FOLLOWING *St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.*, 117 U. S. 1.

Under the provisions of the Maine statute requiring railroad companies to extend equal facilities and accommodations to all persons or companies engaged in the express business within the state, foreign as well as domestic, express companies are protected. *International Exp. Co. v. Grand Trunk R. Co.*, 37 Am. & Eng. R. Cas. 622, 81 Me. 92, 16 Atl. Rep. 370.

A railroad company is not compelled to furnish express facilities to another to conduct an express business over its road the same as it provided for itself or affords to any other express company. Section 4 of the N. C. Commission Act, forbidding discrimination against any other corporation, etc., respecting any species of traffic, is merely declaratory of the common law, and does not enlarge its scope. *Atlantic Exp. Co. v. Wilmington & W. R. Co.*, 111 N. Car. 463, 16 S. E. Rep. 393.

The refusal of the defendants to provide the plaintiff with the express facilities sought is no violation of Rule 8, adopted by the commission: "No railroad company shall, by reason of any contract with any express or other company, decline or refuse to act as a common carrier to transport any articles proper to be transported by the train for which it is offered." *Atlantic Exp. Co. v. Wilmington & W. R. Co.*, 111 N. Car. 463, 16 S. E. Rep. 393.

A contract made by a railroad company, giving to one person or company the exclusive privilege of transportation in their passenger trains, is illegal and void. They have no power to exclude any part of the public, or to grant exclusive privileges to particular persons. *Sanford v. Catawissa, W. & E. R. Co.*, 2 Phila. (Pa.) 107.

The railway committee of the privy council, created by section 8 of the Railway Act, has jurisdiction to inquire into a complaint of an express company against a railway company that the latter has not granted it equal privileges with other express companies. *Ontario E. & T. Co. v. Grand Trunk R. Co.*, 7 Montr. Super. 308.

An adequate remedy being thus provided, a mandamus does not lie in such cases. *Ontario E. & T. Co. v. Grand Trunk R. Co.*, 7 Montr. Super. 308.

(2) *Illustrations*.—Where the Maine Central R. Co. let to the Eastern Express Co.,

for four years, the exclusive use of a separate apartment in a car attached to each of their passenger trains, for the purpose of transporting the express company's messenger and merchandise, and agreed that they would not, during the continuance of such contract, let any space in any car on their passenger trains to any other express carrier; and the railroad company, before the expiration of such contract, but after reasonable notice to them, refused to receive, upon any terms, from the New England Express Co., when and where they received the Eastern Express Co.'s freight, such packages as are usually carried by express companies, to be transported by their passenger trains—*held*, that the railroad company were liable, under Me. Pub. Laws 1868, ch. 193, to the New England Express Co., in an action of damages. *New England Exp. Co. v. Maine C. R. Co.*, 57 Me. 188.—QUOTING *Garton v. Bristol & E. R. Co.*, 95 Eng. C. L. 655; *Marriott v. London & S. W. R. Co.*, 87 Eng. C. L. 499; *Piddington v. South Eastern R. Co.*, 94 Eng. C. L. 111; *Sandford v. Catawissa, W. & E. R. Co.*, 24 Pa. St. 378.—APPLIED IN *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.*, 15 Fed. Rep. 650. APPROVED IN *McDuffee v. Portland & R. R. Co.*, 52 N. H. 430. NOT FOLLOWED IN *Wells v. Oregon R. & N. Co.*, 8 Sawy. (U. S.) 600, 15 Fed. Rep. 561. QUOTED IN *Messenger v. Pennsylvania R. Co.*, 37 N. J. L. 531; *Scofield v. Lake Shore & M. S. R. Co.*, 23 Am. & Eng. R. Cas. 612, 43 Ohio St. 571.

A railroad company was required in its act of incorporation to transport, in the order in which they shall be requested, "all goods, wares, etc., so that equal and impartial justice shall be done to all owners of property who shall pay or tender to the officers of the company, the toll and freight due under this act on the goods, wares, minerals, and merchandise, or other articles which they may wish transported." *Held*, that express companies had as good a right to the benefits of the road as the owners of the packages which they conveyed personally had; but that a contract giving to one express company an exclusive right of transportation in the passenger trains was illegal and void. *Sandford v. Catawissa, W. & E. R. Co.*, 24 Pa. St. 378.—APPLIED IN *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.*, 15 Fed. Rep. 650. APPROVED IN *McDuffee v. Portland & R. R. Co.*, 52 N.

H. 430. DISTINGUISHED IN *Rowland v. Pennsylvania R. Co.*, 52 Pa. St. 250. QUOTED IN *Cobb v. Illinois & St. L. R. & C. Co.*, 68 Ill. 233; *Hickey v. Chicago & W. I. R. Co.*, 6 Ill. App. 172; *New England Exp. Co. v. Maine C. R. Co.*, 57 Me. 188; *Scofield v. Lake Shore & M. S. R. Co.*, 23 Am. & Eng. R. Cas. 612, 43 Ohio St. 571.

The railway company having granted to one incorporated express company the privilege of employing their station agents to act as agents of that express company, the right to use the company's trucks and baggage house as places for storing goods, and refused the same privilege to another incorporated express company, brought themselves within the provisions of subsection 3, section 60, of 42 Vict. c. 9 (D) which enacts that any railway company granting any facilities to any incorporated express company shall grant equal facilities, on equal terms and conditions, to any other incorporated express company demanding the same. *Vickers Exp. Co. v. Canadian Pac. R. Co.*, 13 Ont. App. 210; *affirming* 9 Ont. 251.—REVIEWING *Great Western R. Co. v. Sutton, L. R. 4 H. L. Cas. 226*.

In the absence of collusion the court would not inquire into the reasonableness of the rates charged by a railway company to an express company. *Vickers Exp. Co. v. Canadian Pac. R. Co.*, 13 Ont. App. 210; *affirming* 9 Ont. 251.

10. Specific performance of contracts for express facilities.*—Plaintiff brought action for specific performance of a contract, and on application for a mandatory injunction *pendente lite*, it appeared that the contract in question was exceedingly comprehensive and most minute in its working details; that those details provided for special and varying contingencies, and the elements of discretion and judgment with regard thereto; that the due execution thereof would involve the ascertainment of what is right and proper the parties thereto should do from day to day with regard to ever-varying circumstances. *Held*, that the action could not be maintained, and the injunction should be denied. *Fargo v. New York & N. E. R. Co.*, 23 N. Y. Supp. 360, 3 Misc. 205.—APPROVING *Blanchard v. Detroit, L. & L. M. R. Co.*, 31 Mich. 43.

* Specific performance of contracts to afford express facilities, see note, 22 AM. & ENG. R. CAS. 274.

QUOTING *Powell Duffryn Steam Coal Co. v. Taff Vale R. Co.*, L. R. 9 Ch. 331; *Atlanta & W. P. R. Co. v. Speer*, 32 Ga. 550.

11. Supervision by railway company over business of express company.—One railroad company doing an express business cannot exercise a supervision over the business of a rival company, as by demanding the right to inspect safes, chests and packages. *Southern Exp. Co. v. Louisville & N. R. Co.*, 4 Fed. Rep. 481.

The refusal of a railroad company to carry the safes and chests of an express company unless allowed to open the same and inspect their contents, or being furnished with an inventory of such contents, with the understanding that it might, whenever it saw fit, open the safes and chests and inspect their contents, and also collect the freight on each separate article or parcel contained therein, as if each had been shipped by itself, is in violation of the express company's rights as a shipper, and of an interlocutory injunction restraining an interference with the express company's business. *Dinsmore v. Louisville, N. A. & C. R. Co.*, 3 Fed. Rep. 593.

12. Compensation of railway company for carrying express matter.—Railroad companies are bound to furnish facilities for the business of express companies, and can only exact reasonable compensation therefor, which, if not agreed on, may be determined by the court. *Wells v. Oregon R. & N. Co.*, 8 Sawy. (U. S.) 600, 15 Fed. Rep. 561.—NOT FOLLOWING *Camblos v. Philadelphia & R. R. Co.*, 4 Brews. (Pa.) 563; *New England Exp. Co. v. Maine C. R. Co.*, 57 Me. 194; *Sargent v. Boston & L. R. Corp.*, 115 Mass. 416. REVIEWING *Southern Exp. Co. v. St. Louis, I. M. & S. R. Co.*, 10 Fed. Rep. 210.—FOLLOWED IN *Wells v. Northern Pac. R. Co.*, 10 Sawy. (U. S.) 441, 23 Fed. Rep. 469.

Where an express company applies for an injunction to compel a railroad company to afford it facilities for the transaction of its business over the railroad, as to the question of compensation to be made, the court will assume, for the purpose of a provisional injunction, that what the express company has been paying in the past is reasonable, and will require the railroad company to furnish facilities at the same rates until further hearing. *Wells v. Oregon R. & N. Co.*, 8 Sawy. (U. S.) 600, 15 Fed. Rep. 561.

13. Liability of railway company for injuries to employee of express company.—Where a railroad company, without any express contract, undertakes to carry an express messenger in a car provided by it for the use of the express company, it owes to him the same duty to use every reasonable precaution to carry him safely that it owes to an ordinary passenger. *Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. Rep. 528, 597.

If an express company hires its freight transported on the steamer or railroad of a company engaged in transporting freight and passengers for hire, as common carriers, and hires an agent to take charge of such freight, whose passage is paid for in the contract, such agent occupies the position of an ordinary passenger, as to the liability of the common carrier, for injuries he may sustain, caused by the negligence of its employés. *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71.

If an express messenger, holding a season ticket from a company, and desiring to ride for the conduct of his business in a baggage car in contravention of its rules, agrees to assume all risk of injury therefrom and to hold the company harmless therefor, he takes the risk of all injuries received by him while riding in the baggage car. *Hosmer v. Old Colony R. Co.*, 156 Mass. 506, 31 N. E. Rep. 652.—FOLLOWING *Bates v. Old Colony R. Co.*, 147 Mass. 255.

Where there is no express exemption provided by contract, a railroad company is liable for the consequences of its own or its servants' negligence to persons traveling upon its trains, as messengers or agents of an express company, to the same extent as to other passengers, although no charge is made for their fare. *Blair v. Erie R. Co.*, 66 N. Y. 313.—DISTINGUISHING *Eaton v. Delaware, L. & W. R. Co.*, 57 N. Y. 382. REVIEWING *Smith v. New York C. R. Co.*, 24 N. Y. 222; *Bissell v. New York C. R. Co.*, 25 N. Y. 442; *Poucher v. New York C. R. Co.*, 49 N. Y. 263.—DISTINGUISHED IN *Carpenter v. Boston & A. R. Co.*, 21 Am. & Eng. R. Cas. 331, 97 N. Y. 494, 49 Am. Rep. 540. FOLLOWED IN *Libby v. Maine C. R. Co.*, 85 Me. 34; *Seybolt v. New York, L. E. & W. R. Co.*, 18 Am. & Eng. R. Cas. 162, 95 N. Y. 562, 47 Am. Rep. 75. QUOTED IN *Cleveland, C., C. & St. L. R. Co. v. Ketcham*, 133 Ind. 346.

One temporarily supplying the place of an

express messenger stands in the same position with him and is entitled to the same protection. *Blair v. Erie R. Co.*, 66 N. Y. 313. *Jennings v. Grand Trunk R. Co.*, 15 Ont. App. 477.—DISTINGUISHING *Blackmore v. Toronto St. R. Co.*, 38 U. C. Q. B. 172. QUOTING *Austin v. Great Western R. Co.*, L. R. 2 Q. B. 442.

In an action for the death of B., plaintiff's intestate, who was killed while traveling in an express car in one of defendant's trains, by an accident caused by defendant's negligence, it appeared that B., at the time of his death, was in the employ of the U. S. Express Co. as messenger; that said company had entered into a contract with a railway company, to the rights and duties of which the defendant had succeeded, by which said railway company agreed to transport the messengers of the express company and certain specified property free of charge, the latter assuming all transportation risks and other liabilities arising in respect thereof, and agreeing to indemnify and protect the former therefrom. The responsibility of the railway company in transporting express freight was limited to cases of negligence, it "in no event, whether of negligence or otherwise," to be responsible for property "carried by the railway company free of charge." There was no evidence that B. had any knowledge or information of the provisions of the contract. *Held*, that defendant was liable; that B. was a passenger and could not, without his knowledge or consent, be chargeable with the stipulations in the contract; and that while, when he entered into the service of the express company, he assumed the ordinary hazards incident to that business, there was no presumption or implied understanding that he took upon himself the risks of injury which he might suffer through defendant's negligence. *Brewer v. New York, L. E. & W. R. Co.*, 47 Am. & Eng. R. Cas. 485, 124 N. Y. 59, 26 N. E. Rep. 324, 35 N. Y. S. R. 60; *affirming* 45 Hun 595, *mem.*—DISTINGUISHING *Seybolt v. New York, L. E. & W. R. Co.*, 95 N. Y. 562.

It seems that, as the contract between the companies did not purport to relieve the defendant from its duty to exercise due care for the protection of the messenger, whatever right it could claim to relief from the consequences of its negligence in that respect arose by way of indemnity upon the stipulation of the express company. *Brewer*

v. New York, L. E. & W. R. Co., 47 Am. & Eng. R. Cas. 485, 124 N. Y. 59, 26 N. E. Rep. 324, 35 N. Y. S. R. 60; *affirming* 45 Hun 595, *mem.*—EXPLAINED IN *Kenney v. New York C. & H. R. R. Co.*, 125 N. Y. 422.—*Kenney v. New York C. & H. R. R. Co.*, 52 Am. & Eng. R. Cas. 235, 125 N. Y. 422, 26 N. E. Rep. 626, 35 N. Y. S. R. 447; *affirming* 54 Hun 143, 26 N. Y. S. R. 636, 7 N. Y. Supp. 235.—EXPLAINING *Brewer v. New York, L. E. & W. R. Co.*, 124 N. Y. 59.—QUOTED IN *Rubens v. Ludgate Hill Steamship Co.*, 20 N. Y. Supp. 481.

In an action to recover for injuries caused by the negligence of a railway company in operating one of its trains, it is no defense that the company was carrying the plaintiff as an express messenger, under a contract with an express company, and that he was required by the nature of his employment to occupy a place on the train more dangerous than was occupied by ordinary passengers. The messenger, in accepting his employment, took upon himself the risk of accidents incident to the nature of the business, but not the risks resulting from the negligence of the railroad company in the management of its trains. *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585.

3. Agents, and Liability for Their Acts.

14. Rights as against agents and their sureties.—Where an express company seeks to recover on the bond of its agent for its breach in receiving a package to be forwarded to its destination, and which was not forwarded or accounted for, it must show that defendant received the package as its agent. *Southern Exp. Co. v. Moeller*, 85 Mo. 208.

Where an express company employs as its agent a conductor, with full knowledge of his employment by the railroad company, the contract with the express company must be construed in the light of the duties imposed by the contract with the railroad company; and he will not be liable to the express company for a failure of duty, if caused solely by the obligations imposed by his employment as conductor. *Southern Exp. Co. v. Frink*, 67 Ga. 201.

An express company employed a messenger and required him to give bond, which provided that he should "well and truly perform all the duties required of me in any position or place to which I may be as-

signed in said employment, and well and truly account for all money and property of every description which may come into my possession or control, or for which I may have given my receipt, by reason of said employment, and make good all loss or damage which may happen to such money or property while under my control, for which I may be legally responsible, and indemnify and save harmless the said company from all liability on account of my fault or neglect." *Held*, that as between the company and the messenger his liability was not that of a common carrier, but that of an agent, and depended on his diligence or negligence. *Southern Exp. Co. v. Frink*, 67 Ga. 201.

E. was employed as freight clerk and executed a bond, with sureties, by which he and his sureties bound themselves for the faithful performance of E.'s duties in receiving and forwarding merchandise, money, etc., received in the usual course of business by the express company, in the penalty of \$3000. After the execution of this bond E. was raised to the office of principal agent of the company at P., and whilst acting as such principal agent he embezzled money which came into his hands. *Held*: (1) there being no dispute about the facts, it is for the court to construe the instrument, and the jury are bound to take the construction of the court as correct; (2) the obligation, by its terms, extends to any employment of E. by the express company, and the sureties are liable to the company for the money embezzled by E. whilst acting as principal agent of the company at P. *Collier v. Southern Exp. Co.*, 32 Gratt. (Va.) 718.—*QUOTING Neilson v. Harford*, 8 M. & W. 806.

15. Liability for acts of agents.—

An express company is bound by all the acts of its agents done in the regular course of its business. *American Exp. Co. v. Lesem*, 39 Ill. 312.

An express company has the power, by proper and lawful modes, to pursue and cause the arrest and punishment of any one who has stolen or embezzled the money or property of the company, or for which it was responsible, and may employ an agent for such purpose; but for any trespass committed by him the prosecution of such employment such company is liable. *American Exp. Co. v. Patterson*, 73 Ind. 430.

An express company is bound by the

agreement of its agent to hold goods a year, though such agreement be in violation of its regulations, and is liable to the owner where the goods are sold in a less time for freight. *Adams Exp. Co. v. Schlessinger*, 75 Pa. St. 246.

In the absence of an express stipulation a carrier employed by an express company is the company's agent, and not the agent of the shipper. *Adams Exp. Co. v. Jackson*, 55 Am. & Eng. R. Cas. 319, 92 Tenn. 326, 21 S. W. Rep. 666.

Authority to a general superintendent of an express company to employ and discharge agents and direct their conduct, make contracts and exercise a general supervision over the business of the company, cannot reasonably be construed as empowering him to license one of his employes—an assistant superintendent—to engage in and carry on a business in competition with, and injurious to, that of the express company. *Adams Exp. Co. v. Trego*, 35 Md. 47.

An express-carrying corporation is not liable for damages occasioned by a libelous letter written by its local agent at a town to a consignor, who wrote referring his consignee's letter of complaint to the company's higher officials, in whose possession the agent saw the letters. *Southern Exp. Co. v. Filtner*, 59 Miss. 581.

Where an express company advertises only to carry goods between designated points, and that a special, faithful messenger will be sent in charge, no authority is thereby implied for the messenger to receive goods at intermediate points, so as to make the company liable if not safely carried. *Thurman v. Wells*, 18 Barb. (N. Y.) 500.

Plaintiff sought to recover for injuries done his dog while being transported by the defendant from the plaintiff's residence to its office in Fairhaven, whence it was to be forwarded by rail. Defendant denied that its agent had authority to receive expressage elsewhere than at its office. Thereupon the plaintiff claimed that the defendant had suffered the agent to hold himself out to the world in that capacity to such an extent that he might rely upon it, and introduced evidence tending to show that the agent used a wagon lettered with the defendant's name, to the knowledge of the defendant, in the collection of express parcels. *Held*, that it was not permissible to show that the

agent used his wagon about his own business, unless such use was brought home to the plaintiff. *Winchell v. National Exp. Co.*, 64 *Vt.* 15, 23 *Atl. Rep.* 728.

4. Collections.

16. Liability as collecting agents, generally.—Where bulky produce, such as an express company does not ordinarily receive for carriage, is shipped to a distant point through a railroad company, and the receipt given by the railroad company, together with a draft drawn for collection, are both delivered into the hands of an express company to be taken to the point of destination of the goods, where the draft was to be collected, it appearing that the agent of the railroad company at that point was also the agent of the express company—*held*, that the express company did not have constructive nor actual possession of the goods by reason of having the receipt and draft in its hands for collection, and that it was not liable for the delivery, by the agent as the servant of the railroad company, of the produce into the hands of the consignee without first collecting the draft. *Bland v. Southern Exp. Co.*, 1 *Hughes (U. S.)* 343, 3 *Fed. Cas.* 667.

Where notes issued by a bank had been sent to it through an express company, and while in transit a part were stolen by an agent, who destroyed them after the amount had been paid to the bank by the company—*held*, that the property in the notes was transferred by that payment to the company, who, on proving the destruction, were entitled to recover the amount from the bank. *Hagerstown Bank v. Adams Exp. Co.*, 45 *Pa. St.* 419.

The quantity and character of the evidence relating to the destruction of the notes are for the jury; and where it was such as to justify the submission of the question to them their finding was held conclusive. *Hagerstown Bank v. Adams Exp. Co.*, 45 *Pa. St.* 419.

17. Collection of bills and notes, generally.—If a common carrier undertakes to carry and deliver a draft, he becomes charged on his contract as a common carrier immediately upon his failure to carry and deliver as agreed, and this liability is primary and not secondary to that of the drawer of the draft. *Jones v. Wells*, 28 *Cal.* 259.

Where a note is delivered to the agent of an express company, with directions to take it to the place where the maker resides, present it for payment, and, in case of refusal to pay, to sue and collect immediately, and it is received and sent forward by the agent with instructions in accordance with the directions, this is a contract to carry, not to forward, the note; and if the company's line does not extend to the designated place (the sender being ignorant of the fact, and not being advised thereof at the time of the delivery of the note), and the note is forwarded by another company, the latter becomes the agent of the former, and the former is responsible for damages resulting from the negligence or non-compliance by the latter with the directions. *Palmer v. Holland*, 51 *N. Y.* 416. See also *Knapp v. United States & C. Exp. Co.*, 55 *N. H.* 348.

18. The diligence required.—Where an express company agrees to transmit a package of money, but by the contract it is not made an insurer, and places the same in a safe on a boat which it does not control, in charge of an agent, according to the regular course of business, it is not liable where the money is destroyed while in the safe by the burning of the boat. *Frank v. Adams Exp. Co.*, 18 *La. Ann.* 279.

An overdue draft was delivered to an express company for collection, with instructions to return it at once if not paid. The principal only was tendered on presentation, and the company agreed to hold the draft until the drawee could communicate with the drawer as to the collection of interest; but upon getting an explanation as to the interest, held it for two days, during which time the drawee was ready to pay, but at the end of the time became insolvent. *Held*, that the express company was liable for the loss. *Whitney v. Merchants' Union Exp. Co.*, 104 *Mass.* 152. *Fahy v. Fargo*, 17 *N. Y. Supp.* 344, 43 *N. Y. S. R.* 589, 63 *Hun* 625; *mem.*

19. Liability for mistakes of notaries.—If an express company receives for collection, for a compensation, a bill of exchange drawn in one state and payable in another, and delivers the same to a notary for demand and protest on the day before such demand and protest should be made, and such notary makes demand and protest one day before the maturity of the bill, whereby the drawer and indorsers are dis-

charged, the acceptor being insolvent, the express company will be liable to the holder for the amount of the bill and interest. *American Exp. Co. v. Haire*, 21 Ind. 4.

A note was delivered to defendant, a common carrier, to be carried to a certain place by express for payment or protest. *Held*, that his undertaking was completed when he carried it to the place designated, and there placed it in the hands of a notary for presentment and protest, and he was not bound to give notice of its non-payment. *McQuarrie v. Fargo*, 21 U. C. C. P. 478.

20. Liability in cases of fraud or forgery.—Where an express company receives a promissory note to be transmitted to a bank for discount and the proceeds returned, and it appears that the company was only acting as carrier, it is not liable, though it subsequently turns out that the one delivering the note and receiving the proceeds had stolen the note, falsely representing himself as the maker and rightful owner. *Norwalk Bank v. Adams Exp. Co.*, 19 How. Pr. (N. Y.) 462, 4 Blatchf. (U. S.) 455.

In such case the express company could not be held liable for conveying the note and returning the proceeds, where it turned out that the sender had altered it, whereby it became a forgery, so as not to be binding upon the real maker. *Norwalk Bank v. Adams Exp. Co.*, 19 How. Pr. (N. Y.) 462, 4 Blatchf. (U. S.) 455.

An express company received a draft for collection on plaintiff, but presented it and received the money without disclosing that it was only acting as agent in the collection of the money. It turned out that the draft had been stolen and the payee's indorsement thereon had been forged, and plaintiff was compelled to pay the amount a second time. *Held*, that the express company was bound by the rule that an agent, in order to shield himself from liability, must disclose his agency, and was therefore liable to plaintiff. *Holt v. Ross*, 54 N. Y. 472.—DISTINGUISHING *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 289.

21. Damages for loss of note, or failure to collect it.—An express company is liable for the negligent loss of a note intrusted to it for collection, and *prima facie* the measure of damages is the face of the note; but the company may show that the damages are less, as by showing that the

maker is insolvent, or by other proofs going to show a defense to the note. *American Exp. Co. v. Parsons*, 44 Ill. 312.—DISTINGUISHING *Hamilton v. Cunningham*, 2 Brock. (U. S.) 350.

The makers of a note had property sufficient to pay the same when the defendants received it for collection, but by reason of the defendants' negligence with regard to its collection, the note became worthless upon the failure of the makers of the note. *Held*, the damages were the amount of the note and interest. *Knapp v. United States & C. Exp. Co.*, 55 N. H. 348.

Plaintiffs delivered to an express company a sight draft upon their debtor for transportation and collection. It was duly presented but not paid, but no notice was given to plaintiffs of its non-payment for several months, during which time the debtors failed. *Held*, that only nominal damages could be recovered from the express company, unless plaintiffs made it appear that they could, in all probability, have collected the draft, or some part of it, if they had received prompt notice of its dishonor. *Lienan v. Dinsmore*, 3 Daly (N. Y.) 365, 10 Abb. Pr. N. S. 209, 41 How. Pr. 97.

II. RIGHTS AND LIABILITIES AS CARRIERS.

1. In General.

22. Are common carriers.—Express companies are common carriers in every just sense of that term, and are subject to all their common law liabilities. *Southern Exp. Co. v. Hess*, 53 Ala. 19.—FOLLOWING *Southern Exp. Co. v. Crook*, 44 Ala. 468.—*American Exp. Co. v. Hockett*, 30 Ind. 250. *Stadhecker v. Combs*, 9 Rich. (So. Car.) 193. *Adams Exp. Co. v. Jackson*, 92 Tenn. 326, 21 S. W. Rep. 666. *Southern Exp. Co. v. McVeigh*, 20 Gratt. (Va.) 264.

Express companies who are engaged not only in the transportation of small parcels, packages, and articles of value, properly so called, but also in the carriage of goods, wares, and merchandise, and the great staples and products of the country, are common carriers, and subject to the liabilities imposed by law upon such carriers. *Southern Exp. Co. v. Crook*, 44 Ala. 468.—FOLLOWED IN *Southern Exp. Co. v. Hess*, 53 Ala. 19.

An express company receiving goods

generally for transportation for hire, though it does the carriage by means of vehicles owned and controlled by other parties, is a common carrier. *Christenson v. American Exp. Co.*, 15 Minn. 270 (Gil. 208).—FOLLOWING *Buckland v. Adams Exp. Co.*, 97 Mass. 124.—*Place v. Union Exp. Co.*, 2 Hilt. (N. Y.) 19.—DISAPPROVING *Hersfield v. Adams*, 19 Barb. (N. Y.) 577.—*United States Exp. Co. v. Buckman*, 28 Ohio St. 144, 14 Am. Ry. Rep. 82.

An express company may become liable as a common carrier, though it has not complied with the requirements of section 2 of the Ind. "Act declaring express companies to be common carriers." (1 G. & H. 327.) *United States Exp. Co. v. Rush*, 24 Ind. 403.—DISTINGUISHING *Russell v. Livingston*, 16 N. Y. 515.

Uncontradicted evidence that defendants were incorporated as an express company in another state, and had been doing business as such for nine or ten years, as common carriers with all that called upon them, is *prima facie* evidence that they were common carriers. *Haslam v. Adams Exp. Co.*, 6 Bosw. (N. Y.) 235.

One who is duly licensed by his city as an expressman, and who carries the goods of all persons indifferently for hire, is a common carrier, and as such is liable for goods stolen, though it may be without any connivance on his part, or of his employes. *Robinson v. Cornish*, 13 N. Y. Supp. 577.

23. — and not forwarders merely.—One whose business is for hire to take goods from the custody of their owner, assume entire possession and control of them, transport them from place to place and deliver them at a point of destination to consignees or agents there authorized to receive them, is a common carrier, although he styles himself an express forwarder, and although he contracts with others to transport the goods in vehicles of which they are the owners and the movements of which he himself does not manage or control. *Buckland v. Adams Exp. Co.*, 97 Mass. 124.—DISTINGUISHED IN *Alabama G. S. R. Co. v. Thomas*, 32 Am. & Eng. R. Cas. 464, 83 Ala. 343, 3 So. Rep. 802; *Grace v. Adams*, 100 Mass. 505. FOLLOWED IN *Christenson v. American Exp. Co.*, 15 Minn. 270.—*Christenson v. American Exp. Co.*, 15 Minn. 270 (Gil. 208). *Read v. Spaulding*, 5 Bosw. (N. Y.) 395.—FOLLOWING *Mercantile Mut. Ins. Co. v. Chase*, 1 E. D. Smith (N. Y.) 121.

NOT FOLLOWING *Hersfield v. Adams*, 19 Barb. (N. Y.) 577.

The use of the word "forward" in the receipt is controlled by the nature and extent of the actual undertaking, and does not make the company a forwarder in the technical sense of the word. It is wholly immaterial whether the word "carry," "transfer," or "forward" is used, so long as the undertaking is to convey the goods from the place of receipt to the place of delivery. *Read v. Spaulding*, 5 Bosw. (N. Y.) 395.

Persons receiving goods to be shipped to another point, where they do not own the means of conveyance, are not common carriers, and are not liable as such. They are bailees for hire to receive and forward the goods by the ordinary and approved means of conveyance, and have a legal right to define the extent of their liability. *Hersfield v. Adams*, 19 Barb. (N. Y.) 577.—DISAPPROVED IN *Place v. Union Exp. Co.*, 2 Hilt. (N. Y.) 19. NOT FOLLOWED IN *Read v. Spaulding*, 5 Bosw. (N. Y.) 395.

24. How far insurers.—In the absence of special contract, express companies are subject to the same liability as are other common carriers. At common law they are regarded as absolute insurers of goods intrusted to them for transportation, when properly packed, except for loss by act of God or the public enemy. *Overland M. & E. Co. v. Carroll*, 7 Colo. 43, 1 Pac. Rep. 682. *American Merchants' Union Exp. Co. v. Schier*, 55 Ill. 140. *Klauber v. American Exp. Co.*, 21 Wis. 21.

Express companies are insurers for the safe delivery of a money package intrusted to them for delivery to another person, and nothing can excuse them from their obligation safely to carry and deliver but the act of God or the public enemy. *United States Exp. Co. v. Hutchins*, 67 Ill. 348.

An express messenger is bound to use the utmost care and diligence in protecting goods intrusted to him, but is not an insurer of their safety. *De Reamer v. Pacific Exp. Co.*, 84 Mo. 529.

25. Duty to receive and carry.—It is the duty of express companies to receive all goods offered for transportation, upon the payment or tender of their charges, but prepayment will be considered waived if not demanded. *Alsop v. Southern Exp. Co.*, 40 Am. & Eng. R. Cas. 1, 104 N. Car. 278, 6 L. A. R. 271, 41 Alb. L. J. 167, 10 S. E. Rep. 297.

A common carrier is not bound to receive money for transportation, unless it is properly secured and addressed; nor will his refusal to count the money at the request of the consignor, create any presumption against him as to the amount contained in the package. *Fitzgerald v. Adams Exp. Co.*, 24 Ind. 447.

Money was tendered to the agent of an express company at a regular station for shipment fifty-five minutes before the train would pass, going in the direction that the money was to be sent; but it was refused under a rule of the company that money should be received for shipment only in the morning before the train would pass in the afternoon. *Held*, that the rule was in violation of the N. C. Code, § 1964, requiring all transportation companies to receive goods of the kind and nature usually transported by them, whenever tendered. *Alsop v. Southern Exp. Co.*, 40 Am. & Eng. R. Cas. 1, 104 N. Car. 278, 6 L. R. A. 271, 41 Alb. L. J. 167, 10 S. E. Rep. 297.—REVIEWING *Marshall v. American Exp. Co.*, 7 Wis. 1.

In the absence of any statute, the court cannot hold a regulation requiring the shipper of money to retain it over night at his own risk to be reasonable, where it is made the duty of express companies to provide safe places for valuables received. *Alsop v. Southern Exp. Co.*, 40 Am. & Eng. R. Cas. 1, 104 N. Car. 278, 6 L. R. A. 271, 41 Alb. L. J. 167, 10 S. E. Rep. 297.

Where the company relies in such case upon the defense that the tender was not made during business hours, it is within the exclusive province of the jury, looking to the customs of business men at the place of the tender, to determine whether it was made within such hours. *Alsop v. Southern Exp. Co.*, 40 Am. & Eng. R. Cas. 1, 104 N. Car. 278, 6 L. R. A. 271, 41 Alb. L. J. 167, 10 S. E. Rep. 297.

Whether or not live pigeons would be regarded in any case as common law freight for an express company conducting as common carriers, *quære*. *American Merchants' Union Exp. Co. v. Phillips*, 29 Mich. 515.

An express company is not bound to transport and deliver intoxicating liquor, if thereby it would incur a penalty. *State v. Goss*, 30 Am. & Eng. R. Cas. 118, 59 Vt. 266, 9 Atl. Rep. 829, 4 N. Eng. Rep. 518.

Nor is such company, as a general thing, bound to know the contents of packages offered for carriage; nor are its agents pre-

sumed to know. *State v. Goss*, 30 Am. & Eng. R. Cas. 118, 59 Vt. 266, 9 Atl. Rep. 829, 4 N. Eng. Rep. 518.

An express company accustomed to receive jugs of liquor in an unboxed condition, under a special arrangement voluntarily made by it with shippers, may, at will, withdraw from the arrangement without liability to shippers who have been availing of it, though they incur increased expense by reason of the change. *Vicksburg L. & T. Co. v. United States Exp. Co.*, 68 Miss. 149, 8 So. Rep. 332.

A mandamus will not issue to compel an express company to carry breakable goods, such as glassware, subject to all the common law liabilities of a common carrier, where the uniform practice of defendant company, as well as others, has been to only carry such wares under a limited liability. *People ex rel. v. Babcock*, 16 Hun (N. Y.) 313.

Where common carriers, doing an express business, only hold themselves out as carriers between certain designated points, they cannot be compelled to carry from intermediate points; and where they are sued for property delivered to an agent at an intermediate point, it is competent for them to show that they were not carriers from such point, and that the agent was not authorized to receive the goods. *Thurman v. Wells*, 18 Barb. (N. Y.) 500.

26. Delivery to the company.—

Where a sealed package of money is left at the office of an express company for a point to which it does not act as common carrier, it is not liable for a loss, either for money had and received, or for the conversion of the money. *Pitlock v. Wells*, 109 Mass. 452.

The delivery of a package intended for shipment, to the clerk of the agent of an express company, outside of the express office, is not a delivery to the company, so as to render it liable for a loss before it goes into actual possession of the agent. *Cronkite v. Wells*, 32 N. Y. 247.

The fact that the former agents of said company were accustomed to receive such packages from the plaintiffs outside of their office, etc., will make no difference. And the fact that such clerk was accustomed to receive such packages in the office of the agent, and receipt the same there, will make no difference. *Cronkite v. Wells*, 32 N. Y. 247.

Where goods are not delivered to an express company, but are sent by railway to

their place of destination, consigned to the purchaser, in the care of the express company's agent at that place, and never come into his possession, but are delivered by the railway company directly to the purchaser, without fault of the express company or its agent, and a bill of such goods, sent also to such agent for collection, not being paid by the purchaser, is promptly returned by the agent, no liability of the express company to the consignor is created by these facts. *Wells v. American Exp. Co.*, 44 Wis. 342.

The mere fact, known to the express company's agent at the office of delivery of the above mentioned package, that W. had shipped goods to the sender of the package, and had sent to the proper agent of such company a bill of the goods for collection from him, which had been returned unpaid, would not render the express company liable to W. for the value of the package, or of W.'s interest therein, after its delivery to C. *Wells v. American Exp. Co.*, 44 Wis. 342.

Plaintiff had been in the employ of an express company, but upon leaving delivered his trunk to his successor to be sent by express, expecting to pay therefor, if any charge was made, but supposing it would go free under a rule of the company to transport the baggage of its employes without charge. *Held*, sufficient to warrant a finding that the bailment was not gratuitous. *Gott v. Dinsmore*, 111 Mass. 45.

An express company kept its office in the freight office of a railroad company. Fruit trees were delivered at the office and a receipt given by the railroad agent, but they were rendered worthless by a delay in shipment. When sued for the loss the express company claimed that it was its habit to take up the receipt given by the railroad agent, and give a bill of lading, limiting its liability; but there was no evidence that plaintiff had any knowledge of such custom. *Held*, that inasmuch as the express company received the trees and proceeded to transport them without any contract except that evidenced by the receipt given by the railroad agent, it could not claim the benefit of the limited liability. *Little v. Fargo*, 43 Hun 233, 5 N. Y. S. R. 462.—**DISTINGUISHING** *Shelton v. Merchants' Dispatch Transp. Co.*, 59 N. Y. 258.

Plaintiff had ordered goods to be shipped by rail to a certain point, which he desired

re-shipped to another point by express, and agreed with the agent of an express company to take them up from the railroad as soon as they arrived and re-ship them by express, and at the same time paid the express charges. The goods arrived the next day after this agreement, and notice was given of their arrival to the express company. *Held*, in an action for failing to carry them, that they were delivered to the company as common carriers. *Southern Exp. Co. v. McVeigh*, 20 Gratt. (Va.) 264.

The general rule is that a delivery to a carrier at its usual place is sufficient; but delivery at a place agreed on, with notice to the carrier, is sufficient; and it was therefore binding on the express company when it agreed to take up the goods from the railroad warehouse, and it was notified that they were there. *Southern Exp. Co. v. McVeigh*, 20 Gratt. (Va.) 264.

27. Notice of contents of parcels.—A common carrier is not, under all circumstances, entitled to know the contents of packages tendered for carriage; and a mere failure to ascertain whether the package contains anything dangerous, there being no reasonable ground for suspicion, does not, of itself, constitute negligence. *Parrott v. Barney*, 1 Sawy. (U. S.) 423.—**QUOTING** *Crouch v. London & N. W. R. Co.*, 14 C. B. 255.—*Parrott v. Wells*, 15 Wall. (U. S.) 524.

Where goods of a fragile or breakable nature are delivered to an express company for shipment, without informing the company of the nature of the goods, the company will not be held liable to the full extent of common carriers. *American Exp. Co. v. Perkins*, 42 Ill. 458.—**REVIEWED IN** *Witting v. St. Louis & S. F. R. Co.*, 28 Mo. App. 103.

The delivery of a small paper box containing a valuable gem, to an express company, without giving the company notice of its contents, amounts to a fraud upon the company and will bar a recovery of its value by the sender. *Everett v. Southern Exp. Co.*, 46 Ga. 303.

28. Notice of value.—(1) *In general.*—A common carrier is not liable upon any package carried for more than the value of the article as named in the receipt or bill of lading. He has a right in all cases to be truly informed as to the value of the property, in order to estimate the risk and determine the care which should be exercised

in the protection of the property, and to save himself from loss. *Scammon v. Wells*, 42 Am. & Eng. R. Cas. 400, 84 Cal. 311, 24 Pac. Rep. 284.

If the size or appearance of a package fairly indicates that its value is greater than the sum named, the carrier will be presumed to waive the necessity of stating its value, unless the attention of the shipper is called to the conditions, and the value of the package is required to be given. *Southern Exp. Co. v. Crook*, 44 Ala. 468.

Common carriers who are engaged in transporting and delivering sealed letters, are not liable for the loss of any article of special value contained within a letter envelope, unless at the time of its delivery to them they are informed of its value. *Hayes v. Wells*, 23 Cal. 185.

Where a trunk is delivered to an expressman, described as a traveler's trunk, the expressman has a right to assume that it only contains the ordinary contents of a traveler's trunk, and he will not be liable for the loss of jewelry contained therein, which belongs to a third person, and is being transported for the purpose of sale, where the loss is without fault on the part of the expressman. *Richards v. Wescott*, 7 Bosw. (N. Y.) 6. — ADHERING. To *Richards v. Wescott*, 2 Bosw. (N. Y.) 589.

To hold the express company liable for the loss of the jewelry, under such circumstances, would be to perpetrate a fraud on the carrier, though the shipper may not have intended any actual fraud in failing to disclose the contents of the trunk. *Richards v. Wescott*, 7 Bosw. (N. Y.) 6. — FOLLOWING. *Pardee v. Drew*, 25 Wend. (N. Y.) 462; *Great Northern R. Co. v. Shepherd*, 14 Eng. L. & Eq. 367.

Whether, by the law of Georgia, the refusal of a shipper to place a value upon a trunk expressed by him will bar a recovery for its loss, *quere*. *Green v. Southern Exp. Co.*, 45 Ga. 305.

It was error to charge, in substance, that defendants were liable for the value of articles of special value in the trunk, whether known to them or not, and that to charge defendants it was enough to show that the goods were in the trunk, and lost therefrom when in their possession. *Levy v. Southern Exp. Co.*, 4 So. Car. 234.

The carrier is bound to make inquiry as to the value of a box or articles delivered to him, and the owner must answer at his

peril; but if such inquiry is not made, and it is received and shipped according to its bulk, weight, or external appearance, the carrier is responsible for the loss, whatever may be its actual value. *Gorham Mfg. Co. v. Fargo*, 3 J. & S. (N. Y.) 434, 45 How. Pr. 90.

(2) *Illustrations*.—Plaintiff took a small package containing diamond rings, to an express office, of the actual value of \$735, but refused to disclose their value to the agent, though he had his attention especially called to a provision in the receipt that the company would not be bound for a sum exceeding \$50, unless the value was stated; he paid a charge of \$1, whereas the charges would have been about \$3.50 if the value had been stated. Its habit was to ship small, valued articles in a safe, but unvalued articles loose in the car, and the package in question was lost during transportation. Held, that the shipper could not recover above \$50. *Earnest v. Southern Exp. Co.*, 1 Woods (U. S.) 573.—REVIEWING *Batson v. Donovan*, 4 B. & Ald. 21.

In such a case, independent of the qualifying words in the receipt, the court would be inclined to exempt the company from liability, on the ground of want of good faith in not disclosing the value of the goods. *Oppenheimer v. United States Exp. Co.*, 69 Ill. 62.—APPROVED IN *Hart v. Pennsylvania R. Co.*, 112 U. S. 331. REVIEWED IN *Pacific Exp. Co. v. Foley*, 46 Kan. 457.

A package was delivered to an express company, marked "C. O. D. \$292." Held, that the company had sufficient notice of its value to be liable for the full amount, notwithstanding the receipt given recited that it should be valued under \$50, "unless otherwise herein stated." *Van Winkle v. Adams Exp. Co.*, 3 Robt. (N. Y.) 59.

Silver coin to the value of \$339.90 was placed in a small wooden box, which was wrapped in heavy paper, tied with heavy twine, and sealed with wax at every crossing of the twine and on the knot where it was tied, and stamped with a ten-dollar gold piece, and directed to a well-known silver manufacturing company, and was thus delivered to an express company, without any information as to contents or their value, no questions being asked by the company. Held, that this was not such fraud, imposition, unfair concealment, or disguise as to relieve the express company from liability. *Gorham Mfg. Co. v. Fargo*, 3 J. & S. (N.

Y.) 434, 45 *How. Pr.* 90.—DISTINGUISHING *Warner v. Western Transp. Co.*, 5 Robt. (N. Y.) 490.

The above box was sent to the express office through a local expressman, who delivered it at the place for receiving ordinary freights, though he knew that the company had a counter where it received money packages; but there was nothing to show that he knew the contents, or the value of the box, the amount of his charge indicating that he supposed that it was ordinary goods. He made no statement as to the contents or value, and was not asked. *Held*, that this did not constitute such fraud as to relieve the carrier. *Gorham Mfg. Co. v. Fargo*, 3 J. & S. (N. Y.) 434, 45 *How. Pr.* 90.

2. For Loss or Injury.

29. In general.—The contract of an express company, acting as a common carrier, is that it will carry the goods intrusted to it, and deliver them to the consignee, at the proper time and place, without loss or failure, except by the act of God or of the public enemy. *Marshall v. American Exp. Co.*, 7 Wis. 1.

The liability of an express company for the safe delivery of goods, is the same whether it has received the goods direct from the shipper or through another company; and its liability is not dependent upon its giving a written receipt. *Guliver v. Adams Exp. Co.*, 38 Ill. 504.

30. Care and diligence required.—The carrier must not only exercise diligence, but he must use that degree of attention and care which the occasion and subject committed to his trust demand. What would be sufficient care in case of ponderous articles, not liable to be deteriorated by exposure, might be the most palpable neglect in case of costly and perishable goods. *Wolf v. American Exp. Co.*, 43 Mo. 421.

Proof that a package was delivered to an express company at its regular place of business, and a receipt given, and was put on a shipping bill for its destination, after which the company's agents could give no further account of it, is sufficient to show negligence, and to make the company liable. *Westcott v. Fargo*, 63 Barb. (N. Y.) 349; *affirmed* in 61 N. Y. 542.

An express company is liable for injury to goods by ordinary rain while transport-

ing them from the cars to its office. *Klauber v. American Exp. Co.*, 21 Wis. 21.

A bailee for hire cannot excuse himself for the want of reasonable care in the custody of property intrusted to him, simply by showing that the owner knew and acquiesced in the kind and degree of care which he exercised. And if the owner did not know all the circumstances affecting the risk to which the property was exposed, and especially if he had informed the bailee that the manner of keeping it was unsafe, the judge cannot rule, as matter of law, that the owner waived due care on the part of the bailee. *Conway Bank v. American Exp. Co.*, 8 Allen (Mass.) 512.

A carrier without compensation is liable for gross negligence, and gross negligence in this case consisted in the failure of the agent of the express company to make proper effort to deliver a gold watch, which, in consequence of the failure to deliver, was taken and carried away by soldiers at Elizabethtown, Ky., in 1863. *Adams Exp. Co. v. Cressap*, 6 Bush (Ky.) 572.

If a carrier who is in the habit of carrying large sums of money for hire, and keeping the same for several hours after its transportation, and until it is taken away by the owner, deposits money which has been so carried, in a wooden desk under lock and key, in his office, to which another person has access, and which is situated in a railroad station, which is open to all comers, and then leaves the building for several hours in the middle of the day, with no person in charge of it, the judge cannot rule, as a matter of law, in an action against the carrier for a loss of the money, that the evidence fails to show such want of care as to render him liable. *Conway Bank v. American Exp. Co.*, 8 Allen (Mass.) 512.

In an action against a common carrier for damages caused by the freezing of certain casks of wine, where it appeared in evidence that the cold weather was not the sole, nor entirely the proximate, cause of the injury, and that the loss would not have taken place nor the damage occurred had not the negligence and inattention of the defendant co-operated with the cold—*held*, that plaintiff was entitled to recover for the loss of the merchandise. Where no restriction is stipulated for, the common carrier is held liable as an insurer, and is responsible in that high degree of diligence commensurate with the duties he assumes. And

his liabilities will extend to agencies which the violence of nature caused in consequence of his negligence or defective means. *Wolf v. American Exp. Co.*, 43 Mo. 421.—FOLLOWED IN *Ketchum v. American Merchants' Union Exp. Co.*, 52 Mo. 390.

Placing a wooden car next to the tender of the locomotive, or permitting the express messenger to ride in the front passenger car—held, not to be evidence of want of reasonable care, in an action against an express company for goods destroyed by fire while intrusted to them. *Adams Exp. Co. v. Sharpless*, 77 Pa. St. 516.

31. Act of God or public enemy.*—

An express company is a common carrier, and as such is liable for the loss of goods intrusted to it, except when caused by the act of God or the public enemy. *Southern Exp. Co. v. Newby*, 36 Ga. 635.—FOLLOWING *Fish v. Chapman*, 2 Ga. 349.

An express company, as a common carrier of money and valuables, is not liable for losses resulting from the "act of God, the public enemy, mobs, riots," etc., unless it expressly insures against such losses in the contract of consignment. *Southern Exp. Co. v. Glenn*, 16 Lea (Tenn.) 472, 1 S. W. Rep. 102.

Under such circumstances, an express company, not being liable, is entitled to no notice whatever of the loss. *Southern Exp. Co. v. Glenn*, 16 Lea (Tenn.) 472, 1 S. W. Rep. 102.

The act of God which excuses the carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause. And where the loss is caused by the "act of God," if the negligence of the carrier mingles with it as an active and co-operative cause, he is still responsible. *Wolf v. American Exp. Co.*, 43 Mo. 421.—FOLLOWED IN *Pruitt v. Hannibal & St. J. R. Co.*, 62 Mo. 527.

After the damages to the goods have been established, the burden of proof lies upon the carrier to show that they were occasioned by the act or peril which the law recognizes as constituting an exemption; and then it is still competent for the owner to show that the injury might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods.

* Express company not liable for loss resulting from the act of God, see 26 AM. & ENG. R. CAS. 322, *austr.*

Such a loss will not be held to exempt the carrier from liability, but to have been occasioned by his negligence and inattention to duty. *Wolf v. American Exp. Co.*, 43 Mo. 421.—QUOTED IN *Davis v. Wabash, St. L. & P. R. Co.*, 26 Am. & Eng. R. Cas. 315, 89 Mo. 340.

Admitting that an express company is responsible for the fault or negligence of a railroad over which it carries, the fact that a bridge of a railroad was carried away by a freshet of unusual violence is not such default or negligence in the railroad company as will make the express company responsible for the loss of perishable property occasioned by a delay thus made inevitable. *American Exp. Co. v. Smith*, 33 Ohio St. 511.

A common carrier will be relieved of liability if goods be taken from its possession without its fault by the public enemy; but it will not be relieved if it negligently expose the goods to the enemy, whereby they are captured and destroyed. *Caldwell v. Southern Exp. Co.*, 1 Flipp. (U. S.) 85.

When goods in the hands of a common carrier are threatened to be destroyed or seized by a public enemy, he is bound to use diligence to prevent such destruction or seizure. It is not necessary that he should be guilty of fraud or collusion with the enemy, or wilful negligence, to make him liable; ordinary negligence is sufficient. *Holladay v. Kennard*, 12 Wall. (U. S.) 254.

In 1861 an express company received goods in New York to be carried to a point in Georgia. They were taken possession of after reaching that state by an officer of the confederate government and placed in a bonded warehouse, and subsequently sold for non-payment of duties levied thereon. Held, that the express company was deprived of the goods by the act of the public enemy, and was therefore not liable. *Hubbard v. Harnden Exp. Co.*, 10 R. I. 244.—REVIEWING *Bland v. Adams Exp. Co.*, 1 Duv. (Ky.) 232; *Southern Exp. Co. v. Womack*, 1 Heisk. (Tenn.) 256.

32. Presumptions against the company in cases of loss or injury.—

Where a person sends goods by express and they fail to arrive at their destination, this raises against the company the presumption of the want of ordinary care. The company has it within its power to trace the goods, whilst it is not so with the shipper, and hence the burden is upon the

carrier to show that he has used reasonable care, notwithstanding he may have stipulated that he was only to be held liable for gross negligence. *Adams Exp. Co. v. Stettiners*, 61 Ill. 184.

In an action to recover the value of goods delivered to an express company, where no explanation is given for its failure to deliver the goods, it may be inferred that they are still in the hands of the company, and are withheld from the owner. *Adams Exp. Co. v. Holmes*, (Pa.) 30 Am. & Eng. R. Cas. 14, 9 Atl. Rep. 166.

If goods are lost or injured while in the custody of an express company, in the absence of explanation which rebuts the presumption of negligence, it will be presumed that the loss or injury was occasioned by the negligence of the company, and the carrier will be liable for the actual value of the goods. *Adams Exp. Co. v. Holmes*, (Pa.) 30 Am. & Eng. R. Cas. 14, 9 Atl. Rep. 166.

A *prima facie* case being made against a carrier for injury to goods while in transit, the burden is on him to show affirmatively that they were injured in a manner for which he is not liable under his contract. *Nave v. Pacific Exp. Co.*, 19 Mo. App. 563.

The presumption is that goods delivered to a carrier in good condition, and by him delivered to the consignee in an injured condition, were injured while in the carrier's possession. *Nave v. Pacific Exp. Co.*, 19 Mo. App. 563. *Bowden v. Fargo*, 2 Misc. (N. Y.) 551.

33. Liability for delay in transit.—

An express company received a package of merchandise for transportation to "R.," a point not on its line, which it undertook to forward to the station on its line most convenient to the point of destination, and there deliver to other parties to complete the transportation. The express company had two lines in that section of the state, the "Northern" and the "Southern," the latter passing nearer "R.," and the nearest station being connected therewith by a line of stage coaches. "D." being a well-known point on the "Southern" route, the consignor, to insure a speedy delivery, caused the package to be marked for shipment, "via D." On its arrival at the latter point the company's agent stopped it, claiming the contract for transportation was completed under the shipping directions, by its carriage to that station. He conceded that if consigned to "R." without the words

"via D.," it would have been carried forty or fifty miles further to the station nearest "R." In an action brought by the consignee for damages occasioned by the delay—*held*, that the express company violated its contract by stopping and detaining the package at "D." *Denver & R. G. R. Co. v. De Witt*, 1 Colo. App. 419, 29 Pac. Rep. 524.—*APPROVING Rawson v. Holland*, 39 N. Y. 611.

34. Liability for railway company's negligence.—

Where an express company, having engaged to transport packages, etc., from one point to another, sends its messenger in charge of them on the car set apart for its use by the railroad company employed to perform the service, the railroad company becomes the agent of the express company, and not of the shipper. *Bank of Ky. v. Adams Exp. Co.*, 93 U. S. 174.—*DISTINGUISHED IN Packard v. Taylor*, 35 Ark. 402, 37 Am. Rep. 37.

Where an express company has, by contract, limited its liability so as to only require ordinary care on its part, it will not be liable for a loss resulting from the negligence of the railroad company that it employs to carry the goods, but does not control. *Bank of Ky. v. Adams Exp. Co.*, 1 Flipp. (U. S.) 242.

Though a receipt given by an express company limits the liability of the company as to amount, still it will be liable for the full value of the goods, where they are lost through the negligence of the railroad company that it employs to transport them. *Boscovits v. Adams Exp. Co.*, 93 Ill. 523.

35. Goods defectively packed, or

misdirected.—A hidden defect in the packing, from which damage results in the ordinary course of handling and transportation, is the act of the owner, and the carrier is not liable. *Klauber v. American Exp. Co.*, 21 Wis. 21.

Through the mistake of the consignors, in misdirecting a package shipped through an express company, it was carried to the wrong place, where, without the fault of the company, it was destroyed by fire. *Held*, that the company was not liable. *Southern Exp. Co. v. Kaufman*, 12 Heisk. (Tenn.) 161.

36. Omission to seal money packages, negligence.—

Where a company has rules requiring packages containing money to be sealed in a certain way, and the amount of the contents to be indorsed on the package, and compensation to be paid

in proportion to the amount of money to be conveyed, and one ships money, who has knowledge of the rules, and either negligently or intentionally fails to comply with them, the company will not be liable for a loss, where it takes ordinary care of the package, without knowledge on its part that it contains anything of special value. *St. John v. Southern Exp. Co.*, 1 *Woods* (U. S.) 612.

But in such case, if the money be stolen from the package by an agent of the company, and it afterwards recovers the money from the agent, it will be liable to the owner for the amount recovered, as for money had and received. *St. John v. Southern Exp. Co.*, 1 *Woods* (U. S.) 612.

Where it is the custom of an express company to require valuable packages to be sealed before receiving them for shipment, it is negligence on the part of the company to receive or ship an unsealed package; and the company cannot avoid liability by showing that the loss occurred while in the hands of a subsequent connecting carrier. *Overland M. & E. Co. v. Carroll*, 7 *Colo.* 43, 1 *Pac. Rep.* 682.

37. Goods lost or stolen through carelessness of agent.—An express company is liable for the loss of goods intrusted to it, where it appears that the inattention of its agent was the probable cause of the failure to safely carry the goods. *Adams Exp. Co. v. McDonald*, 1 *Bush* (Ky.) 32.

An express company is liable for the loss of money which one of its agents put in a safe, locked, and put the key in his pocket, but left his clothes hanging over night in an open room on a ground floor, from which the key was stolen, the safe opened, and the money taken. *American Exp. Co. v. Baldwin*, 26 *Ill.* 504.

An express package was taken from the "fire-proof" safe, while the building was burning, by an employé of the company, and lost or stolen. *Held*, that proof that other goods were found in the safe unburned after the fire, would not render the company liable. *Howard Exp. Co. v. Wile*, 64 *Pa. St.* 201.

38. Liability as carriers of horses, birds, etc.—Where an express company accepts horses for shipment, knowing at the time that a portion of its route has been interrupted by floods, it cannot escape liability for injury to such stock, caused by

another company, to which the same has been delivered for transportation, by invoking as a defense an act of God. *Adams Exp. Co. v. Jackson*, 55 *Am. & Eng. R. Cas.* 319, 92 *Tenn.* 326, 21 *S. W. Rep.* 666.

Whether an express company transporting live birds, either as common carriers or as ordinary carriers for hire, would not, in the absence of the express agreement to do so, be impliedly bound to supply them with food and water, so far at least as was essential to their preservation, *quære*. *American Merchants' Union Exp. Co. v. Phillips*, 29 *Mich.* 515.

3. Delivery by the Company.

39. Obligation to deliver.—An express company can discharge itself of responsibility as a common carrier in no other way than by an actual delivery of the goods to the proper person, at his residence or place of business, except by proving that it has been excused from doing so, or prevented by the act of God or the public enemy. *American Merchants' Union Exp. Co. v. Wolf*, 79 *Ill.* 430. *Bennett v. Northern Pac. Exp. Co.*, 12 *Oreg.* 49, 6 *Pac. Rep.* 160.—CRITICISING *Mobile & G. R. Co. v. Prewitt*, 46 *Ala.* 63.—*American Exp. Co. v. Baldwin*, 26 *Ill.* 504.

There is a distinction as to delivery between the duty of an express company and ordinary common carriers. Mere transportation to the place of destination without more will not release the liability of the express company. *Weil v. Express Co.*, 7 *Phila. (Pa.)* 88.

Where one express company transfers all its property to another, which assumes the obligations of the former, the latter will be liable as a common carrier for all contracts entered into with the former relating to the carriage and delivery of goods. *Southern Exp. Co. v. Thornton*, 41 *Miss.* 216.

The goods were placed in a warehouse upon their arrival and subsequently seized by the sheriff, in an action against the company, at the suit of third persons. *Held*, that such seizure was no defense as against an action by the shipper. *Mierson v. Hope*, 2 *Sweeny* (N. Y.) 561.—DISTINGUISHING *Edson v. Weston*, 7 *Cow. (N. Y.)* 278; *Van Winkle v. United States Mail Steamship Co.*, 37 *Barb. (N. Y.)* 122. NOT FOLLOWING *Bliven v. Hudson River R. Co.*, 35 *Barb.*

188.—FOLLOWED IN *The M. M. Chase*, 37 Fed. Rep. 708.

Goods were sent by A. directed to B. at M. They were delivered to the express company's agent on Thursday, and should have reached their destination the same day. They were sent by a circuitous route, and did not arrive at M. until Saturday evening about six o'clock. About two o'clock on Saturday afternoon B. called at the office for the goods, and was informed that there were none there. B. lived about one hundred rods from the express office in M., had lived there for a year, and was well known. No effort was made to deliver the goods to him, nor any notice given of their arrival. They remained in the express office until Tuesday night, when they were consumed in a fire. *Held*, that the company was liable for their loss. *Union Exp. Co. v. Ohleman*, 92 Pa. St. 323.

A package of money belonging to W. alone was sent by express directed to W. & C., and, upon W.'s demanding it as sole owner, without any assignment by C. of his apparent interest to W., or written order by C. to deliver to W., or offer of any receipt or acquittance from both, the express company refused to deliver it to W., claiming that the money had been subjected to process of garnishment in its hands. *Held*, that apart from the question of garnishment W. might recover the full amount of such moneys. *Wells v. American Exp. Co.*, 6 Am. & Eng. R. Cas. 298, 55 Wis. 23, 11 N. W. Rep. 537, 12 N. W. Rep. 441, 42 Am. Rep. 695.

40. What is a sufficient delivery, or attempt to deliver.—Where the consignor is known to the carrier to be the owner, the carrier must be understood to contract with him only, for his interest, upon such terms as he dictates in regard to the delivery, and the consignees are to be regarded simply as agents selected by him to receive the goods at a place indicated. Where he is an agent merely, the rule is different. *Southern Exp. Co. v. Dickson*, 94 U. S. 549.

Where an express company is prevented from delivering a package because the owner is not in, and it is returned to the office, and soon thereafter a fire breaks out in the building, and the package is lost or stolen in being removed—*held*, not sufficient evidence of negligence to make the company liable. *Howard Exp. Co. v. Wile*, 64 Pa. St. 201. —FOLLOWED IN *Philadelphia & R. R. Co.*

v. Yerger, 73 Pa. St. 121.—See also *Weil v. Express Co.*, 7 Phila. (Pa.) 88.

Where an express package is directed to a bank, a delivery to the teller of the bank is sufficient, where he has been in the habit of receiving such packages. *Marshall v. American Exp. Co.*, 7 Wis. 1.

And an offer to deliver to the teller at 5.30 o'clock in the afternoon at the counter of the bank is sufficient and equivalent to an actual delivery. *Marshall v. American Exp. Co.*, 7 Wis. 1.

A consignee of goods occupied a room on the fourth floor of a building. An express company sent a box to him weighing about sixty pounds, and the agent placed it just inside the outer door, and then went up to plaintiff's room and told a boy, about fourteen years old, that the box was down stairs and that he must take care of it. The boy was not authorized to receive packages for plaintiff, and it was lost. *Held*, that there was not a sufficient delivery to discharge the company. *Haslam v. Adams Exp. Co.*, 6 Bosw. (N. Y.) 235.—APPLIED IN *Mierson v. Hope*, 2 Sweeny (N. Y.) 561.

A dealer received an order for wares, and in order to be able to fill it borrowed money from a friend, and both directed the purchaser to return the money through the company to the friend, but it was sent addressed to the two jointly. *Held*, that delivery to either one was delivery to both, and sufficient to release the company. *Wells v. American Exp. Co.*, 44 Wis. 342.

41. Notice of arrival to consignee.—The general rule that carriers may deposit goods in their station at the place of delivery, and give notice to the consignee, does not apply to express companies. They must make delivery at the consignee's residence or place of business. *Wittebeck v. Holland*, 45 N. Y. 13; *affirming* 55 Barb. 443, 38 How. Pr. 273.

This rule does not apply to country sections, where consignees live at a distance; but in such case reasonable notice must be given of the arrival of the goods. A delay from October until February in giving notice to a consignee, who lived eight miles from the place of delivery, is unreasonable. *Gulliver v. Adams Exp. Co.*, 38 Ill. 504.—QUOTING *Baldwin v. American Exp. Co.*, 23 Ill. 197.

Mere notice to the consignee of an express package that such a package is in the office, without an offer to deliver, and before

the company is ready to deliver, not having the package entered on its delivery book, is not enough to relieve the company of its liability as a common carrier in case of loss. *Baldwin v. American Exp. Co.*, 23 Ill. 197. — QUOTED IN *Gulliver v. Adams Exp. Co.*, 38 Ill. 504.

Where the residence or place of business of the consignee of express goods is not known to the company, the sufficiency of the notice that it must give him of the arrival of the goods is to be determined by the same rules that apply to the making and posting of notice of the dishonor of a note or bill of exchange. *Stephenson v. United States Exp. Co.*, 21 Wis. 405.

Merely evidence of the custom of a clerk of the company to give notice, whose business it was to make out notices every evening of the arrival of goods during the day consigned to persons unknown to the company, and to address them letters through the post office, where he testifies that he has no knowledge or recollection of giving notice to the plaintiff, and where there is no note or memorandum on the company's books that such notice was given, is not sufficient to meet the requirements of the above rule. *Stephenson v. United States Exp. Co.*, 21 Wis. 405.

Goods were ordered shipped by express to a point off a railroad, and the company sent them to a point not the usual place for goods designed for the point of destination, where, after three weeks, they were destroyed by fire. No notice was given to the consignee of their arrival. *Held*, that the consignee was not in fault in not calling for the goods in a reasonable time; but the company was liable for carrying them to an improper place, and for failure to give notice of their arrival. *American Merchants' Union Exp. Co. v. Schier*, 55 Ill. 140.

Express goods were shipped, deliverable "to order." Before the goods arrived plaintiff's agent inquired for them, and notified the company that he was authorized to receive them, and left his name and place of business, which were written down, and a promise made to notify him of the arrival of the goods; but no notice was given of the arrival of the goods. *Held*, that the company at once became liable for any loss which might afterward occur. *Mierson v. Hope*, 2 Sweeney (N. Y.) 561. — APPLYING *Haslam v. Adams Exp. Co.*, 6 Bosw. (N. Y.) 235.

42. Effect of usage or custom of company as to delivery.—A usage to leave goods at a railway station, and to give the consignees notice, instead of making a personal delivery, is not binding on the shipper, unless it was known to him at the time he made the shipment. *Packard v. Earle*, 113 Mass. 280.

An express company received a package marked to a consignee in a certain city, with street and number given, and gave a receipt agreeing to forward it "to our agency nearest or most convenient to destination only." The company had at the place of delivery agents who were employed to deliver packages in conformity with the usages of the company. *Held*, that the term "agency" included not only its warehouse or place of business, but the means that it employed for delivering goods to consignees, and it was therefore the duty of the company to make delivery at the consignee's place of business. *Sullivan v. Thompson*, 99 Mass. 259.

The package shipped in such case was a box of clothing, and the consignee was employed in a government building, and the box was delivered to a government clerk who occupied an office, being the only place where the express agent was admitted. *Held*, that a delivery to the government clerk, in conformity to the usage of the company, was sufficient. It might have been different if the package had been small, and contained money or other valuables. *Sullivan v. Thompson*, 99 Mass. 259.

43. Time of delivery.—Express companies are required to deliver money or goods transported by them as soon as practicable after they reach their destination, within business hours, at the residence or place of business of the consignee, or such other place as he may designate within reasonable distance of the station where they are received. *Alsop v. Southern Exp. Co.*, 40 Am. & Eng. R. Cas. 1, 104 N. Car. 278, 6 L. R. A. 271, 41 Alb. L. J. 167, 10 S. E. Rep. 297.

It is the duty of an express company to deliver goods as soon as possible after their arrival, and within the usual hours of transacting general business; and it cannot be limited to the hours of transacting a particular kind of business, such as banking. *Marshall v. American Exp. Co.*, 7 Wis. 1.

Where an express company is charged with failing to deliver a package addressed

to a bank, within banking hours, the company may show that the bank was closed for banking purposes only before the delivery was tendered, and that it was in the habit of delivering packages after banking hours. *Marshall v. American Exp. Co.*, 7 Wis. 1.

An express company carrying goods addressed to a bank is not bound to deliver them during banking hours, and the company cannot refuse to receive them because the cashier has locked the vaults and gone away with the keys. *Marshall v. American Exp. Co.*, 7 Wis. 1.—REVIEWED IN *Alsop v. Southern Exp. Co.*, 40 Am. & Eng. R. Cas. 1, 104 N. Car. 278, 6 L. R. A. 271, 10 S. E. Rep. 297.

44. Delay in delivery.—An express company may justify a delay in the transportation of goods delivered to it for carriage, by showing that the delay was caused by a strike among railroad employes, provided it exercised proper care and diligence and used all reasonable means to move its trains and avoid the delay. *Little v. Fargo*, 43 Hun 233, 5 N. Y. S. R. 462.

45. Place of delivery.—Express companies are ordinarily to be held to personal delivery, either to the residence or place of business of the consignee. *American Union Exp. Co. v. Robinson*, 72 Pa. St. 274. *Southern Exp. Co. v. Van Meter*, 17 Fla. 783. *Witbeck v. Holland*, 38 How. Pr. (N. Y.) 273, 55 Barb. 443; affirmed in 45 N. Y. 13. *American Merchants' Union Exp. Co. v. Wolf*, 79 Ill. 430.

In the absence of notice to the contrary, an express company may assume that the consignee is the owner of goods shipped. So where a package of money is sent by one bank to another, the latter may be considered the owner, so as to give directions as to the delivery, as by authorizing a delivery at the office of the express company. *Sweet v. Barney*, 24 Barb. (N. Y.) 533.

Where a package of money is directed to a bank at its usual place of business, ordinarily it is the duty of the company to deliver at the banking office, to some officer or clerk who is authorized to receive money for the bank; but the bank may waive this requirement and authorize the money to be paid at a different place, and to a person that might not be authorized to receive it in the bank, so as to thereafter discharge the express company from further liability. *Sweet v. Barney*, 24 Barb. (N. Y.) 533.

But where money addressed to a bank is delivered at the express office to a porter of the bank, it is incumbent on the company to show that he was authorized to receive it; but this authority may be inferred from proof of former acts, as that the company had on other occasions delivered packages to the porter with the knowledge and assent of the bank. *Sweet v. Barney*, 24 Barb. (N. Y.) 533.

46. Delivery of goods at place where company has no agent.—Where an express company deposited goods on the platform of the railroad depot at the place of destination, without delivering them to the consignee or placing them in the custody of any person—held, that this was gross negligence, and rendered the company liable as a common carrier for their loss, although the company's agent, to whom they were tendered by the consignor's messenger for shipment, at first declined to receive them, because the company had no agent at the place of destination, and was not allowed to use the depot of the railroad company; and although the shipping agent, in signing the receipt, added the words "owner's risk," but without the knowledge or consent of the consignor; and although the consignee, when he ordered the goods to be forwarded by the express company, knew that the company had no agent at the place of destination, and he had lately received goods forwarded by it under receipts containing the same added words. *Southern Exp. Co. v. Armstead*, 50 Ala. 350.—DISTINGUISHED IN *South & N. Ala. R. Co. v. Wood*, 9 Am. & Eng. R. Cas. 419, 66 Ala. 167.

47. Delivery to agent of consignor.—A valuable box was shipped by express marked to a consignee, in care of the express agent at the place of destination, who was personally requested to take special care of the box. The box was delivered to the agent by the company, but was afterward lost. Held, that the court properly charged the jury that if they believed that the shipper made the express agent at the place of delivery his agent, and that the box had been delivered to such agent, the company was not liable. *Fitzsimmons v. Southern Exp. Co.*, 40 Ga. 330.

An order by the consignee of fruit trees which had been shipped by express, as follows, "R. R. agent, Orange—Please deliver to the bearer any freight I may have in your

possession," the railroad agent being also express agent, is not a sufficient demand for the trees held by him as express agent to make it his duty to deliver them or to charge the express company damage resulting from a failure to do so. *Wells v. Windham*, 1 Tex. Civ. App. 267, 21 S. W. Rep. 402.

The fact that the agent was agent for both companies did not diminish his duties to each. From the order given he could not know that its bearer was authorized to receive express freight. *Wells v. Windham*, 1 Tex. Civ. App. 267, 21 S. W. Rep. 402.

48. Delivery to wrong person.—In many cases a consignee is deemed to be the owner of goods; but where an express company receives goods, knowing that the property therein is in the shipper, it is liable for delivering them to a third person at the place of destination, according to the order of the consignee. *Southern Exp. Co. v. Dickson*, 94 U. S. 549.

It is the duty of an express company upon receiving a package of money to be forwarded to safely carry and deliver it to the consignee; and the only way it can relieve itself from responsibility as a common carrier is by showing performance, or its prevention by the act of God or a public enemy. It is not discharged by delivering the same to another on a forged order of the owner. *American Merchants' Union Exp. Co. v. Milk*, 73 Ill. 224.

Express companies are insurers for the safe delivery of goods, and nothing can relieve them of this obligation except the act of God or the public enemy. No fraud, imposition, or mistake will excuse a delivery to the wrong person. *Shearer v. Pacific Exp. Co.*, 43 Ill. App. 641.—**DISTINGUISHING** *Samuel v. Cheney*, 135 Mass. 278. **QUOTING** *Palm v. Watt*, 7 Hun (N. Y.) 318; *Sword v. Young*, 89 Tenn. 126. **REVIEWING** *American Exp. Co. v. Fletcher*, 25 Ind. 492; *American Exp. Co. v. Stack*, 29 Ind. 27; *Price v. Oswego & S. R. Co.*, 50 N. Y. 213.

In a suit against an express company for the loss of a package by the delivery of it to the wrong person, the court declined to examine the question whether the liability of the company, under the contract, was that of a common carrier or a warehouseman, because in either case the company was bound to deliver to the right person. *American Exp. Co. v. Stack*, 29 Ind. 27.—**DISTINGUISHED** In *The Drew*, 15 Fed. Rep.

826. **NOT FOLLOWED IN** *Bush v. St. Louis, K. C. & N. R. Co.*, 3 Mo. App. 62. **REVIEWED IN** *Shearer v. Pacific Exp. Co.*, 43 Ill. App. 641.

Where two men of the same name live in the same town, and one of them orders goods from a distant merchant, the carrier that delivers the goods to the one who really ordered them is not liable to the shipper simply because he thought that the order was from the other of the two men. *Wilson v. Adams Exp. Co.*, 27 Mo. App. 360.—**DISTINGUISHING** *Price v. Oswego & S. R. Co.*, 50 N. Y. 213.

Where a shipper seeks to hold a carrier liable for delivering goods to a fraudulent purchaser, the right of recovery is not affected by his failure to exercise his right of stoppage *in transitu*, where the evidence shows that he did not discover the fraud until after the delivery. *Wilson v. Adams Exp. Co.*, 43 Mo. App. 659.

Where goods are fraudulently ordered, the express company is only liable to the shipper for delivering to the consignee, where it is guilty of negligence—i.e., where it had knowledge of the fraud, or by the exercise of proper care would have discovered it. *Wilson v. Adams Exp. Co.*, 43 Mo. App. 659.

A written authority from a consignee to a third person should not be so uncertain as to give just grounds for doubting the scope of the authorization, as great care must be taken by express agents to deliver goods to the proper person, and heavy liabilities may result from a wrong delivery. *Wells v. Windham*, 1 Tex. Civ. App. 267, 21 S. W. Rep. 402.

Suit against an express company for a failure to deliver a package of money consigned by the plaintiffs to one A. The receipt given for the package stipulated that it was to be delivered to A. in person. Answer, that the agent of the company at the place to which said package was addressed was also the telegraph operator at that place; that a person pretending to be A. came to said agent and sent a telegram through him to the plaintiffs, requesting that the money sued for should be sent; that in answer two said telegram the money was sent by the plaintiffs, addressed to A., and that the same person who had sent said telegram called for and demanded said package, representing himself to be the person to whom the same was addressed, and the money was

thereupon delivered to him by the defendant's agent. *Held*, that the answer did not show such a degree of care and caution as would relieve the defendant from liability, even if charged as a forwarder only. *American Exp. Co. v. Fletcher*, 25 Ind. 492.—DISTINGUISHED IN *The Drew*, 15 Fed. Rep. 826; *Price v. Oswego & S. R. Co.*, 50 N. Y. 213; *Samuel v. Cheney*, 135 Mass. 278. NOT FOLLOWED IN *Bush v. St. Louis, K. C. & N. R. Co.*, 3 Mo. App. 62. REVIEWED IN *Shearer v. Pacific Exp. Co.*, 43 Ill. App. 641.

There was a conflict of evidence as to whether an express package was addressed simply to the consignee, or whether it was addressed to him in care of a third person. *Held*, that if the jury should find that the first was the true address of the package, then the company was liable for its contents until it was safely delivered to the consignee; but if the jury should find that the latter was the actual address, then the company discharged its duty by a delivery to the person to whose care the package was addressed. *Ela v. American Merchants' Union Exp. Co.*, 29 Wis. 611.

Where a carrier becomes liable for the loss of goods, it has a right to assume, in the absence of notice to the contrary, that the consignee is the owner, and settle with him therefor. *Scammon v. Wells*, 42 Am. & Eng. R. Cas. 400, 84 Cal. 311, 24 Pac. Rep. 284.

49. Duties of consignee; examination of goods, etc.—A consignee who does not examine goods delivered to him by a carrier within a reasonable time thereafter, cannot recover against the carrier for their injury by showing that when he examined them they were in a damaged condition, without further showing that the injury did not occur after their delivery. *Nave v. Pacific Exp. Co.*, 19 Mo. App. 563.

The agents of an express company may refuse to permit a consignee to examine goods until he has accepted a delivery and paid the charges; and upon his refusal may return the goods to the shipper, where he has given special directions to do so, or the shipment has been made under a general regulation of the company prescribing this course, which was known to the shipper. *Wiltse v. Barnes*, 46 Iowa 210.—DISTINGUISHING *Lyons v. Hill*, 46 N. H. 49.

50. Refusal to receive—Return to consignor.—When goods forwarded by

the owner by express are refused by the consignee, and the express company promises to return them to the consignor, but negligently fails to return them in proper time, the consignor is entitled to recover from the company the damages thus occasioned to him. *Green v. Pacific Exp. Co.*, 37 Mo. App. 537.

51. Waiver by consignee of irregular delivery.—H. told C., the agent of an express company at a way station, that he was looking for a package of money by the next train, and wanted to board the same train and carry the money with him. The agent said his company's rules forbade him to deliver except on receipt signed in the company's books, and that the train would not stop long enough to permit that. H. replied that he would sign the receipt in advance, and that would relieve the agent, and this was done. On the arrival of the train H. got on the platform of the coach, and as the train moved off, C. called to H. and threw the package of money to him, but H. did not receive it and it was lost. *Held*, that the express company was released by the act of H., the consignee, from its liability to the consignor for the safe delivery of this money, as C. became the agent of H. so soon as the money was received by C. *Carroll v. Southern Exp. Co.*, 37 So. Car. 452.

52. Delivery of C. O. D. goods, generally.*—The meaning of the term C. O. D., placed upon an express package, is that the carrier is directed to collect the price of the goods at the time of delivering them to the consignee, and to withhold such delivery until the payment thereof is made; and is authorized on receipt of such payment to discharge the purchaser of the goods from liability for their price. *Com. v. Fleming*, 130 Pa. St. 138, 18 Atl. Rep. 622. *American Exp. Co. v. Lessem*, 39 Ill. 312. *American Merchants' Union Exp. Co. v. Wolf*, 79 Ill. 430.

Those letters have nothing to do with the transportation charges. *American Merchants' Union Exp. Co. v. Schier*, 55 Ill. 140.

The letters C. O. D., used in a complaint against an express company, have acquired in the commerce of the country such a fixed and determinative meaning that

* Carriers of C. O. D. goods. Duty to collect price on delivery, see note, 49 AM. & ENG. R. CAS. 114.

courts and juries from their general information, will readily understand what they mean; and if a failure to aver their meaning is a defect at all, it must be reached by a motion to make more specific. *United States Exp. Co. v. Keefer*, 59 Ind. 263.

Where goods are sent by express marked C. O. D., and delivered without the amount being collected, parol evidence is admissible to prove the meaning of the letters. *American Exp. Co. v. Lesem*, 39 Ill. 312.

In an action for delivering C. O. D. goods without collecting the price, it is not competent for the company to prove that other goods shipped by the same consignor to the same consignee so marked had, by consent, been delivered without collecting the price. *American Exp. Co. v. Lesem*, 39 Ill. 312.

An express company carrying C. O. D. goods is bound upon their arrival at the place of destination to tender the same to the consignee in apt time, demand the price, and in case of non-acceptance or non-payment to also notify the shipper in apt time. A failure to give notice for a week, during which time goods are destroyed by fire, will render the company liable. *American Exp. Co. v. Wettstein*, 28 Ill. App. 96.—FOLLOWING American Merchants' Union Exp. Co. v. Wolf, 79 Ill. 430.

The general rule is that actions against a common carrier for the loss of goods must be brought in the name of the consignee; but where the goods are shipped marked "C. O. D.," the contract of the common carrier is not only to safely carry and deliver the goods to the consignee, but also to "collect on delivery" and return to the consignor the charges on the goods; and the consignor may sue on such contract where neither the goods nor the charges thereon are returned to him. *United States Exp. Co. v. Keefer*, 59 Ind. 263.

When goods are expressed C. O. D., the liability of the express company as a common carrier terminates upon the safe carriage of the goods to their place of destination, notice to the consignee of their arrival, and an offer to deliver upon payment of the amount charged against them. *Hasse v. American Exp. Co.*, 94 Mich. 133, 53 N. W. Rep. 918.—REVIEWING *Weed v. Barney*, 45 N. Y. 344.

Where a bill of the price of goods accompanies them, with instructions to the express company not to deliver the goods unless the bill is paid, the company renders

itself liable by delivering without receiving payment; but it may avoid liability by procuring a return of the goods. *Tooker v. Gormer*, 2 Hill. (N. Y.) 71.

But it seems that an indorsement on the bill of "Please collect" is but a mere request, and the carrier may refuse to collect, in which case the indorsement in itself is not sufficient evidence of an undertaking to not deliver unless the bill is paid. *Tooker v. Gormer*, 2 Hill. (N. Y.) 71.

An order from a seller to a carrier to collect on delivery is a mere provision for retention of the seller's lien; if accepted, it creates a contract between the seller and the carrier, on breach of which by the latter the seller may recover the price from him; but it does not make payment by the vendee a condition precedent to delivery, so that the seller may reclaim goods delivered by the carrier without payment. *Com. v. Fleming*, 130 Pa. St. 138, 18 Atl. Rep. 622.

53. — taking payment—Part payment.—Where an express company carries C. O. D. goods, and receives only part of the price, which it remits to the consignor, the latter cannot credit it to the general indebtedness of the consignee, but must credit it to the company. *American Exp. Co. v. Lesem*, 39 Ill. 312.

Where goods were sent by express C. O. D., and the consignee, knowing himself to be insolvent, induced the agent to accept a check for the amount by representing his check as "good as gold"—held, that a delivery of the goods passed no title, and the company could recover them back. *American Merchants' Union Exp. Co. v. Willsie*, 79 Ill. 92.

54. — conditional payment by consignee—Return of money on breach of condition.—A consignee took up a box of C. O. D. goods and paid the price, but on examining it found the contents worthless, and a swindle on the part of the shipper, and the agent of the express company returned the money on the promise of the consignee "to make it right." Held, that the agent was bound to return the money as long as it remained in his hands, and that the voluntary return was therefore right, the illegality of the transaction being a defense to any claim that the consignor or the company might make on the agent for the money. *Herrick v. Gallagher*, 60 Barb. (N. Y.) 566.

Plaintiffs, who were tailors, contracted

with a customer for a suit of clothes, which they warranted should fit, and should be sent subject to inspection. They were sent C. O. D., and the customer paid the amount of the bill, but notified the express agent of his disagreement with plaintiffs, and instructed him to retain the money until further notice. The clothes did not fit, and he took them to plaintiffs, who promised to alter them and send them back, and at the same time told plaintiffs that they could not have the money paid to the express agent until the clothes were satisfactory. They returned them to him a second time, but being unsatisfactory he returned them to the agent and took back the money. *Held*, that the act of plaintiffs, after knowing of the terms upon which the money was paid to the agent, was a ratification of the act of the agent in receiving the money with such conditions, and they could not recover. *Brooks v. American Exp. Co.*, 14 Hun (N. Y.) 364.

55. Charges, and lien therefor.

—An express company cannot make an *ad valorem* charge for carrying a package of valuable bonds which is much higher than usual rates where the company acts as absolute insurer, where the evidence shows that the bonds were carried under a contract limiting the company's liability for loss or damage caused by fraud or gross negligence, and where the bonds received no more care or diligence in their transportation than other articles without reference to their value. *Holford v. Adams*, 2 Duer (N. Y.) 471.

Where goods were sent by express over the line of two companies and returned, the first company advancing the charges to the second company, on the return of the goods the former company had a lien on the goods for its charges and advances made. *United States Exp. Co. v. Haines*, 67 Ill. 137.

Where goods are delivered to a person at a place off the regular line of carriage of the company by railroad, who has been accustomed to receive express packages and collect charges upon them, such person, being *pro hac vice* the agent of the company, would have a right to retain the goods until the charges were paid. *American Merchants' Union Exp. Co. v. Schier*, 55 Ill. 140.

A carrier sued to recover its charges for transporting rice, and the shipper set up as counterclaim a loss of a part of the rice, and also the premium that it commanded at the place of delivery over the place of

shipment; but it appeared that he had sued the company in trover for the lost portion of the goods, and had recovered judgment for the price at the place of shipment. *Held*, that the judgment in trover was a bar to the counterclaim, though there was no proof that there was any evidence in the action in trover as to the difference between the prices at the two places. *Union R. & T. Co. v. Traube*, 59 Mo. 355, 8 Am. Ry. Rep. 441.—APPLIED IN *Adler v. Kansas City, S. & M. R. Co.*, 92 Mo. 242, 10 West. Rep. 333, 4 S. W. Rep. 917.

4. Liability as Warehouseman.

56. When the liability as carrier ceases and that of warehouseman begins.—After a common carrier has made a proper tender of the goods to the consignee, who refuses to receive them, his possession is as a mandatary only, and he is only liable for gross negligence. *Marshall v. American Exp. Co.*, 7 Wis. 1.

In such a case it is the duty of the express company to notify the consignor of the goods, and when this is done, the company is relieved of its responsibility as a common carrier, and holds the goods subject to the order of the consignor, but not before. *American Merchants' Union Exp. Co. v. Wolf*, 79 Ill. 430.—FOLLOWED IN *American Exp. Co. v. Wettstein*, 28 Ill. App. 96.

An express carrier's duty to deliver to the consignee in person and the consignee's duty to receive are reciprocal. The consignee cannot, by design, or to promote his convenience, deprive the carrier of the right to terminate, by delivery, the liability as insurer within a reasonable time. Where the consignee has notice of the arrival, and the carrier is ready to deliver, but is prevented by the consignee's absence, the liability as carrier ends, and thenceforward the liability is for reasonable care. *Adams Exp. Co. v. Darnell*, 31 Ind. 20.—REVIEWED IN *Pittsburgh, C. & St. L. R. Co. v. Nash*, 43 Ind. 423.

The consignor impliedly undertakes that the consignee, or some proper person, shall be at the place of destination to receive the goods, or in default thereof, upon due notice, the liability of the carrier as such ceases. *Marshall v. American Exp. Co.*, 7 Wis. 1.

Plaintiff shipped a trunk by express, and after its arrival called at the express office

and obtained leave to open it and remove some of the contents, upon paying charges and receipting for it, and obtained permission to leave it a day or two longer. On the following day some one called for it, but it turned out that he was not authorized to receive it. At the trial of an action against the company for a wrongful delivery, there was a conflict of evidence as to whether the arrangement to leave the trunk was made before or after the charges were paid and the receipt given. *Held*: (1) that it was proper to leave it to the jury to determine when the charges were paid and the receipt signed, and if they found the arrangement was made before, that they should determine whether the relation of carrier had ceased and that of warehouseman commenced; (2) whether there was such gross negligence in the delivery as to make the company liable as a warehouseman. *Oderkirk v. Fargo*, 41 N. Y. S. R. 9, 16 N. Y. Supp. 220, 61 Hun 418.

57. Duties as warehousemen, generally.—In case the consignee is not ready to receive and pay for the goods, it is the duty of the company to safely store and care for them, and to hold them for a reasonable time to enable the consignee to make such payment, and to notify the consignor; and the liability of the company meanwhile is that of warehouseman. *Hasse v. American Exp. Co.*, 94 Mich. 133, 53 N. W. Rep. 918.

58. Liability for loss by fire.—If goods are under the control of parties as forwarders and not as common carriers, and are consumed by accidental fire in a warehouse, without any fault or negligence on their part, they are not liable, unless they had expressly agreed, for compensation paid, to insure them, and had failed to do it. *Southern Exp. Co. v. McVeigh*, 20 Gratt. (Va.) 264.

An express company undertook to carry C. O. D. goods, and gave a receipt relieving the company from liability from loss by fire, unless where it occurred through fraud or gross negligence, and that if the price was not paid within thirty days the goods might be returned to the consignor, and in the mean time the company should hold them as warehousemen only. The consignee refused to take them up, and thirty-nine days afterward they were destroyed by fire, without any charge of fraud or negligence on the part of the company, and before any notice

had been given to the consignor that the goods had not been taken up. *Held*, that the company was not liable. *Landsberg v. Dinsmore*, 4 Daly (N. Y.) 490.

59. Liability for loss by theft.—Where an express company is sued for the loss of money after it reaches its place of destination and before delivery to the consignee, an answer setting up that the money was placed in its safe in its office upon arrival, and notice given to the consignee through the post office, and that the safe was broken open by burglars and the money stolen, does not constitute a good defense, even as warehouseman, where it is not averred that either the building or the safe was of such construction as to render it a safe place of deposit for money. *American Exp. Co. v. Hockett*, 30 Ind. 250. Compare *Adams Exp. Co. v. Darnell*, 31 Ind. 20.

An express company carried C. O. D. goods to the place of destination, and duly gave the consignee notice, who was not able to pay the charges and the price at the time, but repeatedly promised to do so in a few days. After holding the goods some three weeks the company's office was broken into and the goods were stolen. *Held*: (1) that the company was only liable as warehouseman after the consignee was notified of the arrival of the goods; (2) that the company was not negligent in failing to notify the shipper that the goods had not been taken up, so as to make it liable. *Grossman v. Fargo*, 6 Hun (N. Y.) 310.—FOLLOWING *Weed v. Barney*, 45 N. Y. 344; *Burnell v. New York C. R. Co.*, 45 N. Y. 184.

The goods in the above case were shipped to a village of some 800 inhabitants, and the company's office was in a wooden building inclosed with inch boards, but not plastered inside. The door was locked and the windows nailed down, but the thief entered by prying up one of the windows. *Held*, that the company was not guilty of negligence in storing the goods in such a building. *Grossman v. Fargo*, 6 Hun (N. Y.) 310.

5. Limitation of Liability.

60. Power to limit the common law liability, generally.—It is competent for an express company to limit its liability as insurer of the safe carriage of goods; or from losses arising through the default or negligence of any third person to whom it

may be necessary to deliver the goods; or for liability above a certain amount, unless the just and true value be stated in the receipt; or for property not properly packed or marked, or fragile or breakable goods. *Boorman v. American Exp. Co.*, 21 Wis. 152.

If in his employment a carrier uses the vehicles of others, over which he has no control, and uses reasonable care—that is, such care as ordinarily prudent persons engaged in like business use in selecting the vehicles—and if the loss arises from a cause against which he has stipulated with the shipper, he shall not be liable for the same, unless it arises from his want of care or the want of care of his employés. *Bank of Ky. v. Adams Exp. Co.*, 1 Flipp. (U. S.) 242.

61. Limitation by stipulations or conditions in receipts or bills of lading.—An express company, like any other common carrier, may restrict or limit its liability by express contract; but it may well be doubted whether it can do so by a mere printed notice or condition on the receipt, which the party sending goods by, or otherwise employing it, may or may not have seen. *Lienau v. Dinsmore*, 41 How. Pr. (N. Y.) 97.

Whether the shipper had knowledge of its terms and assented to its restrictions is a question of fact for the jury to determine upon evidence *aliunde*; and all the circumstances attending the giving of the receipt are admissible in evidence. *American Merchants' Union Exp. Co. v. Schier*, 55 Ill. 140.—DISAPPROVING *Grace v. Adams*, 100 Mass. 505. FOLLOWING *Adams Exp. Co. v. Haynes*, 42 Ill. 89.—NOT FOLLOWED IN *Mulligan v. Illinois C. R. Co.*, 36 Iowa 181; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304.

In the absence of fraud or imposition, a receipt delivered by an express company to a person shipping goods must be held to be the contract between the parties. *Huntington v. Dinsmore*, 4 Hun (N. Y.) 66, 6 T. & C. 195.

In the absence of fraud, concealment, or improper practice, the legal presumption is that stipulations limiting its common law liability, contained in a receipt given by such company for freight, were known and assented to by the party receiving it. *Belger v. Dinsmore*, 51 N. Y. 166; *reversing* 51 Barb. 69, 34 How. Pr. 421.—DISTINGUISHING *Blossom v. Dodd*, 43 N. Y. 264.—APPROVED IN *Hart v. Pennsylvania R. Co.*, 112

U. S. 331. DISTINGUISHED IN *Magnin v. Dinsmore*, 56 N. Y. 168. FOLLOWED IN *Muser v. Holland*, 17 Blatchf. (U. S.) 412, 1 Fed. Rep. 382; *Steers v. Liverpool, N. Y. & P. Steamship Co.*, 57 N. Y. 1; *Westcott v. Fargo*, 61 N. Y. 542; *Dana v. New York C. & H. R. R. Co.*, 50 How. Pr. (N. Y.) 428. NOT FOLLOWED IN *Ghormley v. Dinsmore*, 19 J. & S. (N. Y.) 196.

So a shipper is bound by the terms of such receipt relating to a limitation of the company's liability. And it is not material whether or not the shipper paid more or less than the usual charge for carriage; nor is it permissible to show what the company's agent said about making good any loss, where there is nothing to show that he was authorized to make any such promise. *Huntington v. Dinsmore*, 4 Hun (N. Y.) 66, 6 T. & C. 195.

An express company may limit its liability, in its receipt, to transport the package safely to the point on its line nearest to the place of destination, and there deliver it to the proper carrier, to be forwarded to its destination, and having done this, the company is not responsible for its subsequent loss. *United States Exp. Co. v. Rush*, 24 Ind. 403.—QUOTING *Quimby v. Vanderbilt*, 17 N. Y. 306.—APPROVED IN *Coates v. United States Exp. Co.*, 45 Mo. 238. REVIEWED IN *Gray v. Jackson*, 51 N. H. 9.—*United States Exp. Co. v. Haines*, 67 Ill. 137.

Exceptions in a common carrier's receipt, limiting his common law responsibility, are strictly construed against the carrier, and are never extended to relieve from responsibility for a loss occasioned by his own negligence. *Southern Exp. Co. v. Moon*, 39 Miss. 822.

And the burden is upon the company to show that the loss occurred through one of the excepted causes. *United States Exp. Co. v. Backman*, 28 Ohio St. 144, 14 Am. Ky. Rep. 82.—FOLLOWING *Union Exp. Co. v. Graham*, 26 Ohio St. 595.—APPROVED IN *Louisville & N. R. Co. v. Wynn*, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311. FOLLOWED IN *Gaines v. Union T. & I. Co.*, 28 Ohio St. 418.

When no receipt was given at the time of the delivery of a package to an express company, it cannot limit its liability by a receipt afterwards given, when the evidence negatives expressly all presumption of any knowledge on the part of the shipper that

the receipt contained a clause limiting the carrier's liability as claimed, and that he ever had any knowledge that it thus claimed to limit its liability. *American Exp. Co. v. Spellman*, 90 Ill. 455.

If a common carrier, who undertakes to transport goods for hire from one place to another, "and deliver to address," inserts a clause in a receipt signed by him alone, and given to the person intrusting him with the goods, stating that the carrier is "not to be responsible except as forwarder," this restrictive clause does not exempt the carrier from liability for loss of the goods, occasioned by the carelessness or negligence of the employes on a steamboat owned and controlled by other parties than the carrier, but ordinarily used by him in his business of carrier as a means of conveyance. The managers and employes of the steamboat are, in legal contemplation, for the purposes of the transportation of such goods, the managers and employes of the carrier. *Hooper v. Wells*, 27 Cal. 11.

An express company upon receiving three packages for transportation gave the shipper a receipt in which it was stated that the company were "forwarders only." *Held*, that these words were ineffectual to restrict their liability. The law determines the character of the occupation of expressmen; it assigns to them the liabilities of common carriers, and this status is not affected by an agreement between the parties that they are not carriers, but "forwarders." *Galt v. Adams Exp. Co.*, *MacArth. & M. (D. C.)* 124.

The clerk of a shipper took with him to an express office a blank receipt of a different company, containing a printed clause limiting the liability of the latter company, and inserting the articles and number, etc., therein, writing the name of the company with whom he was shipping over that of the other company, which was signed by the agent of the company. *Held*, that this constituted no contract with the defendant company, limiting its liability, and that before it could claim the benefit of the exemption it must be proved by evidence outside the receipt that such was the agreement of the parties. *Boscovitz v. Adams Exp. Co.*, 93 Ill. 523.—*EXPLAINING* *Oppenheimer v. United States Exp. Co.*, 69 Ill. 62.

A common carrier gave a receipt for three separate bales of furs to be trans-

ported, containing a printed clause that the company should not be liable for any loss or damage except as forwarder only, nor for any loss or damage "of any box, package, or thing" for over \$50, unless the just and true value thereof was therein inserted. *Held*, that the limitation as to the amount of the recovery was not to be applied to the three bales, but to each one separately, notwithstanding they were all embraced in one receipt, and that the shipper might at least recover that sum for each package. *Boscovitz v. Adams Exp. Co.*, 93 Ill. 523.

62. Effect of failure to read receipt.—Where a shipper, upon delivery of property for transportation, receives, without dissent, a receipt, with the understanding that it contains a contract on the part of the company as to the carriage, in the absence of fraud or imposition, the company has a right to infer an assent on his part to conditions in the receipt, not unusual or unreasonable, limiting its common law liability as carrier; and he is precluded from denying it thereafter to the company's injury. After a loss, therefore, it is too late for the shipper to object that he omitted to read the receipt, and was ignorant that it contained such conditions. *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475; *reversing 2 Hun* 46, 4 T. & C. 304.—*DISTINGUISHING* *Blossom v. Dodd*, 43 N. Y. 264.—*FOLLOWED IN* *Muser v. Holland*, 17 Blatchf. (U. S.) 412, 1 Fed. Rep. 382.

Where the receipt given is contained in a book of blank receipts previously furnished by the company for the use of the shipper, and the written portions of the receipt were in the shipper's handwriting, it will be presumed that its contents were known to him, and he is presumed to have assented to its conditions. *Durgin v. American Exp. Co.*, (N. H.) 45 Am. & Eng. R. Cas. 325, 20 Atl. Rep. 328.

The receipt contained a clause limiting the liability of the company to the risks of carriage to the end of its route. The consignor could not read, and the agent read the principal part of the receipt to him, but did not read that clause. *Held*, that as that clause was expressive only of the company's liability under the law, the omission to read it was no fraud on the consignor. Such a receipt, like any simple receipt, may be explained by parol evidence. *Hadd v. United States & C. Exp. Co.*, 6 Am. & Eng. R. Cas. 443, 52 Vt. 335, 36 Am. Rep. 757.

63. Limitation of liability by mere notice.—Mere notices brought home to the owner of the goods, by which the carrier seeks to avoid or limit his common law liability, but which are not expressly assented to, cannot be availed of to defeat a claim for loss. *Gott v. Dinsmore*, 111 Mass. 45.

A public notice given by a common carrier, brought home to the knowledge of the shipper, enters into the contract of affreightment, so far as the carrier has the right to impose such terms, either by express or implied contract, not, however, inconsistent with the express contract; and such notice will be considered in construing the contract when its terms do not conflict with the express undertaking. *Orndorff v. Adams Exp. Co.*, 3 Bush (Ky.) 194.

A common carrier by notices cannot exempt himself from losses by the malfeasance, misfeasance, or gross negligence of himself or his servants. If, therefore, he or they convert the goods to a wrong use, or make a wrong delivery to a person not entitled to them, or are guilty of gross negligence in the carriage or care of them, the loss must be borne by the carrier. *Orndorff v. Adams Exp. Co.*, 3 Bush (Ky.) 194.

In cases of notices, the carrier is liable for losses and injuries occasioned not only by gross negligence, but by ordinary negligence; or, in other words, the carrier is bound to ordinary diligence. *Orndorff v. Adams Exp. Co.*, 3 Bush (Ky.) 194.

64. Effect of custom to limit liability.—The liability of an express company as a common carrier cannot be limited by a custom not brought to the knowledge of the party dealing with it. *Little v. Fargo*, 43 Hun 233, 5 N. Y. S. R. 462.

Where an express company receives a valise which is valued at \$500, and it turns out that the valise contained money which was stolen, the company cannot avoid liability by showing a custom of express companies to ship money only through the money department, and never to ship it in a valise. The liability of the company attached when it received the valise knowing that it was valued at \$500, and this liability could not be limited by custom, nor even by a special contract. *Texas Exp. Co. v. Dupree*, 2 Tex. App. (Civ. Cas.) 274.

65. Limiting liability for negligence, generally.—An express company engaged in carrying for hire goods, parcels,

and money is a common carrier, and cannot by contract relieve itself from liability for its own negligence or that of its servants. *Bank of Ky. v. Adams Exp. Co.*, 93 U. S. 174.—DISTINGUISHED IN *McCarn v. International & G. N. R. Co.*, 84 Tex. 352. FOLLOWED IN *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 10 Biss. (U. S.) 18; *Capehart v. Seaboard & R. R. Co.*, 81 N. Car. 438; *Eells v. St. Louis, K. & N. W. R. Co.*, 52 Fed. Rep. 903.—*Overland M. & E. Co. v. Carroll*, 7 Colo. 43, 1 Pac. Rep. 682. *Kirby v. Adams Exp. Co.*, 2 Mo. App. 369.

Though a contract between an express company and a shipper be legally sufficient to restrict the liability of the company as a common carrier, yet it will be liable for a loss or injury occurring through actual negligence; and it will be chargeable with negligence unless it exercised the care and prudence of a prudent man in dealing with his own affairs. *United States Exp. Co. v. Kountze*, 8 Wall. (U. S.) 342.—REVIEWED IN *Virginia & T. R. Co. v. Sayers*, 26 Gratt. (Va.) 328.

The printed receipts generally given and used by common carriers, containing conditions limiting their liabilities to a certain sum, unless the value of each package is named and stated therein, will not exempt them from liability for the value of packages lost by the negligence or fraud of themselves or their agents. *Southern Exp. Co. v. Crook*, 44 Ala. 468. *Orndorff v. Adams Exp. Co.*, 3 Bush (Ky.) 194.

66. The New York rule.*—Where a carrier, by his contract, limits his liability to a specified amount in case the value of goods delivered for carriage is not stated by the shipper, if goods of greater value are so delivered, silence on the part of the shipper as to the real value, although there is no inquiry by the carrier, and no artifice to conceal the value or to deceive, is a legal fraud, which discharges the carrier from liability for ordinary negligence for an amount exceeding the limitation of the contract. *Magnin v. Dinsmore*, 70 N. Y. 410; reversing 10 J. & S. 16.—DISTINGUISHED IN *Ghormley v. Dinsmore*, 19 J. & S. 196. FOLLOWED IN *Muser v. Holland*, 17 Blatchf. (U. S.) 412, 1 Fed. Rep. 382.—*Magnin v. Dinsmore*, 62 N. Y. 35, 50 How. Pr. 457; reversing 6 J. & S. 248.—APPLYING *New York C. R. Co. v. Lockwood*, 17 Wall.

* See also *post*, 72, 73.

(U. S.) 357. FOLLOWING *Batson v. Donovan*, 4 B. & Ald. 21.—DISTINGUISHED IN *Curtis v. Delaware*, L. & W. R. Co., 74 N. Y. 116; *Baldwin v. Liverpool & G. W. Steamship Co.*, 74 N. Y. 125, 30 Am. Rep. 277. REFERRED TO IN *Weeks v. New York*, N. H. & H. R. Co., 72 N. Y. 50.—*Magnin v. Dinsmore*, 53 N. Y. 652, *mem.*; *reversing* 3 J. & S. 182.

The disclosure of value, in such case, is a condition precedent to liability on the part of the carrier for mere ordinary negligence unaccompanied with any misfeasance or wilful act. *Magnin v. Dinsmore*, 70 N. Y. 410; *reversing* 10 J. & S. 16.

An omission upon the part of the carrier to make inquiry as to the value is not a waiver of the limitation in the contract. *Magnin v. Dinsmore*, 70 N. Y. 410; *reversing* 10 J. & S. 16.

Goods worth \$1500 were delivered to an express company, and a receipt given containing various limitations of the carrier's liability, with one providing that "if the value of the property is not stated by the shipper, the company should not be liable for a loss or damage in a sum exceeding \$50." No value was stated by the shipper. *Held*, in the absence of an express stipulation against loss through negligence, that the \$50 limitation did not apply to a loss occurring through the carrier's negligence. *Magnin v. Dinsmore*, 56 N. Y. 168; *reversing* 46 How. Pr. 297.—APPLYING *Steinweg v. Erie R. Co.*, 43 N. Y. 123; *Guillaume v. Hamburgh & A. Packet Co.*, 42 N. Y. 212; *Lamb v. Camden & A. R. & T. Co.*, 46 N. Y. 271; *Bostwick v. Baltimore & O. R. Co.*, 45 N. Y. 712; *Westcott v. Fargo*, 6 Lans. (N. Y.) 319. DISTINGUISHING *Belger v. Dinsmore*, 51 N. Y. 166; *Steers v. Liverpool*, N. Y. & P. Steamship Co., 57 N. Y. 1; *Cragin v. New York C. R. Co.*, 51 N. Y. 61; *Newstadt v. Adams*, 5 Duer (N. Y.) 43; *Bissell v. New York C. R. Co.*, 25 N. Y. 442.—APPROVED IN *Hart v. Pennsylvania R. Co.*, 112 U. S. 331. DISAPPROVED IN *Louisville & N. R. Co. v. Wynn*, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311. FOLLOWED IN *Westcott v. Fargo*, 61 N. Y. 542; *Ghormley v. Dinsmore*, 19 J. & S. (N. Y.) 196. QUOTED IN *Nicholas v. New York C. & H. R. R. Co.*, 9 Am. & Eng. R. Cas. 103, 89 N. Y. 370.

An express company received goods to be shipped by vessel, and gave a receipt limiting its liability to loss or injury occur-

ring through fraud or gross negligence. The vessel went down while *en route*, and the goods were recovered, but damaged, and after being examined by surveyors were sold at auction. There was no proof of fraud or gross negligence up to the time of the sinking of the vessel. *Held*, that the company was only liable for the amount that the goods sold for, and the freights that had been advanced, and interest; that it was not liable for not forwarding the damaged goods to the place of destination, it appearing that the captain of the vessel had a right to control. *Hersfield v. Adams*, 19 Barb. (N. Y.) 577.

67. Limitation of liability for delay.—An express company is not relieved from liability for damages caused by its negligent delay in delivering goods, by provisions in a receipt to the effect that the company would not be liable for a sum exceeding \$50 unless the value of the goods was stated, and unless a claim for damages was made in writing within thirty days. *Vroman v. American Merchants' Union Exp. Co.*, 5 T. & C. (N. Y.) 22, 2 Hun 512.

An express company cannot defend an action for a delay in carrying goods, under a provision in the receipt given by it to the effect that it should not be liable for delays beyond its control, where the evidence shows that the delay was caused by the inability of the railroad employed by it to carry its freights as fast as received, where the express company received the goods with full knowledge of the fact that the railroad had been in arrears in shipping freights for some time. A mere temporary delay on the part of the railroad might be an excuse. *Place v. Union Exp. Co.*, 2 Hill. (N. Y.) 19.

An express company received fruit for shipment, agreeing to deliver it at the place of destination in twelve days, and in default thereof that it would pay five cents per hundred pounds for each day the goods were delayed. The receipt contained various limitations of the company's liability, among others that it would not be liable for injury to freight during transportation occasioned by weather, accidental delays, or natural tendency to decay. The goods were delayed some ten days beyond the stipulated time on account of one of the railroads employed failing to carry its freights as fast as delivered to it, and the fruit was nearly ruined by decay when delivered. *Held*, that

the company was liable. *Place v. Union Exp. Co.*, 2 *Hill*. (N. Y.) 19.

68. When stipulation as to notice of claim will protect the carrier.*—

A contract that an express company would not "in any event be liable for any loss or damage unless the claim therefor shall be presented to them, in writing, at their said office, within thirty days after the time when said property has or ought to have been delivered," is reasonable and proper.

Weir v. Express Co., 5 *Phila.* (Pa.) 355.—FOLLOWED IN *Southern Exp. Co. v. Hunnicutt*, 54 *Miss.* 566. QUOTED IN *Adams Exp. Co. v. Reagan*, 29 *Ind.* 21.—*Southern Exp. Co. v. Hunnicutt*, 54 *Miss.* 566.—FOLLOWING *United States Exp. Co. v. Harris*, 51 *Ind.* 127; *Weir v. Express Co.*, 5 *Phila.* (Pa.) 355. NOT FOLLOWING *Southern Exp. Co. v. Caperton*, 44 *Ala.* 101.—*United States Exp. Co. v. Harris*, 51 *Ind.* 127.—DISTINGUISHED IN *Adams Exp. Co. v. Harris*, 40 *Am. & Eng. R. Cas.* 151, 120 *Ind.* 73, 21 *N. E. Rep.* 340. FOLLOWED IN *Southern Exp. Co. v. Hunnicutt*, 54 *Miss.* 566. REVIEWED IN *Missouri Pac. R. Co. v. Harris*, 28 *Am. & Eng. R. Cas.* 107, 67 *Tex.* 166.

So an agreement is valid which requires the shipper of a small package to give notice of a claim for loss or damage within ninety days from delivery to the company, where the usual time between the place of shipment and delivery is but a single day. *Southern Exp. Co. v. Caldwell*, 21 *Wall.* (U. S.) 264.—FOLLOWED IN *Rice v. Kansas Pac. R. Co.*, 63 *Mo.* 314. QUOTED IN *Coles v. Louisville, E. & St. L. R. Co.*, 41 *Ill. App.* 607. REVIEWED IN *Muser v. Holland*, 17 *Blatchf.* (U. S.) 412, 1 *Fed. Rep.* 382; *Hartwell v. Northern Pac. Exp. Co.*, 37 *Am. & Eng. R. Cas.* 635, 5 *Dak.* 463, 3 *L. R. A.* 342, 41 *N. W. Rep.* 732; *Missouri Pac. R. Co. v. Harris*, 28 *Am. & Eng. R. Cas.* 107, 67 *Tex.* 166.

Reasonable time within which the shipper is required to give notice to the express company of his claim, is such time as would be ample to ascertain the non-delivery of the parcel at the place of destination, depending on the distance and facilities of communication. *Southern Exp. Co. v. Hunnicutt*, 54 *Miss.* 566.

Where the receipt or bill of lading given by an express company provides that, in

* Limitation of time within which claim must be presented, see notes, 16 *AM. & ENG. R. CAS.* 260; 32 *Id.* 546.

case of loss, proof shall be made within a limited time and in a particular manner, if notice of loss is given within the time limited and no objection is made to its sufficiency, but the objection to payment is put by the company upon other grounds, all defects in such notice will be regarded as waived. *Merrill v. American Exp. Co.*, 62 *N. H.* 514.

An express company is not liable as a carrier for loss resulting from such causes as the act of God, the public enemy, mobs or riots, unless it expressly insures against such loss. Therefore the company is not entitled to any notice whatever of such a loss. *Southern Exp. Co. v. Glenn*, 16 *Lea* (Tenn.) 472, 1 *S. W. Rep.* 102.

But the company, being liable for loss occurring from any other cause than the above, is entitled to notice of the loss within thirty days after the shipment, so that the goods may be traced by it. *Southern Exp. Co. v. Glenn*, 16 *Lea* (Tenn.) 472, 1 *S. W. Rep.* 102.

69. When breach of such stipulation will not bar recovery.—Under the provision of *Dak. Civ. Code*, §§ 1261, 1262, that a common carrier cannot limit his liability by general notice, but may limit it by special contract, and that a consignor or consignee by accepting a bill of lading with a knowledge of its terms assents to the rate of hire, the time, place, and manner of delivery therein, but his assent to any other modification of the carrier's liability can only be manifested by his signature to the same, a consignee is not bound by a condition in a receipt given by an express company to the effect that the company will not be liable for loss or damage unless claim thereof be presented within a specified time, when such receipt has not been signed by the consignee or any one acting for him. *Hartwell v. Northern Pac. Exp. Co.*, 37 *Am. & Eng. R. Cas.* 635, 5 *Dak.* 463, 41 *N. W. Rep.* 732, 3 *L. R. A.* 342.—QUOTING *Southern Exp. Co. v. Caldwell*, 21 *Wall.* (U. S.) 266. REVIEWING *Bissell v. New York C. R. Co.*, 25 *N. Y.* 442.—DISTINGUISHED IN *Hazel v. Chicago, M. & St. P. R. Co.*, 82 *Iowa* 477.

A stipulation in a receipt given by a common carrier that it should not be liable for loss of a package of money unless a claim for the loss was made within thirty days from the date of the receipt is unreasonable, and tends to fraud, and is inoperative. *Southern Exp. Co. v. Caperton*,

44 Ala. 101. — NOT FOLLOWED IN Southern Exp. Co. v. Hunnicutt, 54 Miss. 566. QUOTED IN Missouri Pac. R. Co. v. Harris, 28 Am. & Eng. R. Cas. 107, 67 Tex. 166. RECONCILED IN Goggin v. Kansas Pac. R. Co., 12 Kan. 416.

A provision in a carrier's receipt requiring the shipper to give notice of a claim for loss or damage "within thirty days from the accruing of the cause of action" is not a condition precedent to the plaintiff's right of recovery, but is in the nature of a limitation; and to be available as a defense must be specially pleaded in the company's answer. *Westcott v. Fargo*, 61 N. Y. 542; *affirming 63 Barb.* 349, 6 *Lans.* 119. — FOLLOWING *Belger v. Dinsmore*, 51 N. Y. 166; *Steers v. Liverpool, N. Y. & P. Steamship Co.*, 57 N. Y. 1; *Magnin v. Dinsmore*, 56 N. Y. 168. — REVIEWED IN Missouri Pac. R. Co. v. Harris, 28 Am. & Eng. R. Cas. 107, 67 Tex. 166.

A stipulation that an express company shall not be liable for money lost by its default unless claim therefor is made in writing, at its office, within thirty days after its delivery to the company, is reasonable and valid; but where the failure to make the claim as required by such stipulation occurs without fault or negligence of the parties entitled to the money, then such failure will be excused, and will not prevent a recovery for the loss. *Glenn v. Southern Exp. Co.*, 35 Am. & Eng. R. Cas. 627, 86 Tenn. 594, 8 S. W. Rep. 152.

Where a package was shipped from C., in Indiana, to S., in Georgia, during the war, when transportation was much interrupted, a condition that the carrier should not be liable for any loss unless a claim therefor was presented within thirty days after the shipment at C., was void. *Adams Exp. Co. v. Reagan*, 29 Ind. 21. — QUOTING *Weir v. Express Co.*, 5 Phila. (Pa.) 355.

A claim for damages based upon a subsequent contract for the return of the goods, and not upon the original contract of shipment, is not affected by a clause in the latter contract requiring claims arising from it to be made in writing within sixty days from its date. *Green v. Pacific Exp. Co.*, 37 Mo. App. 537.

A condition annexed to a receipt given by an express company upon receiving a draft, that it should not be liable for any loss or damage unless a claim should be asserted within ninety days, does not limit the

company's liability for neglect or refusal to pay to the plaintiffs the money received for them. *Bardwell v. American Exp. Co.*, 35 Minn. 344, 28 N. W. Rep. 925.

A condition in an express receipt that the company shall in no case be liable for loss or damage unless the claim thereof shall be presented in writing within ninety days after date of receipt, is waived by the company in not exacting a compliance therewith. *Bennett v. Northern Pac. Exp. Co.*, 12 Oreg. 49, 6 Pac. Rep. 160.

A provision in a receipt given by an express company for goods shipped, to the effect that it is not "to be held liable for any loss or damage whatever unless claim be made therefor within ninety days from the delivery to it," is not a limitation of the liability of the company when sued for the non-delivery of the goods. *Porter v. Southern Exp. Co.*, 4 So. Cur. 135.

70. Special contracts limiting liability, generally.—The liabilities of common carriers may be reasonably limited by special contract, but public policy will not permit them, even by special contract, to be exempted from damages for losses occasioned by the negligence or misfeasance of themselves or their servants. *Southern Exp. Co. v. Crook*, 44 Ala. 468.

While it is true as a general proposition that where one party executes a contract and the other accepts it, both are bound thereby, yet in an action against an express company for loss of goods such special agreement only relieves the company from extraordinary care and diligence, and the instruction should not be given to the jury without such qualification. *Southern Exp. Co. v. Newby*, 36 Ga. 635. — FOLLOWING *Berry v. Cooper*, 28 Ga. 543.

Where an express company is sued for a failure to safely carry and deliver a package of money, a plea filed by it setting up a contract limiting its liability is not sustained by proof, which fails to show that the limitations were known or assented to by the plaintiff. *Adams Exp. Co. v. King*, 3 Ill. App. 316.

If the common carrier may limit his liability by an express contract, the limitation must be reasonable in itself, and not such as to operate as a snare or fraud upon the public. *Adams Exp. Co. v. Reagan*, 29 Ind. 21. — RECONCILED IN *Goggin v. Kansas Pac. R. Co.*, 12 Kan. 416.

Where a plaintiff sends an order for

goods to a dealer and directs him to ship them by a certain express line, the dealer has authority to make a contract limiting the liability of the express company, so as to bind the plaintiff. *Moriarty v. Harnden's Exp. Co.*, 1 *Daly* (N. Y.) 227. *Levy v. Southern Exp. Co.*, 4 *So. Car.* 234.

It would virtually destroy the utility of the express business to hold that when the goods are delivered, the carrier who chooses to limit his responsibility, should be compelled to stop and examine the authority of the person presenting the goods, to make the contract. *Meyer v. Harnden's Exp. Co.*, 24 *How. Pr.* (N. Y.) 290.

Where the shipper himself fills up a receipt, and presents it to an express company to be signed, which provides that the company is not to be held liable for any loss or damage by fire, it is not liable where the goods shipped are burned, without fault or neglect on its part, while *in transitu*. *Falkenau v. Fargo*, 44 *How. Pr.* (N. Y.) 325.

71. Receipt when deemed a special contract.—A common carrier is bound to carry all articles within the line of his business upon the terms and conditions imposed by law, if the shipper shall so demand. He has a right, however, to charge in proportion to the risk assumed by him. But when he has undertaken to carry at a less rate than he would have a right to charge, and would charge if he undertook to carry only upon the conditions imposed by law, and has by his receipt, delivered to the shipper, stipulated for a reasonable limitation of his responsibility, and the shipper has accepted the receipt without objection, the latter is as much bound by the contract thus made as any other party would be. *Brown v. Adams Exp. Co.*, 1 *Flipp.*

When a shipper of goods who has been provided with blank receipts fills up one ready for the signature of the company's agent, and presents it at the office with the goods, where it is signed by the agent and returned, it constitutes a special contract between the parties, including all the provisions therein contained relating to the manner of shipment and the limitations of the carrier's liability, and the shipper cannot plead ignorance of its terms. *Falkenau v. Fargo*, 44 *How. Pr.* (N. Y.) 325.—FOLLOWING *Breese v. United States Tel. Co.*, 45 *Barb.* (N. Y.) 274.

An express company, on receiving fruit for transportation, gave a receipt stating that it would be carried only at the owner's risk, and that the carrier would not be liable for injuries occasioned "by the weather, accidental delays, or natural tendency to decay." Held, that if such conditions were known to the shipper it constituted a contract, and would release the company from such injuries, if they did not occur through its negligence. *Giles v. Fargo*, 17 *N. Y. Supp.* 476.—REVIEWING *Falkenau v. Fargo*, 3 *J. & S.* 332.

72. Limitation of amount recoverable, when valid and binding on shipper.—(1) *In general.*—An express company has the right to demand from a consignor such information as will enable it to decide on the proper compensation to charge for the risk, and the degree of care to bestow in discharging its trust; and a limitation of its liability not to exceed \$50 unless the value of the goods forwarded is truly stated, if brought to the knowledge of the consignor, is reasonable and consistent with public policy. *Oppenheimer v. United States Exp. Co.*, 69 *Ill.* 62. — QUOTING *Orange County Bank v. Brown*, 9 *Wend.* (N. Y.) 115.—DISTINGUISHED IN *Erie & W. Transp. Co. v. Dater*, 91 *Ill.* 195. EXPLAINED IN *Boscowitz v. Adams Exp. Co.*, 93 *Ill.* 523.—*Galt v. Adams Exp. Co.*, *Mac-Arth. & M. (D. C.)* 124. *Ballou v. Earle*, 17 *R. I.* 441, 22 *Atl. Rep.* 1113.—APPROVING *New York C. R. Co. v. Lockwood*, 17 *Wall.* (U. S.) 357; *Hooper v. Wells*, 27 *Cal.* 11; *Christenson v. American Exp. Co.*, 15 *Minn.* 270; *Bank of Ky. v. Adams Exp. Co.*, 93 *U. S.* 174; *Kirby v. Adams Exp. Co.*, 2 *Mo. App.* 369. NOT FOLLOWING *American Exp. Co. v. Sands*, 55 *Pa. St.* 140; *Grogan v. Adams Exp. Co.*, 114 *Pa. St.* 523, 7 *Atl. Rep.* 134.

But a condition of this character which seeks to cover the negligence of the carrier is void. *Galt v. Adams Exp. Co.*, *Mac-Arth. & M. (D. C.)* 124.

It is only when an actual loss is shown, that a plaintiff, under such a contract, is bound to prove that the fraud or gross negligence of the carrier caused the loss. When the contract limits the liability to \$150 unless the nature and value of the property are disclosed when delivered, to the carrier, the plaintiff, *prima facie*, cannot recover

*See also *ante*, 66.

beyond that sum, though the property is clearly proved to be worth more. *Newstadt v. Adams*, 5 *Duer* (N. Y.) 43.—DISTINGUISHED IN *Magnin v. Dinsmore*, 56 N. Y. 168.

Where the shipper accepts carriage upon the terms of a limited liability, silence is the same as an assertion of little value, and the carrier is not only thereby deprived of his adequate reward, but is misled as to the degree of care and security which he should provide. *Magnin v. Dinsmore*, 62 N. Y. 35, 50 *How. Pr.* 457; *reversing* 6 J. & S. 248. *Belger v. Dinsmore*, 51 N. Y. 166, 10 *Am. Rep.* 575; *reversing* 51 *Barb.* 69, 34 *How. Pr.* 421. *Ballou v. Earle*, 48 *Am. & Eng. R. Cas.* 31, 17 *R. I.* 441, 22 *Atl. Rep.* 1113.

Where a shipper fills up a blank receipt containing a provision that the company's liability shall be limited to \$50 unless the value of the articles shipped is expressed, and presents it with the goods, which is signed by the company's agent and returned, he is bound thereby, where the evidence shows that he was a frequent shipper, and familiar with the custom of the company only to make shipments with such provision in the receipts. *Ghormley v. Dinsmore*, 21 J. & S. (N. Y.) 36.—FOLLOWING *Hart v. Pennsylvania R. Co.*, 112 U. S. 331. QUOTING *Magnin v. Dinsmore*, 6 J. & S. 248, 62 N. Y. 35, 70 N. Y. 410.

Where goods are delivered to an express company to be carried beyond its line, and a special contract is entered into, limiting its liability to \$50 unless a greater value be specified, a second company accepting and carrying the goods is entitled to the benefit of the limitation given to the first, on the principle that the first company was the agent of the shipper in delivering the goods to the second company, and was therefore authorized to make a contract containing special terms of shipment. *Levy v. Southern Exp. Co.*, 4 *So. Car.* 234.—FOLLOWING *York Mfg. Co. v. Illinois C. R. Co.*, 3 *Wall* (U. S.) 107.

(2) *Illustrations*.—A railroad passenger on arrival at his destination delivered his baggage check to a local expressman to enable him to take up his baggage from the railroad and carry it to his residence. The expressman gave in return a paper which contained, among other things, a printed statement that he would not become "liable for merchandise or jewelry contained in baggage received upon baggage checks, nor for loss

5 D. R. D.—38.

by fire, nor for any amount exceeding \$100 upon any article, unless specially agreed for in writing on this check receipt, and the extra risk paid for," with a further statement that the owner thereby agreed that the expressman should only be liable as therein stated. *Held*, that the owner was bound by the notice whether he read it or not. *Hopkins v. Westcott*, 6 *Blatchf.* (U. S.) 64.—QUOTING *Brooke v. Pickwick*, 4 *Bing.* 218; *Hawkins v. Hoffman*, 6 *Hill* (N. Y.) 586; *Orange County Bank v. Brown*, 9 *Wend.* (N. Y.) 115.—APPROVED IN *Hart v. Pennsylvania R. Co.*, 112 U. S. 331. DISAPPROVED IN *Blossom v. Dodd*, 43 N. Y. 264. FOLLOWED IN *Muser v. Holland*, 17 *Blatchf.* (U. S.) 412, 1 *Fed. Rep.* 382.—*Muser v. Holland*, 17 *Blatchf.* (U. S.) 412, 1 *Fed. Rep.* 382.—FOLLOWING *Hopkins v. Westcott*, 6 *Blatchf.* 64; *Belger v. Dinsmore*, 51 N. Y. 166; *Magnin v. Dinsmore*, 62 N. Y. 35, 70 N. Y. 410; *Kirkland v. Dinsmore*, 62 N. Y. 171. REVIEWING *Southern Exp. Co. v. Caldwell*, 21 *Wall* (U. S.) 264.—APPROVED IN *Hart v. Pennsylvania R. Co.*, 112 U. S. 331.—*Adams Exp. Co. v. Boskowitz*, 16 *Am. & Eng. R. Cas.* 102, 107 *Ill.* 660. *Kallman v. United States Exp. Co.*, 3 *Kan.* 205.—COMMENTED ON AND DISTINGUISHED IN *Pacific Exp. Co. v. Foley*, 46 *Kan.* 457, 26 *Pac. Rep.* 665.—*Durgin v. American Exp. Co.*, (N. H.) 45 *Am. & Eng. R. Cas.* 325, 20 *Atl. Rep.* 328. *Newburger v. Howard*, 6 *Phila. (Pa.)* 174.—APPROVED IN *Hart v. Pennsylvania R. Co.*, 112 U. S. 331.

Plaintiff shipped goods by express and took a receipt containing printed conditions providing that in no case "shall the holder hereof demand beyond \$50, at which the article forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured, and so specified in this receipt." *Held*, that this constituted a special contract, and the liability of the company was limited to the \$50, though the actual value of the package was \$675. *Brehme v. Dinsmore*, 25 *Md.* 328.—DISTINGUISHED IN *Louisville & N. R. Co. v. Wynn*, 45 *Am. & Eng. R. Cas.* 312, 88 *Tenn.* 320, 14 *S. W. Rep.* 311.

73. When such limitation will not bind the shipper.—A common carrier cannot limit his liability for the loss of goods by a stipulation in a printed receipt that he will not be liable beyond a specified sum. *Southern Exp. Co. v. Armstead*, 50 *Ala.* 350.—QUOTING *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 *Wall* (U. S.) 318.

Where an express company receives a package of gold with full knowledge of its character and contents, it becomes liable for the full value of the package, even though it gives a receipt treating it as an ordinary package valued at \$50. When the company was informed of the contents of the package it should have given a receipt for the full amount, and not attempted to limit its liability to a smaller value. So where the owner sues for a loss he is not concluded by the receipt, but may show the contents of the package and recover its full value. *Kember v. Southern Exp. Co.*, 22 La. Ann. 158.

Such a stipulation will not relieve the company from liability for the full value of the goods if lost through its fault, and a presumption of negligence arises from the mere fact of loss. *Kirby v. Adams Exp. Co.*, 2 Mo. App. 369. *Westcott v. Fargo*, 61 N. Y. 542; *affirming* 63 Barb. 349, 6 Lans. 319.

This rule applies though the shipper, on demand by the carrier, refused to state the value, and though a larger charge would have been made for its carriage and it would have been differently carried than was done if such value had been disclosed. *Conover v. Pacific Exp. Co.*, 40 Mo. App. 31.

Such stipulation does not release the common carrier, unless it appears that the shipper knew of, and assented to, the limitation. *Adams Exp. Co. v. Stettaners*, 61 Ill. 184. *Fibel v. Livingston*, 64 Barb. (N. Y.) 179.

And his omission to read the receipt is not *per se* negligence, and he is not, as a matter of law, bound by its terms. *Grossman v. Dodd*, 43 N. Y. S. R. 375, 63 Hun 324, 17 N. Y. Supp. 855.

The question whether, in a particular case, a party receiving such a receipt accepted it with notice of its contents, or with notice that it contained the terms of a special contract, so as to require him to acquaint himself with its contents, is one to be determined by the jury; and no contract arises, as a matter of law, upon the acceptance of the receipt. *Grossman v. Dodd*, 43 N. Y. S. R. 375, 63 Hun 324, 17 N. Y. Supp. 855.

And it is competent to prove by the agent of the consignor that he did not read or understand and did not accept the condition limiting the liability of the carrier. *Adams Exp. Co. v. Nock*, 2 Dur. (Ky.) 562.—DIS-

TINGUISHED IN *Muller v. Cincinnati, H. & D. R. Co.*, 2 Cin. Super. Ct. 280. FOLLOWED IN *Adams Exp. Co. v. Loeb*, 7 Bush (Ky.) 499.

Where a trunk containing money and jewelry to the amount of \$350 was delivered to an express company without notice of the contents or value, and the receipt contained stipulations that the company would be liable for loss or damage to goods only when specially insured by the terms of the receipt, and in no case for more than \$50, unless a greater value be specified—*held*, that it was not error to refuse to charge the jury, as matter of law, that the company had the right to assume that the trunk did not contain articles of special value, and for such articles they were not then liable, nor for any injury to the trunk beyond \$50. *Lay v. Southern Exp. Co.*, 4 So. Car. 234.

74. Construction of contracts limiting amount of recovery.—Bales of cotton are not "packages" within the meaning of a provision of an express receipt providing that the liability of the company for loss or damage shall be limited to \$50 "to each package" unless its value be expressed. The term "package" must be held to include small parcels or bundles, the appearance of which could give the carrier no adequate knowledge as to their value; but there could be no deception practised on the carrier as to the value of a bale of cotton, as what it is, and its market value, must be as well known to the carrier as to the shipper. *Southern Exp. Co. v. Crook*, 44 Ala. 468.

The defendant company received at New York, for transportation to plaintiffs at St. Louis, one package containing three gross or cases of "Shallenberger's pills," worth \$113.50 per gross. The receipt or bill of lading contained a clause that the holder should not demand more than \$50 for any loss or damage, at which "the article forwarded" is valued, and which shall constitute the limit of the liability of the company. The three cases were severally addressed to plaintiffs, and were then wrapped up with a paper cover, in a single package similarly addressed. Only one of the cases reached plaintiffs. An action was brought to recover for the loss. *Held*, that "the article forwarded" was the single package, and that plaintiffs were not entitled to recover \$50 upon each of the missing cases. *Wetzell v. Dinsmore*, 54 N. Y. 496; *reversing* 4 Daly 193.

6. Connecting Lines.

75. In general.—Where two express companies are running over one continuous route as common carriers, dividing profits, and employing one messenger, who remains in charge of the goods during the entire route, and who, by agreement between the companies, is considered the agent of one up to a certain point on the route, and as the agent of the other thence to the end, they cannot relieve themselves of their responsibility as common carriers by giving to the shipper a receipt such as was given in this case, and, in case of loss, claiming that the messenger ceased to be the receiving company's agent before the goods arrived at the end of his route. It is questioned whether, under the circumstances of this case, the second company was "another company," within the meaning of the receipt. *Schutter v. Adams Exp. Co.*, 5 Mo. App. 316.

Plaintiff delivered a bag of gold dust to an expressman to be carried to a United States mint at a point beyond the receiving company's line. The dust was duly carried over the two lines, and delivered to the mint; but after the money was coined, the agent of the company delivering it to the mint received back the money to be carried to the plaintiff, but it was never delivered. *Held*, that in the absence of any instructions to return the money, neither company had any authority to receive it, and that the agent in receiving it exceeded his authority, and was therefore personally liable for the value of the coin. *Tuite v. Wakelee*, 19 Cal. 692.

76. When initial carrier's liability ends with his own route.—In the absence of special contract, a common carrier receiving a parcel marked to a point beyond its route, but having no special business relationship with the carrier on the connecting line, is responsible, as such carrier, only for safe and seasonable delivery at the end of its own route to the carrier next in the line of transportation. *Hadd v. United States & C. Exp. Co.*, 6 Am. & Eng. R. Cas. 443, 52 Vt. 335, 36 Am. Rep. 757.—CRITICISING *King v. Woodbridge*, 34 Vt. 565. QUOTING AND DISTINGUISHING *Morse v. Brainard*, 41 Vt. 550.—*Coates v. United States Exp. Co.*, 45 Mo. 238.

A carrier who receives goods as a carrier, and not as a forwarder, and forwards them

to their destination from the end of his line, in the exercise of a sound discretion, cannot be held responsible for want of notice of his action to the owner or consignor. *Cramer v. American Merchants' Union Exp. Co.*, 56 Mo. 524.

A common carrier receipted for goods marked to a point beyond its line, to be carried to the end of its line, and there delivered to another carrier named, which was found not to exist. At the end of the first carrier's line the goods were forwarded by a first-class steamer, which sank with the goods on board. *Held*, in an action against the first carrier, that after the goods reached the end of its own line it only acted as a forwarding agent, and having forwarded them in the exercise of a sound discretion, it was not liable for the loss. *Cramer v. American Merchants' Union Exp. Co.*, 56 Mo. 524.—FOLLOWED IN *Gashweiler v. Wabash, St. L. & P. R. Co.*, 25 Am. & Eng. R. Cas. 403, 83 Mo. 112, 53 Am. Rep. 558.—*Reed v. United States Exp. Co.*, 48 N. Y. 462, 8 Am. Rep. 561.—DISTINGUISHING *Weed v. Saratoga & S. R. Co.*, 19 Wend. (N. Y.) 535; *Barker v. New York C. R. Co.*, 24 N. Y. 599.

An express company may receive a parcel to carry it as far as he goes, and then to send it farther; and such carrier may, by special contract, limit his common law liability, though he cannot exempt himself from liability for his own negligence. *Snyder v. Adams Exp. Co.*, 63 Mo. 376, 20 Am. Ry. Rep. 435.—FOLLOWING *Coates v. United States Exp. Co.*, 45 Mo. 241.—DISTINGUISHED IN *Dimmitt v. Kansas City, St. J. & C. B. R. Co.*, 103 Mo. 433. REVIEWED IN *Bennitt v. Missouri Pac. R. Co.*, 46 Mo. App. 656.

In case for money delivered to the agent of an express company to be sent to a place beyond the route of a company, it appeared that plaintiff paid charges through, and received a receipt for the money to be sent containing a memorandum of such payment. *Held*, that on the facts there was not a special contract to carry to destination. *Hadd v. United States & C. Exp. Co.*, 6 Am. & Eng. R. Cas. 443, 52 Vt. 335, 36 Am. Rep. 757.

Where an express company receives C. O. D. goods for a point beyond its line, and makes no contract to carry to the place of destination personally, but engages to forward them through established lines, it is

not liable for a failure of such connecting lines to pay over the price of such goods collected from the consignee. *Lowell Wire Fence Co. v. Sargent*, 8 Allen (Mass.) 189. *Gibson v. American Merchants' Union Exp. Co.*, 1 Hun (N. Y.) 387, 3 T. & C. 501.

Where an express company intrusts blank envelopes, for convenience in sending money, to a commissary in a military camp, he is not authorized to bind the company as common carriers beyond their route, by addressing an envelope to such place; especially where the company gives a receipt which expressly states that it will only act as forwarder beyond its own route. *Pendergast v. Adams Exp. Co.*, 101 Mass. 120.—REVIEWED IN *Gray v. Jackson*, 51 N. H. 9.

77. Initial carrier, when liable beyond his own route.—Where an express company receives a package addressed to a point beyond its line, and receives the freight charges for the entire distance, and has an arrangement with a connecting line for carriage to the place of destination, upon a *pro rata* division of the freights, the receiving company is liable for a failure to deliver at the place of destination, though it gives a receipt upon receiving the goods, stating that it is to forward the same to its agent nearest or most convenient to the destination only, and then to deliver the same to other parties, they to complete the transportation. *St. John v. Southern Exp. Co.*, 1 Woods (U. S.) 612.

The reception by an express company of a package directed to a point beyond its route, and the receipt by such company of the entire freight charges, show a *prima facie* contract to carry and deliver the package at the place of destination, and will bind the company unless a different contract is shown, or a settled and uniform rule established by the company, not to be bound beyond its own line, which rule is brought home to the shipper, either by express notice or by notoriety so general that he may fairly be presumed to have had notice. *St. John v. Southern Exp. Co.*, 1 Woods (U. S.) 612.

An express company is liable for the loss beyond the terminus of its own line, of goods received for transportation beyond such terminus, not being within the exemption given to railroads by Ga. Rev. Code, § 2054. *Mosher v. Southern Exp. Co.*, 38 Ga. 37.—DISTINGUISHED IN *Johnson v. East Tenn., V. & G. R. Co.*, 90 Ga. 810. FOL-

LOWED IN *Southern Exp. Co. v. Shea*, 38 Ga. 519.

An express company cannot protect itself from liability for goods lost beyond the terminus of its own line, by words upon its receipt for such transportation, to the effect that it is mutually agreed that the goods are to be delivered at its own agency to other parties to complete the transportation, especially when the sender did not know and is not notified that the defendant's line does not extend as far as the destination of the goods. (Harris, J., dissenting.) *Mosher v. Southern Exp. Co.*, 38 Ga. 37.

Where an express contract was made for transportation of plaintiff's goods to a certain point by the Adams Express Co., and the goods were lost by the Southern Express Co. as the agents of the former company to complete the transportation, the Adams Co. and not the Southern Co. will be liable for such loss, at suit of the plaintiff. *Southern Exp. Co. v. Shea*, 38 Ga. 519.—DISTINGUISHED IN *Johnson v. East Tenn., V. & G. R. Co.*, 90 Ga. 810. FOLLOWED IN *East Tenn., V. & G. R. Co. v. Johnson*, 85 Ga. 497.—*Cohen v. Southern Exp. Co.*, 45 Ga. 148.—FOLLOWING *Southern Exp. Co. v. Shea*, 38 Ga. 519.—DISTINGUISHED IN *Cohen v. Southern Exp. Co.*, 53 Ga. 128. FOLLOWED IN *Southern Exp. Co. v. Palmer*, 48 Ga. 85; *East Tenn., V. & G. R. Co. v. Johnson*, 85 Ga. 497.

After an express company had agreed to ship live stock, and before the shipment had been made, an unusual flood occurred which broke the company's ordinary line to the place of destination; but with this well known to both parties, the company received the stock and substituted another line; but the proof showed that it did not select the best one, nor take proper precautions to secure transportation in advance, and the stock was much injured by delays and lack of attention while *en route*. Held, that the company was liable. *Adams Exp. Co. v. Jackson*, 92 Tenn. 326, 21 S. W. Rep. 666.

In such case the flood preventing shipment over the usual line could not be considered the proximate cause of the injury, as it occurred before the shipment was made, and was fully known to the company, but was due to the negligence of the sub-carrier, who acted merely as the agent of the receiving company. *Adams Exp. Co.*

protect itself
beyond the ter-
ms upon its
contract, to the
effect that the
owner agency
transporter
did not
the defend-
er as the des-
s, J., dissent-
Co., 38 Ga.

was made for
goods to a cer-
tain express Co., and
Southern Ex-
press former com-
pensation, the
Southern Co. will
of the plain-
a, 38 Ga. 519.
East v. East
a. 810. FOL-
G. R. Co. v.
v. Southern
WING South-
519.—DISTIN-
Southern Exp. Co.,
Southern Exp.
Tenn., V. &
97.

had agreed to
the shipment
loss occurred
ordinary line to
with this well
company re-
tuted another
that it did not
proper precau-
in advance,
red by delays
route. Held,
Adams Exp.
21 S. W. Rep.

venting ship-
did not be con-
of the injury,
shipment was
to the com-
pensation of the
as the agent
Adams Exp. Co.

v. Jackson, 92 Tenn. 326, 21 S. W. Rep. 666.

Where an express company contracts to carry goods not only over its own route, but over connecting lines, it cannot contract that its responsibility shall terminate at the end of its own line. It will be held responsible for the negligence of itself and servants, and also for that of the connecting lines. *Texas Exp. Co. v. Dupree*, 2 Tex. App. (Civ. Cas.) 274.—FOLLOWED IN *Texas & P. R. Co. v. Scrivener*, 2 Tex. App. (Civ. Cas.) 284.

78. Judgment over against succeeding carrier.—Suit was brought, to recover money lost, against two express companies, it having passed over the line of each. At the trial the first company introduced a receipt from the second company showing that it had received the value containing the money "in good order." Held, the liability of the two companies jointly to plaintiff having been established, that this receipt *prima facie* established the liability of the second company to the first, and without further proof the first company was entitled to judgment over against the second. *Texas Exp. Co. v. Dupree*, 2 Tex. App. (Civ. Cas.) 274.

79. Liability of last or final carrier.—Where the last of a line of connecting express companies makes only a partial delivery of goods, the presumption is that the loss occurred by its default; and if its contract be such that it is liable only for losses occurring on its own, and not on connecting, lines, and there is any evidence of the delivery of the goods to it, and that the loss could have occurred while in its custody, it must account for the loss. *Southern Exp. Co. v. Hess*, 53 Ala. 19.

Although an express company may not be the first carrier to which a package was delivered, yet if its line extends to the point of destination and it receives the package, it is its duty to make personal delivery in accordance with the address of the package; and if it delivers elsewhere than as addressed, or to a wrong person, it is liable for the loss. *Southern Exp. Co. v. Van Meter*, 17 Fla. 783.

Where goods delivered to an express company have been by it delivered to another express company, and there is no evidence of the terms on which the first company received them, it will be presumed, in the absence of proof to the contrary, that the last company received them for transporta-

tion under such obligations as to diligence as the law imposes on it as a common carrier. *Southern Exp. Co. v. Urquhart*, 52 Ga. 142.

An express company which receives from another company money of a third person, without any express contract to carry and deliver the same, will be liable to such third person for "money had and received," if it fails to account for or deliver the money. *Southern Exp. Co. v. Thornton*, 41 Miss. 216.

Express companies which receive from other companies goods which the latter have contracted to carry and deliver, thereby incur the liabilities of a common carrier to the owner of the goods; and he, in the event of loss, has his election either to proceed against the company to which the goods were delivered, or against the one that received them. *Southern Exp. Co. v. Thornton*, 41 Miss. 216. *Southern Exp. Co. v. Shea*, 38 Ga. 519.—FOLLOWED IN *Southern Exp. Co. v. Palmer*, 48 Ga. 85.

Where a company receives a package for a point beyond its route, to be carried and delivered to another company to be by it carried to the place of destination, any contract between the shipper and the first company, limiting its liability, is of no effect in determining the liability of the second company, in the absence of any arrangement between the two for the transportation of goods over the entire route of the two companies. *Witbeck v. Holland*, 55 Barb. (N. Y.) 443, 38 How. Pr. 273; affirmed in 45 N. Y. 13.

So the second company cannot have the benefit of a contract entered into between the shipper and the receiving company, limiting its liability to a certain amount, unless the true value of the goods be stated in the receipt. *Martin v. American Exp. Co.*, 19 Wis. 336.

A party forged a telegram in the name of a third person, requesting a bank to forward to such person at a place named a certain amount of money. Upon the telegram being received and the agent of such third person giving his note for the money, the bank forwarded it by express; and the agent delivered it to the sender of the telegram, though he knew that he was a stranger, who had just arrived in the town, without requiring any identification except that the hotel keeper where the man lodged called with him for the package and treated him as the party to whom it was addressed.

Held, that the company was liable for the loss occurring through the wrong delivery, though it was the second carrier of the money. *Southern Exp. Co. v. Van Meter*, 17 Fla. 783.

Plaintiff delivered a box to defendant express company for a point beyond its line, and took a receipt stating that the company should only be liable as forwarder beyond its line, and that it should not be liable for loss by fire, nor for any default or negligence of any other company. Defendant carried the box to the end of its line and delivered it to a connecting company, which carried it to the place of destination and tendered it to the consignee, who refused to receive it, and subsequently it was burned in the company's office. *Held*, that the second company only held the box as warehouseman after it was tendered to the consignee, and could only be made liable upon proof of negligence, which would not be presumed by mere proof of loss; and in the absence of such proof defendant was not liable. *Gibson v. American Merchants' Union Exp. Co.*, 1 Hun (N. Y.) 387, 3 T. & C. 501.

III. ACTIONS BY AND AGAINST.

80. Jurisdiction.—Under the New York statutes an express company organized as a joint stock association possesses nearly all the attributes of a corporation; and as the statute provides that suit may be brought against such association, either against its president or treasurer, and such officers are citizens of New York, it follows that whether the association be regarded as a corporation of that state, or whether the action be regarded as against the officers, in either event the federal courts have jurisdiction, so far as depends upon citizenship. *Baltimore & O. R. Co. v. Adams Exp. Co.*, 18 Am. & Eng. R. Cas. 455, 22 Fed. Rep. 404.—*QUOTING Waterbury v. Merchants' Union Exp. Co.*, 50 Barb. (N. Y.) 160.

Where the complaint alleged that the plaintiff had delivered to the defendant, an express company, an article valued at less than two hundred dollars, and then averred the loss of it by negligence, and demanded a judgment for a sum over two hundred dollars—*held*, that the claim was founded upon a contract for less than two hundred dollars, and that therefore the N. C. superior court had no jurisdiction of the

case. *Froelich v. Southern Exp. Co.*, 67 N. Car. 1.

81. Right of action—Who may sue.—In an action against an express company upon a written contract to convey and deliver goods, the plaintiff relies upon the terms of the contract, and not upon the implied common law obligation of carriers. *Porter v. Southern Exp. Co.*, 4 So. Car. 135.

Where a clerk in an express office, by mistake delivers a package of money to the wrong person, and the father of the clerk, upon learning of the mistake, pays the amount to the true owner, the owner may still prosecute an action against the company for the wrongful delivery, for the benefit of the clerk's father. *American Exp. Co. v. Haggard*, 37 Ill. 465.

It is no objection to an action against an express company as a corporation, to recover for a loss of goods, that plaintiffs are corporators or members of the company. *Westcott v. Fargo*, 63 Barb. (N. Y.) 349; *affirmed* in 61 N. Y. 542, 19 Am. Rep. 300.

Where a creditor, living at a distance from his debtor, requests the payment of the debt without giving specific instructions as to how the money shall be sent, and the debtor sends it by an express company, and it is lost *in transitu*, the debtor rather than the creditor may maintain an action against the company for its recovery. *Bernstine v. Union Exp. Co.*, 40 Ohio St. 451.

Where money is shipped by express and lost, the consignee may procure a release to him from the consignor, and maintain an action against the carrier for money had and received. *Ela v. American Merchants' Union Exp. Co.*, 29 Wis. 611.

Where gold dust which was shipped by express has been stolen, and the carrier has paid to the consignee, as agent of the owner, the value specified in the bill of lading, in terms of Cal. Civ. Code, § 2200, which provides that "a common carrier of gold * * * upon loss or injury of such articles * * * is not liable for more than the value of the articles named in the receipt or bill of lading," the owner cannot, upon the subsequent recovery of the gold dust by the carrier from the robber, maintain an action for damages upon the ground of wrongful conversion, in the absence of fraud, malice, or oppression on the part of the carrier. *Scammon v. Wells*, 42 Am. & Eng. R. Cas. 400, 84 Cal. 311, 24 Pac. Rep. 284.

Where an agent, pursuant to instructions

of his principal, delivers to a common carrier moneys of the principal consigned and to be transported to him, the consignor, from the time of the delivery, ceases to have any title or interest therein, and he cannot maintain an action against the carrier therefor. *Thompson v. Fargo*, 63 N. Y. 479; *affirming 2 Hun* 379, 4 T. & C. 665, 48 How. Pr. 93.

The fact that the moneys were the fruits of a fraud perpetrated by the principal through the instrumentality of the agent, although the latter was innocent of the fraud, gives him no title to the moneys which will authorize him to maintain the action. *Thompson v. Fargo*, 63 N. Y. 479; *affirming 2 Hun* 379, 4 T. & C. 665, 48 How. Pr. 93.

The consignee paid the express charges, but refused to receive the goods, and directed the company to return them to the consignor. The consignor brought suit against the consignee, and recovered a judgment for the value of the goods; but in the mean time, after a verdict was rendered in favor of the consignor, and before judgment was rendered thereon, the express company, by direction of the consignor's attorney, returned the goods to the consignor. The consignee never countermanded his directions to the company to reship to the consignor. When final judgment was rendered, the consignee brought an action of trover against the company to recover the value of the goods, without offering to pay the money collected. *Held*, that the consignee had no right of action against the company. It was not the duty of the company to seek the owner, nor was it its duty, unasked and unwarned, to seek to protect the contingent future interests of the consignee. *American Exp. Co. v. Greenhalgh*, 80 Ill. 68.

82. Demand before suit.—A consignor of C. O. D. goods cannot recover their value from the express company, where they have been carried to the place of destination and tendered to the consignee, who refuses to take them up, without first making a demand on the company either for the price or a return of the goods. *Adams Exp. Co. v. McConnell*, 9 Am. & Eng. R. Cas. 240, 27 Kan. 238.

The owner of goods stolen from an express company may either demand the value of the property which was lost, not to exceed that stated in the bill of lading, or wait until the property is recovered, and then

demand possession of the property itself. *Scammon v. Wells*, 42 Am. & Eng. R. Cas. 400, 84 Cal. 311, 24 Pac. Rep. 284.

83. Pleading.—In an action against an express company for loss of a draft, a complaint which does not state the date of the draft, the amount for which it was drawn, the time when it was payable, or to whom payable, is insufficient. *Zeigler v. Wells*, 23 Cal. 179.

A mere allegation that goods being transported by an express company were seized by legal process, without more, is an insufficient defense for loss of the goods. *Mosher v. Southern Exp. Co.*, 38 Ga. 37.

In order to introduce parol proof in what sense characters or letters such as "C. O. D.," which have not acquired a legal significance, are used in a particular trade or business, it is necessary, in a suit brought upon a contract embodied in such letters or characters, to aver in the declaration in what sense they are so used. *American Exp. Co. v. Lesem*, 39 Ill. 312.

The allegation in a complaint that the defendant is a common carrier doing business under the style and firm name of The Adams Express Company implies that the defendant is a corporation, and not a partnership. And where the defendant, in that name, forms an issue by general denial and goes to trial, it is not necessary for the plaintiff to introduce any evidence of the existence of the corporation. *Adams Exp. Co. v. Hill*, 43 Ind. 157.—*DOUBTING GOTT v. Adams Exp. Co.*, 100 Mass. 320. *QUOTING WOMACK v. McAhren*, 9 Ind. 6. *REVIEWING HAYS v. Lanier*, 3 Blackf. (Ind.) 322.

Where an express company is sued for the loss of state bonds which have been entrusted to it for carriage, it is not necessary for the plaintiff to aver, or to furnish the company with, the numbers or date of the bonds, as a condition precedent to a right of recovery, where there is no rule of the company requiring it, though such information might enable the company to give the state an indemnity bond and to procure others in lieu of the lost ones, or enable it to trace and find the bonds the better. *Martin v. American Exp. Co.*, 19 Wis. 336.

84. What evidence is admissible.—A receipt of an agent of an express company of goods for conveyance and delivery to plaintiffs, containing a memorandum of agreement, is of itself evidence to bind the

company. *Porter v. Southern Exp. Co.*, 4 So. Car. 135.

An indorsement on a package by the company's agents, "said to contain \$300," is evidence of value in a suit to recover for its loss. *Weil v. Express Co.*, 7 Phila. (Pa.) 88.

Upon the question whether the agent had notified the plaintiff that dogs were sent at the owner's risk, it would have been proper to show that at the time of the pretended notification there was in the office at Fair Haven a book of instructions, one rule of which required such notice to be given; but since the time was not so limited the question was properly excluded. *Winchell v. National Exp. Co.*, 64 Vt. 15, 23 Atl. Rep. 728.

An express company was sued for a failure to deliver a package of money which it was claimed had been receipted for by the plaintiff through a clerk by mistake. The company then proved, by an agent, the custom of drivers to never deliver goods without taking a receipt, and that they always took the goods when they called for a receipt. *Held*, that it was admissible for plaintiff to prove on cross-examination that a particular driver was in the habit of stealing money packages, and that some time after the occurrence in question the company had him arrested, and that he had surrendered valuable jewelry and nearly \$1000 in money, and then escaped. *American Exp. Co. v. Haggard*, 37 Ill. 465.

Where an express company received a package of money destined for a point beyond its lines, for which it gave a receipt limiting its liability to a safe delivery to a connecting carrier, and on the arrival of the package at its destination it was found to contain more than \$250 less than the amount shipped, evidence was held admissible to show that it had delivered the package to its agents nearest to the point of destination, and its agents had there delivered the package to other parties, to complete the transportation, and that the package, when received from the consignor, was securely sealed, and that it was delivered just as it was received, in good order, without being broken or mutilated. *Snider v. Adams Exp. Co.*, 63 Mo. 376, 20 Am. Ry. Rep. 435.

An express company received a package marked to a designated place, and gave a receipt stipulating that its liability "should cease upon delivering the goods to another

carrier at the agency" of the company nearest the place of destination. *Held*, in an action for loss of the package, that the burden was on the company to show that the agency at which the package was delivered to the other carrier was its nearest agency to the place of destination. *Schutter v. Adams Exp. Co.*, 5 Mo. App. 316.

In such case a letter of defendant's agent at the shipping point, addressed to an agent at a certain other point nearer to the place of destination than where the goods were delivered to the other carrier, directing the latter to trace the package, and his reply on the same sheet, and a further reply of the agent at the shipping point, stating a loss by fire, and an indorsement on the letter asking the shipper to present his claim, invoice, and receipt for settlement, were competent for the purpose of showing an admission of liability. *Schutter v. Adams Exp. Co.*, 5 Mo. App. 316.

85. What evidence is inadmissible.

—The fact that an express company commonly gave printed receipts, containing certain conditions, for goods received will not authorize the admission in evidence of such a receipt to limit their liability in a case where a mere written receipt was given which contained no limitations at all. *Southern Exp. Co. v. Womack*, 1 Heisk. (Tenn.) 256.—*EXPLAINING Walker v. Skipwith*, Meigs (Tenn.) 502; *Turney v. Wilson*, 7 Yerg. (Tenn.) 340.

Where an express company is sued for the loss of a trunk after the owner had receipted for it but obtained permission to leave it a day or two longer in the express office, evidence of general instructions of the company to its agents not to keep goods in the office after the charges were paid and a receipt given is not admissible, where there is no evidence that such instructions had been communicated to the agent at the place of the loss, or were known to plaintiff. *Oderkirk v. Fargo*, 41 N. Y. S. R. 9, 16 N. Y. Supp. 220, 61 Hun 418.

86. Sufficiency of evidence.

—A plaintiff suing an express company for the loss of money makes out a *prima facie* case by proving a delivery to the company to be carried, and its failure to redeliver the same. *United States v. Pacific Exp. Co.*, 15 Fed. Rep. 867.

A plaintiff cannot be nonsuited upon evidence that goods for whose value he sues

were delivered to an express company whose duty it was to transport them safely as a common carrier, and that the company failed so to do, in the absence of any evidence of an express contract for carriage with another company. *Cohen v. Southern Exp. Co.*, 53 Ga. 128.—DISTINGUISHING *Southern Exp. Co. v. Shea*, 38 Ga. 519; *Cohen v. Southern Exp. Co.*, 45 Ga. 148.—QUOTED IN *Johnson v. East Tenn., V. & G. R. Co.*, 90 Ga. 810; *East Tenn., V. & G. R. Co. v. Johnson*, 85 Ga. 497.

And it is not necessary to aver a provision in the contract tending to limit the carrier's liability. Such provision is for the benefit of the carrier, and is matter of defense. *Newstadt v. Adams*, 5 Duer (N. Y.) 43.—FOLLOWING *Hearn v. London & S. W. R. Co.*, 29 Eng. L. & Eq. 494.

Where several persons are sued as a partnership in the express business, and the evidence is sufficient to show that one of the defendants is a member of the partnership, and is liable, the plaintiff may discontinue as to the other defendants and take judgment against the one. *Fenn v. Timpon, 4 E. D. Smith* (N. Y.) 276.

Where an express company is sued for the loss of a diamond pin, the fact that the complaint states that the delivery to the company was at an office in a certain street and number in a city, while the proof shows that it was at an office on another street of the same city, is immaterial, as the variance is one which the court is required to disregard under N. Y. Code, § 169. *Newstadt v. Adams*, 5 Duer (N. Y.) 43.

In an action against two express companies and certain individuals, for destruction of goods in transit, there was no proof that one of the companies ever undertook to carry the goods, or assumed any liability with reference to the goods. Held, that a judgment against such company was erroneous. *Merchants' Despatch Co. v. Smith*, 44 Ill. 319.

Evidence that A. delivered a box containing his property to a common carrier at one town to be carried to another town; that the box was directed to B. at the latter town; that A. had made efforts to find the box, but had not been able to do so; and that he had made inquiries at both towns at the offices of the carrier; that he had not seen the box since he sent it; that he had inquired of B. about the box—is not sufficient evidence to maintain an action

by A. against the carrier for the value of the box and its contents, although the defendant put in no evidence. *Morley v. Eastern Exp. Co.*, 116 Mass. 97.

Defendant was sued, as a member of a joint stock company doing an express business, for injuries to goods received and shipped. Plaintiff testified that defendant said that he was one of the proprietors of the "Adams & Co.'s Express," and that the receipt given for the goods at the office was given by one of their clerks. There was evidence that the true name of the company was "Adams Express Company." Held, that the evidence was sufficient to show that he was a partner, or a person interested in the company, so as to charge him as a common carrier, and the slight variation in the name of the company was not sufficient to destroy the effect of the evidence. *Fenn v. Timpon, 4 E. D. Smith* (N. Y.) 276.

Action against express carriers for value of a lost trunk and its contents. Held, that defendants' acknowledgments by letter and otherwise were sufficient evidence that plaintiff was the owner to sustain a verdict in his favor, and that the presiding judge properly charged the jury that this was a case in which some relaxation of the rule of exactness in the evidence as to the quantity and value of the goods might be allowed. *Stadhecker v. Combs*, 9 Rich. (So. Car.) 193.

87. Presumptions and burden of proof.—Where an express receipt, embodying certain limitations of the carrier's liability, is shown to have been in the custody of a plaintiff, a due and proper delivery of it to him, and his assent to its terms, are presumed, and cast the burden on him to rebut these presumptions. *Boorman v. American Exp. Co.*, 21 Wis. 152.—FOLLOWING *King v. Woodbridge*, 34 Vt. 571.—FOLLOWED IN *Strohn v. Detroit & M. R. Co.*, 21 Wis. 554.

In an action against an express company for money delivered for carriage but not delivered at point of destination, the burden of proof rests upon the plaintiff to establish by a preponderance of evidence both a delivery to the company and a failure on its part to redeliver at its destination. *United States v. Pacific Exp. Co.*, 15 Fed. Rep. 867.

In an action against the "Adams Express Company," the declaration alleged that the defendants were "a company having a place of business" in the state; and the answer

denied each and every allegation of the plaintiff. *Held*, that whether or not the declaration sufficiently alleged that the defendants were a corporation, the plaintiff was bound to prove it as a fact if they denied it at the trial. *Gott v. Adams Exp. Co.*, 100 Mass. 320.—DOUBTED IN *Adams Exp. Co. v. Hill*, 43 Ind. 157.

Where a local express company agrees to receive a trunk of an incoming railroad passenger and carry it to his residence, evidence that the company received the trunk in its custody from the railroad company, and the next day received the checks, and undertook to deliver it to the owner, is sufficient to cast the burden upon the company of explaining why it was not delivered. *Aiken v. Westcott*, 16 N. Y. S. R. 600, 9 N. Y. Supp. 481.

The burden of proof is on a common carrier after a loss is shown, to show that it was by one of the excepted perils for which carriers are not liable. The plaintiff may then show that the loss might have been avoided by reasonable skill and attention, but the burden of proof is on him to establish the negligence. *Hubbard v. Harnden Exp. Co.*, 10 R. I. 244.—REVIEWING *Patterson v. North Carolina R. Co.*, 64 N. Car. 147.

Upon receiving goods for transportation an express company gave a receipt with a condition therein that it would not be "responsible for any loss or damage arising from the dangers of railroad, steam, or river navigation, leakage, fire, or from any cause whatever, unless the same be proved to have occurred by the fraud or gross negligence" of the company or its agents. *Held*, that the burden of proof to show such fraud or negligence was on the plaintiff, and in order to recover he must also show that it caused or contributed to the injury. *Cochran v. Dinmore*, 49 N. Y. 249.—DISTINGUISHING *Maghee v. Camden & A. R. Co.*, 45 N. Y. 514. FOLLOWING *Lamb v. Camden & A. R. & T. Co.*, 46 N. Y. 271.—APPLIED IN *Steers v. Liverpool, N. Y. & P. Steamship Co.*, 57 N. Y. 1; *Platt v. Richmond, Y. R. & C. R. Co.*, 32 Am. & Eng. R. Cas. 517, 108 N. Y. 358, 11 Cent. Rep. 101, 15 N. E. Rep. 393, 13 N. Y. S. R. 660. FOLLOWED IN *Sutro v. Fe-go*, 9 J. & S. (N. Y.) 231. NOT FOLLOWED IN *Lupe v. Atlantic & P. R. Co.*, 3 Mo. App. 77.

88. Instructions.—A party, in forwarding goods by express, took a blank re-

ceipt of the United States Express Co., and wrote the word "Adams" over the words "United States," and inserted therein a description of the goods, leaving an exemption clause unchanged, so that it read "the said United States Express Co. are not to be held liable," etc., which receipt was signed by the agent of the Adams Express Co., and delivered to the shipper. *Held*, that the United States Express Co. was in no sense a party to the contract or receipt, and that in a suit against the Adams Express Co. an instruction stating that the receipt contained on its face no agreement for an exemption from liability between the plaintiffs and defendant, and assuming that the exemption in the receipt was contained in the "contract with the United States Express Co.," was palpably misleading and unwarranted. *Adams Exp. Co. v. Boskowitz*, 16 Am. & Eng. R. Cas. 102, 107 Ill. 660.

The Adams Express Co. undertook to deliver a box of goods in New York. The contract of the company sued on is indicated in this instruction: "If the jury believe, from the evidence, that the parties agreed that the company was not to be held responsible for loss or damage unless the same was caused by the fraud or the gross negligence of the defendant, before the plaintiffs can recover in this action they must prove to the satisfaction of the jury such fraud or negligence," which was offered by the company and refused by the court on the trial of an action founded on the contract, for an alleged loss of a portion of the goods alleged to have been shipped in said box. *Held*, in the absence of any allegation calling in question the fairness and binding force of the contract, it must be regarded as obligatory. The instruction copied above "was therefore improperly withheld, as appellant (the express company) was only, by the terms of the contract, to be responsible for fraud or gross negligence." *Adams Exp. Co. v. Loeb*, 7 Bush (Ky.) 499.—FOLLOWING *Adams Exp. Co. v. Nock*, 2 Duv. (Ky.) 562.

In an action against an express company for delivering a trunk to an unauthorized person, it appeared that the agent who made the delivery did not inquire as to the authority of the persons who applied for the trunk, and did not even look at them. *Held*, that the court did not err in refusing to charge that there was no gross negligence on the part of defendant. *Oderkirk*

v. Fargo, 41 N. Y. S. R. 9, 16 N. Y. Supp. 220, 61 Hun 418.

89. Questions for the jury.—A package of money was delivered to the Northern Pacific Express Co. for transportation, addressed to the "Northern Pacific Company, Ainsworth, W. T." Subsequently the address was changed by inserting the word "agent" before the word "Northern." The money was lost, and in an action therefor—*held*, that whether such change resulted from a modification of the contract of carriage was a question for the jury. *Bennett v. Northern Pac. Exp. Co.*, 12 Oreg. 49, 6 Pac. Rep. 160.

Plaintiff packed her trunks in New York in February, locked them, and then came to Philadelphia to reside, leaving the trunks in the custody of a friend, but keeping the keys herself. In April she employed the defendants to bring the trunks from New York, which they accordingly did. There being evidence to show that when they arrived in Philadelphia they were locked and to all appearances in the same condition as when she left New York—*held*, that it was properly left to the jury to say whether the things which were in them when she left New York were in them when they came into the possession of the defendants. *Schlessinger v. Adams Exp. Co.*, 9 Phila. (Pa.) 70.

A valise was sent by express marked "\$500," and when it reached its destination it had been cut open and, as plaintiff claimed, the contents stolen. In an action against the company plaintiff claimed that the valise contained \$500 in money, but there was a conflict of evidence as to whether he had practised any fraud upon the company at the time of shipment in concealing the contents or denying that it contained money. *Held*, that it was a question for the jury after being properly instructed. *Texas Exp. Co. v. Dupree*, 2 Tex. App. (Civ. Cas.) 274.

90. Damages recoverable.—(1) *For loss or injury.*—In an action against a common carrier to recover damages for the loss of a draft, the measure of damages, *prima facie*, is the amount due on the same; but the defendant is at liberty to reduce the damages by proof of payment, the insolvency of the maker, or any fact tending to invalidate the security. *Zeigler v. Wells*, 23 Cal. 179.

An express company lost a check drawn

on itself, and it was afterward presented by a person who falsely represented himself as the rightful owner, and received payment. *Held*, in an action by the rightful owner, that the measure of damages was the full amount of the check. *Survey v. Wells*, 5 Cal. 124.

A carrier is not liable in trover for property of which he has been robbed, beyond the value specified in his receipt, in the absence of charge of fraud, malice, oppression, or collusion with the robber, or of wilfully mingling the property after rescue with other property of the same kind, so that it cannot be identified or segregated. *Scammon v. Wells*, 42 Am. & Eng. R. Cas. 400, 84 Cal. 311, 24 Pac. Rep. 284.

In an action against a company for loss of a package containing architect's plans the measure of damages is the reasonable expense of procuring new plans; but the consequent delay in constructing the house is not an element, if the carrier had no notice of the contents of the package or their intended use. *Mather v. American Exp. Co.*, 138 Mass. 55, 52 Am. Rep. 258.—**DISTINGUISHING** *Green v. Boston & L. R. Co.*, 128 Mass. 221. **FOLLOWING** *Hadley v. Baxendale*, 9 Ex. 341.

The ordinary rule is that the measure of damages for the loss of goods is their value at the place of destination; but where they are shipped from a place where they have a market value to a place where they have not, and are lost, evidence may be resorted to of their value at the place of shipment. *Vroman v. American Merchants' Union Exp. Co.*, 5 T. & C. (N. Y.) 22, 2 Hun 512.

A package of confederate notes was shipped by express during the civil war, but before they reached the place of destination it was within federal control, and before they could be returned to the place of shipment it was likewise in federal control, and a delivery to either the consignee or the shipper was thus prevented while the war lasted. *Held*, in an action against the company for a failure to deliver, that the measure of damages was the value of the package at the close of the war, when a demand was made, with interest thereon from the time of the demand. *Caldwell v. Southern Exp. Co.*, 1 Flipp. (U. S.) 85.

Plaintiff sold a pool table and shipped it by express, with instructions to the company to deliver to the purchaser on receiving \$25 in cash, and the execution of notes

for the balance secured by a chattel mortgage; but by an oversight the agent delivered it without complying with these conditions. After the lapse of about a month, his attention having been called to it, he took possession of the table for the company, and still held it at the time of trial. *Held*, in an action for negligence in delivering, that the damages should be measured by the actual loss or amount of the injury, and as the evidence showed that the table was taken back substantially as good as when delivered, a judgment for the full price was excessive. *American Exp. Co. v. Brunswick*, 4 Ill. App. 606.

(2) *For delay*.—For a negligent delay in the transportation of goods an express company is liable for such damages only as are the direct and immediate consequence of the breach, and are deemed to have been contemplated by the parties when they made the contract. Thus, in case of such delay, an express company will be liable for the difference between the market value of the goods at the time and place when and where they ought to have been delivered and such value when they were delivered; also for any extra expense incurred in writing or telegraphing for them, but not for the difference between the price for which the consignor had contracted to sell them and their market value when and where they were delivered, unless the company was notified that they were shipped to complete contracts of sales theretofore made. *Murrell v. Pacific Exp. Co.*, 54 Ark. 22, 14 S. W. Rep. 1098.

Where money is sent by express, in a suit for delay in its transmission, in the absence of proof of special damages, the measure of damages is interest on the money from the time it should have reached its destination to the time it did. *United States Exp. Co. v. Haines*, 67 Ill. 137.

In an action for damages against an express company for a delay in the shipment of a piece of machinery necessary to the operation of the plaintiff's mill, the jury, in estimating the damages, may, under proper obligations and proof, consider the loss of time, the expense of idle hands, the contracts which the plaintiff had to fill, and the profits arising from the operation of the mill. The fact that the machinery was delayed for four months at the place where it had been sent for repairs, does not preclude the plaintiff's right to recover. *Pacific*

Exp. Co. v. Darnell, (Tex.) 32 Am. & Eng. R. Cas. 543, 6 S. W. Rep. 765.

A prize of \$500 was offered for the best plans and specifications of a building. Plaintiff sent plans and specifications by express, but they were not received in time, owing to the negligence of the express company. *Held*, that the measure of damages was not the value of the time and materials expended in making the plans, but the value of plaintiff's chance of obtaining the prize. *Adams Exp. Co. v. Egbert*, 36 Pa. St. 360.

In such case, in the absence of proof of any probability that plaintiff would have obtained the premium had his plans and specifications been delivered according to the contract, there can only be a recovery of nominal damages. *Adams Exp. Co. v. Egbert*, 36 Pa. St. 360.

91. Recovery over by express company.—Treasury notes [7-30 notes] of the United States stolen from an express company, and sold for value after due, in the regular course of business, may be recovered of the purchaser by the express company which has succeeded to the rights of the original owner. *Vermilye v. Adams Exp. Co.*, 21 Wall. (U. S.) 138; *affirming* 10 Blatchf. 280.

The fact that an express company, receiving goods from a vendor to be transported and delivered to a vendee upon the payment of the price, renders itself liable to respond to the vendor for the price in consequence of its delivering the goods to the vendee without the payment of the price, will not entitle it to sue the vendee by attachment under subdivision 13 of section 1 of the Mo. Attachment Act. *Richardson's Mo. Exp. Co. v. Cunningham*, 25 Mo. 396.

EXPROPRIATION.

Of land, under Canadian statutes, see EMINENT DOMAIN, 1210-1281.

EXPULSION.

From trains, generally, see EJECTION OF PASSENGERS.

Of disorderly passenger from ladies' car, see CARRIAGE OF PASSENGERS, 324.

—passengers from street-cars, see STREET RAILWAYS, 510-531.

—person riding on free pass, see PASSES, 17.

EXTENSION.

- Of main line, when deemed a branch, see BRANCH AND LATERAL ROADS, 7.
- period of exemption from taxes, see TAXATION, 151.
 - receiverships, see RECEIVERS, 170.
 - roads, construction of statutes relating to, see STATUTES, 57.
 - location of, see LOCATION OF ROUTE, 7.
 - shore front, see RIPARIAN RIGHTS, 6.
 - time for sale of "superfluous lands," see EMINENT DOMAIN, 1118.
 - to answer, in foreclosure, see MORTGAGES, 198.
 - track, by permission of city, see STREET RAILWAYS, 30, 95.
 - mandamus to compel, see STREET RAILWAYS, 31.
 - use, when a "taking," see EMINENT DOMAIN, 157.
- Right to construct, under charter provisions, see CHARTERS, 71; STREET RAILWAYS, 72.
- When covered by mortgage made prior to construction, see MORTGAGES, 44.
- deemed a public use, see EMINENT DOMAIN, 184.

EXTINGUISHMENT.

- Of carrier's lien for charges, see CARRIAGE OF MERCHANDISE, 389-395.
- easements, see EASEMENTS, 9, 10.
 - exemption from taxation by leasing road, see TAXATION, 152.
 - fires, see FIRES, 73-78, 110, 111, 328.
 - limitation of liability, see CARRIAGE OF MERCHANDISE, 485-490.
 - mortgages, see MORTGAGES, 304-309.
 - private ways, see PRIVATE WAYS, 7, 8.
 - right of stoppage in transitu, see CARRIAGE OF MERCHANDISE, 510-517.
 - title to right of way, see RIGHT OF WAY, 3.
- Payment, when not an, see COUPONS, 9.

FACILITIES.

- Discrimination as to furnishing, see DISCRIMINATION, 50-54.
- For purchase of tickets, see TICKETS AND FARES, 26-29.
- To express companies, duty of railway company to furnish, see EXPRESS COMPANIES, 7-9.

EXTRA.

- Allowance, in addition to costs, see COSTS, 4; EMINENT DOMAIN, 772.
- Baggage, limit of weight, etc., see BAGGAGE, 46.
- Charges, see CHARGES, 64-66, 94.
- Fare, see CONDUCTORS, 8; EJECTION OF PASSENGERS, 6, 7; SLEEPING AND PALACE CAR COMPANIES, 8; TICKETS AND FARES, 122-129.
- Pay, see CONSTRUCTION OF RAILWAYS, 37; RECEIVERS, 161.
- Risks, see EMPLOYEES, INJURIES TO, 263-284.
- Services, see DIRECTORS, ETC., 30.
- Sessions, see STATUTES, 33.
- Trains, duty in management of, see EMPLOYEES, INJURIES TO, 164.
- right of lessee to compensation for running, see LEASES, ETC., 76.
- Wages, see EMPLOYEES, 19.
- Work, right to pay for, see CONSTRUCTION OF RAILWAYS, 30, 80; GOVERNMENT RAILROADS, 9.

EXTRAHAZARDOUS.

- Work, duty to warn employees as to, see EMPLOYEES, INJURIES TO, 32.

EXTRAORDINARY.

- Floods, non-liability in cases of, see FLOODING LANDS, 22.
- Risks, assumption of, by employee, see EMPLOYEES, INJURIES TO, 264.
- negligence in subjecting employees to, see EMPLOYEES, INJURIES TO, 518.

EXTRATERRITORIALITY.

- Of statutes as to liability for negligence of co-servants, see FELLOW-SERVANTS, 164.
- giving action for causing death, see DEATH BY WRONGFUL ACT, 112.
 - stock laws, see ANIMALS, INJURIES TO, 16.

F**FALSE IMPRISONMENT.**

- See also ARREST, 3; TICKETS AND FARES, 143-149.

1. What constitutes, generally.—The employees of a railroad company were arrested under criminal process, for malicious injury to a building while removing a

section house belonging to the company, and were brought before a magistrate, but were subsequently released, the persons ordering the arrest saying that they did not wish to prosecute them further, as they had sued out an injunction restraining the company from removing the building. *Held*, that the proceeding was a sham, and those causing the arrest were liable in damages for false imprisonment; that under the circumstances the damages were aggravated rather than diminished because the forms of legal process were made use of to accomplish the sham arrest. *Goodman*, 49 Mo. 62.

Plaintiff, acting under the authority of a permit issued by the proper official, and for the purpose of repairing sewer connections, which could not be done in any other way excavated a street, and thereby unavoidably interfered with the passage of the defendant's cars. For this, and on request and complaint of the defendant's servants, he was, without warrant, twice arrested and brought before a police justice, charged with violating section 426, subd. 3, of the N. Y. Penal Code. The last time he was found guilty and fined. He paid the fine, was discharged, and brought suit for false imprisonment. *Held*, that the jury were justified in finding that plaintiff had not violated section 426, subd. 3, of the penal code, and that the arrest and imprisonment were caused and instigated by defendant's agents or servants. *Kolsen v. Broadway & S. A. R. Co.*, 1 Misc. 148, 48 N. Y. S. R. 656, 20 N. Y. Supp. 700.

A by-law of a railway company, whereby a passenger not producing or delivering up his ticket is to be required to pay the fare from the place where the train originally started, is not a by-law imposing a penalty or a forfeiture, such as the defendant company was authorized to make, and the arrest of a passenger on not producing his ticket and refusing to pay the fare from the place where the train started was illegal. *Chilton v. London & C. R. Co.*, 5 *Railw. Cas.* 4, 16 M. & W. 212, 11 *Jur.* 149, 16 L. J. Ex. 89.—DISAPPROVED AS TO DICTUM IN *Brown v. Great Eastern R. Co.*, L. R. 2 Q. B. D. 406, 46 L. J. M. C. 231, 36 L. T. 767, 25 W. R. 792.

2. What does not.—If the agent of a company does nothing more than to make a complaint to a magistrate against another for an offense, and the latter is arrested

under a warrant duly issued by the magistrate, who has jurisdiction of the subject-matter and of the party, the company is not liable to an action by the arrested person for false imprisonment, although the complaint is defective. *Langford v. Boston & A. R. Co.*, 30 Am. & Eng. R. Cas. 653, 144 Mass. 431, 4 N. Eng. Rep. 209, 11 N. E. Rep. 697.

3. Company's liability for acts of its agents, generally.*—A corporation is liable for false imprisonment committed by its authority; such authority need not be under seal, but evidence must be given to satisfy the jury that the wrong-doer had authority from the company. *Goff v. Great Northern R. Co.*, 3 El. & El. 672, 30 L. J. Q. B. 148, 7 *Jur. N. S.* 286, 3 L. T. 850.—APPROVED IN *Moore v. Metropolitan R. Co.*, L. R. 8 Q. B. 36, 27 L. T. 579, 21 W. R. 145, 42 L. J. Q. B. 23.—And see *Moore v. Metropolitan R. Co.*, L. R. 8 Q. B. 36. *Henderson v. Midland R. Co.*, 20 W. R. 23, 25 L. T. 881. *Kelly v. Midland G. W. R. Co.*, 7 *Ir. R. C. L.* 8.

Where a passenger is wrongfully arrested for non-payment of fare by a station employé having no authority to arrest, and whose act is not ratified by the company, it is not liable. *Roe v. Birkenhead, L. & C. J. R. Co.*, 7 Ex. 36, 6 *Railw. Cas.* 795, 21 L. J. Ex. 9.

A railroad company is liable for an unlawful arrest and imprisonment, if made by its agent while acting within the scope of his employment, notwithstanding, in doing so, he was acting also for another railroad company. *Illinois C. R. Co. v. King*, 69 *Miss.* 852, 13 *So. Rep.* 824.

Where a corporation is sued for assault and battery and false imprisonment, it is correct to charge that "if defendants' employé, while acting within the scope of his duty, unjustifiably assaulted plaintiff, and assuming to act under the defendants' authority, and as a part of the same transaction, caused plaintiff's arrest," then defendants are liable. *Hamel v. Brooklyn & N. Y. Ferry Co.*, 25 N. Y. S. R. 153, 53 *Ham* 634, *mem.*, 1 *Silo. Sup. Ct.* 584, 6 N. Y. Supp. 102; *affirmed in* 125 N. Y. 707, *mem.*, 26 N. E. Rep. 753, 34 N. Y. S. R. 1013.

Whether the company authorized the ar-

* Liability of company for arrests of passengers by servants, see note, 32 AM. ST. REP. 100. Company not liable for unlawful arrests by servants, see note, 18 AM. & ENG. R. CAS. 386.

rest is immaterial. *Hamel v. Brooklyn & N. Y. Ferry Co.*, 25 N. Y. S. R. 153, 53 Hun 634, mem., 1 *Silv. Sup. Ct.* 584, 6 N. Y. Supp. 102; affirmed in 125 N. Y. 707, mem., 26 N. E. Rep. 753, 34 N. Y. S. R. 1013.

An express company is liable for the acts of its officers and agents, when acting in the sphere of their appropriate duties; and an agent of a company who arrested the plaintiff, who was suspected with having stolen money from the company, for the purpose of recovering the money so stolen for the benefit of the company, was acting within the sphere of his appropriate duty as the agent of said company, and the arrest of the plaintiff by such agent under the circumstances set forth in the record, was not such a wilful trespass on the part of the agent as will exonerate the company from liability for the conduct of their agent in making the arrest; the more especially as the company, after the arrest and discharge of the plaintiff, recognized the authority of their agent to make the arrest, by endeavoring to procure a release from the plaintiff for the damages sustained by him in consequence of such arrest and imprisonment. *Green v. Southern Exp. Co.*, 41 Ga. 515.

In an action for damages against a railway company or its receiver for false imprisonment, the act being calling a police officer and causing him to take the plaintiff into custody, the plaintiff being drunk and in a public depot—held, if the act of the officer in the matter was legal it would follow that if the defendant through its servant abetted the policeman, such act would also be justifiable. *Pratt v. Brown*, 80 Tex. 608, 16 S. W. Rep. 443.

If the arrest when made was lawful and caused by the agent of the railway company, and the police officer or city authorities kept the accused in confinement for a longer time than was lawful, neither the agent nor the railway company would be responsible for the wrong in such confinement. *Pratt v. Brown*, 80 Tex. 608, 16 S. W. Rep. 443.

4. — **conductor.**—A company is liable for the false imprisonment of a passenger, made or caused to be made by its conductor in charge of the train during his execution of the carrier's contract to treat properly and convey safely. *Gillingham v. Ohio River R. Co.*, 51 Am. & Eng. R. Cas.

222, 35 W. Va. 588, 14 L. R. A. 798, 14 S. E. Rep. 243.

W. Va. Code, § 31, ch. 146, which enacts, among other things, that "the conductor of every train of railroad cars shall have all the powers of a conservator of the peace, while in charge of the train," does not relieve the carrier of passengers from such liability. *Gillingham v. Ohio River R. Co.*, 51 Am. & Eng. R. Cas. 222, 35 W. Va. 588, 14 L. R. A. 798, 14 S. E. Rep. 243.

Where the conductor on a street railway car procures the arrest of a disorderly passenger, such act not being within the scope of the conductor's authority, if the company does not adopt his action, it is not liable. *Cunningham v. Seattle Elec. R. & P. Co.*, 3 Wash. 471, 28 Pac. Rep. 745.

A conductor refused to accept a ticket offered by a passenger, and on the arrival of the train at his destination procured an officer to enter the car and arrest him without a warrant, though the conductor was a police officer himself. Held, that it could not be said, as a matter of law, that the arrest was by the conductor as police officer; but if the conductor in procuring the arrest acted merely as conductor, and within the scope of his employment, the arrest being unauthorized, constituted a false imprisonment for which the company would be liable. *Krulevitz v. Eastern R. Co.*, 28 Am. & Eng. R. Cas. 138, 143 Mass. 228, 9 N. E. Rep. 613.

Defendant requested the court to charge that if there was no probable cause for making the complaint, yet if in making it the conductor did not act with a malicious purpose or with actual malice, defendant was entitled to a verdict. The court so charged, striking out the word "actual." Held, no error; the word omitted did not detract from the force of the request made, the jury not having been instructed in the technical distinction between legal and actual malice, and as applied to the case at bar, in the form submitted, there was none. *Toomey v. Delaware, L. & W. R. Co.*, 2 Misc. 82, 49 N. Y. S. R. 623, 21 N. Y. Supp. 448; affirmed in 4 Misc. 392.

At plaintiff's request the court charged that if the conductor made the charge of the criminal complaint for the sole purpose of collecting a debt, and to prove himself right, they must find malice. Held, correct. *Toomey v. Delaware, L. & W. R. Co.*, 2

Misc. 82, 49 *N. Y. S. R.* 623, 21 *N. Y. Supp.* 448; *affirmed in 4 Misc.* 392.—*FOLLOWING* *Lynch v. Metropolitan El. R. Co.*, 90 *N. Y.* 77.

The court further charged at plaintiff's request, that the conductor was chargeable with the knowledge of his assistant conductor, that plaintiff had delivered unpunched tickets to him. *Held*, that in the circumstances the charge was right; it was the duty of the one to keep the other informed as to the tickets collected, so that demands might not be made twice of the same passenger; the implication of knowledge arises from the duty imposed of communicating it. *Toomey v. Delaware, L. & W. R. Co.*, 2 *Misc.* 82, 49 *N. Y. S. R.* 623, 21 *N. Y. Supp.* 448; *affirmed in 4 Misc.* 392.

Defendant requested the court to charge that the plaintiff, when applied to by the conductor, was bound to produce a proper and valid ticket as evidence of his right to ride upon the train or pay his fare. The court replied: "If he could do so, he was. If he had had a ticket and lost it, it was a subject of explanation. It was his duty either to produce a proper ticket, or pay his fare, or make some reasonable explanation why he didn't do it." *Held*, that in view of the facts and the rules of law applicable thereto, the reply of the court was a proper answer, for it left the jury free to determine whether the plaintiff really had the proper ticket and how he had disposed of it, and whether, in view of the explanation given, the conductor acted with or without probable cause. *Toomey v. Delaware, L. & W. R. Co.*, 2 *Misc.* 82, 49 *N. Y. S. R.* 623, 21 *N. Y. Supp.* 448; *affirmed in 4 Misc.* 392.

5. — depot agent.*—The question whether the Miss. Act of 1890, Laws, p. 106, creating depot agents conservators of the peace, is unconstitutional, as infringing the chartered right of a railroad company to employ its own agents and define their duties, is not involved in an action against such company for an unlawful arrest made by its depot agent while engaged in its service and about its business, for in the absence of such statute, the company would be liable. *Illinois C. R. Co. v. King*, 69 *Miss.* 852, 13 *So. Rep.* 824.

The authority conferred upon depot

agents to arrest those guilty of disorderly conduct in waiting rooms will not justify the arrest of a passenger who is a stranger, and who, after failing to find the gentlemen's water-closet, outside the main depot building, impelled by necessity, has resort to the water-closet intended and designated for "ladies only" and opening into the ladies' division of the general waiting room. *King v. Illinois C. R. Co.*, 69 *Miss.* 245, 10 *So. Rep.* 42.

6. — detective.—Where a corporation employs an agent to detect and arrest offenders against its property, and such agent, acting within the general scope of his employment, arrests an innocent man, such corporation is liable therefor, although the particular act was not directly authorized. *Pennsylvania Co. v. Weddle*, 26 *Am. & Eng. R. Cas.* 120, 100 *Ind.* 138. *Evansville & T. H. R. Co. v. McKee*, 22 *Am. & Eng. R. Cas.* 366, 99 *Ind.* 519, 50 *Am. Rep.* 102.—*APPLYING* *Chicago City R. Co. v. McMahon*, 103 *Ill.* 485, 42 *Am. Rep.* 29. *DISTINGUISHING* *Helfrich v. Williams*, 84 *Ind.* 553.

Where a company employs a detective and he arrests a person on suspicion, the company is not liable for the action of a police justice in detaining the person, unless it was done at the request of the detective. *Newman v. New York, L. E. & W. R. Co.*, 54 *Hun* 335, 27 *N. Y. S. R.* 135, 7 *N. Y. Supp.* 560.

If plaintiff's appearance, under the circumstances, was such as to justify the careful conclusion of the officer that he had either committed or was about to commit a felony, the officer was excusable for making the arrest, although, in fact, the suspicion was unfounded. *Newman v. New York, L. E. & W. R. Co.*, 54 *Hun* 335, 27 *N. Y. S. R.* 135, 7 *N. Y. Supp.* 560.

Plaintiff was arrested on a charge from an express company of stealing \$60,000, and the evidence showed that for the period of about two weeks he was constantly guarded by detectives employed by the company; that he was at no time free to come and go as he pleased; that his movements were at all times subject to the control and direction of those who had him in charge; that he was urged by them on several occasions to confess his guilt, and make known his confederates; and that he was subjected to repeated examinations and cross-examinations touching the robbery, of such a char-

* Liability for arrest by station agent of person in waiting room, see 48 *AM. & ENG. R. CAS.* 428, *abstr.*

act as to clearly show that he was regarded as a criminal, and that force would be used to detain him if he attempted to assert his liberty. *Held*, sufficient to justify a finding that he was deprived of his freedom. *Fotheringham v. Adams Exp. Co.*, 36 *Fed. Rep.* 252; see also 34 *Fed. Rep.* 646.

7. — gatekeeper.—A gateman employed to see that passengers deposit their tickets at the terminus of a railroad, and to prevent the exit of passengers who omit to make such deposit, has no constabulary right to pursue and bring back a passenger failing to comply with the regulations, after the passenger has been allowed to depart from the depot grounds, nor has the gateman the power to direct a policeman to bring the offender back. *Corwin v. Long Island R. Co.*, 2 *City Ct. (N. Y.)* 106.

Such acts are in excess of the gateman's implied authority, and do not bind the railroad company unless it expressly authorizes them. The gateman, by virtue of his position, is merely authorized to prevent infractions of the regulations, and not to punish past transgressions. *Corwin v. Long Island R. Co.*, 2 *City Ct. (N. Y.)* 106.

Plaintiff purchased a ticket and entered the cars; before reaching his destination he lost his ticket, and when he attempted to pass through the gate, from the station platform, he was stopped by the gatekeeper, and told that he could not pass until he produced a ticket or paid his fare. He stated the facts of his purchase of a ticket and its loss, and insisted on passing out, but was pushed back by the gatekeeper, who sent for a police officer and ordered his arrest; he was arrested, taken to the police station, where the gatekeeper made a complaint against him, and he was locked up over night. In the morning plaintiff was examined before a police magistrate, the gatekeeper appearing against him, and he was discharged. Defendant had given orders to its gatekeepers not to let passengers pass out until they either paid their fares or showed tickets. In an action for false imprisonment—*held*, that the detention was unlawful, that defendant was responsible for the acts of the gatekeeper, and that plaintiff was entitled to recover. *Lynch v. Metropolitan El. R. Co.*, 12 *Am. & Eng. R. Cas.* 119, 90 *N. Y.* 77; *affirming* 24 *Hun* 506. —*REVIEWING* *Sunbolt v. Alford*, 3 *M. & W.* 248; *Chilton v. London & C. R. Co.*, 16 *M. & W.* 212; *Standish v. Narragansett Steam-*

5 *D. R. D.*—39.

ship Co., 111 *Mass.* 512.—*APPLIED IN* *Muligan v. New York & R. B. R. Co.*, 39 *N. Y. S. R.* 20, 60 *Hun* 579. *DISTINGUISHED IN* *Hardy v. New York C. & H. R. R. Co.*, 34 *N. Y. S. R.* 902, 58 *Hun* 607, 12 *N. Y. Supp.* 55. *FOLLOWED IN* *Toomey v. Delaware, L. & W. R. Co.*, 2 *Misc. (N. Y.)* 82.

8. — inspector at station.—A railway company having by statute authority to arrest persons defrauding it is liable for the act of an inspector at one of its stations in wrongfully arresting a passenger on the charge of refusing to give up his ticket or pay his fare. *Moore v. Metropolitan R. Co.*, *L. R.* 8 *Q. B.* 36, 42 *L. J. Q. B.* 23, 27 *L. T.* 579, 21 *W. R.* 145.

It is a question for the jury, in an action for false imprisonment, whether the inspector at a railway station has authority from the company to give a passenger into custody for his alleged refusal to deliver up his ticket or pay the fare. *Moore v. Metropolitan R. Co.*, 42 *L. J. Q. B.* 23, *L. R.* 8 *Q. B.* 36.

9. — night watchman.—A person arrested by the night watchman of a railroad company, who has no legal authority to make arrests as an officer, can recover against the company damages for false imprisonment. *Norfolk & W. R. Co. v. Galliher*, 89 *Va.* 639, 16 *S. E. Rep.* 935.

10. — police officer.*—A railroad company is not liable for a malicious prosecution or a false imprisonment, where one of its employes charges the party with a crime, and has him arrested by a police officer, where he is convicted of the crime, upon a trial before a magistrate. *Oppenheimer v. Manhattan R. Co.*, 45 *N. Y. S. R.* 134, 63 *Hun* 633, 18 *N. Y. Supp.* 411.

The mayor of a city is not authorized by law to appoint a special policeman for a railroad company. *Norfolk & W. R. Co. v. Galliher*, 89 *Va.* 639, 16 *S. E. Rep.* 935.

Where a special policeman for a railroad depot within the municipality is appointed for an indefinite time by the mayor thereof, the appointee to receive no pay from the city, he being employed and paid by the depot company, and acting generally, in his official capacity, under the orders and directions of the depot superintendent, his official authority ceases on the expiration of

* Liability of company for false arrests by servants employed for police duty, see note, 14 *L. R. A.* 792.

the charter limitation, unless the appointment be approved by the council. In the absence of proof of such ratification, the mayor's commission will not protect the depot company in an action for damages for false imprisonment brought against it by one arrested by the officer for a supposed violation of a city ordinance. *Union D. & R. Co. v. Smith*, 16 *Colo.* 361, 27 *Pac. Rep.* 329.

11. — street-car driver.—Where a dispute arises between a driver of a street-car and a passenger as to whether or not he has paid his fare, the company is liable for the act of the driver in procuring his arrest by a policeman for a failure to pay or leave the car, if it turns out that he had in fact paid. *Rown v. Christopher & T. St. R. Co.*, 34 *Hun (N. Y.)* 471.—APPLYING *Hoffman v. New York C. & H. R. R. Co.*, 87 *N. Y.* 25; *Schultz v. Third Ave. R. Co.*, 89 *N. Y.* 242; *Stewart v. Brooklyn & C. T. R. Co.*, 90 *N. Y.* 588.

A passenger on a street-car, by mistake deposited an extra fare in the box, which he asked the driver to return to him, which he declined to do, and referred the passenger to the office of the company; but the passenger took a fare from another passenger, which was about to be deposited in the box, and kept it, whereupon the driver caused him to be arrested. *Held*, that a regulation, if it existed, requiring him to go to the company's office for such a matter was unreasonable, and that the company was liable for false imprisonment. *Corbett v. Twenty-third St. R. Co.*, 42 *Hun* 587, 4 *N. Y. S. R.* 535.

In such case the damages should include not only a sum sufficient to compensate for the injury and indignity to which the passenger was subjected in being arrested and removed from the car, but also for the subsequent imprisonment while detained at a station house. *Corbett v. Twenty-third St. R. Co.*, 42 *Hun* 587, 4 *N. Y. S. R.* 535.—APPLYING *Rown v. Christopher & T. St. R. Co.*, 34 *Hun* 471.

12. — ticket agent.—Where a ticket agent wrongfully gives into custody a person upon the charge of attempting to steal money from the till, the company is not liable for false imprisonment, since the agent had no implied authority for what he did. *Allen v. London & S. W. R. Co.*, 40 *L. J. Q. B.* 55, 23 *L. T.* 612, *L. R.* 6 *Q. B.* 65.

So held, where the agent caused the arrest

because he mistakenly supposed plaintiff had passed a counterfeit bill upon him. *Mulligan v. New York & R. B. R. Co.*, 53 *Am. & Eng. R. Cas.* 47, 129 *N. Y.* 506, 29 *N. E. Rep.* 952, 42 *N. Y. S. R.* 83; reversing 39 *N. Y. S. R.* 20, 14 *N. Y. Supp.* 456.—DISTINGUISHED IN *Palmeri v. Manhattan R. Co.*, 133 *N. Y.* 261; *Tinker v. New York, O. & W. R. Co.*, 71 *Hun (N. Y.)* 431.

13. Ratification of agent's acts.—An act of an employé in assaulting and imprisoning a passenger to compel him to pay his fare may be ratified by the company, since it might have been committed for its benefit. *Eastern Counties R. Co. v. Broom*, 6 *Ex.* 314, 6 *Railw. Cas.* 743, 15 *Jur.* 297, 20 *L. J. Ex.* 196.—NOT FOLLOWED IN *Goff v. Great Northern R. Co.*, 3 *El. & El.* 672, 30 *L. J. Q. B.* 148, 7 *Jur. N. S.* 286, 3 *L. T.* 850.

14. Malice — Probable cause.—Though the ticket of a passenger may not entitle him to ride, yet if the conductor acts without probable cause and maliciously in having him arrested for attempting to evade payment of fare, the company may be liable, as the want of probable cause, and malice, on the part of the conductor may be imputed to the corporation itself. *Krulevitz v. Eastern R. Co.*, 140 *Mass.* 573, 5 *N. E. Rep.* 500.

Plaintiff got on a train to ride and had a ticket, but it called for a ride in the inverse order in which plaintiff desired to go, and the conductor refused to accept it, and demanded fare. Plaintiff informed him that he thought his ticket was good, and he had got on the train without money, and offered to let him hold the ticket as security that he would pay in the evening, which the conductor refused, and told him that he would "fix him" when they got to the station. The conductor was a police officer, but he procured another officer to be at the station, who entered the train and arrested plaintiff before he attempted to leave the car, and had him retained in custody on a complaint subsequently made by the conductor; but he was subsequently acquitted on the trial. *Held*, sufficient evidence that the complaint was made without probable cause. *Krulevitz v. Eastern R. Co.*, 28 *Am. & Eng. R. Cas.* 138, 143 *Mass.* 228, 9 *N. E. Rep.* 613.

Plaintiff was arrested on suspicion at the instance of a detective employed by defendant company, at a station, when he was

about to depart on a train. The detective testified that plaintiff had on a rubber suit and hood, part of which came down over his face, with holes in it through which he could see, and wearing a false beard, and that he arrested him because he regarded him as a suspicious and disorderly person; and that he found on his person a bottle of liquid and rags in an oily condition, and eight or ten wax tapers; but he was acquitted on the trial. *Held*, in an action for false arrest and imprisonment, that the question of whether the arrest was justifiable should have been submitted to the jury. *Newman v. New York, L. E. & W. R. Co.*, 27 N. Y. S. R. 135.

15. Pleading.—A count which avers that the defendants "maliciously and without probable cause sued out a warrant, commonly called a peace-warrant, against the plaintiff," is in case for a malicious prosecution; and so is a count which avers that the defendants "recklessly and without probable cause, through their agent and servant, caused and procured a peace-warrant to be sued out," etc., "on which said warrant plaintiff was arrested, and brought before the said justice of the peace, who, on hearing the evidence advanced by the defendants, discharged the plaintiff from the arrest under said warrant"; but a count which avers that the defendants "recklessly, maliciously, and without probable cause therefor, caused the plaintiff to be arrested and imprisoned, on a charge that he had threatened to injure and destroy the lives and property of the defendants, and that plaintiff was imprisoned by defendants for ten days," etc., is in trespass for false imprisonment. *Owsley v. Montgomery & W. P. R. Co.*, 37 Ala. 560, Ala. Sel. Cas. 485.

Justification must be pleaded, and a mere denial of knowledge or information whether the company caused the arrest raises no issue. *Wilson v. Manhattan R. Co.*, 49 N. Y. S. R. 116, 20 N. Y. Supp. 852, 2 Misc. 127.

16. Evidence.—In an action by the injured person for damages, he may give in evidence the declarations of the agent, made at the time of the arrest. *Pennsylvania Co. v. Weddle*, 26 Am. & Eng. R. Cas. 120, 100 Ind. 138.

In an action for false imprisonment on a charge of larceny, evidence of the physical condition of plaintiff's brother, arrested at

the same time, is admissible to show that the persons making the arrest had no reasonable ground to suppose that plaintiff and his brother were guilty. *Fitzpatrick v. New York & M. B. R. Co.*, 24 N. Y. S. R. 636, 53 Hun 629, mem., 2 Silb. Sup. Ct. 192, 5 N. Y. Supp. 685.

Where the action is for false imprisonment in causing the arrest of plaintiff on a charge of raising a disturbance in a car, and plaintiff testifies that he was making no disturbance and heard no complaint from other passengers, it is competent to show by the persons who made the arrest that other passengers approved of the arrest. *McGuire v. Broadway & S. A. R. Co.*, 42 N. Y. S. R. 824, 62 Hun 623, 16 N. Y. Supp. 922.

Where a street car company is sued for wrongfully causing the arrest of a person on its cars, it is proper for the company to show that the driver of the car at the time was no longer in its service, and that it could not learn of his whereabouts, for the purpose of showing why it did not produce him as a witness. *McGuire v. Broadway & S. A. R. Co.*, 42 N. Y. S. R. 824, 62 Hun 623, 16 N. Y. Supp. 922.

Plaintiff was engaged in an altercation with a depot guard about eleven o'clock at night, when he was arrested, and was taken before a magistrate the next morning and discharged. *Held*, in an action for false imprisonment, that the proceedings before the magistrate were admissible in evidence as a part of a continuous transaction. *Shea v. Manhattan R. Co.*, 15 Daly 528, 8 N. Y. Supp. 332, 29 N. Y. S. R. 313; affirming 27 N. Y. S. R. 33, 7 N. Y. Supp. 497. — QUOTING *Rown v. Christopher & T. St. R. Co.*, 34 Hun 471.

A judgment in a criminal prosecution is admissible in a subsequent civil action for false imprisonment only as to the fact that the judgment was rendered; but it is not evidence of the fact on which such judgment rests—that is, of the guilt of the accused. *Wilson v. Manhattan R. Co.*, 49 N. Y. S. R. 116, 20 N. Y. Supp. 852, 2 Misc. 127.

Where plaintiff sues for being arrested by a policeman on a charge of larceny made by defendant company, it is proper to refuse to allow a witness to testify as to the description of the thief that had been given him by the company, where no question of that kind is presented to the jury. *Fitzpatrick v. New York & M. B. R. Co.*, 24 N. Y. S. R.

636, 53 Hun 629, *mem.*, 2 Silv. Sup. Ct. 192, 5 N. Y. Supp. 685.

In an action for the wrongful arrest of a passenger caused by the conductor, it was alleged that the conductor was "acting within the scope of his authority." *Held*, competent to prove that in the performance of the act the conductor was acting within the sphere of his authority as conferred by the company, or under its instructions. *Galveston, H. & S. A. R. Co. v. Donahoe*, 9 Am. & Eng. R. Cas. 287, 56 Tex. 162.—FOLLOWING *De Gress v. Hubbard*, 4 Tex. L. J. 17.

17. Instructions.—A passenger is bound to produce a valid ticket when applied to by a conductor, or pay his fare, or the company may remove him; but where a passenger is allowed to complete his journey and is then arrested for stealing a ride, and sues for false arrest, it is proper for the court, when requested to instruct that "the plaintiff, when applied to by the conductor, was bound to produce a proper and valid ticket as evidence of his right to ride upon the train, or pay his fare," to modify the charge as follows: "If he could do so, he was. If he had a ticket and lost it, it was a subject for explanation. It was either his duty to produce a proper ticket, pay his fare, or make some reasonable explanation why he did not do so." *Toomey v. Delaware, L. & W. R. Co.*, 53 N. Y. S. R. 567.

A passenger refused to sign his ticket as required by a provision therein, which rendered it void, and refused to leave the train when notified that his ticket did not entitle him to ride, and in resisting the conductor in an effort to put him off, drew a revolver. A constable was afterward procured, and he was arrested and removed from the train and kept in irons for twenty minutes before a warrant was produced, but was subsequently acquitted. In a suit against the company for malicious prosecution, the constable testified that he acted merely as a peace officer, having been informed that plaintiff had drawn a revolver. *Held*, that it was error to instruct the jury that if the company caused the arrest merely to eject the passenger, the constable was its agent for that purpose, and the company was liable for any unnecessary violence, as it failed to distinguish between the violence of the officer before and after the passenger was removed. *Southern Pac. Co. v. Hamilton*,

54 Fed. Rep. 468, 7 U. S. App. 626, 4 C. C. A. 441.

18. Damages, generally.—In estimating the actual damages sustained by a passenger who is arrested on the car, on a claim of failing to pay his fare, the jury may include the injury to the plaintiff's feelings, and compensation for the insult they deem him to have sustained, and the indignity to which he was subjected. *Roun v. Christopher & T. St. R. Co.*, 34 Hun (N. Y.) 471.—APPLIED IN *Corbett v. Twenty-third St. R. Co.*, 42 Hun 587, 4 N. Y. S. R. 535. QUOTED IN *Shea v. Manhattan R. Co.*, 15 Daly 528, 8 N. Y. Supp. 332, 29 N. Y. S. R. 313.

Where a petition sets forth a cause of action for an unlawful arrest and imprisonment, but does not set forth any sickness nor any facts from which it might be inferred, or from which the law would imply that sickness would necessarily follow from the facts alleged, or from the arrest and the imprisonment, it is error for the court to permit evidence to be introduced, over the objection of the defendant, tending to show that after the arrest and the imprisonment the plaintiff became sick, and that the sickness was produced by such arrest and imprisonment. *Atchison, T. & S. F. R. Co. v. Rice*, 36 Kan. 593, 14 Pac. Rep. 229.

19. — remote.—The plaintiff was improperly arrested for using a ticket which he had purchased of the company. Upon trial the court ruled that the plaintiff was entitled to recover damages for indignities which he had suffered at the hands of the police, for his mental suffering, and for sickness produced by a cold caught while confined. *Held*, that these results were too remote to come within the rule of damages applicable to an action of contract, and that the plaintiff's remedy for these wrongs is by an action of tort. *Murdock v. Boston & A. R. Co.*, 6 Am. & Eng. R. Cas. 406, 133 Mass. 15, 41 Am. Rep. 57.—REVIEWED IN *Alabama & V. R. Co. v. Hanes*, 69 Miss. 160.

20. — exemplary.—A passenger suing for false imprisonment is entitled to exemplary damages for indignity and humiliation in being arrested, handcuffed, and led away without the slightest pretext or cause for it whatever, except that the conductor persisted in closing his eyes and shutting his ears to those who knew, and who both showed him and told him, the real offender.

Gillingham v. Ohio River R. Co., 51 Am. & Eng. R. Cas. 222, 35 W. Va. 588, 14 L. R. A. 798, 14 S. E. Rep. 243.

21. — **excessive.**—In case of an unwarranted interference with the personal liberty of a citizen, under circumstances indicating an oppressive use of a supposed authority, a court of last resort cannot say that a verdict for \$3000 damages, though unusually large, is excessive, it being the result of the third trial of the action by a jury. *Union D. & R. Co. v. Smith*, 16 Colo. 361, 27 Pac. Rep. 329.

A passenger who had refused to present a valid ticket or pay fare, and who had resisted being ejected, with a revolver in his hand, was subsequently arrested by a constable and kept in irons for twenty minutes before a warrant was procured, but was subsequently discharged. In an action against the company the evidence tended to show that the constable used more violence than was necessary, but that plaintiff received no great bodily harm. *Held*, that a judgment for \$15,000 should be set aside as excessive, especially where enhanced by erroneous instructions from the court. *Southern Pac. Co. v. Hamilton*, 54 Fed. Rep. 468, 7 U. S. App. 626, 4 C. C. A. 441.—**QUOTING** *Etna Life Ins. Co. v. Ward*, 140 U. S. 76, 11 Sup. Ct. Rep. 720; *Pleasants v. Fant*, 22 Wall. (U. S.) 120.

Plaintiff was arrested on a charge of larceny or robbery from an express company, by detectives, and held for some two weeks without a warrant, under circumstances that would allow the awarding of exemplary damages. *Held*, nevertheless, that a verdict for \$20,000 was excessive, and a new trial should be granted, unless the plaintiff elected to remit \$8000. *Fotheringham v. Adams Exp. Co.*, 36 Fed. Rep. 252.

FALSE PRETENSES.

Prosecutions for, see CRIMINAL LAW, 23.

FALSE REPRESENTATIONS.

By agents, liability of principal for, see AGENCY, 109.

—infant employee as to his age, see EMPLOYES, INJURIES TO, 468.

On sale of stock, see STOCK, 51.

FAMILY PORTRAITS.

Measure of damages for loss of, see CARRIAGE OF MERCHANDISE, 797.

FARES.

Generally, see TICKETS AND FARES, 110-149.

Constitutionality of statutes regulating, see STATUTES, 25.

Crown duties on, in England, see TICKETS AND FARES, 142.

Duty to carry passenger to station to which fare has been paid, see CARRIAGE OF PASSENGERS, 227.

Effect of payment of, on freight train, see CARRIAGE OF PASSENGERS, 47.

—tender of, to prevent ejection of passenger, see EJECTION OF PASSENGERS, 47-51.

Ejection of passenger for non-payment of, see EJECTION OF PASSENGERS, 5-18; STREET RAILWAYS, 519.

Evidence of established rate of, see EJECTION OF PASSENGERS, 93.

Lien of carrier upon baggage for, see BAGGAGE, 91.

Necessity of payment of, see CARRIAGE OF PASSENGERS, 13.

No agreement to stop implied from collection of, see CARRIAGE OF PASSENGERS, 253.

On English tramways, see TRAMWAYS, 5.

—ferries, see FERRIES, 8.

—street railways, regulation of, by statute, see STREET RAILWAYS, 255.

Ordinance regulating, see STREET RAILWAYS, 260, 261.

Overcharges and discrimination in, see STREET RAILWAYS, 306-308.

Penalties for overcharges in, see PENALTIES, 6.

Persons on train after refusal to pay, when deemed trespassers, see TRESPASSERS, INJURIES TO, 17.

Prosecution for traveling without paying, see CRIMINAL LAW, 44.

Regulation of, by railway commissioners, see RAILWAY COMMISSIONERS, 8.

Riding on freight trains without paying, see COLLISIONS, 19.

Status of traveler before payment of, see CARRIAGE OF PASSENGERS, 25.

Tender of, how pleaded, see EJECTION OF PASSENGERS, 83.

Validity of state laws attempting to regulate, see COMMERCE, 5.

FARM CROSSINGS.

Construction of statutes requiring, see STATUTES, 62.

Cost of, as an element of land damages, see EMINENT DOMAIN, 676.

Duty of company respecting, see ANIMALS, INJURIES TO, 170-184.

Duty of lessee to maintain gates at, see LEASES, ETC., 74.

— to build cattle-guards at, see CATTLE-GUARDS, 13.

— fence track at, see FENCES, 57.

Injuries to persons and teams at, see CROSSINGS, INJURIES, ETC., AT, 5.

Right of landowner to construction of, see EMINENT DOMAIN, 144.

1. Definition.—The term "farm crossing" means a passage either over or under the railroad track. *Wheeler v. Rochester & S. R. Co.*, 12 Barb. (N. Y.) 227.—REVIEWED IN *Louisville, N. A. & C. R. Co. v. Hughes*, 2 Ind. App. 68.—*Burke v. Grand Trunk R. Co.*, 6 U. C. C. P. 484.

A farm crossing is an easement over the track of a railroad, while a gate is a part of the fence which is required to be placed wherever there is such farm crossing. *Wabash R. Co. v. Kime*, 42 Ill. App. 272.

A private way across a railroad from a farm lying wholly on one side of the right of way to a highway on the opposite side of the right of way is not a farm crossing within the meaning of section 5 of the Act of April 13, 1885 (Ind. Acts 1885, p. 224), which provides that "all gates and bars at farm crossings shall * * * be constructed and maintained and kept closed by the owner of such farm crossing." *Louisville, N. A. & C. R. Co. v. Hughes*, 2 Ind. App. 68, 28 N. E. Rep. 158.—REVIEWING *Wheeler v. Rochester & S. R. Co.*, 12 Barb. (N. Y.) 227.

Where a landowner puts up gates in the right of way fence to enable him to go from his land to a private side track on the railroad right of way, said gates do not constitute "a private farm crossing" within the meaning of the Indiana Acts of April 8 and 13, 1885, and the railroad company is liable in damages for the killing of stock belonging to a third person, which entered on its right of way through said gates. *Wabash R. Co. v. Williamson*, 3 Ind. App. 190, 29 N. E. Rep. 455.—QUOTING *Jeffersonville, M. & I. R. Co. v. Dunlap*, 112 Ind. 93; *Louisville, N. A. & C. R. Co. v. Hughes*, 2 Ind. App. 68.

Ground occupied as a private farm crossing over a railroad track is not an established road or way within the meaning of Pa. Act of Feb. 19, 1849, § 12, providing that such roads or ways must not be impeded or obstructed by a railroad. *Ambler's Appeal*, (Pa.) 4 Atl. Rep. 187.

2. Duty to construct, generally.*—

As a general rule, the landowner has a reasonable right to farm crossings over a right of way condemned through his premises, at such places as the necessities of his farm demand; provided such crossings and the use thereof will not interfere with the paramount rights of the railroad company. *Kansas City & E. R. Co. v. Kregelo*, 20 Am. & Eng. R. Cas. 241, 32 Kan. 608, 5 Pac. Rep. 15.—FOLLOWED IN *Chicago, K. & W. R. Co. v. Cosper*, 42 Kan. 561, 22 Pac. Rep. 634.

A railroad company whose line runs through the land of an owner is only required to provide a crossing for such owner when his interests and convenience require it. *Henderson v. Chicago, R. I. & P. R. Co.*, 48 Iowa 216.—NOT OVERRULING *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30 Iowa 459.

If farm crossings are a part of the plan of a railroad where its right of way crosses the farm and are shown on the map and profile of the road on record, and are taken into consideration by the commissioners in making the award of damages, the court or jury upon appeal should assess the damages to the owner of the land with reference to such plan of construction, and the railroad company becomes bound thereby to construct such crossings. *Kansas City & E. R. Co. v. Kregelo*, 20 Am. & Eng. R. Cas. 241, 32 Kan. 608, 5 Pac. Rep. 15.

When requested by the owner of land crossed by the road of a company, railroads in Nebraska are required to make and keep in good repair an adequate means of crossing the track. *Fremont, E. & M. V. R. Co. v. Lamb*, 5 Am. & Eng. R. Cas. 367, 11 Neb. 592, 10 N. W. Rep. 493.

Where landowners have granted a railroad company a right of way over their lands, the company is under no obligation to provide a crossing over its track, where there is no agreement to that effect in the deed conveying the right of way. *Gulf, C. & S. F. R. Co. v. Jones*, 3 Tex. App. (Civ. Cas.) 39.—FOLLOWING *International & G. N. R. Co. v. Bost*, 2 Tex. App. (Civ. Cas.) 334.—*Cook v. North & S. R. Co.*, 50 Ga. 211.

The right to have a farm crossing over

* Duty of company as to crossings of private ways, see note, 13 AM. & ENG. R. CAS. 626.

Duty of companies to build bridges over track and maintain farm crossings. Who has a right to locate, see 26 AM. & ENG. R. CAS. 364, *abstr.*; 49 *Id.* 302, *abstr.*

generally.*—
ner has a reas-
gs over a right
is premises, at
es of his farm
ssings and the
with the para-
ad company.
regelo, 20 Am.
n. 608, 5 Pac.
cago, K. & W.
, 22 Pac. Rep.

se line runs
ner is only re-
or such owner
nience require
I. & P. R. Co.,
ULING Ayles-
P. R. Co., 30

of the plan of
ay crosses the
ap and profile
are taken into
ioners in mak-
e court or jury
the damages to
erence to such
railroad com-
y to construct
v. E. R. Co.,
R. Cas. 241, 32

owner of land
pany, railroads
make and keep
means of cross-
M. V. R. Co.
s. 367, 11 Neb.

granted a rail-
ay over their
no obligation
s track, where
at effect in the
way. Gulf, C.
Tex. App. (Civ.
national & G.
pp. (Civ. Cas.)
Co., 50 Ga. 211.
crossing over

sings of private
t. Cas. 626.
idges over track
Who has a right
CAS. 364, abstr.;

one of the government railways is not a statutory right, and in awarding damages full compensation for the future as well as for the past for the want of a farm crossing should be granted. *Vezina v. Queen*, 44 Am. & Eng. R. Cas. 73, 17 Can. Sup. Ct. 1. —DISTINGUISHING *Clarke v. Rochester, L. & N. F. R. Co.*, 18 Barb. (N. Y.) 350; *Wademan v. Albany & S. R. Co.*, 51 N. Y. 568; *Smith v. New York & O. M. R. Co.*, 63 N. Y. 59. REVIEWING *Brown v. Toronto & N. R. Co.*, 26 U. C. C. P. 206.

Railroad companies cannot be compelled to erect and maintain residence crossings at their own expense, for the use and benefit of individuals, when no statute existed at the time of the construction of the roads requiring such action on their part. *People v. Detroit, G. H. & M. R. Co.*, 42 Am. & Eng. R. Cas. 257, 79 Mich. 471, 44 N. W. Rep. 934.

In the absence of any statutory provision, the owner of inclosed land who has granted a right of way across it to a railway company by deed, must be held entitled to such crossings over the track as are reasonably necessary for the use of the premises inclosed. This right exists whether the right of way be conveyed by deed or is secured by condemnation. In either case the obligation does not rest on the railway company to construct crossings at its own expense. It will be presumed that when the right of way was secured the railway indemnified the landowner for the expense of constructing and keeping in repair all necessary crossings. *Gulf, C. & S. F. R. Co. v. Rowland*, 35 Am. & Eng. R. Cas. 286, 70 Tex. 298, 7 S. W. Rep. 718.

Where a company buys land on one side of its track, after it has constructed a farm crossing thereon, it cannot close the crossing, where the landowner retains a private right of way over the land sold, to enable him to reach a public highway. *Lakenan v. Hannibal & St. J. R. Co.*, 36 Mo. App. 363.

Plaintiff owned land along the river Thames at a point where there was a bend or elbow in the stream. He conveyed to defendants the strip required for their track, which ran close to the bank at this bend, so as to leave no passage from his land above to that below, but he had access to each part separately by the highway. Held, that defendants were not bound to provide any

such passage. *Carroll v. Great Western R. Co.*, 14 U. C. Q. B. 614.

3. Duty to construct under statutes.—(1) *Illinois*.—The duty of railroads to construct necessary farm crossings is purely statutory, and the remedy for its violation must be pursued as pointed out in the statute. *Chicago, M. & N. R. Co. v. Eichman*, 47 Ill. App. 156.

The word "necessary" in the statute, requiring railroad corporations to construct farm crossings "when and where the same may become necessary for the use of the proprietors of the lands adjoining such railroad," was used in its more popular sense, and is equivalent to the words "reasonably convenient." *Chalcraft v. Louisville, E. & St. L. R. Co.*, 113 Ill. 86.—DISTINGUISHED IN *Illinois C. R. Co. v. Willenborg*, 26 Am. & Eng. R. Cas. 358, 117 Ill. 203, 57 Am. Rep. 862.

The act of 1874, in relation to fencing and operating railroads, which imposes the duty on the railway companies to construct farm crossings for the use of the owners of land adjoining their tracks, is a valid and constitutional law, even in respect to railway corporations organized under charters long before its passage, its requirements being but police regulations. *Illinois C. R. Co. v. Willenborg*, 26 Am. & Eng. R. Cas. 358, 117 Ill. 203, 7 N. E. Rep. 698, 57 Am. Rep. 862.

A railway corporation will not be relieved of its duty, by law, to make a farm crossing over its track for an owner whose land is divided by the track, merely because many years before it may have built a crossing upon other lands, and to make use of which would be attended with danger to such owner. *Illinois C. R. Co. v. Willenborg*, 26 Am. & Eng. R. Cas. 358, 117 Ill. 203, 7 N. E. Rep. 698, 57 Am. Rep. 862.—QUOTED IN *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309.

In determining the question whether a proposed bridge is a necessary farm crossing within the meaning of the statute, it is not enough to show that the crossing would add somewhat to the convenience of the landowner; but the safety and convenience of the corporation in the operation of its trains and in the care and use of its right of way should be regarded, and the final rights of both parties kept in view, so as to furnish reasonable safety and security to each with-

out the imposition of an unreasonable burden or duty upon either. *Louisville, E. & St. L. R. Co. v. Chalcraft*, 14 Ill. App. 516.

(2) *Iowa*.—The right to the construction of a private railway crossing, under the provisions of section 1268 of the code, is so far public in its nature as to impose upon the state the duty of its enforcement, and the existence of such right under particular circumstances is, therefore, within the jurisdiction of the board of railroad commissioners to determine. *State v. Mason City & Ft. D. R. Co.*, 55 Am. & Eng. R. Cas. 73, 85 *Iowa* 516, 42 N. W. Rep. 490.

An order by the railroad commissioners for the construction of such a crossing is enforceable by the district court under the provisions of chapter 133 of the laws of 1884, giving to said court "jurisdiction to enforce by proper decrees * * * the rulings, orders, and regulations affecting public right, made * * * by the board of railroad commissioners." *State v. Mason City & Ft. D. R. Co.*, 55 Am. & Eng. R. Cas. 73, 85 *Iowa* 516, 52 N. W. Rep. 490.

The order of the railroad commissioners in such case, not being in the nature of a judgment binding upon the parties, the law giving the commissioners jurisdiction in such cases to determine the right to a crossing under the law, and to order its construction, is not in conflict with section 1 of article 5 of the constitution, vesting the judicial powers of the state in a supreme court, district court, and such other courts as the legislature may from time to time establish. *State v. Mason City & Ft. D. R. Co.*, 55 Am. & Eng. R. Cas. 73, 85 *Iowa* 516, 52 N. W. Rep. 490.

(3) *Massachusetts*.—Since St. 1874, ch. 372, § 81 (Pub. Sts. ch. 112, § 113), a structure by which a landowner whose lands have been appropriated by a railroad company may conveniently cross the tracks at the same grade, or over or under the same, may be ordered, if the county commissioners judge it reasonable for his security and benefit. *Boston & P. R. Corp. v. Doherty*, 154 Mass. 314, 28 N. E. Rep. 277.

(4) *New Hampshire*.—A provision in the charter of a railroad corporation that the road shall be so constructed as not to obstruct the safe and convenient use of any private way which it crosses, imposes upon the corporation the duty of maintaining a safe and convenient crossing for such private way. *Keefe v. Sullivan County R. Co.*,

23 Am. & Eng. R. Cas. 301, 63 N. H. 271.—REVIEWING *March v. Portsmouth & C. R. Co.*, 19 N. H. 372.

The owner of land over which a railroad is constructed has no right of action against the company for damages resulting from the want of necessary farm crossings and cattle passes, unless it appear that the company have agreed to provide them, or that the landowner has made application to three justices of the peace, and obtained their report, determining where and within what time such crossings and passes shall be made, agreeable to the act of 1850, ch. 593, § 5. *Horne v. Atlantic & St. L. R. Co.*, 36 N. H. 440.—DISTINGUISHED IN *Chapin v. Sullivan R. Co.*, 39 N. H. 564.

(5) *New York*.—The provision of the general railroad act of 1848, requiring companies to erect farm crossings for the use of the proprietors of lands adjoining such railroads, is not applicable to corporations existing before the passage of that act, and which had previously obtained the right of way for their road, and paid the landowners the damages sustained by them. *Milliman v. Oswego & S. R. Co.*, 10 Barb. (N. Y.) 87.—QUOTED IN *Marsh v. New York & E. R. Co.*, 14 Barb. 364.

The provisions of the general railroad act, requiring railroad companies to construct farm crossings, applies to all lands alike, whether the company has condemned a right of way over them, or has acquired the right of way by agreement and conveyance. *Clarke v. Rochester, L. & N. F. R. Co.*, 18 Barb. (N. Y.) 350. *Smith v. New York & O. M. R. Co.*, 63 N. Y. 58.—DISTINGUISHED IN *Vezina v. Queen*, 17 Can. Sup. Ct. 1. FOLLOWED IN *Jones v. Seligman*, 3 Am. & Eng. R. Cas. 236, 81 N. Y. 190.

Proof of such a conveyance was no defense to an action against a railroad company to recover damages for injuries resulting from its neglect to keep a farm crossing in a safe and passable condition. *Smith v. New York & O. M. R. Co.*, 63 N. Y. 58.

The provision of the general railroad act was designed to compel the corporations to construct and maintain such crossings over their lines as are necessary to enable owners, having land abutting on either or both sides of the road, to reach and work their properties. *Buffalo S. & C. Co. v. Delaware, L. & W. R. Co.*, 130 N. Y. 152, 29 N. E. Rep. 121, 41 N. Y. S. R. 259; affirming 27 N. Y. S. R. 216, 7 N. Y. Supp. 604.

N. H. 271.—
outh & C. R.

which a rail-
right of action
ges resulting
rm crossings
hear that the
ide them, or
application to
and obtained
e and within
passes shall
of 1850, ch.
St. L. R. Co.,
D IN Chapin
64.

on of the gen-
quiring com-
for the use of
ing such rail-
porations ex-
that act, and
the right of
the landown-
them. *Milli-*
Earb. (N. Y.)
New York & E.

l railroad act,
to construct
lands alike,
condemned a
acquired the
conveyance.
F. R. Co., 18
New York &
DISTINGUISHED
Sup. Ct. 1.
man, 3 Am. &

There was no de-
railroad com-
injuries result-
farm crossing
on. *Smith v.*
N. Y. 58.
l railroad act
corporations
such crossings
ary to enable
on either or
each and work
& C. Co. v.
o *N. Y. 152, 29*
259; *affirm-*
Y. Supp. 604.

The statute does not limit the right of adjoining owners to crossings solely for agricultural purposes, but they may be ordered to enable owners to remove the natural products of the land, as stone, minerals, etc., therefrom. *Buffalo S. & C. Co. v. Delaware, L. & W. R. Co., 130 N. Y. 152, 29 N. E. Rep. 121, 41 N. Y. S. R. 259; affirming 27 N. Y. S. R. 216, 7 N. Y. Supp. 604.*

Nor is the right limited to a proprietor, a strip of whose land has been taken for the road, leaving remaining portions adjoining such strip on both sides. *Buffalo S. & C. Co. v. Delaware, L. & W. R. Co., 130 N. Y. 152, 29 N. E. Rep. 121, 41 N. Y. S. R. 259; affirming 27 N. Y. S. R. 216, 7 N. Y. Supp. 604.*

Where, therefore, the defendant, a corporation organized in another state, having been authorized by statute (ch. 244, laws of 1855) to contract with corporations in this state and to sue and be sued in its courts, leased the road of a railroad corporation of this state, the lease containing a provision requiring the lessor "to do and perform all acts and things" which the lessor "would be bound by law to do and perform" had the lease not been made—*held*, that the duty of constructing farm crossings, in the cases prescribed, was imposed upon it. *Buffalo S. & C. Co. v. Delaware, L. & W. R. Co., 130 N. Y. 152, 29 N. E. Rep. 121, 41 N. Y. S. R. 259; affirming 27 N. Y. S. R. 216, 7 N. Y. Supp. 604.*

The object and intent of the general railroad act of 1850, § 44, which requires the maintenance of farm crossings, is plain. It is to enable the owner of lands separated into two or more parcels to pass from one parcel to the other for the purpose of husbandry, with loaded or empty wagons. The crossing is required to be made for his benefit, and not for the purpose of imposing a useless burden upon the railroad company; and when it is clear that the crossing cannot be used by the owner, that he has not any property on which to go after the crossing is made, the court will not decree that the railroad waste its resources in building impracticable and useless crossings. *Kerr v. West Shore R. Co., 18 N. Y. S. R. 63, 2 N. Y. Supp. 685.*

The provision of the general railroad act of 1850, § 44, was not repealed by the change made in 1890, when the railroad laws were codified. *Peckham v. Dutchess County R.*

Co., 47 N. Y. S. R. 182, 20 N. Y. Supp. 39.

(6) *Pennsylvania.*—The plain object of the act of February 19, 1849, § 12, P. L. p. 79, was to compel railroad companies to give the owners of farms a convenient mode of access from one part to the other when divided by a railroad. While it may not be impossible for a farmer in gathering his crops to make a *détour* of half a mile in getting from one field to an adjoining field, it would nevertheless be intolerably inconvenient. *Dubbs v. Philadelphia & R. R. Co., 148 Pa. St. 66, 23 Atl. Rep. 883.*

(7) *Texas.*—Plaintiff conveyed a right of way to the defendant railroad company over his lands, and in the construction of the railroad it crossed a private road that he had constructed across the land, and was so elevated as to make the crossing impassable. The company constructed a crossing at another point, but which seemed to be inconvenient, and constructed at such grade as to make it impracticable for loaded teams. A deed conveying the right of way made no reservation of the road. *Held*, that the statute does not require companies to construct and keep up farm crossings; that he was not entitled to the old road as a matter of right, and that he was only entitled to claim a crossing over the company's right of way, and this having been given him, if it was inconvenient or did not suit him, he could at his own expense change it to some other more convenient place. This was the extent of his right. *International & G. N. R. Co. v. Bost., 2 Tex. App. (Civ. Cas.) 334.*—QUOTING *Houston & E. T. R. Co. v. Adams, 58 Tex. 476; Houston & T. C. R. Co. v. McKinney, 55 Tex. 176.*

(8) *Canada.*—Under 14 & 15 Vict. c. 51, § 13, railway companies were required to erect and maintain fences on each side of the railway, with openings or gates or bars therein, "and" farm crossings, etc., for the use of the adjoining proprietors; but on the consolidation of this act in the Cons. St. C. c. 66, § 13, the clause was changed by requiring the company to erect and maintain fences, etc., "at" farm crossings. *Held*, that the substitution of the word *at* for the word *and* varied the liability of railway companies and imposed no duty upon the defendants, who were incorporated by 31 Vict. c. 41, to make farm crossings. *Brown v. Toronto & N. R. Co., 26 U. C. C. P. 206.*

4. Duty to construct under contract.—Where the owner of real estate conveys to a railroad company a right of way over his premises, with the proviso that the company shall construct adequate crossings over its road, it cannot, after its acceptance of the grant and the construction of its road, exonerate itself from its obligation to construct the crossings, by a condemnation of the right of way under the provisions of the statute. *Gray v. Burlington & M. R. Co.*, 37 Iowa 119.—**DISTINGUISHED IN** *Omaha & R. V. R. Co. v. Severin*, 30 Neb. 318.

In an action against a railroad company for the breach of a contract to provide the plaintiff with "a good crossing" in consideration of his conveying to it a strip of land through his farm for the construction of its road, the measure of damages is what it will reasonably cost to make a good crossing at the point named in the contract, and such damages as may have directly resulted up to the time of trial from the inconvenience of not having the crossing. *Cincinnati Southern R. Co. v. Hudson*, 88 Ky. 480, 11 S. W. Rep. 509.—**REVIEWING** *Lawton v. Fitchburg R. Co.*, 8 Cush. (Mass.) 230; *Taylor v. North Pac. Coast R. Co.*, 56 Cal. 317.

The fact that the plaintiff has parted with the fee in his land, without reserving the right to prosecute this suit, and now has only a life estate, presents no defense to the action. The right of action did not pass to the plaintiff's alienee any more than it would have done if the promise had been to pay money, the construction of the crossing being a part of the consideration for the conveyance to the company. *Cincinnati Southern R. Co. v. Hudson*, 88 Ky. 480, 11 S. W. Rep. 509.

A separate agreement at the time a landowner conveys a right of way to a company, made in part consideration of the conveyance, that the company would construct certain farm crossings and cattle-guards on the premises, is not a covenant running with the land, and does not bind a lessee of the road, although it leases with notice of the agreement. *Cook v. Milwaukee & St. P. R. Co.*, 36 Wis. 45.

A person who has made a special agreement for crossing over a railway, but allows such agreement to fall through, cannot afterwards set up general rights to have other crossings made, under the railways acts. *Darnley v. London, C. & D. R. Co., L.*

R. 2 H. L. Cas. 43, 36 L. J. Ch. 404, 15 W. R. 817, 16 L. T. 217.

The owner of land conveyed a right of way over his land to defendants in 1869, and the deed contained the following stipulation: "The company to make and maintain a farm crossing, with gates at the present farm lanes, the fence at crossing to be returned as much as possible." The company's engineer treated for the conveyance, but had no power to agree for a second crossing, though it was said he had promised if he should find a second crossing necessary he would, so far as in him lay, get it done, and the deed was executed upon this understanding. *Held*, that defendants could not be compelled to make a second crossing for use in winter; and that upon the construction of the words above set forth they were bound to continue the crossing, not close it up or impair it or alter its character as a farm crossing, but were not obliged to keep it free from snow. *Cameron v. Wellington, G. & B. R. Co.*, 28 Grant's Ch. (U. C.) 327; *reversing* 27 Grant's Ch. 95.

A railway purchased a right of way through C.'s farm, paying \$662 in money and agreeing to make and maintain at its own expense five farm crossings, two of them to be under crossings. C. wished the agreement put into writing, but the agent of the company assured him that the law would compel the company to maintain the crossings as agreed, and having received advice to the same effect from a lawyer, C. signed the deed. The company some years afterwards decided to fill up that portion of the road on which were the under crossings used by C., who thereupon brought suit for damages for an injunction. *Held* (Ritchie, C.J., dissenting), that the evidence showed that the plaintiff relied upon the law to secure for him the crossings to which he considered himself entitled, and not upon any contract with the company, and he could not, therefore, compel the company to provide an under crossing through the solid embankment formed by the filling up of the road, the cost of which would be altogether disproportionate to his own estimate of its value and of the value of the farm; but that the company was bound to provide such farm crossings as might be necessary for the beneficial enjoyment by C. of his farm, the nature, location, and number of said crossings to be determined on a

reference to a master. *Canada Southern R. Co. v. Clouse*, 35 Am. & Eng. R. Cas. 296, 13 Can. Sup. Ct. 139; *reversing* 11 Ont. App. 287; *varying* 4 Ont. 28.

In negotiating for the sale of lands taken by the Canada Southern railway for the purposes of their railway, the agent of the company signed a written agreement with the owner of the land, which contained a clause to the effect that such owner should "have liberty to remove for his own use all buildings on the said right of way, and that in the event of there being constructed on the same lot a trestle bridge of sufficient height to allow the passage of cattle the company will so construct their fence on each side thereof as not to impede the passage thereunder." *Held*, that under this agreement the only obligation on the company was to maintain a cattle-pass so long as the trestle bridge was in existence, and it did not prevent them from discontinuing the use of such bridge and substituting a solid embankment therefor without providing a pass under such embankment. *Canada Southern R. Co. v. Erwin*, 35 Am. & Eng. R. Cas. 311, 13 Can. Sup. Ct. 162; *reversing* 11 Ont. App. 306.

5. Construction by farm owner.—To authorize a landowner to make a farm crossing, the necessities of the farm must require a crossing at that particular place, and its use must not interfere with the paramount use of the railroad company. *Chicago, K. & W. R. Co. v. Cosper*, 42 Kan. 561, 22 Pac. Rep. 634.—**FOLLOWING** Kansas City & E. R. Co. v. Kregelo, 32 Kan. 608.

Where the erection of a proposed farm crossing will directly affect the operation of the road by seriously tending to increase the danger of collisions, this will be a sufficient reason why such crossing should not be made; and if attempted to be made by the landowner, he may be restrained from doing so by injunction. *Chalcraft v. Louisville, E. & St. L. R. Co.*, 113 Ill. 86.

It being the duty of a company to construct farm crossings when and where necessary for the use of landowners whose lands are divided by its track, it will not be allowed to enjoin the owner from making such crossing, on its neglect to make the same on notice, on the ground that the proposed crossing may be dangerous, when it has not offered to make one at some other place, and without proof that a crossing at the place proposed would be more dangerous

than elsewhere. *Illinois C. R. Co. v. Willenborg*, 26 Am. & Eng. R. Cas. 358, 117 Ill. 203, 7 N. E. Rep. 698, 57 Am. Rep. 862.

A notice requiring a railroad company to erect suitable wagon ways or farm crossings must specify what ways and how many are needed, in order to enable the landowner to recover the cost of erecting them after the company failed, upon notice, to erect them. *Green v. Morris & E. R. Co.*, 24 N. J. L. 486.

The owner of inclosed land who grants to a railway company a right of way through his inclosure reserves a right to such ways over the track as are reasonably necessary to the use of his property; but if his conveyance is absolute, in the absence of an existing statute making it the duty of the company to construct the crossings, he must put them in at his own expense. *Gulf, C. & S. F. R. Co. v. Ellis*, 35 Am. & Eng. R. Cas. 292, 70 Tex. 307, 7 S. W. Rep. 722.—**FOLLOWING** Gulf, C. & S. F. R. Co. v. Rowland, 70 Tex. 298.

A provision in a railroad charter giving landowners the right to cross the railroad track, is not a vested right, so that it cannot be repealed or regulated by subsequent general legislation. *Connecticut & P. R. R. Co. v. Holton*, 32 Vt. 43.

6. Where located.—The right of choice to say where a farm crossing shall be located is in the landowner; but he must exercise the right reasonably, with reference to his own convenience in pursuing his farming operations, and not capriciously and wantonly, to annoy the corporation and cause it unnecessary trouble and expense. *Wheeler v. Rochester & S. R. Co.*, 12 Barb. (N. Y.) 227.—**CRITICISED** in *Wademan v. Albany & S. R. Co.*, 51 N. Y. 568.—*Van Vrankin v. Wisconsin, I. & N. R. Co.*, 68 Iowa 576, 27 N. W. Rep. 761.

A provision in a charter making it the duty of the company "where the said road shall intersect any farms or lands of any individual, to provide and keep in repair suitable wagon ways over or under said road, so that he may pass the same," means that a suitable wagon way shall be provided by the company in cases where the road crosses the lands, not at a point where the road merely intersects the lands. *Ellsworth v. Central R. Co.*, 34 N. J. L. 93.

Under the provisions of the N. Y. General Railroad Act of 1850, the corporation may determine the location of the cross-

ings; but the interest of neither party alone is to be considered, but they must be suitable and convenient, looking to all the circumstances. *Wadman v. Albany & S. R. Co.*, 51 N. Y. 368, 4 Am. Ry. Rep. 259. — CRITICISING *Wheeler v. Rochester & S. R. Co.*, 12 Barb. (N. Y.) 227. — DISTINGUISHED IN *Vezina v. Queen*, 17 Can. Sup. Ct. 1.

Where a landowner brings an action to compel a company to construct a suitable farm crossing, and for damages, and the trial court finds that the crossing that the company has built is inconvenient, and that the proper place for a crossing is where plaintiff desires it, it is proper to refuse to direct a new crossing, and to award damages, though in a sum less than the cost of a new crossing. *Wademan v. Albany & S. R. Co.*, 51 N. Y. 568, 4 Am. Ry. Rep. 259. — APPROVING *Clarke v. Rochester, L. & N. F. R. Co.*, 18 Barb. (N. Y.) 350.

Under Vt. Comp. St. ch. 26, § 43, relating to farm crossings, neither the company nor the landowner has a right to determine, without the consent of the other, the number, character, or location of the crossings. *Connecticut & P. R. R. Co. v. Holton*, 32 Vt. 43.

Neither has the landowner a right to build a crossing at any other place than that fixed by the commissioners, nor to cross the track, except at established crossings. *Connecticut & P. R. R. Co. v. Holton*, 32 Vt. 43.

The embankment of a railway intersected a private road used by plaintiff between different portions of his farm, and the company had made a crossing so as to give plaintiff access to that part of his land cut off by their line, but plaintiff required that the crossing should be made in continuation of the old road directly across the railway track, which would have involved great expense and engineering difficulties. *Held*: (1) that plaintiff had not the right to prescribe the place where the farm crossing should be made; (2) that it was the duty of the company without delay to make the necessary crossing at the most fitting place; (3) that the owner of the land might maintain an action either for not affording him a crossing at all, or for forming an insufficient one, or for unreasonable delay in making it. *Burke v. Grand Trunk R. Co.*, 6 U. C. C. P. 484. — APPROVING *York & N. M. R. Co. v. Queen*, 1 El. & Bl. 865.

7. Sufficiency. — The "causeway or other adequate means of crossing," which railroad corporations are required to make and keep in repair, when any person owns land on both sides of any railroad, and when requested so to do, is an adequate means of crossing such railroad track and right of way by such owner on foot or horseback, with wagon or carriage, or with domestic animals under his control, but is not required to be adequate to the free passage of unherded cattle or other domestic animals wandering unrestrained from one side of the railroad to the other. *Omaha & R. V. R. Co. v. Severin*, 45 Am. & Eng. R. Cas. 122, 30 Neb. 318, 46 N. W. Rep. 842.

Where a railroad running through premises separates the house of the owner from the highway, a crossing thereto through heavy gates which are not placed on hinges, but must be slid back and carried around, is not, under the circumstances, an adequate crossing. *Gray v. Burlington & M. R. Co.*, 37 Iowa 119.

A requirement that a company shall erect suitable bridges across its railroad where crossed by roads, does not require it to erect a bridge at a farm crossing. *Green v. Morris & E. R. Co.*, 24 N. J. L. 486.

8. Under-grade crossings. — Where a landowner is entitled to a crossing, the court may direct the company to construct a crossing under its track, where a surface crossing is not practicable. *Jones v. Seligman*, 3 Am. & Eng. R. Cas. 236, 81 N. Y. 190; *affirming* 16 Hun 230.

Where the only convenient means of passing from one part of land to the other is along a depression, and a railroad is constructed across the land in a cut, except at the depression, where a fill is made some twelve feet high, and it appears that no practicable grade crossing can be constructed at any other point, the company will be required to construct an under-grade crossing at the place of depression. *Beardsley v. Lehigh Valley R. Co.*, 48 N. Y. S. R. 485, 65 Hun 502, 20 N. Y. Supp. 458.

Where a company is bound to furnish the plaintiff with crossings over its railroad, if a change of grade is made in the railroad, the company is not liable for the expense of raising the approaches to the crossing, rendered necessary by the change in the railroad grade. *Williams v. Clark*, 24 Am. & Eng. R. Cas. 460, 140 Mass. 238, 5 N. E. Rep. 802.

9. Enforcement of the obligation.

—The remedy of a landowner whose land is divided by a railroad track, for a refusal or neglect of the company to construct him a suitable farm crossing, whether the duty to make it arises out of a contract or under the statute, is full, complete, and adequate at law. Therefore a court of equity has no jurisdiction to enforce performance of the duty. *Illinois C. R. Co. v. Willenborg*, 26 *Am. & Eng. R. Cas.* 358, 117 *Ill.* 203, 7 *N. E. Rep.* 698, 57 *Am. Rep.* 862.

Where a party granted a right of way over his land to a railway company, taking back an agreement in writing to perpetually maintain certain openings under the road as passageways for stock, and a successor of the company, through a judicial sale, was about to close such passageways—held, that a court of equity had jurisdiction to protect the landowner in the enjoyment of his rights under his contract, by enjoining the closing up of such openings or passageways. *Rock Island & P. R. Co. v. Dimick*, 144 *Ill.* 628, 32 *N. E. Rep.* 291.

Where a conveyance of the right of way stipulates that the grantor is to have two crossings over the railroad, if he requests them, and he accordingly serves notice on the company that he requires such crossings, he will not be denied relief because he undertook to dictate the locality and kind of crossings, or because he asked more than in this respect he was entitled to. *Gray v. Burlington & M. R. Co.*, 37 *Iowa* 119.—DISTINGUISHED IN *Tyson v. Keokuk & D. M. R. Co.*, 43 *Iowa* 207.

A party petitioning to compel a company to provide an open crossing to connect the parts of a pasture through which the road runs, should at least show that he has no other adequate means of crossing. In the absence of the entire evidence, the finding of the court below will not be disturbed, that the gates provided by the company were adequate, and that the only objection to such gates was the trouble of opening and closing them. *Curtis v. Chicago, M. & St. P. R. Co.*, 13 *Am. & Eng. R. Cas.* 593, 62 *Iowa* 418, 17 *N. W. Rep.* 591.

Where a right of way is acquired across a village lot, and the road is so constructed as to cut off access from one part to the other, and it appears that a crossing would cost more than one side of the lot, and there is nothing to show that the use of the lot renders a crossing necessary, the court

will not direct a crossing, but will leave the lot owner to his remedy for damages. *Clarke v. Rochester, L. & N. F. R. Co.*, 18 *Barb. (N. Y.)* 350.

Where a railroad has been taken possession of under a mortgage, by trustees for bondholders, and is being operated by them, and where, by the mortgage, power is given them to make repairs and additions to the road, they may be held for a performance of the duties imposed by said provision. *Jones v. Seligman*, 3 *Am. & Eng. R. Cas.* 236, 81 *N. Y.* 190; affirming 16 *Hun* 230.—FOLLOWED IN *Buffalo S. & C. Co. v. Delaware, L. & W. R. Co.*, 130 *N. Y.* 152. QUOTED IN *Omaha & R. V. R. Co. v. Severin*, 30 *Neb.* 318. REVIEWED IN *Chicago & A. R. Co. v. Kansas City, I. & P. R. Co.*, 110 *Mo.* 510.

The award and payment of damages in proceedings to condemn land taken for the road does not preclude the former owner from maintaining an action to compel the corporation to fulfil the duty imposed upon it as to crossings. *Jones v. Seligman*, 3 *Am. & Eng. R. Cas.* 236, 81 *N. Y.* 190; affirming 16 *Hun* 230.—FOLLOWING *Smith v. New York & O. M. R. Co.*, 63 *N. Y.* 58.

A company in the discharge of its duty of providing farm crossings is not vested with any absolute discretion as to the number or character of the crossings. The power must be exercised in a proper manner, having due regard to the necessities and the convenience of the owner of the land, who may maintain an action to compel the corporation to erect necessary and suitable crossings; or where crossings have been made which are insufficient, to construct additional ones; and in such an action the question as to the propriety of additional crossings is one of fact for the court. *Jones v. Seligman*, 3 *Am. & Eng. R. Cas.* 236, 81 *N. Y.* 190; affirming 16 *Hun* 230.

Wisconsin Rev. St. § 1810, as amended by ch. 193, Laws of 1881, makes it the absolute duty of railroad companies to make suitable and convenient farm crossings for the use of occupants of adjoining lands; and they can be compelled by mandamus to make such crossings, unless they can show a valid excuse for not doing so. *State ex rel. v. Chicago, M. & N. R. Co.*, 49 *Am. & Eng. R. Cas.* 304, 79 *Wis.* 259, 48 *N. W. Rep.* 243.

The provision of section 1813, imposing a penalty for neglecting to make the proper crossings, and giving the occupants of a farm

the right to recover the same from the railroad company, does not furnish an adequate remedy, since it will not secure the construction of the necessary crossings, and therefore it does not deprive the occupant of the remedy by writ of mandamus. *State ex rel. v. Chicago, M. & N. R. Co.*, 49 Am. & Eng. R. Cas. 304, 79 Wis. 259, 48 N. W. Rep. 243.

A covenant to erect and build across the line of a railway a crossing for the use of plaintiff is not such a covenant as to enable plaintiff to maintain several successive actions for breach thereof, the breach being entire and perfect in the first instance, and a recovery for such breach being a bar to a future action. *Smith v. Great Western R. Co.*, 6 U. C. C. P. 151.

Defendant's track crossed plaintiff's farm between his house and the highway. Plaintiff constructed a lane from his house to the highway, being open at the end where it met the latter, and requested defendant to make an open crossing at the point where the lane intersected the track, which was refused. In mandamus to compel the construction of such crossing—*held*: (1) that an open crossing is within the contemplation of Iowa Code, § 1268, and may be required under its provision when, as in this case, it is the only "adequate means" of crossing which can be afforded a landowner; (2) that in such case the duty to construct a crossing of that character is imposed by the statute, and its performance may be compelled by mandamus; (3) that the point designated by the landowner is *prima facie* the most convenient for him, and will be deemed a reasonable place unless rendered unreasonable by difficulty of construction, or some other fact. *Boggs v. Chicago, B. & Q. R. Co.*, 54 Iowa 435, 6 N. W. Rep. 744.—DISTINGUISHED IN *Omaha & R. V. R. Co. v. Severin*, 30 Neb. 318.

10. Changing, removing, or closing crossings.—If a company removes a farm crossing after it has been put in, thereby causing inconvenience to the landowner, he may maintain a common law action, based on the statutory duty of the company, for damages; but the burden is on the landowner to show the amount of damage. *Ohio & M. R. Co. v. McGehee*, 47 Ill. App. 348.—DISTINGUISHING *Peoria, D. & E. R. Co. v. Schiller*, 12 Ill. App. 443.

In an action for removal of a farm crossing it is the duty of the landowner to till

and harvest growing crops in the usual way, and the measure of damages against the company is the increased cost or inconvenience of not having the crossing. *Ohio & M. R. Co. v. McGehee*, 47 Ill. App. 348.

A company which acquires its title through a deed from a landowner, which expressly reserves a right of way to the landowner through the land, is estopped from closing the right of way reserved. *Lakenan v. Hannibal & St. J. R. Co.*, 36 Mo. App. 363.

A purchaser of a railroad and right of way, seeing the manner in which land was fenced and the use of openings by the owner of the adjacent lands, who had deeded the right of way to the original owner of the railroad, and seeing that such passageways were not fenced up by the railroad company, but left open for the free and uninterrupted use of such adjacent owner, as the only means of communication between his fields, would be put upon inquiry as to the right and title by and under which they were so used; and though the size and location of the passageways were not stated in the original contract, the owner of the farm would be entitled to an injunction to restrain said purchaser from closing up either of the said passageways. *Rock Island & P. R. Co. v. Dimick*, 55 Am. & Eng. R. Cas. 65, 144 Ill. 628, 32 N. E. Rep. 291.

A company having maintained a railway crossing across its tracks through a farm, its subsequent purchase of that portion of the farm lying on one side of its tracks, subject to the existing private way from said crossing, across said land, to the county road, cannot close said crossing so as to obstruct the entrance to said private way. *Lakeran v. Hannibal & St. J. R. Co.*, 36 Mo. App. 363.

Whether or not railroad companies are bound to furnish suitable railroad crossings over their roads, between the different parts of the owner's land intersected by the road, *quære*. But if they do provide them, they become the property of the landowner, and cannot be removed by the corporation, except when it becomes necessary to do so for the improvement of the road. And when they are so made by the company the jury, in assessing land damages, should not allow the expense of making crossings to the landowner. *March v. Portsmouth & C. R. Co.*, 19 N. H. 372.—REVIEWED IN

Keefe v. Sullivan County R. Co., 23 Am. & Eng. R. Cas. 301, 63 N. H. 271.

A company and a landowner settled a dispute about damages, by the company agreeing orally to erect, and erecting, a fence of a certain description and a farm crossing. Subsequently the road was sold at foreclosure proceedings to which the landowner was not a party, and defendant company became the purchaser. *Held*, that it could not remove the fence and an additional crossing, though they were not such as it was obliged to maintain. *Hunter v. Burlington, C. R. & N. R. Co.*, 76 Iowa 490, 41 N. W. Rep. 305.

Defendant's railroad was located through plaintiff's farm. Defendant constructed a crossing for plaintiff over its tracks, but afterwards removed it, claiming that plaintiff had access by a public road. The route by way of this public highway required him to make a *détour* of about half a mile to pass from one portion of his farm to the other, while the crossing which the company constructed and afterwards removed gave him convenient access. *Held*, that the provisions of the act (Pa. P. L. p. 79, § 12) were applicable in this case, and that the plaintiff could recover damages for the removal of the crossing. *Dubbs v. Philadelphia & R. Co.*, 148 Pa. St. 66, 23 Atl. Rep. 883.

11. Duty to keep in repair.—A company which fails to remove a farm crossing constructed for an adjoining landowner under an agreement binding only on the contracting parties, after its termination, and continues it as a crossing, is obligated to use ordinary care to see that the crossing is not dangerous, while so continued, to those who accept the invitation to use it for the purposes for which it is maintained. *Stewart v. Cincinnati, W. & M. R. Co.*, 49 Am. & Eng. R. Cas. 456, 89 Mich. 315, 50 N. W. Rep. 852.

Where a railroad owes no duty to one to keep a private crossing in repair, he cannot recover for an injury sustained by his wagon thereon, caused by the crossing being out of repair. *Mann v. Chicago, R. I. & P. R. Co.*, 86 Mo. 347.

Where a farm crossing is necessary and has been maintained for nearly fifty years, the company is liable to one injured while attempting to drive across it by reason of its bad condition. *Prince v. New York C. & H. R. R. Co.*, 38 N. Y. S. R. 793, 60 Hun 581, *mem.*, 14 N. Y. Supp. 817.

Where a company enters into an agreement to maintain two crossings on a farm, its obligation to keep them both in proper condition is the same as in the case of the single crossing as required by the statute. *Grasse v. Milwaukee, L. S. & W. R. Co.*, 36 Wis. 582.

A gate constructed by a company at a crossing having got out of repair, the adjoining proprietor, without giving notice to the company, took measures to secure it, which proved ineffectual; his cattle escaped through it and were killed. *Held*, that whether the mode adopted was reasonably judicious, and whether the plaintiff was culpably negligent in not taking away and securing his cattle when he had reason to suppose there was danger of their getting on the track, or in having failed to give notice to the company of the defect, were questions of fact properly submitted to the jury. *Poler v. New York C. R. Co.*, 16 N. Y. 476.

12. Signals—Speed.—While the failure of those in charge of a railroad train to give signal of its approach to a private crossing is not generally regarded as negligence, yet where a signal which it is the duty of the company to give, and which is usually given at a public crossing, may be heard at a private crossing near by, those entitled to use the private crossing have the right to rely upon the signal being given, and the failure to give it is negligence as to them as well as to persons traveling on the public highway. *Cahill v. Cincinnati, N. O. & T. P. R. Co.*, 49 Am. & Eng. R. Cas. 390, 92 Ky. 345, 18 S. W. Rep. 2.

Whether a railroad company is under an obligation to signal the approach of trains at a farm crossing, when used by the employees of an ice company in prosecuting its business, the court expresses no opinion. *Chase v. Maine C. R. Co.*, 78 Me. 346, 5 Atl. Rep. 771.

The failure to ring the bell or blow the whistle of a locomotive at a private crossing in the open country, guarded by gates on either side, where there was no station for passengers or for freight, nor any side track, and where no trains ever stopped; where for more than twenty years no whistle had ever been sounded, nor whistling-post put up, nor any request therefor made by the owners of the property entitled to use the crossing; and where the line of the railroad on either side was nearly straight—

is not evidence to go the jury of culpable negligence on the part of a railroad company. (Alvey, C.J., dissenting.) *Philadelphia, W. & B. R. Co. v. Fronk*, 32 *Am. & Eng. R. Cas.* 31, 67 *Md.* 339, 9 *Cent. Rep.* 64, 10 *Atl. Rep.* 204, 307.—DISTINGUISHING *Berry v. New York C. & H. R. R. Co.*, 92 *N. Y.* 289; *Dublin, W. & W. R. Co. v. Slatery*, L. R. 3 *App. Cas.* 1155; *Northern C. R. Co. v. State*, 54 *Md.* 115. QUOTING *Metropolitan R. Co. v. Jackson*, L. R. 3 *App. Cas.* 197.

Failure to give signals of the approach of a train to a farm crossing is not negligence, although the crossing is situated upon a curve, is hidden from view until within thirty yards, and the train is running at the rate of fifteen miles an hour and is not upon schedule time. *Annapolis & B. S. L. R. Co. v. Pumphrey*, 42 *Am. & Eng. R. Cas.* 590, 72 *Md.* 82, 19 *Atl. Rep.* 8.

If the owner of property has been accustomed to allow to others a permissive use of it, such as tends to produce a confident belief that the use will not be objected to, and therefore to act on the belief accordingly, he must be held to exercise his rights in view of the circumstances so as to not mislead others to their injury without a proper warning of his intention to recall the permission. In such a case, when the user by the public of a path crossing a railway track might not constitute it such a crossing as to impose on the company the statutory duty to signal the approach of its train, yet the failure to do so might, according to the facts of the case, constitute negligence. *Houston & T. C. R. Co. v. Booser*, 34 *Am. & Eng. R. Cas.* 63, 70 *Tex.* 530, 8 *S. W. Rep.* 119.

13. Gates, bars, etc.—Railroad companies are only required to use reasonable care and diligence to keep gates closed at farm crossings. *Peoria, D. & E. R. Co. v. Babbs*, 23 *Ill. App.* 454.

They are not responsible for any injury sustained by a third party, which is occasioned by the negligence of him for whose benefit the crossing is provided. *Henderson v. Chicago, R. I. & P. R. Co.*, 39 *Iowa* 220. *Henderson v. Chicago, R. I. & P. R. Co.*, 43 *Iowa* 620, 14 *Am. Ry. Rep.* 484.

The company is not required to patrol the line of its road to see if gates at farm crossings are left open; nor to keep a guard upon it sufficient to discover and counteract danger from their being open, immedi-

ately; nor can it be charged with negligence unless it has had a reasonable time to discover the fact, or had been notified and has failed to act in proper time. *Chicago, B. & Q. R. Co. v. Sierer*, 13 *Ill. App.* 261.

Where a company has erected bars or gates at crossings in pursuance of the statute, the landowners are bound to keep them shut when not open for use in crossing the track. *Diamond Brick Co. v. New York C. & H. R. R. Co.*, 28 *N. Y. S. R.* 95, 7 *N. Y. Supp.* 868, 5 *Silv. Sup. Ct.* 321, 55 *Hun* 605, *mem.*—DISTINGUISHING *Shepard v. Buffalo, N. Y. & E. R. Co.*, 35 *N. Y.* 641. REVIEWING *Spinner v. New York C. & H. R. R. Co.*, 67 *N. Y.* 153.—*Pennsylvania Co. v. Spaulding*, 35 *Am. & Eng. R. Cas.* 184, 112 *Ind.* 47, 13 *N. E. Rep.* 268.—REFERRING TO *Hunt v. Lake Shore & M. S. R. Co.*, 112 *Ind.* 69.

Where a company is required by statute to erect and maintain along its right of way suitable fences with bars or gates at farm crossings and cattle-guards, which it has done, it is not liable if a casual breach occurs or a defect therein appears by reason of which stock is injured. *Chicago, B. & Q. R. Co. v. Sierer*, 13 *Ill. App.* 261.

Where the issue is as to the sufficiency of a gate at a farm crossing, it is not error to permit the landowner to testify that "anything that would touch it would throw it down," or another witness to testify that "most any animal would throw it down." Such evidence is not mere expressions of opinion. *Chicago & A. R. Co. v. O'Brien*, 34 *Ill. App.* 155.—DISTINGUISHING *Illinois C. R. Co. v. McKee*, 43 *Ill.* 119.

Persons for whose convenience railroad companies maintain gates at private crossings assume the risk of increased danger to their property resulting from having gates instead of fences. *Evansville & T. H. R. Co. v. Mosier*, 114 *Ind.* 447, 14 *West. Rep.* 299, 17 *N. E. Rep.* 109.

It cannot be implied that the company was under obligation to keep gates, used exclusively by the landowners, closed. *Evansville & T. H. R. Co. v. Mosier*, 114 *Ind.* 447, 14 *West. Rep.* 299, 17 *N. E. Rep.* 109.

The fact that bars at a private crossing which a company is required to maintain, were left down by the landowner, does not discharge the company from liability for injuries resulting, if it has not used due care to keep them closed. *Bartlett v. Dubuque & S. C. R. Co.*, 20 *Iowa* 188.—DISTINGUISH-

ING Great Western R. Co. v. Helm, 27 Ill. 198; Alger v. Mississippi & M. R. Co., 10 Iowa 268; Indianapolis, P. & C. R. Co. v. Shimer, 17 Ind. 295; Terre Haute & W. R. Co. v. Fowler, 22 Ind. 316; Indianapolis & C. R. Co. v. Adkins, 23 Ind. 342.

The conduct of a landowner through whose property a railroad passes, in forcibly opening the gates at the crossing which has been closed by the company, sufficiently indicates his requirement that the company should comply with the provisions of Iowa Rev. § 1329. *Henderson v. Chicago, R. I. & P. R. Co.*, 43 Iowa 620, 14 Am. Ry. Rep. 484.

It is the duty of a company to close a gate in its fence upon learning that it is open, whether it was left open by the company's employes or by others. *Wait v. Burlington, C. R. & N. R. Co.*, 35 Am. & Eng. R. Cas. 194, 74 Iowa 207, 37 N. W. Rep. 159.

The provision in section 4, ch. 98, Minn. Gen. Laws 1877, that railroad companies may furnish landowners with locks for gates at farm crossings, is permissive and not mandatory; and in case no such locks are furnished, the question of the negligence of the corporation in any particular case, as respects the opening or closing of such gates, or their being securely fastened, is open for investigation, and is not affected by the statutory provision referred to. *Sather v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 283, 40 Minn. 91, 41 N. W. Rep. 458.

A company is bound to build and keep in repair fences along the sides of its track, with gates or bars for the use of adjoining owners at farm crossings; and such gates or bars are a part of the fence which the company is bound to maintain and keep in repair. *Hungerford v. Syracuse, B. & N. Y. R. Co.*, 46 Hun 339, 12 N. Y. S. R. 204.—REVIEWED IN *Becker v. New York, L. E. & W. R. Co.*, 31 N. Y. S. R. 750, 57 Hun 585, 10 N. Y. Supp. 413.

The statutory duty to keep them in repair necessarily includes the duty to keep them safely and securely closed. *Woods v. Missouri, K. & T. R. Co.*, 51 Mo. App. 500.

But before a landowner can recover for injury to his live stock by reason of such bars being down, he must show either that the company had actual notice that they were down, or that they had been down for such a length of time that the company

might be presumed to have had notice. *Hungerford v. Syracuse, B. & N. Y. R. Co.*, 46 Hun 339, 12 N. Y. S. R. 204.—APPLYING *Spinner v. New York C. & H. R. R. Co.*, 67 N. Y. 153.—APPLIED IN *McGuire v. Ogdensburg & L. C. R. Co.*, 44 N. Y. S. R. 348, 63 Hun 632, 18 N. Y. Supp. 313.

Where a company has built for a landowner a gate, in accordance with the statute, it cannot afterward control the use of the gate; and as between it and the landowner, the company is not chargeable with negligence in failing to close the gate, even after notice to its officers that it is open. *Diamond Brick Co. v. New York C. & H. R. R. Co.*, 58 Hun 396, 34 N. Y. S. R. 637, 12 N. Y. Supp. 22.

Where a farm crossing is constructed over the railroad for the benefit of an adjacent landowner, it is the duty of the corporation, under the statute, to guard it by a continuous fence, and to erect suitable bars or gates, in order to give convenient access to it; and if injury arise through the want of such bars or gates, the corporation will be liable, unless some facts exist by which they are relieved from the responsibility. *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116.

If the landowner refused to have bars placed at such crossing, and forbade the corporation to make them, when they offered to do so, or were in the act of erecting them, this, as against such landowner, would operate as a legal excuse for the omission to build the fence, even if an express agreement had been made by the parties for the erection of gates instead of bars. For the non-performance of the agreement, and the refusal to erect gates, as stipulated, the remedy of the party would be only by action on the contract for damages, and the effect of the refusal to have bars erected would be to replace upon the landowner the obligation which rested upon him at common law, to keep his cattle on his own premises, and from the premises and railway of the corporation. *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116.

If a railway company knows that a gate erected under section 8 of the Railways Clauses Act 1845 is out of repair by reason of a spring catch being ineffective, there is evidence of negligence for the jury, although the gate was provided with other fastenings. *Brooks v. London & N. W. R. Co.*, 33 W. R. 167.

Defendants are bound, under the provisions of 46 Vict. (D), c. 24, § 16, to make and maintain at farm crossings gates with proper fastenings; and the construction of slide gates (*des barrières à coulisse*), which are merely supported and held in position by their own weight, is not a compliance with the statute. *Vernon v. Grand Trunk R. Co.*, 2 *Montr. Super.* 181.

By a contract between plaintiff's grantor and the defendant, a railroad company, the latter was to furnish the former, his heirs and assigns, with two convenient crossings over its railroad, one of which was to be a crossing at grade. The place for the crossing was designated by plaintiff's grantor, and the crossing was built, and was unobstructed by gates or bars for many years. The contract did not in terms provide that the crossing should be unobstructed by gates and bars, but merely that it should be convenient. *Held*, that the defendant was bound to keep the crossing unobstructed and free from gates or bars. *Williams v. Clark*, 24 *Am. & Eng. R. Cas.* 460, 140 *Mass.* 238, 5 *N. E. Rep.* 802.

14. Liability for failure to construct or repair.*—A railroad company is not liable for a failure to keep in repair a private way over its track, constructed for its own use, but by license used by other persons. In such case a plaintiff must allege and prove some act of misfeasance on the part of the company. *Ferguson v. Virginia & T. R. Co.*, 13 *Nev.* 184. — **DISTINGUISHING** *Sweeny v. Old Colony & N. R. Co.*, 10 *Allen (Mass.)* 368.

Where a landowner refuses to have gates or bars erected at a railroad crossing, as the statute provides, agreeing to maintain them himself, neither he nor those claiming under him can maintain an action against the company for a failure to erect them as required by statute. *Tombs v. Rochester & S. R. Co.*, 18 *Barb. (N. Y.)* 583.

Under the 14 & 15 Vict. c. 51, where a railway company's line severs a farm it is *prima facie* their duty to construct a farm crossing; and the fact of their having commenced the construction of such a crossing at a particular place and afterwards desisted at the request of the owner, does not prevent the owner from recovering damages as for a continuing breach. *Reist v. Grand*

Trunk R. Co., 6 *U. C. C. P.* 421.—**FOLLOWED IN** *Burke v. Grand Trunk R. Co.*, 6 *U. C. C. P.* 484.

Pursuant to an agreement made with a landowner at the time of the execution by him of a deed of right of way, the company constructed a farm crossing, with bridges over ditches it had cut on each side of its roadbed, to enable the landowner to reach his land, and after the sale of the land an employé of the new owner, while hauling wood across one of the bridges, was injured by its giving way, the sills being defective. *Held*, that the bridge was a structure built upon the railroad company's land, and, by its nature and use, was a continual invitation to those having a lawful right to cross from one side to the other to enter upon it and cross there; and as long as this invitation, thus impliedly given to such persons, continued, it was the duty of the company, independently of any contract, to see to it that the bridge was safe for the purposes implied by the invitation. *Stewart v. Cincinnati, W. & M. R. Co.*, 80 *Mich.* 166, 44 *N. W. Rep.* 1116; *further appeal* 89 *Mich.* 315, 50 *N. W. Rep.* 852.

The charter of a railroad company required them to build certain bridges and ways for farm crossings, and provided that, in case of omission of this duty, the landowner might build the bridges and recover their value. *Held*, that such remedy was merely cumulative, and did not affect the liability of the company to an action of tort. *Green v. Morris & E. R. Co.*, 20 *N. L.* 486.

The G. T. R. passed through plaintiff's farm, and where it intersected a lane running from the front to rear of the farm a cutting was rendered necessary. The plaintiff insisted on having a farm crossing made in continuation of this lane, and by means of a raised bridge; the defendants offered to make it at the place required, but not by a raised bridge; and they were proceeding to cut through the plaintiff's land on either side, to make an approach to the railway, so as to cross upon a level, when the plaintiff interfered, and prevented them from going on with the cutting. They then desisted, and did nothing more. The plaintiff sued them for not making a convenient crossing, and recovered £12 10s. *Held*, that the action was maintainable, and the verdict must stand, for defendants should

* Private crossings; liability of company at, see note, 35 *AM. & ENG. R. CAS.* 184.

oughly plain-
tersected a lane
near of the farm
necessary. The
a farm crossing
his lane, and by
the defendants
ce required, but
they were pro-
plaintiff's land
approach to the
n a level, when
prevented them
ing. They then
ore. The plain-
ing a convenient
12 108. *Held*,
tainable, and the
endants should

To an action on a special agreement for not maintaining proper crossings for the plaintiff, whose land had been separated by the railway, and for not keeping up the cattle-guards and fences connected with such crossings, defendants pleaded that the agreement was executed by them for the benefit of plaintiff, his executors, administrators, and assigns—for the time being the occupants of said land—and that during the whole continuance of the grievances complained of, one J. T. and others were possessed to their own use, and to the exclusion of the plaintiff, of said land on each side of the railway, for divers terms of years, under leases executed by the plaintiff be-

Proceedings in, after removal of cause, see
REMOVAL OF CAUSES, 55.

Proceedings in, under interstate commerce law, see INTERSTATE COMMERCE, 156-163.

Review of town bonding proceedings by mandamus in, see MUNICIPAL AND LOCAL AID, 439.

Right of personal representatives to sue in, see DEATH BY WRONGFUL ACT, 97.

Rule as to imputed negligence in, see IMPUTED NEGLIGENCE, 24.

Service of process of, on foreign corporation, see PROCESS, 17.

I. IN GENERAL.....	628
II. THE SUPREME COURT.....	638

I. IN GENERAL.

1. Jurisdiction, generally.*—The question whether a state court has given due effect to a decree or judgment of a U. S. court is one arising under the U. S. constitution, and gives the federal courts jurisdiction. *Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.*, 120 U. S. 141, 7 Sup. Ct. Rep. 472.—DISTINGUISHED IN *Winona & St. P. R. Co. v. Plainview*, 143 U. S. 371, 12 Sup. Ct. Rep. 530.

It is within the province of a federal circuit court sitting in equity to inquire into the reasonableness and justice of rates prescribed by a state railroad commission; this power, however, does not authorize the court to revise or change the body of rates, but its inquiry is limited to the effect of the tariff as a whole and to its validity. *Reagan v. Farmers' L. & T. Co.*, 53 Am. & Eng. R. Cas. 670, 154 U. S. 35, 14 Sup. Ct. Rep. 1047.

Where a bill has been filed in the U. S. circuit court to foreclose a mortgage given by a railroad company, various interlocutory orders entered, a trustee appointed who had taken possession of the road, and on the faith of these orders certain bonds had been surrendered, stocks taken, and debts and liabilities incurred, that court is the proper tribunal to decide the rights and equities of the parties in interest. *Bill v. New Albany, etc., R. Co.*, 2 Biss. (U. S.) 390.

The circuit court of the United States, in the absence of express authority by act of congress, has no jurisdiction to compel a railroad company to operate its road outside of the state in which the court sits. *People ex rel. v. Colorado C. R. Co.*, 45 Am.

* Jurisdiction of federal courts, see note, 35 AM. & ENG. R. CAS. 700.

& Eng. R. Cas. 599, 42 Fed. Rep. 638.—FOLLOWING *United States ex rel. v. Union Pac. R. Co.*, 2 Dill. (U. S.) 527, 3 Dill. 515, 91 U. S. 343.

The act of congress of February 18, 1888, entitled "An act to authorize the Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory and for other purposes," and conferring jurisdiction upon the circuit and district courts of the western district of Arkansas and the northern district of Texas, in suits between such company and the Indian tribes through whose territory the road may run, is not repealed by the act of March 1, 1889, creating a federal court in the Indian Territory, nor by the subsequent act of May 2, 1890, enlarging the jurisdiction of such court. *Gowen v. Harley*, 56 Fed. Rep. 973.

A bill charging that complainant, a street railroad company, has an exclusive privilege under the authority of a city to construct and operate a street railway, and that the city has granted the right to operate a railroad to another company, which will have the effect of impairing the obligation of the contract existing between plaintiff and the city, is sufficient to give a federal court jurisdiction. *Citizens' St. R. Co. v. City R. Co.*, 56 Fed. Rep. 746.

2. Jurisdiction as dependent upon amount.—A circuit court of the United States has no jurisdiction of a bill filed by a railroad company to enjoin the collection of taxes against it, where the taxes in no one county amount to \$2000, though the aggregate amount of taxes sought to be enjoined in different counties comes to more than that sum. *Walter v. Northeastern R. Co.*, 147 U. S. 370, 13 Sup. Ct. Rep. 348.—FOLLOWED IN *Keels v. Central R. Co.*, 147 U. S. 374; *Northern Pac. R. Co. v. Walker*, 148 U. S. 391.

Under the act of congress of 1875, which makes it the duty of a federal court to dismiss any action when it appears to its satisfaction that the suit does not really and substantially involve a dispute properly within its jurisdiction, the circuit court will not entertain an action of tort for the recovery of damages for personal injuries, when it is obvious upon the pleadings that the amount of the recovery would be less than \$2000. *Maxwell v. Atchison, T. & S. F. R. Co.*, 34 Am. & Eng. R. Cas. 574, 34 Fed. Rep. 286.

Rep. 638.—
rel. *v. Union*
7, 3 Dill. 515.

January 18, 1888,
the Choctaw
to construct
gh the Indian
ases," and con-
e circuit and
ern district of
istrict of Texas,
ny and the In-
rity the road
e act of March
urt in the In-
sequent act of
urisdiction of
v. 56 *Fed. Rep.*

ainant, a street
usive privilege
y to construct
and that the
operate a rail-
hich will have
ligation of the
aintiff and the
federal court
Co. v. City R.

endent upon
of the United
a bill filed by a
ne collection of
axes in no one
ugh the aggre-
to be enjoined
to more than
stern R. Co., 147
B.—FOLLOWED
147 U. S. 374;
ulker, 148 U. S.

of 1875, which
l court to dis-
ars to its satis-
not really and
pute properly
rcuit court will
ort for the re-
sonal injuries,
pleadings that
would be less
hison, T. & S.
as. 574, 34 *Fed.*

The federal courts of the Indian Terri-
tory have jurisdiction of an action against
a railroad company for killing stock valued
at more than \$100, though no one animal
killed was worth that sum, under the act of
congress of March 1, 1889, § 6, giving such
courts jurisdiction in civil cases "when the
value of the thing in controversy, or dam-
ages or money claimed, shall amount to
\$100 or more." *Gulf, C. & S. F. R. Co. v.*
Washington, 49 *Fed. Rep.* 347, 4 U. S. *App.*
121, 1 C. C. A. 286.

3. Diverse citizenship of parties.*

—Under the Judiciary Act of 1789, § 11,
providing that the U. S. circuit courts shall
have jurisdiction of suits "between a citizen
of the state where the suit is brought, and a
citizen of another state," to give the court
jurisdiction where there are several plain-
tiffs, each must be qualified to sue. So a
circuit court has not jurisdiction of a suit
by two mortgage trustees against a railroad
company to foreclose the mortgage, where
one of the trustees is a citizen of the same
state as the railroad, though they sue for
the benefit of persons none of whom reside
in the same state as the railroad. *Susque-
hanna & W. V. R. & C. Co. v. Blatchford*,
11 *Wall. (U. S.)* 172.—QUOTED IN *Harper*
v. Norfolk & W. R. Co., 36 *Fed. Rep.* 102.

A circuit court of the United States has
jurisdiction of a suit brought by a citizen
of another state, to recover the amount due
on the bonds of a municipal corporation
of Michigan, payable to a corporation of
Michigan or bearer, or to bearer. *Chick-
aming Tp. v. Carpenter*, 106 U. S. 663, 1
Sup. Ct. Rep. 620.

A bill in equity in the circuit court of
the United States against a town in one
state by a citizen of another, for relief
against the accidental omission of seals
from bonds of defendant, payable to bearer,
and held by plaintiff, some of which are
owned by him, and others of which are
owned, in different amounts, part by citizens
of the state in which the town is, and part by
citizens of other states, and have been
transferred to him by the real owners for
the mere purpose of being sued, should be
dismissed, under the act of March 3, 1875,
ch. 137, § 5, so far as regards all bonds
held by citizens of the same state as defend-

ant, and bonds held by a citizen of another
state to a less amount than \$500, the sum
necessary to give the court jurisdiction.
Bernards Tp. v. Stebbins, 15 *Am. & Eng. R.*
Cas. 634, 109 U. S. 341, 3 *Sup. Ct. Rep.* 252.

Negotiable bonds issued by a municipal
corporation in New Jersey for stock in a rail-
road, and sold by citizens of that state to a
citizen of California, may be sued on in the
federal courts in the former state; but he
cannot unite therewith other bonds only
held for collection, which belong to citizens
of New Jersey. *New Providence v. Halsey*,
117 U. S. 336, 6 *Sup. Ct. Rep.* 764.—FOL-
LOWING *Cotton v. New Providence*, 47 N.
J. L. 401; *Mutual Life Ins. Co. v. Elize*
beth, 42 N. J. L. 235.

The jurisdiction of federal courts is con-
trolled altogether by the constitution and
laws of the United States; and the right of
a railway corporation to sue in a federal
court, so far as citizenship is concerned, is
not affected by a state statute, requiring a
foreign corporation to file with the secre-
tary of state a copy of its charter, and a
resolution authorizing service of process to
be made on some officer or agent, and
agreeing, among other things, not to re-
move any suit from a state court to a fed-
eral court. *Southern Pac. Co. v. Denton*,
146 U. S. 202, 13 *Sup. Ct. Rep.* 44.—AP-
PLIED IN *New York & N. E. R. Co. v. Hyde*,
56 *Fed. Rep.* 188. FOLLOWED IN *Frisbie v.*
Chesapeake & O. R. Co., 57 *Fed. Rep.* 1.

Whenever a citizen of a state can go
into the courts of the state to defend his
property against the illegal acts of its offi-
cers, a citizen of another state may invoke
the jurisdiction of the federal courts to
maintain a like defense. *Reagan v. Farm-
ers' L. & T. Co.*, 58 *Am. & Eng. R. Cas.*
670, 154 U. S. 362, 14 *Sup. Ct. Rep.* 1047.

Where a non-resident judgment creditor
of a railroad company files a bill in the
nature of a creditor's bill for the appoint-
ment of a receiver, and for the sale of the
company's property, which is entirely in the
district where he sues, he may bring in, as
defendants, a non-resident municipal cor-
poration which holds mortgage bonds of
the company, and the mortgage trustees.
The bringing in of such non-resident def-
endants is authorized by the act of con-
gress of March 3, 1875, § 8. *Hay v. Alex-
andria & W. R. Co.*, 4 *Hughes (U. S.)* 331.
—QUOTING *Baltimore & O. R. Co. v. Har-
ris*, 12 *Wall. (U. S.)* 81.

* Sufficiency of allegation of diverse citizen-
ship of corporations to give federal courts juris-
diction, see note, 57 *AM. & ENG. R. CAS.* 91.

A foreign corporation having a right to sue in a federal court cannot file a supplementary bill joining as a co-plaintiff another domestic corporation; and the jurisdiction will be defeated by the plaintiff conveying all or a part of its interest in the subject-matter of the suit to the domestic corporation. *Adams Exp. Co. v. Denver & R. G. R. Co.*, 4 *McCrary* (U. S.) 77, 16 *Fed. Rep.* 712.

Under the act of congress of March 3, 1887, § 1, allowing an action between citizens of different states to be brought in the district where either party resides, a plaintiff may bring suit in the district where he resides against a corporation created by the laws of another state. *Rawley v. Southern Pac. R. Co.*, 33 *Fed. Rep.* 305.

Where a railroad is chartered in two states, and a United States circuit court for one state has appointed a receiver for that state, a citizen of that state may file an ancillary bill in a federal court in the other state to extend the authority of the receiver to the whole of the road; and jurisdiction will not be defeated because the plaintiff unites as defendants certain citizens of his own state, where no relief against them is sought. *Phinney v. Augusta & K. R. Co.*, 56 *Fed. Rep.* 273.

A suit by a corporation created by the concurrent legislation of two states is a suit in which citizens of each state are joined as plaintiffs. If the defendant is a citizen of either of those states, the suit cannot be maintained in the United States courts. *Allegheny County v. Cleveland & P. R. Co.*, 51 *Pa. St.* 228.

4. Jurisdiction without regard to citizenship.—Where a U. S. circuit court has obtained possession of railroad property under an original foreclosure bill, the court will adjudicate matters arising under a cross-bill without reference to the citizenship of the parties. *Morgan's L. & T. R. & S. Co. v. Texas C. R. Co.*, 137 *U. S.* 171, 11 *Sup. Ct. Rep.* 61.—FOLLOWED IN *Carey v. Houston & T. C. R. Co.*, 52 *Fed. Rep.* 671.

Where a bill is pending in a federal court for the appointment of a receiver and for the foreclosure of a mortgage on a railroad, the court will regard a further bill filed by lien holders as an ancillary bill, and will take jurisdiction without regard to the citizenship of the parties. *Central Trust Co. v. Bridges*, 57 *Fed. Rep.* 753.

The holder of the bonds of a foreign rail-

road, which are secured by a mortgage, may file a creditor's bill in a federal court, seeking payment, and may unite as a defendant the mortgage trustee, though he is a citizen of the same state as plaintiff, where he averred that the trustee is only made a party because he asserted that no duty was imposed upon him touching the suit, and had refused to bring the suit upon request. *Barry v. Missouri, K. & T. R. Co.*, 29 *Am. & Eng. R. Cas.* 384, 27 *Fed. Rep.* 1.—FOLLOWING *Pacific R. Co. v. Ketchum*, 101 *U. S.* 289; *Arapahoe County v. Kansas Pac. R. Co.*, 4 *Dill* (U. S.) 277.

The federal courts have jurisdiction over civil actions for the violation of the Interstate Commerce Act, without regard to the diverse citizenship of the parties; and therefore such an action can be brought only in the district of which the defendant is an "inhabitant" within the meaning of the act of March 3, 1887. *Connor v. Vicksburg & M. R. Co.*, 35 *Am. & Eng. R. Cas.* 696, 36 *Fed. Rep.* 273.—QUOTING *Louisville, C. & C. R. Co. v. Letson*, 2 *How* (U. S.) 556.

An appeal was taken from a decree of a U. S. circuit court foreclosing a railroad mortgage, and the supreme court held that the circuit court had jurisdiction of the cause, and affirmed the decree. The railroad company then filed a bill to set aside the decree for fraud. *Held*, that the bill was a continuation of the former suit on the question of jurisdiction, without regard to the citizenship of the present parties. *Pacific R. Co. v. Missouri Pac. R. Co.*, 111 *U. S.* 505, 4 *Sup. Ct. Rep.* 583.—FOLLOWING *Krippeendorf v. Hyde*, 110 *U. S.* 276.

5. Defendant must be an inhabitant of district where sued.—Under the act of congress of August 13, 1888, providing that actions between citizens of different states "shall be brought only in the district of the residence of either plaintiff or defendant," a circuit court sitting in California has no jurisdiction of a suit by a corporation created under the laws of Missouri against another corporation created under the laws of Illinois, though the defendant corporation has an office in California, and is organized for the purpose of doing business there. *St. Louis R. Co. v. Pacific R. Co.*, 52 *Fed. Rep.* 770. *Southern Pac. Co. v. Denton*, 146 *U. S.* 202, 13 *Sup. Ct. Rep.* 44.

So under the act of congress of March 3, 1887, authorizing actions in federal courts

mortgage, may
al court, seek-
s a defendant
ne is a citizen
ff, where he
only made a
no duty was
the suit, and
upon request.
Co., 29 Am.
Rep. 1.—FOL-
chum, 101 U.
Kansas Pac. R.

isdiction over
of the Inter-
regard to the
es; and there-
ought only in
endant is an
ing of the act
Vicksburg &
Cas. 696, 36
uisville, C. &
J. S.) 556.

a decree of a
ing a railroad
urt held that
iction of the
e. The rail-
e to set aside
that the bill
er suit on the
out regard to
arties. *Paci-*
Co., 111 U. S.
OWING Krip-

an inhabi-
ted.—Under
13, 1888, pro-
tizens of dif-
at only in the
ther plaintiff
rt sitting in
of a suit by a
laws of Mis-
ation created
ough the de-
fice in Cali-
urpose of *vis*
R. Co. v.
o. Southern
202, 13 *Sup.*

o of March 3,
ederal courts

only in districts where the defendant is an inhabitant, a railroad corporation can only be sued in a state where it is created, though it appears that the greater part of its road is in another state, where it has its principal office, and where its elections of officers are held, and where many of them reside. *Filli v. Delaware, L. & W. R. Co.*, 37 Fed. Rep. 65.—NOT FOLLOWED IN *Riddle v. New York, L. E. & W. R. Co.*, 39 Fed. Rep. 290.

When the line of a railroad company extends into and through a federal judicial district, and it has local agents there who transact its ordinary corporate business, and it may be sued there under the laws of the state, it is an inhabitant of the district within the meaning of the provision of the act of congress of March 3, 1887, that no civil suit shall be brought before a circuit or district court against any person "in any other district than that whereof he is an inhabitant," notwithstanding the fact that it has its principal office in a neighboring district. *Zambrino v. Galveston, H. & S. A. R. Co.*, 38 Am. & Eng. R. Cas. 521, 38 Fed. Rep. 449.—FOLLOWED IN *Riddle v. New York, L. E. & W. R. Co.*, 39 Fed. Rep. 290.

6. Aliens.*—An alien resident of a state who holds land under a special law of the state may maintain a suit in the circuit court of the United States, relating to the land, against the agents of a corporation that is not itself suable in the federal court. *Bonaparte v. Camden & A. R. Co., Baldu.* (U. S.) 205.

The U. S. courts have jurisdiction in a case between citizens of the same state, if the plaintiff sues for the use of an alien. *Browne v. Strobe*, 5 *Cranch* (U. S.) 303.—DISTINGUISHED IN *Harper v. Norfolk & W. R. Co.*, 36 Fed. Rep. 102.

7. Assignees.†—A non-resident assignee of a municipal bond, payable to a railroad company or its assignees, may sue in a federal court in the state where both the municipality and the railroad corporation are created. *Porter v. Janesville*, 3 *Fed. Rep.* 617.

Municipal bonds were issued by a town in New York under seal, payable to bearer, with interest coupons, not under seal, pay-

able to bearer. A suit was brought by a citizen of Pennsylvania, the holder of some of the bonds and coupons, against the town, to recover interest on the bonds. The plaintiff obtained the bonds and coupons from a citizen of New York. *Held*, that the plaintiff was not an assignee of the bonds and coupons, within the meaning of section 1 of the act of March 3, 1875 (18 U. S. Stat. at L. 470), but was to be regarded as the direct promisee, and could sue in the U. S. courts. *Farr v. Lyons*, 21 *Blatchf.* (U. S.) 116.—DISTINGUISHING *Coe v. Cayuga Lake R. Co.*, 19 *Blatchf.* 522.

8. Corporations, generally.*—A railroad corporation created by, and transacting business in, a state, is to be deemed an inhabitant of the state, capable of being treated as a citizen, for all purposes of suing and being sued; and an averment of the facts of its creation and the place of transacting business is sufficient to give the circuit courts jurisdiction. *Louisville, C. & C. R. Co. v. Letson*, 2 *How.* (U. S.) 497.—APPROVED IN *Marshall v. Baltimore & O. R. Co.*, 16 *How.* 314. QUOTED IN *Blackburn v. Selma, M. & M. R. Co.*, 2 *Flipp.* (U. S.) 525. REVIEWED IN *State ex rel. v. Milwaukee, L. S. & W. R. Co.*, 45 *Wis.* 579.—*Marshall v. Baltimore & O. R. Co.*, 16 *How.* (U. S.) 314.—APPROVING *Louisville, C. & C. R. Co. v. Letson*, 2 *How.* 497; *Rundle v. Delaware & R. Canal Co.*, 14 *How.* 80.—FOLLOWED IN *Philadelphia, W. & B. R. Co. v. Quigley*, 21 *How.* 202; *Wheeling v. Mayor, etc., of Baltimore*, 1 *Hughes* (U. S.) 90. QUOTED IN *State ex rel. v. Milwaukee, L. S. & W. R. Co.*, 45 *Wis.* 579. RECONCILED IN *Wilmer v. Atlanta & R. A. L. R. Co.*, 2 *Woods* (U. S.) 447. REVIEWED IN *Blackburn v. Selma, M. & M. R. Co.*, 2 *Flipp.* (U. S.) 525.

A citizen of one state can sue a railroad corporation which has been created by, and transacts its business in, another state (the suit being brought in the latter state), although some of the members of the corporation are not citizens of the state in which the suit is brought, and although the state itself may be a member of the corporation. *Louisville, C. & C. R. Co. v. Letson*, 2 *How.*

* Jurisdiction of federal courts of suit by aliens against foreign corporation, see note, 57 AM. & ENG. R. CAS. 92.

† Jurisdiction of United States courts where rights of property have been assigned, see note, 13 AM. & ENG. R. CAS. 179.

* Jurisdiction of federal courts over corporations. Citizenship, see note, 35 AM. & ENG. R. CAS. 700.

Action between corporations of different states as affecting jurisdiction of federal courts, see note, 57 AM. & ENG. R. CAS. 89.

(U. S.) 497.—DISTINGUISHED IN *Davis v. Central R. & B. Co.*, 17 Ga. 323. QUOTED IN *Connor v. Vicksburg & M. R. Co.*, 35 Am. & Eng. R. Cas. 696, 36 Fed. Rep. 273.

The constitutional privilege which a citizen of one state has to sue the citizen of another state in the federal courts cannot be taken away by the erection of the latter into a corporation by the laws of the state in which they live. The corporation itself may therefore be used as such. *Marshall v. Baltimore & O. R. Co.*, 16 How. (U. S.) 314.

For the purposes of jurisdiction a suit against a railroad in its corporate name is presumed to be a suit by or against citizens of the state creating the corporation, and no evidence to the contrary is admissible. But where the jurisdiction depends on the citizenship of the individuals it cannot be affected by suing in the corporate name. *Ohio & M. R. Co. v. Wheeler*, 1 Black (U. S.) 286.—APPROVED IN *Fisk v. Chicago, R. I. & P. R. Co.*, 3 Abb. Pr. N. S. (N. Y.) 453, 53 Barb. 472. FOLLOWED IN *Pacific R. Co. v. Missouri Pac. R. Co.*, 5 McCrary (U. S.) 373; *Horne v. Boston & M. R. Co.*, 12 Am. & Eng. R. Cas. 287, 18 Fed. Rep. 50; *Baltimore & O. R. Co. v. Cary*, 28 Ohio St. 208. QUOTED IN *St. Louis, A. & T. H. R. Co. v. Indianapolis & St. L. R. Co.*, 9 Biss. (U. S.) 144.—*Muller v. Dows*, 94 U. S. 444.—FOLLOWED IN *Colglazier v. Louisville, N. A. & C. R. Co.*, 20 Am. & Eng. R. Cas. 611, 22 Fed. Rep. 568; *Loneragan v. Illinois C. R. Co.*, 55 Fed. Rep. 550. QUOTED IN *Paul v. Baltimore & O. & C. R. Co.*, 44 Fed. Rep. 513; *McFadden v. May's Landing & E. H. C. R. Co.*, 49 N. J. Eq. 176.

The circuit court takes jurisdiction where a suit is brought by a corporation, from the place where it is located, and where its corporate functions are discharged. No further allegation of citizenship is required. *New York & E. R. Co. v. Shepard*, 5 McLean (U. S.) 455.

Where a receiver of a national bank, appointed by the comptroller of the currency, has in his possession railroad bonds pledged to the bank for a debt, and has obtained from the U. S. circuit court an order, under the statute, to sell them, and a railroad corporation, a citizen of Vermont, has brought a suit in Canada, against the receiver, to recover the bonds, that court has jurisdiction of a bill filed by the receiver against the corporation, to enjoin it

from further prosecuting the suit in Canada, and will issue a preliminary injunction to that effect. Such jurisdiction is not taken away by section 4 of the act of July 12, 1882 (22 U. S. Stat. at L. 162). *Hendee v. Connecticut & P. R. R. Co.*, 23 Blatchf. (U. S.) 453, 26 Fed. Rep. 677.

Where a circuit court has obtained jurisdiction of a suit, seeking a receiver and sale of the property of a railroad company, and the sale has been made and the court in its decree transferring the property, has reserved the right to determine all claims growing out of the matter, it has jurisdiction of a controversy growing out of a claim that the property was not turned over as it should have been, though all the parties are citizens of the same state. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 46 Fed. Rep. 156.

But where the claimant appears in a pending action by intervention, and it appears that the title is fully vested in the claimant, it is error to join in his petition the original plaintiff. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 46 Fed. Rep. 156.

For the purpose of federal jurisdiction, the principal office and domicile of a corporation are supposed to be in the district where its meetings of stockholders and directors are held, and its records kept, and where its principal officers reside, where the charter does not provide otherwise. *Interstate Commerce Commission v. Texas & P. R. Co.*, 57 Fed. Rep. 948; affirming 52 Fed. Rep. 187.

Under a statute (Pa. Act June 19, 1871) which provides that in proceedings in courts of law or equity in which it is alleged that the private rights of individuals or of corporations are injured or invaded by any corporation claiming a right or franchise to do the act from which such injury results, the court may inquire and ascertain whether such corporation does in fact possess the right or franchise to do the act, and, if such right or franchise have not been conferred on such corporation, such courts, by exercising equitable powers, shall by injunction, at suit of the private parties or other corporations, restrain such injurious acts—held, that this equitable right may be administered by a court of the United States. *Weidenfeld v. Sugar Run R. Co.*, 51 Am. & Eng. R. Cas. 505, 48 Fed. Rep. 615.

D. Federal corporations.—A case cannot be said to arise under the laws of the United States, within the meaning of the act of congress of 1875, conferring jurisdiction upon the circuit courts, simply because it is a suit by or against a corporation organized under a federal statute. It is only in cases where the suit arises under the constitution and laws of the United States under such act that the court has jurisdiction—i.e., where some question is presented involving the construction of some provision of the constitution or laws, or when some right or privilege is claimed thereunder. *Adams Exp. Co. v. Denver & R. G. R. Co.*, 4 *McCrary* (U. S.) 77, 16 *Fed. Rep.* 712.

Under the act of congress creating the Union Pacific R. Co. (12 Stat. at L. 489, § 1), the federal courts have jurisdiction in actions by and against that corporation whenever these courts would have jurisdiction of the same class of actions between other parties. *Smith v. Union Pac. R. Co.*, 2 *Dill.* (U. S.) 278.

A corporation created by congress is a domestic institution in every state and territory in which it may lawfully exercise its powers, and is liable to be sued in the national courts in any district wherein it may be found doing business and having a representative upon whom service can be had, although such corporation has its principal place of business and keeps its seal in another state. *Van Dresser v. Oregon R. & N. Co.*, 50 *Am. & Eng. R. Cas.* 634, 48 *Fed. Rep.* 202. *Hughes v. Northern Pac. R. Co.*, 13 *Am. & Eng. R. Cas.* 157, 9 *Sawyer* (U. S.) 313, 18 *Fed. Rep.* 106.

Under the act of congress of July 4, 1884, granting a right of way through the Indian Territory to the Southern Kansas railway company, the federal circuit and district courts for the district of Kansas, the western district of Arkansas, and the northern district of Texas, have jurisdiction over all controversies arising between the company and the inhabitants of the Indian tribes through whose territory the road may be constructed, without reference to the amount in controversy or the citizenship of the parties. *Southern Kan. R. Co. v. Briscoe*, 144 U. S. 133, 12 *Sup. Ct. Rep.* 538; *affirming* 40 *Fed. Rep.* 273.

Where a corporation is organized under an act of the legislature of a territory, the fact that the territory was organized under

and by virtue of an act of congress does not make the corporation a federal corporation. *Adams Exp. Co. v. Denver & R. G. R. Co.*, 4 *McCrary* (U. S.) 77, 16 *Fed. Rep.* 712.

Where a railroad corporation has been created by the laws of a territory, the fact that congress grants it a right of way over the public domain does not make it a federal corporation, so as to give jurisdiction to the federal courts. *Adams Exp. Co. v. Denver & R. G. R. Co.*, 4 *McCrary* (U. S.) 77, 16 *Fed. Rep.* 712.

10. Foreign corporations.*—When a railroad company is incorporated by two states, a citizen of one of the states may sue it in a United States court in the other state in which it is incorporated. *Wheeling v. Mayor, etc., of Baltimore*, 1 *Hughes* (U. S.) 90.—FOLLOWING *Marshall v. Baltimore & O. R. Co.*, 16 *How.* (U. S.) 314.

In the case of an existing railroad corporation organized under the laws of one state which is authorized by the laws of another state to extend its road into the latter, it does not become a citizen of the latter state by exercising this authority, within the meaning of the law giving federal courts jurisdiction on account of diverse citizenship, unless the statute giving this permission must necessarily be construed as creating a new corporation of the state which grants this permission. *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 24 *Am. & Eng. R. Cas.* 58, 118 U. S. 290, 6 *Sup. Ct. Rep.* 1094.—FOLLOWED IN *Goodlett v. Louisville & N. R. Co.*, 122 U. S. 391. QUOTED IN *James v. St. Louis & S. F. R. Co.*, 46 *Fed. Rep.* 47.—*Antelope County v. Chicago, B. & Q. R. Co.*, 4 *McCrary* (U. S.) 46, 16 *Fed. Rep.* 295.

Where a foreign corporation enters another state under a statute recognizing it, and extending to it the right to enter the state and transact business the same as under its original charter, it may be said to be "found" there, within the meaning of the federal statutes, so as to give the federal courts jurisdiction. *Blackburn v. Selma, M. & M. R. Co.*, 2 *Flipp.* (U. S.) 525.

Where a corporation has entered a state

* Actions between corporations of different states as affecting jurisdiction of federal courts, see note, 57 *AM. & ENG. R. CAS.* 89.

Jurisdiction of federal court where foreign corporation is sued in state where it does business, see note, 52 *AM. & ENG. R. CAS.* 94.

under a statute recognizing it, and granting it the right to do business in the state, and has represented itself as a corporation of that state, it cannot afterward deny it, so as to defeat the jurisdiction of federal courts. *Blackburn v. Selma, M. & M. R. Co.*, 2 *Flipp. (U. S.)* 525.—QUOTING *Louisville, C. & C. R. Co. v. Letson*, 2 *How. (U. S.)* 497. REVIEWING *Marshall v. Baltimore & O. R. Co.*, 16 *How.* 314.

The right of a non-resident creditor of a railroad company to sue in the federal courts is not defeated by the fact that he purchased his evidence of indebtedness against the company for the purpose of bringing suit, if the transaction is real; but if it is only colorable, with the real title remaining in the grantor, the jurisdiction is defeated. *Blackburn v. Selma, M. & M. R. Co.*, 2 *Flipp. (U. S.)* 525.

Where a railroad company is chartered under the laws of two states and is subsequently consolidated by authority of each state, it does not lose its citizenship in each state, but as a citizen of one state may go into the other and sue another corporation therein created in the federal courts. *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 8 *Fed. Rep.* 458.—FOLLOWED IN *Colglazier v. Louisville, N. A. & C. R. Co.*, 20 *Am. & Eng. R. Cas.* 611, 22 *Fed. Rep.* 568.

Where a state statute provides that any railroad company organized under the laws of certain other states may become a corporation of that state by filing its articles of incorporation with the secretary of state, a foreign company becomes a domestic corporation by complying with the statute, so as to defeat jurisdiction of the federal courts in suits between the company and citizens of the same state. *Stout v. Sioux City & P. R. Co.*, 3 *McCrary (U. S.)* 1, 8 *Fed. Rep.* 794.—DISTINGUISHED IN *Moore v. Chicago, St. P., M. & O. R. Co.*, 21 *Fed. Rep.* 817.

A citizen of a foreign state cannot be denied the right to sue in the federal courts by a state law; nor can the jurisdiction of such courts over persons or subject-matter which is conferred by the constitution and laws of the United States, be circumscribed by any legislation of the state. *Merchants' Mfg. Co. v. Grand Trunk R. Co.*, 21 *Blatchf. (U. S.)* 109, 11 *Abb. N. Cas. (N. Y.)* 183.

A corporation created by another state, which for all the purposes of suing and being sued in the federal courts is deemed a citizen of that state, may maintain an ac-

tion against another foreign corporation in a federal court, upon any cause of action of which the court has jurisdiction, whenever it can obtain due service of process upon the defendant; as when the defendant is transacting business in the district where sued, and the service is upon a proper officer. *Merchants' Mfg. Co. v. Grand Trunk R. Co.*, 21 *Blatchf. (U. S.)* 109, 11 *Abb. N. Cas. (N. Y.)* 183.

Where corporations, created under the laws of different states, in pursuance of law, consolidate by one buying the property and the franchise of the other, the citizenship of the purchasing company determines the right of the consolidated company to sue in the federal courts. *Antelope County v. Chicago, B. & Q. R. Co.*, 4 *McCrary (U. S.)* 46, 16 *Fed. Rep.* 295.

A foreign railroad company is not deprived of the right to sue in a federal court, because it has purchased the road of a corporation in the state where the suit is brought. *Chicago, St. P., M. & O. R. Co. v. Dakota Co.*, 28 *Fed. Rep.* 219.—FOLLOWING *Moore v. Chicago, St. P., M. & O. R. Co.*, 21 *Fed. Rep.* 817.

The question of the jurisdiction of a federal court over a railroad corporation does not depend on the diverse citizenship of the party; and the mere fact that defendant has an office and an agent within the district, for the purpose of making freight contracts, will not give the court jurisdiction, where all of defendant's road, and its principal office and place of business, are within the state which created it, altogether outside of the district. *Connor v. Vicksburg & M. R. Co.*, 35 *Am. & Eng. R. Cas.* 696, 36 *Fed. Rep.* 273.

Under the act of congress of August 13, 1883, providing that when a civil action is founded on the fact that the parties are citizens of different states suit may be brought in the district "of the residence of either the plaintiff or the defendant," a suit between corporations of different states may be brought in the state where the plaintiff was created. *Fairbank v. Cincinnati, N. O. & T. P. R. Co.*, 54 *Fed. Rep.* 420, 9 *U. S. App.* 212, 4 *C. C. A.* 403.

11. Suits by or against states.—A state cannot be sued in a U. S. court by one of its citizens on the ground that the case is one arising under the constitution and laws of the United States. *Hans v. Louisiana*, 134 *U. S.* 1, 10 *Sup. Ct. Rep.* 504.—

FOLLOWED IN *North Carolina v. Temple*, 134 U. S. 22.

A suit against state officers to compel a transfer of stock in a railroad held by the state, to the company, under the act of 1865, is not a suit against a state, within the meaning of the U. S. constitution providing that the jurisdiction of the federal courts shall not extend to suits against states. *Rolston v. Crittenden*, 120 U. S. 390, 7 *Sup. Ct. Rep.* 599.—DISTINGUISHING *Louisiana v. Jumel*, 107 U. S. 711.

A suit by a railroad company chartered in one state against railroad commissioners of another state, to prevent them from enforcing a schedule of freight rates, is not a suit against a state, within the meaning of the eleventh amendment to the constitution of the United States; and therefore a federal court may take jurisdiction of the matter. *Chicago, St. P., M. & O. R. Co. v. Becker*, 35 *Fed. Rep.* 883.—FOLLOWING *Chicago & N. W. R. Co. v. Dey*, 35 *Fed. Rep.* 866.—*Clyde v. Richmond & D. R. Co.*, 57 *Fed. Rep.* 436.—FOLLOWING *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 10 *Sup. Ct. Rep.* 462, 702.

In such case the fact that the state statute requires actions to be brought in the name of the state, to recover penalties prescribed for disregarding the rates fixed by the commissioners, does not make the state a party. *Clyde v. Richmond & D. R. Co.*, 57 *Fed. Rep.* 436.

United States circuit courts will take jurisdiction of causes affecting the property of a state, in the hands of its agents, where it otherwise has jurisdiction, without making the state a party. *Swasey v. North Carolina R. Co.*, 1 *Hughes (U. S.)* 17.—FOLLOWING *Osburn v. Bank of U. S.*, 9 *Wheat. (U. S.)* 738.—CRITICISED IN *Christian v. Atlantic & N. C. R. Co.*, 133 U. S. 233, 10 *Sup. Ct. Rep.* 260.

The fact that the state of South Carolina, under the operation of an act passed Dec. 24, 1892, known as "the dispensary act," has a material interest in the proceeding as the only agency by which liquors may be shipped into the state and sold, does not make the state a party to a proceeding, so as to defeat federal jurisdiction. *Clyde v. Richmond & D. R. Co.*, 57 *Fed. Rep.* 436.

12. Concurrent jurisdiction with state courts.—State statutes providing for the winding up of the affairs of a corporation after its charter is forfeited, do not

give the state courts exclusive jurisdiction, as such laws can be complied with and enforced in the federal courts. *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 48 *Fed. Rep.* 351.

When the act of congress under which a drawbridge was built provides that, where any litigation arises from any obstruction or alleged obstructions to the free navigation of the river, the case may be tried in the district court of the United States in which any portion of said bridge or obstruction touches, such provision does not divest the state courts of jurisdiction of such causes. *Silver v. Missouri Pac. R. Co.*, 44 *Am. & Eng. R. Cas.* 467, 101 *Mo. 79*, 13 *W. Rep.* 410.—FOLLOWING *Missouri River Packet Co. v. Hannibal & St. J. R. Co.*, 79 *Mo.* 478.

Plaintiff claimed a right of way for a railroad over certain lands, and filed his bill in the U. S. district court, against the owner of the fee, to quiet title. *Held*, that the jurisdiction of the federal court could not be ousted, by showing that plaintiff had a complete and adequate remedy at law by ejectment in the state courts. *McConihay v. Wright*, 121 U. S. 201, 7 *Sup. Ct. Rep.* 940.

13. Conflict of jurisdiction between federal and state courts.*—A decree in a state court, ordering a sale of a railroad, is binding on all the parties to the suit, and cannot be attacked collaterally in a suit by any of the same parties in the federal courts, thereafter brought, and no order from the latter court could suspend a sale ordered by the state court. *Central Trust Co. v. Seaboard*, 130 U. S. 482, 9 *Sup. Ct. Rep.* 575.

Where the property of a railroad company has actually been sold under a foreclosure decree of the court of last resort of a state, a federal circuit court cannot entertain a bill to compel the mortgage trustees to operate the road for the benefit of the stockholders, although the bill is filed before the sale, and the sale was made subject to the result of the proceedings in the circuit court. *Bruce v. Manchester & K. R. Co.*, 19 *Fed. Rep.* 342.

The provision of the federal statutes that a writ of injunction shall not be granted to

* Receivers' right to possession of property as between state and federal courts, see note, 20 L. R. A. 393.

stay proceedings in any state court cannot be construed to have any application, except to proceedings commenced in a state court before the proceedings are commenced in the federal court; and an injunction will therefore issue from the federal court to restrain suits threatened against a railroad company in a justice's court, where no proceedings have begun prior to the filing of the bill for the injunction, although the only relief sought or needed is an injunction against the institution of a multiplicity of suits, when the company has no adequate remedy at law. *Texas & P. R. Co. v. Kuteman*, 55 Am. & Eng. R. Cas. 507, 54 Fed. Rep. 547.

While a suit was pending in a state court to enforce a lien against a railroad for materials furnished in its construction, a proceeding was instituted in a federal court for the appointment of a receiver and for a foreclosure of a mortgage on the road. The proceeding in the state court, without leave of the federal court, was prosecuted to final judgment, which was declared a lien on the road. *Held*, that the federal court would not afterward entertain a petition to have this judgment declared the first lien on the road. *Blair v. St. Louis, H. & K. R. Co.*, 25 Fed. Rep. 2.

A company whose road extended through more than one state purchased a short road lying wholly in one state, and then mortgaged its entire system, and subsequently proceedings for a receiver and foreclosure of the mortgage were instituted in a federal circuit court. In the mean time the charter of the short road had been declared forfeited, and a receiver appointed by a state court. The state receiver petitioned the federal court for possession of the road, alleging that its sale was *ultra vires* and void. *Held*, that this only raised an issue as to the validity of the sale, which the federal court might hear and determine; therefore it was no objection to the federal court retaining possession. *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 48 Fed. Rep. 351.

The fact that a mortgage existed on the short road at the time of its sale, and that the mortgagees had intervened in the federal court praying for a foreclosure, was sufficient ground to justify the federal court in retaining possession of the road. *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 48 Fed. Rep. 351.

The holder of first mortgage bonds of a railroad filed a bill to foreclose and to remove two trustees; and alleged as the reason for removing the trustees that one was sole trustee in another mortgage of the same property, which he was seeking to foreclose in a state court, and that the other trustee had been appointed receiver in the state proceeding. Defendants demurred, and filed pleas setting up the pendency of the foreclosure proceedings, and that the trustees in the first mortgage had filed a cross-bill therein the day after the bill was filed in the federal court, in which the plaintiff in the federal court was named as a defendant, and that process had been served on him out of the state before service of process in the federal suit. *Held*: (1) that the federal court would not stay proceedings until those in the state court were completed, but would proceed, though the property was in the possession of the receiver appointed by the state court, so far as it could without disturbing his possession; (2) that service of process on the plaintiff out of the state was not effectual; (3) that the possession of the trustees was such that they could not properly represent the bondholders; (4) that the jurisdiction of the federal court could not be objected to because it could not settle the accounts of the receiver. *Mercantile Trust Co. v. Lamoille Valley R. Co.*, 16 Blatchf. (U. S.) 324.

14. Adoption of state laws.—The established rule is that the federal courts are to administer the laws of the states in cases where they apply; and the uniform practice has been to consider a judicial interpretation placed upon a statute the same as if incorporated within the language of the statute itself; hence when the highest judicial tribunal of a state has placed a construction upon a statute of a state, and declared certain county orders issued in aid of a railroad invalid, that construction will be adopted by the federal court. *Olcott v. Fond du Lac County*, 2 Biss. (U. S.) 368.—FOLLOWING *Whiting v. Sheboygan & F. du L. R. Co.*, 25 Wis. 167.

Where a condemnation proceeding is commenced in a state court and removed to a federal court, the latter court will not direct its marshal to remove the railroad company from the land because it has failed to pay the damages assessed, where the state statute provides a sufficient method

for ousting the company, but will leave the landowner to his remedy under the statute. *Reed v. Chicago, M. & St. P. R. Co.*, 25 *Fed. Rep.* 386.

Neither the constitution of the United States nor any act of congress guarantees to a suitor that the same rule of law shall be applied to him by a state court which would be applied if his citizenship were such that his suit might be brought in a federal court. *Winona & St. P. R. Co. v. Plainview*, 143 *U. S.* 371, 12 *Sup. Ct. Rep.* 530.—DISTINGUISHING *Green v. Van Buskirk*, 5 *Wall.* (U. S.) 307, 7 *Wall.* 139; *Crapo v. Kelly*, 16 *Wall.* 610; *Factors' & T. Ins. Co. v. Murphy*, 111 *U. S.* 738; *Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.*, 120 *U. S.* 141.

15. Following decisions of state courts.—In the administration of state laws the federal courts will follow state decisions on such questions as the relation of master and servant. *Becker v. Baltimore & O. R. Co.*, 57 *Fed. Rep.* 188.—FOLLOWING *Kerlin v. Chicago, P. & St. L. R. Co.*, 50 *Fed. Rep.* 185.

After the court of last resort of a state has declared that a railroad deed of trust did not constitute a lien on the property, by reason of defective recording, a federal court will not re-examine the question in a collateral proceeding. *Hay v. Alexandria & W. R. Co.*, 15 *Am. & Eng. R. Cas.* 647, 20 *Fed. Rep.* 15.

Where a state court of last resort has decreed a railroad deed of trust a lien on the road, notwithstanding a want of authority in a municipality to guarantee certain bonds secured by the deed of trust, a federal court will accept such decision, and refuse to compel certain lien holders of the company to litigate, as between themselves, the liability of the city to pay the bonds. *Hay v. Alexandria & W. R. Co.*, 15 *Am. & Eng. R. Cas.* 647, 20 *Fed. Rep.* 15.

The Missouri act giving double damages for stock killed by reason of railroad companies failing to properly fence their tracks is a police regulation, and the construction thereof by the state courts will be followed by the federal courts. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 30 *Fed. Rep.* 344.—FOLLOWING *Daniels v. St. Louis, K. C. & N. R. Co.*, 62 *Mo.* 43.

In an action of tort against a railroad company in a federal court to recover damages caused by the negligence of the com-

pany, the assessment of the damages upon a default, whether by a jury or not, should conform to the practice in the state courts. *Raymond v. Danbury & N. R. Co.*, 43 *Conn.* 596.

Where the decisions of the highest court of a state favor the validity of railroad aid bonds at the time they are issued, the federal courts will not follow subsequent decisions impairing their validity. *Marshall v. Elgin*, 3 *McCrary* (U. S.) 35, 8 *Fed. Rep.* 783.

So where one railroad company is incorporated with "the rights, powers, and privileges" of an existing company, the new company will acquire an exemption from taxation, which is guaranteed to the former company, irrespective of the state decisions to the contrary. *Louisville & N. R. Co. v. Gaines*, 2 *Flipp.* (U. S.) 621, 3 *Fed. Rep.* 266.—REVIEWING *Pine Grove Tp. v. Talcott*, 19 *Wall.* (U. S.) 666.

In the absence of statutes, the decision of the courts of Kentucky that a brakeman and an engineer are not fellow-servants, so as to prevent recovery from the company by the brakeman for the engineer's negligence, since it is a construction of the general contract of service, and not a rule of property, does not bind federal courts when construing the common law of Kentucky. *Newport News & M. V. Co. v. Howe*, 52 *Fed. Rep.* 362, 6 *U. S. App.* 172, 3 *C. C. A.* 121.—FOLLOWING *Randall v. Baltimore & O. R. Co.*, 109 *U. S.* 478, 3 *Sup. Ct. Rep.* 322; *Chicago, M. & St. P. R. Co. v. Ross*, 112 *U. S.* 377, 5 *Sup. Ct. Rep.* 184. NOT FOLLOWING *Louisville & N. R. Co. v. Brooks*, 83 *Ky.* 131; *Louisville & N. R. Co. v. Moore*, 83 *Ky.* 677.—DISTINGUISHED IN *Cincinnati, N. O. & T. P. R. Co. v. Clark*, 57 *Fed. Rep.* 125.

The right of a carrier to stipulate for exemption from liability for his own negligence is not a local question, upon which the decision of a state court must control; but the question is a matter of general law upon which the courts of the United States will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law, of which the courts of the state have concurrent jurisdiction, and upon a contract made and to be performed within the state. *Ecels v. St. Louis, K. & N. W. R. Co.*, 55 *Am. & Eng. R. Cas.* 339, 52 *Fed. Rep.* 903.

After obtaining the permission of state railway commissioners to condemn certain lands, a railway company applied to the proper state court to have the damages assessed. The landowner removed the proceedings to assess damages to a federal court, and at the same time appealed from the decision of the railway commissioners, and then pleaded the pendency of the appeal as cause for abatement in the federal court; but the appeal was dismissed by the state court before a hearing on the plea. *Held*, that while the sufficiency of the plea was to be determined as of the date it was filed, yet the subsequent decision of the state court in dismissing the appeal would be taken as showing what the law was at the time of filing. *New York, N. H. & H. R. Co. v. Cockcroft*, 49 *Fed. Rep.* 3.

16. Following decisions of courts of other circuits.—A lessor railroad corporation brought suit against the lessee corporation in a United States circuit court to recover dividends due stockholders under the lease, which court decided that the right of action was in the company and not in its stockholders. Subsequently suit was brought in the circuit court of another district by one of the stockholders to recover a part of the same dividends. *Held*, that the decision in the former suit should be followed. *Reed v. Atlantic & P. R. Co.*, 22 *Blatchf. (U. S.)* 469.—FOLLOWING *Pacific R. Co. v. Atlantic & P. R. Co.*, 20 *Fed. Rep.* 277.

II. THE SUPREME COURT.

17. Jurisdiction, generally.—Where an original suit is filed in the U. S. supreme court by a state to protect its interests in a railroad, after it has passed upon the rights of the state, and exercised the jurisdiction it was called upon to exercise, all that remains for it is to turn the road over to the state, and to dispose of any money in the hands of a receiver. *Florida v. Anderson*, 91 *U. S.* 667.

A judgment of the state court holding that a subscription for the capital stock of a railroad had not been authorized by the requisite number of votes, as required by the state laws, but that if it had been originally authorized by a vote, the bonds ought not to issue, because the company had failed to comply with certain conditions, raises no federal question, and is therefore not reviewable, in a mandamus proceeding, by the

supreme court of the United States. *Missouri ex rel. v. Harris*, 144 *U. S.* 210, 12 *Sup. Ct. Rep.* 838.—FOLLOWING *Mississippi & M. R. Co. v. Rock*, 4 *Wall. (U. S.)* 177; *St. Paul, M. & M. R. Co. v. Todd County*, 142 *U. S.* 282, 12 *Sup. Ct. Rep.* 281.

18. Amount necessary to confer jurisdiction.—Under U. S. Rev. St. § 692, providing that an appeal shall be allowed from all final decrees in the circuit courts when the matter in dispute exceeds \$5000, an appeal will lie from a consent decree foreclosing a railroad mortgage, the amount exceeding \$5000; but the supreme court cannot consider any errors that were waived by the consent. *Pacific R. Co. v. Ketchum*, 101 *U. S.* 289.

Where several judgment creditors unite in a mandamus to compel payment of judgments against a town on its bonds issued for railroad stock, two judgments in favor of one of the plaintiffs, aggregating, principal and interest, more than \$5000, will give the U. S. supreme court jurisdiction on writ of error. *Hawley v. Fairbanks*, 108 *U. S.* 543, 2 *Sup. Ct. Rep.* 846.

In an appeal by a railroad company from a judgment in a proceeding by a telegraph company to appropriate a part of the former's lands for telegraph purposes, the amount in controversy, as affecting the jurisdiction of the U. S. supreme court, is the difference between the compensation claimed and that allowed by the jury. *East Tenn., V. & G. R. Co. v. Southern Tel. Co.*, 112 *U. S.* 306, 5 *Sup. Ct. Rep.* 168.

Persons holding less than \$5000 of the bonds of a railroad company, par value, are not entitled to appeal to the supreme court of the United States from a judgment of a district court determining the priority of the bonds in the distribution of the proceeds of a sale under a mortgage given to secure them. *McMurray v. Moran*, 43 *Am. & Eng. R. Cas.* 442, 134 *U. S.* 150, 10 *Sup. Ct. Rep.* 427.

In writs of error from the District of Columbia the jurisdiction of the U. S. supreme court is determined by the amount of the judgment exclusive of interest and costs. So where a railroad took a writ of error to a judgment against it which did not exceed \$2500—*held*, that the court did not have jurisdiction. *Baltimore & P. R. Co. v. Trook*, 100 *U. S.* 112.—FOLLOWING *Baltimore & P. R. Co. v. Grant*, 98 *U. S.* 398.

A railroad appealed a judgment against it for \$2250, from the District of Columbia to the U. S. supreme court, where the statute gave that court jurisdiction in such cases where the matter in dispute was of the value of \$1000. Afterward, and while the case was pending, the law was amended so as to require the matter in dispute to exceed \$2500. *Held*, that the jurisdiction was taken away. *Baltimore & P. R. Co. v. Grant*, 98 U. S. 398.—FOLLOWED IN *Baltimore & P. R. Co. v. Trook*, 100 U. S. 112.

A street railway company in the District of Columbia filed a bill to enjoin the municipal authorities from imposing a license tax on each car run. Appeals would only lie to the U. S. supreme court from the District when the amount involved exceeded \$5000. *Held*, that the specific tax sought to be enjoined only could be computed in determining the question of jurisdiction, and no appeal would lie if that was less than \$5000, though the company had refused to pay for former years, which aggregated would exceed that sum. *Washington & G. R. Co. v. District of Columbia*, 146 U. S. 227, 13 *Sup. Ct. Rep.* 64.

In a damage suit against a railroad a verdict was returned for \$11,000 and a remittitur of \$6001 was entered. The first part of the judgment was for the full amount of the verdict, and then recited the remittitur, and ended, "It is therefore ordered and adjudged by the court that execution issue for the sum of \$4999 only." *Held*, that the judgment must be taken to be for but \$4999, and therefore for a sum less than would give the supreme court jurisdiction on appeal. *Texas & P. R. Co. v. Horn*, 151 U. S. 110, 14 *Sup. Ct. Rep.* 259.

A railroad company was sued for negligently causing death, and a verdict was rendered for the plaintiff for \$5000. A few days after judgment had been rendered, on an *ex parte* motion of the company's counsel, the judgment was amended so as to be for the amount found by the jury, "together with the sum of \$110.73, the amount of interest thereon from the rendition of verdict to date." *Held*, that it being apparent that the motion was made for the sole object of obtaining a writ of error, the supreme court refuses to entertain the writ. *Northern Pac. R. Co. v. Booth*, 152 U. S. 671, 14 *Sup. Ct. Rep.* 693.

19. Appeals from the circuit courts.—A decree made by a circuit court

of the United States, directing the payment of costs and expenses, out of a fund in court, to the complainant, the fund in the mean time remaining in the court in course of administration, is *pro tanto* a final decree, from which an appeal will lie to this court. *Trustees of Internal Imp. Fund v. Greenough*, 12 *Am. & Eng. R. Cas.* 345, 105 U. S. 527.

A judgment against a railroad, at the suit of an employé, for personal injuries, cannot be reviewed in the United States supreme court on the ground that the damages are excessive. *Wabash R. Co. v. McDaniels*, 11 *Am. & Eng. R. Cas.* 158, 107 U. S. 454, 2 *Sup. Ct. Rep.* 932.—FOLLOWING *New York C. & H. R. R. Co. v. Fraloff*, 100 U. S. 31.

An order sending a case back from a United States circuit court to the state court is not a final order, and cannot be reviewed on appeal. *Richmond & D. R. Co. v. Thouron*, 134 U. S. 45, 10 *Sup. Ct. Rep.* 517.—FOLLOWED IN *Joy v. Adelbert College*, 146 U. S. 355.—*Chicago, St. P., M. & O. R. Co. v. Roberts*, 141 U. S. 690, 12 *Sup. Ct. Rep.* 123.—FOLLOWED IN *Joy v. Adelbert College*, 146 U. S. 355.

Where a railroad is sued in a U. S. circuit court, and a judgment obtained for less than \$5000 against the company, on appeal to the supreme court, the only question of jurisdiction is that of the court below; and where the only contention is that the suit was brought in the wrong circuit, that question is waived by appearing and pleading to the merits. *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, 11 *Sup. Ct. Rep.* 982.

A bill in equity was filed, seeking to set aside a decree of foreclosure of a railroad mortgage on the ground of fraud, and to prevent the reorganization of the company. *Held*, that the questions presented under the bill were distinct from those presented under the foreclosure suit, and a question of jurisdiction raised or pertaining in the former suit is not available to support an appeal to the supreme court of the United States, under the act of March 3, 1891, § 5. *Carey v. Houston & T. C. R. Co.*, 150 U. S. 170, 14 *Sup. Ct. Rep.* 63.

20. — from interstate commerce commission.—There is no appeal from the decisions of the interstate commerce commission to the supreme court of the United States. *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 149 U. S. 264, 13 *Sup. Ct. Rep.* 837.—FOLLOW-

ING *McLish v. Roff*, 141 U. S. 661; *Lau Ow Bew v. United States*, 144 U. S. 47; *Hubbard v. Soby*, 146 U. S. 56; *Chicago & N. W. R. Co. v. Osborne*, 146 U. S. 354.

21. Certiorari.—The supreme court of the United States will not entertain a petition for a *certiorari* to the circuit court of appeals to bring up records and proceedings in that court, reversing and remanding judgments against a railroad company, in actions instituted under the interstate commerce act to recover an overcharge on freights. *Chicago & N. W. R. Co. v. Osborne*, 146 U. S. 354, 13 *Sup. Ct. Rep.* 281.—FOLLOWING *McLish v. Roff*, 141 U. S. 661; *Rice v. Sanger*, 144 U. S. 197; *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U. S. 608.—FOLLOWED IN *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 149 U. S. 264.

Where a federal circuit court has granted an injunction and appointed a receiver for the property of a railway company, and authorized him to issue receivers' notes, where the injunction has been modified by the circuit court of appeals, and the order otherwise modified, the supreme court will not issue a writ of *certiorari* to review the decree of the circuit court of appeals. *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, 13 *Sup. Ct. Rep.* 758.

Neither will the supreme court issue a *certiorari* to a judgment of the circuit court of appeals, reversing an order of the circuit court, either because the party has no remedy by appeal, or because the order appointing the receiver was made by a circuit judge outside of his jurisdiction. *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, 13 *Sup. Ct. Rep.* 758.

22. Certificate of division of opinion.—In a suit in a circuit court against a railroad to recover for a personal injury received while riding on a locomotive, the trial court, on a division, certified the following questions: "Whether in point of law, upon the facts as stated and proved, the action could be maintained, and whether the jury should be instructed that, under the facts as proved, the plaintiff could not recover." Before answering these questions it was necessary to determine whether plaintiff was a passenger or servant of the company when injured. *Held*, that the supreme court could not answer the points certified, as they involved questions of fact. *Daniels*

v. Chicago & R. I. R. Co., 3 *Wall. (U. S.)* 250.

23. Jurisdiction on writ of error, generally.—Where a railroad company claimed the right to use a street in the District of Columbia under certain statutes of the United States, and the court did not deny the right, but entered an order limiting the right, the validity of no act of congress or authority under the United States was drawn in question, so as to give the supreme court jurisdiction on writ of error. *Baltimore & P. R. Co. v. Hopkins*, 130 U. S. 210, 9 *Sup. Ct. Rep.* 503.

24. When error will lie to a state court.—Where a state authorizes the building of a tall bridge over a river and provides that no other bridge shall be erected over the river within a given distance of the bridge, and afterward authorizes a railroad bridge within that distance, an injunction to restrain the latter on the ground that it impairs the obligation of a contract, under the U. S. constitution, raises a federal question that gives the U. S. supreme court jurisdiction to review the case; and in pleading it is sufficient to charge that the latter act violates the constitution, without specifying the article or section violated. *Bridge Propr's v. Hoboken L. & I. Co.*, 1 *Wall. (U. S.)* 116.

The judgment of a state court adverse to the title of the purchase of a railroad in bankruptcy proceedings under the laws of the United States, is reviewable on writ of error to the supreme court, under Rev. St. § 709, providing for a review of any state judgment "where any title, right, privilege, or immunity is claimed under the constitution, or any * * * statute of * * * the United States." *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 5 *Sup. Ct. Rep.* 1009.—FOLLOWING *Factors' & T. Ins. Co. v. Murphy*, 111 U. S. 738.

Where a railroad company claims that it is exempted by its charter from taxation imposed pursuant to a statute subsequently passed, the question arises whether the statute imposing the taxes impairs the obligation of the contract, and the supreme court of the United States has jurisdiction to review the decision of the supreme court of the state sustaining an assessment under the latter statute, although such decision was rendered upon the ground that the exemption properly construed was not applicable to the taxes assessed, and the state court

never considered the effect of the statute upon the charter of the company. *Yazoo & M. V. R. Co. v. Thomas*, 41 Am. & Eng. R. Cas. 599, 132 U. S. 174, 10 Sup. Ct. Rep. 68.—FOLLOWED IN *Yazoo & M. V. R. Co. v. Levee Com'rs*, 132 U. S. 190.

A suit was instituted in a state court of Louisiana to restrain payment of certain state bonds issued to aid a railroad, under a statute of 1871, on the ground that the statute violated the amended constitution of 1870, which declared that the state debt, prior to 1890, should not exceed twenty-five millions of dollars, which amount, it was claimed, had been reached before the passage of the statute of 1871. Certain bondholders intervened and set up that their present bonds were issued in lieu and discharge of other valid obligations of the state, created prior to the constitutional amendment. Held, that the U. S. supreme court had jurisdiction of the case on writ of error to determine whether the amended constitution impaired the obligation of a contract. *Williams v. Louisiana*, 103 U. S. 637.—FOLLOWED IN *Durkee v. Board of Liquidation*, 103 U. S. 646.

The act is in conflict with that amendment, inasmuch as it authorized the creation of a new debt on a new consideration, in excess of the prescribed amount, and the bonds are void. *Williams v. Louisiana*, 103 U. S. 637.

A suit was instituted against a railroad in a state court of Minnesota. The company moved to remove the case to the U. S. court on the ground that it was a resident of another state. To defeat the removal plaintiff was permitted to show that he was not a citizen of Minnesota. Held, that the facts made on the petition for removal were not properly triable in the state court, but it having retained the case, and the point being saved on appeal to the supreme court of the state, it was reviewable on error to this court. *Burlington, C. R. & N. R. Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. Rep. 1262.—FOLLOWING *Stone v. South Carolina*, 117 U. S. 432; *Carson v. Hyatt*, 118 U. S. 279.

25. When error will not lie to a state court.—(1) *In general.*—A judgment of a state court holding that certain county bonds, issued for stock in a railroad, were unauthorized, and were forbidden by the state constitution, cannot be reviewed by the U. S. supreme court, on the ground that the constitution impairs the obligation

of a contract, where the constitution was in force when the bonds were issued, and no statute had been passed under the constitution affecting the bonds. *Mississippi & M. R. Co. v. McClure*, 10 Wall. (U. S.) 511.

The federal courts have jurisdiction of cases only where it is claimed that a state constitution or statute impairs the obligation of a contract, not of cases where the judgments of state courts have that effect. So the U. S. supreme court cannot review the judgment of a state court dissolving a railroad corporation, on the ground that a statute impaired the obligation of a contract, when it appears that the judgment was not based on the statute. *Northern R. Co. v. New York*, 12 Wall. (U. S.) 384.—FOLLOWING *Knox v. Exchange Bank*, 12 Wall. 379.—*New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 8 Sup. Ct. Rep. 741.—ADHERED TO IN *St. Paul, M. & M. R. Co. v. Todd County*, 142 U. S. 282.—*Kennebec & P. R. Co. v. Portland & K. R. Co.*, 14 Wall. (U. S.) 23.

The fact that a state court decided, in an action for damages sustained by vessels in navigating the Missouri river, that a railroad bridge across such river not having been built as required by the act of congress authorizing its construction, rendered the railroad companies liable, irrespective of the question whether the improper construction caused the accident, does not present any federal question for the consideration of the United States supreme court. *Hannibal & St. J. R. Co. v. Missouri River Packet Co.*, 34 Am. & Eng. R. Cas. 157, 125 U. S. 260, 8 Sup. Ct. Rep. 874.

A judgment of the highest court of a state construing a state statute to the effect that a proceeding for the condemnation of lands required notice to be given to the landowner, raises no federal question which would give the supreme court jurisdiction on writ of error. *Baltimore Traction Co. v. Baltimore Belt R. Co.*, 151 U. S. 147, 14 Sup. Ct. Rep. 294.

Where a state brings a suit to establish its title to lands which are claimed by a railroad company, a judgment of the highest court of the state, holding that the state is estopped from setting up such claim by certain acts and silence, presents no federal question that will give the supreme court jurisdiction on writ of error. *Michigan v. Flint & P. M. R. Co.*, 152 U. S. 363, 14 Sup. Ct. Rep. 586.

(2) *Illustrations.*—A state sold a railroad, and created the purchasers a corporation, with a provision in its charter that no other road should be authorized or built within five miles of its line. Afterward the company filed a bill to enjoin the building of a branch railroad within the five miles. The defendants insisted that the law did not prohibit branches, and the whole issue was as to the construction of the statute, the validity of which was not questioned in the trial court. *Held*, that the question as to whether the provision in the charter that no other road should be built within five miles constituted a contract whose obligation had been violated, was not raised, and therefore no federal question that would give the U. S. supreme court jurisdiction to review the judgment. *Michigan C. R. Co. v. Michigan Southern R. Co.*, 19 How. (U. S.) 378.

A taxpayer filed a bill to have declared void certain county bonds issued for stock in a railroad on the ground (1) that the law was not complied with in submitting the question to a vote of the people, and (2) that there were fraud and collusion on the part of the county judge and the railroad in issuing the bonds. The court granted the prayer of the petition, and the decree was affirmed by the supreme court of the state. Afterward the chief justice certified that at the trial the issue was made that a certain provision of the state constitution was in violation of that part of the U. S. constitution declaring that no state shall pass any law impairing the obligation of contracts; but there was nothing else to show on what grounds the decision rested. *Held*, that the U. S. supreme court had no jurisdiction to review the judgment. *Mississippi & M. R. Co. v. Rock*, 4 Wall. (U. S.) 177.

A state brought a suit against a railroad for a nuisance committed by taking possession, without license from the state, of a quantity of land and water and erecting docks and other improvements thereon. The railroad claimed that the land was situate in an adjoining state under an agreement between the two states relating to the boundary line between the two. The whole controversy turned upon the construction of the agreement. *Held*, that no question was involved that gave the U. S. supreme court jurisdiction on writ of error. *New York v. Central R. Co.*, 12 Wall. (U. S.) 455.

While a railroad was in the hands of receivers it was adjudged a bankrupt. After-

ward the receivers filed a bill in a state court to obtain possession of certain bonds which they alleged belonged to the company at the time they became receivers, and which were transferred to defendants by an officer of the road. Defendants answered claiming that the bonds were the individual property of the officer from whom they got them; and also set up the title thereto of the assignee in bankruptcy, not as claiming under him, but to defeat the title of the receivers. *Held*, that the U. S. supreme court had no jurisdiction of the case on writ of error. To give jurisdiction under the Judiciary Act of 1789, "where any title, right, privilege, or immunity" is claimed under a law of the United States, the party claiming it must do so for himself, and not for a third person, as here. *Long v. Converse*, 91 U. S. 105.

The holder of certain railroad bonds in Louisiana, on which the state was guarantor, filed a mandamus to compel the funding board of the state to fund the bonds under the Funding Act of January 24, 1874. The defense was made that they were not bonds of the state that could be funded under said act, and the state court so decided. *Held*, that no federal question was raised that would give the U. S. supreme court jurisdiction. *Citizens' Bank v. Board of Liquidation*, 98 U. S. 140.

A suit was instituted against a county to compel a delivery of its bonds for stock in a railroad which had been authorized, and the case was prosecuted to final judgment in the state courts without raising any federal question. On writ of error to the U. S. supreme court the defense was made that the bonds, if issued, would deprive the taxpayers of their property without due process of law, in violation of the fourteenth amendment to the constitution of the United States. *Held*, that the question was raised too late to give the court jurisdiction. *Santa Cruz County Sup'rs v. Santa Cruz R. Co.*, 15 Am. & Eng. R. Cas. 661, 111 U. S. 361, 4 Sup. Ct. Rep. 474.

In a controversy between a railroad and a county both claimed certain lands under different acts of congress, but no issue was made as to the validity of either grant, the railroad insisting that the county was esopped by certain acts from asserting its title. *Held*, there was no federal question raised that gave the U. S. supreme court jurisdiction on writ of error. *Adams*

County v. Burlington & M. R. R. Co., 22 Am. & Eng. R. Cas. 188, 112 U. S. 123, 5 Sup. Ct. Rep. 77.

A railroad contracted in Illinois with a ferry company whereby the latter was to have the exclusive right to carry the freight and passengers of the railroad across the Mississippi river at the city of St. Louis. The ferry company instituted suit in Missouri for a breach of the contract, and the railroad defended on the ground that the contract was "*ultra vires*, contrary to public policy, and in restraint of trade." On appeal the highest court of Missouri decided against defendants. On appeal it was urged this judgment did not give "full faith and credit to the public acts, records, and judicial proceedings" of Illinois. *Held*, that the judgment could not be reviewed by the U. S. supreme court in the absence of any evidence to show what were the rulings of the Illinois court, or the laws and usages of that state touching the questions raised. *Chicago & A. R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615, 7 Sup. Ct. Rep. 398.

A railroad company was chartered with an exemption from taxation. It afterward bought a large tract of land for timber purposes. A decision of the state court held that this land was taxable. *Held*, that the federal courts had no jurisdiction to review this judgment on the ground that it violated the obligation of the charter contract. The federal constitutional inhibition against laws impairing the obligation of contracts applies only to state laws, and not judgments, where the validity of the law is not drawn in question. *St. Paul, M. & M. R. Co. v. Todd County*, 142 U. S. 282, 12 Sup. Ct. Rep. 281.—ADHERING TO New Orleans Waterworks Co. v. Louisiana Sugar Refining Co., 125 U. S. 18.

Lands granted to a railroad, but not yet patented, and on which the cost of surveying was unpaid, were conveyed to purchasers and taxed in their hands. *Held*, that a decision that while a tax title thereon was void under the statutes of the United States, the purchaser at the sale could not recover back the price paid, involved no question reviewable on error in the U. S. supreme court. *Tyler v. Cass County*, 142 U. S. 288, 12 Sup. Ct. Rep. 225.

26. Practice on error to state courts.—Ordinances of a city imposing a

tax on railroads are not part of the revenue laws of a state, within the meaning of the act of congress of June 30, 1870, making it the duty of the court to give causes wherein the execution of the revenue laws of any state is enjoined or suspended by judicial order, preference, and priority over all other civil causes. *Davenport v. Dows*, 15 Wall. (U. S.) 390.

Where a railroad company enjoins the collection of a state tax on the ground that by its charter it is exempt from taxation, the U. S. supreme court, on writ of error, will not give the case preference on the calendar, under the act of July 30, 1870, unless it appears that the state government will be embarrassed by the delay. *Hoge v. Richmond & D. R. Co.*, 93 U. S. 1.

A justice of the U. S. supreme court cannot grant a supersedeas on a writ of error, or upon an appeal, unless the writ of error is sued out and served, or the appeal taken, within sixty days after the judgment or decree is rendered. So where a trustee in a railroad mortgage brought suit to foreclose the mortgage, and certain of the bondholders came in and were made parties more than sixty days after the entry of a decree of foreclosure—*held*, that one of said justices could not grant a supersedeas after sixty days on an appeal from such decree. *Sage v. Central R. Co.*, 93 U. S. 412.—FOLLOWING *Kitchen v. Randolph*, 93 U. S. 86.

A case was litigated through the state courts, between two railroads, without raising any federal question. After judgment in the supreme court, on a petition for a rehearing it was claimed that the judgment violated the interstate commerce law, and other "rights, privileges, and immunities" under the laws of the United States. *Held*, that the questions were raised too late. *Texas & P. R. Co. v. Southern Pac. Co.*, 137 U. S. 48, 11 Sup. Ct. Rep. 10.

27. Effect of the writ while pending.—No order or action of any kind can be taken in a state court in a cause which has been removed by writ of error to the supreme court of the United States. The writ of error suspends the jurisdiction of the state courts until by some act of the supreme court of the United States itself it is restored to them. *Ex parte Dunn*, 6 So. Car. 307.

28. Following decisions of state courts.—The U. S. supreme court is not bound by a decision of the supreme court of Missouri adjudicating the liability of stockholders for corporate debts under a statute of that state, made in a different suit, after the transaction, and after the U. S. circuit court had decided the same question. *Burgess v. Seligman*, 9 *Am. & Eng. R. Cas.* 655, 107 *U. S.* 20, 2 *Sup. Ct. Rep.* 10.

What is a contract of carriage by a common carrier is not a matter of local or state law, but one of general law in which the U. S. supreme court will exercise its own judgment without reference to the state decisions. *Michigan C. R. Co. v. Myrick*, 9 *Am. & Eng. R. Cas.* 25, 107 *U. S.* 102, 1 *Sup. Ct. Rep.* 425.—**APPROVING** *Nutting v. Connecticut River R. Co.*, 1 *Gray (Mass.)* 502; *Borroughs v. Norwich & W. R. Co.*, 100 *Mass.* 26. **DISAPPROVING** *Illinois C. R. Co. v. Frankenberg*, 54 *Ill.* 88; *Illinois C. R. Co. v. Johnson*, 34 *Ill.* 389.—**QUOTED IN** *McCarn v. International & G. N. R. Co.*, 84 *Tex.* 352.

Where it is urged that a state law taxing a railroad impairs the obligation of a contract in its charter exempting it from taxation, the U. S. supreme court will decide, independent of the state courts, whether there is a contract and whether its obligation is impaired; and the state decisions will not be followed unless so firmly established as to become a rule of property. *Louisville & N. R. Co. v. Palmes*, 13 *Am. & Eng. R. Cas.* 380, 109 *U. S.* 244, 3 *Sup. Ct. Rep.* 193.

29. Appeals from the court of claims.—Where a railroad company sues in the court of claims, under U. S. Rev. St. § 5261, to recover for services in carrying the mails, and appeals from a judgment therein to the supreme court of the United States, the appeal brings up for review by that court only the questions of law arising in the course of the trial, or the judgment of the court in the application of the law to the facts. *Union Pac. R. Co. v. United States*, 116 *U. S.* 154, 6 *Sup. Ct. Rep.* 325.

FEDERAL GRANTS.

Of swamp lands, see **LAND GRANTS**, 128.
To railroads, see **LAND GRANTS**, 47-110.
— states, see **LAND GRANTS**, 11-46.

* How far and when supreme court of United States will follow state courts, see note, 12 *AM. & ENG. R. CAS.* 560.

FEDERAL STATUTES.

As to trial by jury on assessment of land damages, see **EMINENT DOMAIN**, 518.
Discrimination in charges under, see **DISCRIMINATION**, 7.

FEE.

Measure of damages to, in elevated railway cases, see **ELEVATED RAILWAYS**, 130-147.
Merger of mortgage in, see **MORTGAGES**, 307.
Of street in city does not bar action by abutting owner, see **ELEVATED RAILWAYS**, 57, 58, 65.
— ownership of, see **STREETS AND HIGHWAYS**, 130-143.
Ownership of, by company as a defense to action for flooding land, see **FLOODING LANDS**, 58.
When acquired in condemnation proceedings, see **EMINENT DOMAIN**, 120, 778-785.
— passes by deed, see **DEEDS**, 26, 27.
— by deed of right of way, see **EMINENT DOMAIN**, 204.
— to purchaser at foreclosure sale, see **MORTGAGES**, 253.

FEEs.

For storage, see **WAREHOUSEMEN**, 6, 7.
Of tax collectors, see **TAXATION**, 304.
Payment of, in foreclosure, see **MORTGAGES**, 281-283.
Recovery of, in actions for taxes, see **TAXATION**, 322.

FELLOW-SERVANTS.

Allegation of incompetency of, see **EMPLOYEES, INJURIES TO**, 530, 541.
Negating negligence of, in complaint, see **CONTRIBUTORY NEGLIGENCE**, 73; **EMPLOYEES, INJURIES TO**, 540.
Negligence of, as a defense to action for causing death, see **DEATH BY WRONGFUL ACT**, 100.
Risks assumed from negligence of, see **EMPLOYEES, INJURIES TO**, 203-205.
Rule as to, where road is operated under running powers, see **LEASES, ETC.**, 110.

I. RULE OF NON-LIABILITY FOR NEGLIGENCE.

LEGISLATION OF FELLOW-SERVANT. 645
1. *Statement of the Rule*..... 645
2. *Scope and Extent of the Rule*..... 650
3. *Particular Applications of the Rule*..... 652

<p>a. In General..... 652</p> <p>b. In the Management and Operation of Engines, Cars, and Trains..... 655</p> <p>4. Limits and Exceptions to the Rule..... 663</p> <p>a. In General..... 663</p> <p>b. Company's Concurring Negligence.... 665</p> <p>II. SUPERIOR-SERVANT OR VICE-PRINCIPAL RULE..... 671</p> <p>1. Statement of the Rule..... 671</p> <p>2. Scope and Extent of the Rule..... 673</p> <p>3. Particular Applications of the Rule..... 676</p> <p>4. Limits and Exceptions to the Rule..... 681</p> <p>III. SERVANTS IN DIFFERENT DEPARTMENTS; SERVANTS OF DIFFERENT COMPANIES..... 683</p> <p>1. Servants in Different Departments..... 683</p> <p>a. Statement of the Rule..... 683</p> <p>b. Scope and Extent of the Rule..... 685</p> <p>c. Limits and Exceptions to the Rule.. 686</p> <p>d. What Servants are Deemed to be in Different Departments within the Rule..... 687</p> <p>2. Servants of Different Companies..... 691</p> <p>IV. INCOMPETENCY OF FELLOW-SERVANTS..... 694</p> <p>1. Company's Duty to Select Competent Servants..... 694</p> <p>a. In General..... 694</p> <p>b. Liability for Failure to Perform this Duty..... 697</p> <p>2. Retaining Incompetent Servants in Service..... 701</p> <p>3. Notice or Knowledge of Incompetency..... 704</p> <p>a. On the Part of the Company..... 704</p> <p>b. On the Part of the Injured Servant... 705</p> <p>V. STATUTORY REGULATIONS..... 707</p> <p>1. In the United States..... 707</p> <p>a. In General..... 707</p>	<p>b. Interpretation and Effect of Particular Statutes..... 709</p> <p>2. In England..... 720</p> <p>VI. WHO ARE AND WHO ARE NOT FELLOW-SERVANTS; WHO ARE AND WHO ARE NOT VICE-PRINCIPALS..... 720</p> <p>1. In General..... 720</p> <p>a. Who are Fellow-servants..... 720</p> <p>b. Who are Vice-principals..... 725</p> <p>2. Particular Servants..... 730</p> <p>a. Car Inspector; Car Repairer..... 730</p> <p>b. Conductor..... 732</p> <p>c. Engineer..... 740</p> <p>d. Foreman..... 746</p> <p>e. Section Master; Section Foreman..... 753</p> <p>f. Superintendent..... 755</p> <p>g. Various Other Servants..... 757</p> <p>VII. PROCEDURE..... 773</p> <p>1. Pleading..... 773</p> <p>2. Defenses; Contributory Negligence..... 776</p> <p>3. Evidence..... 778</p> <p>a. In General..... 778</p> <p>b. As to the Incompetency of Negligent Servant..... 780</p> <p>4. Instructions..... 785</p> <p>5. Questions of Law and Fact..... 788</p> <p>I. RULE OF NON-LIABILITY FOR NEGLIGENCE OF FELLOW-SERVANT.</p> <p>1. Statement of the Rule.</p> <p>1. Generally.*—Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another, when both are engaged in the same service. <i>Priestley v. Fowler</i>, 3 M. & W. 1, <i>Neubauer v. New York, L. E. & W. R. Co.</i>, 101 N. Y. 607, <i>mem.</i>, 4 N. E. Rep. 125; <i>af-</i></p> <p>* Liability of railroad company for injury to one servant occasioned by negligence of another, see notes, 17 AM. & ENG. R. CAS. 514; 21 <i>Id.</i> 514; 30 AM. DEC. 279, 282.</p> <p>Master's exemption from liability for servant's torts to fellow-servant, see note, 22 AM. & ENG. R. CAS. 319.</p>
---	--

farming 31 *Hun* 173, *mem.* — FOLLOWING *Crispin v. Babbitt*, 81 N. Y. 516. — REVIEWED IN *Hansen v. New York & B. Bridge*, 9 N. Y. S. R. 726, 45 *Hun* 590. — *Warner v. Erie R. Co.*, 39 N. Y. 468; *reversing* 49 *Burb.* 558. — FOLLOWING *Hard v. Vermont & C. R. Co.*, 32 Vt. 473.

In an action against a railroad corporation for personal injuries, the plaintiff is not entitled to recover where there is no evidence of an injury except that resulting from the negligence of the plaintiff's fellow-employed not representing the corporation. *Hanley v. Grand Trunk R. Co.*, 62 N. H. 274.

This rule has been followed and applied in actions by an employe against a railroad company for injuries sustained through the negligence of a fellow-servant in Alabama. *Alabama G. S. R. Co. v. Carroll*, 97 Ala. 126, 11 So. Rep. 803. — FOLLOWING *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672; *Mobile & M. R. Co. v. Smith*, 59 Ala. 245; *Louisville & N. R. Co. v. Allen*, 78 Ala. 494. — *Smoot v. Mobile & M. R. Co.*, 67 Ala. 13. *Mobile & M. R. Co. v. Smith*, 59 Ala. 245. — DISTINGUISHED IN *Tyson v. South & N. Ala. R. Co.*, 61 Ala. 554. FOLLOWED IN *Smoot v. Mobile & M. R. Co.*, 67 Ala. 13. — *Alabama & F. R. Co. v. Waller*, 48 Ala. 459. *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672. — EXPLAINING *Scudder v. Woodbridge*, 1 Ga. 195. REVIEWING *Little Miami R. Co. v. Stevens*, 20 Ohio 415; *Louisville & N. R. Co. v. Collins*, 5 Am. Law Reg. (N. S.) 265. — FOLLOWED IN *Alabama & F. R. Co. v. Waller*, 48 Ala. 459. QUOTED IN *Tyson v. South & N. Ala. R. Co.*, 61 Ala. 554; *Nashville, C. & St. L. R. Co. v. Foster*, 10 Lea (Tenn.) 351.

And in Arkansas. *St. Louis, A. & T. R. Co. v. Triplett*, 48 Am. & Eng. R. Cas. 323, 54 Ark. 289, 15 S. W. Rep. 831, 16 S. W. Rep. 266. *Little Rock & Ft. S. R. Co. v. Duffey*, 4 Am. & Eng. R. Cas. 637, 35 Ark. 602.

And in California. *Long v. Coronado R. Co.*, 96 Cal. 269, 31 Pac. Rep. 170. *Congrave v. Southern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 337, 88 Cal. 360, 26 Pac. Rep. 175. — QUOTING *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71; *Hogan v. Central Pac. R. Co.*, 49 Cal. 128. — *Hogan v. Central Pac. R. Co.*, 49 Cal. 128. — QUOTED IN *Congrave v. Southern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 337, 88 Cal. 360. — *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71. — QUOTED

IN *Congrave v. Southern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 337, 88 Cal. 360.

And in Colorado. *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484, 20 Am. Ry. Rep. 359. *Colorado C. R. Co. v. Ogden*, 3 Colo. 499.

And in Dakota territory. *Herbert v. Northern Pac. R. Co.*, 8 Am. & Eng. R. Cas. 85, 3 Dak. 38, 13 N. W. Rep. 349.

And in Delaware. *Flinn v. Philadelphia, W. & B. R. Co.*, 1 *Houst. (Del.)* 469.

And in Florida (prior to the enactment of chapter 3744 of the laws of 1887). *Parish v. Pensacola & A. R. Co.*, 28 Fla. 251, 9 So. Rep. 696.

And in Illinois. *Stafford v. Chicago, B. & Q. R. Co.*, 114 Ill. 244, 2 N. E. Rep. 185. *Chicago & N. W. R. Co. v. Sweet*, 45 Ill. 197. *Chicago, B. & Q. R. Co. v. Stafford*, 16 Ill. App. 84. *Chicago & E. I. R. Co. v. Fagar*, 11 Ill. App. 498. *Kranz v. White*, 8 Ill. App. 583. — FOLLOWING *Toledo, W. & W. R. Co. v. Moore*, 77 Ill. 217; *Columbus, C. & I. C. R. Co. v. Troesch*, 68 Ill. 545. — *Chicago & N. W. R. Co. v. Scheuring*, 4 Ill. App. 533.

And in Indiana. *Justice v. Pennsylvania Co.*, 53 Am. & Eng. R. Cas. 604, 130 Ind. 321, 30 N. E. Rep. 303. *Capper v. Louisville, E. & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 525, 103 Ind. 305, 2 N. E. Rep. 749. *Indianapolis & St. L. R. Co. v. Johnson*, 102 Ind. 352, 26 N. E. Rep. 200. *Indiana Car Co. v. Parker*, 100 Ind. 181. *Bogard v. Louisville, E. & St. L. R. Co.*, 100 Ind. 491. *Sullivan v. Toledo, W. & W. R. Co.*, 58 Ind. 26. *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174. *Ohio & M. R. Co. v. Hammersley*, 28 Ind. 371. *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226. *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366. *Madison & I. R. Co. v. Bacon*, 6 Ind. 205. — EXPLAINING *Little Miami R. Co. v. Stevens*, 20 Ohio 415.

And in Iowa. *Theleman v. Moeller*, 73 Iowa 108, 34 N. W. Rep. 765. *Hunt v. Chicago & N. W. R. Co.*, 26 Iowa 363.

And in Kansas. *Kansas Pac. R. Co. v. Salmon*, 11 Kan. 83. — REVIEWED IN *Ewald v. Chicago & N. W. R. Co.*, 33 Am. & Eng. R. Cas. 326, 70 Wis. 420, 36 N. W. Rep. 12. — *Dow v. Kansas Pac. R. Co.*, 8 Kan. 642, 5 Am. Ry. Rep. 401.

And in Kentucky. *McLeod v. Ginther*, 8 Am. & Eng. R. Cas. 162, 80 Ky. 399. *Louisville & N. R. Co. v. Collins*, 2 *Duv. (Ky.)* 114. *Coffman v. Louisville & N. R. Co.*, (Ky.) 18 S. W. Rep. 1012.

C. R. Co., 48
l. 360.
ays v. Kan-
Am. Ry. Rep.
yden, 3 Colo.

Herbert v.
Eng. R. Cas.
19.
Philadelphia,
469.
e enactment
1887). Par-
28 Fla. 251,

Chicago, B.
E. Rep. 185.
Sweett, 45 Ill.
v. Stefford,
I. R. Co. v.
uz v. White,
Toledo, W. &
Columbus,
68 Ill. 545.—
heuring, 4 Ill.

Pennsylvania
604, 130 Ind.
per v. Louis-
n. & Eng. R.
E. Rep. 749.
Johnson, 102
Indiana Car
Bogard v.
100 Ind. 491.
R. Co., 58
R. Co. v. Ar-
M. R. Co. v.
dson v. Madi-
Ohio & M. R.
adison & I.
EXPLAINING
20 Ohio 415.
Moeller, 73
Hunt v. Chi-
363.
ac. R. Co. v.
D IN Ewald
Am. & Eng.
W. Rep. 12.
Kan. 642, 5

v. Ginther,
80 Ky. 399.
ins, 2 Duw.
lle & N. R.

And in Louisiana. *Hugh v. New Or-
leans & C. R. Co.*, 6 La. Ann. 496.—AP-
PROVED IN *Palfrey v. Portland, S. & P. R.*
Co., 4 Allen (Miss.) 55. FOLLOWED IN
Herman v. New Orleans & C. R. Co., 11
La. Ann. 5.

And in Maine. *Cassidy v. Maine C. R.*
Co., 17 Am. & Eng. R. Cas. 519, 76 Me. 488.
Blake v. Maine C. R. Co., 70 Me. 60.

And in Maryland. *Cumberland C. & I.*
Co. v. *Scally*, 27 Md. 589. *Shauk v. North-
ern C. R. Co.*, 25 Md. 462. *O'Connell v.*
Baltimore & O. R. Co., 20 Md. 212.

And in Massachusetts. *Fitzgerald v.*
Boston & A. R. Co., 156 Mass. 293, 31 N. E.
Rep. 7. *O'Brien v. Boston & A. R. Co.*, 138
Mass. 387, 52 Am. Rep. 279. *Holden v.*
Fitchburg R. Co., 2 Am. & Eng. R. Cas.
94, 129 Mass. 268, 37 Am. Rep. 343. *King*
v. *Boston & W. R. Corp.*, 9 Cush. (Mass.)
112. *Farwell v. Boston & W. R. Corp.*, 4
Metc. (Mass.) 49.

And in Michigan. *Hunn v. Michigan C.*
R. Co., 41 Am. & Eng. R. Cas. 452, 78
Mich. 513, 7 L. R. A. 500, 44 N. W. Rep.
502. *Peterson v. Chicago & N. W. R. Co.*, 31
Am. & Eng. R. Cas. 292, 67 Mich. 102, 10
West. Rep. 870, 34 N. W. Rep. 260. *Mich-
igan C. R. Co. v. Dolan*, 32 Mich. 510. *Day*
v. *Toledo, C. S. & D. R. Co.*, 2 Am. & Eng.
R. Cas. 126, 42 Mich. 523, 4 N. W. Rep. 203.
Henry v. Lake Shore & M. S. R. Co., 8
Am. & Eng. R. Cas. 110, 49 Mich. 495, 13
N. W. Rep. 832.

And in Mississippi. *Louisville, N. O. &*
T. R. Co. v. Petty, 41 Am. & Eng. R. Cas.
444, 67 Miss. 255, 7 So. Rep. 351.—FOLLOW-
ING *New Orleans, J. & G. N. R. Co. v.*
Hughes, 49 Miss. 258; *Howd v. Mississippi*
C. R. Co., 50 Miss. 178.—*Chicago, St. L. &*
N. O. R. Co. v. Doyle, 8 Am. & Eng. R. Cas.
171, 60 Miss. 977. *Memphis & C. R. Co. v.*
Thomas, 51 Miss. 637.

And in Missouri. *McDermott v. Pacific*
R. Co., 30 Mo. 115.—EXPLAINED IN *Dixon*
v. *Chicago & A. R. Co.*, 109 Mo. 413. FOL-
LOWED IN *Brothers v. Cartter*, 52 Mo. 372.
OVERRULED IN *Parker v. Hannibal & St.*
J. R. Co., 109 Mo. 362. QUOTED IN *Elliott*
v. *St. Louis & I. M. R. Co.*, 67 Mo. 272.—
Warmington v. Atchison, T. & S. F. R.
Co., 46 Mo. App. 159.—FOLLOWING *Gibson*
v. *Pacific R. Co.*, 46 Mo. 163; *McDermott*
v. *Pacific R. Co.*, 30 Mo. 115; *Smith v. St.*
Louis, K. C. & N. R. Co., 69 Mo. 32; *Current*
v. *Missouri Pac. R. Co.*, 86 Mo. 62.—*Gibson*
v. *Pacific R. Co.*, 46 Mo. 163. *Thorpe v. Mis-*

souri Pac. R. Co., 89 Mo. 650, 2 S. W. Rep. 3.
Bowen v. Chicago, B. & K. C. R. Co., 95 Mo.
268, 14 West. Rep. 744, 8 S. W. Rep. 230.
Higgins v. Missouri Pac. R. Co., 104 Mo. 413,
16 S. W. Rep. 409. *Dixon v. Chicago & A.*
R. Co., 53 Am. & Eng. R. Cas. 589, 109 Mo.
413, 19 S. W. Rep. 412.—REVIEWING *Sulli-
van v. Missouri Pac. R. Co.*, 97 Mo. 113;
Connolly v. Davidson, 15 Minn. 519; *Nash-
ville & C. R. Co. v. Carroll*, 6 Heisk. (Tenn.)
347; *Baird v. Pettit*, 70 Pa. St. 477; *Pool v.*
Chicago, M. & St. P. R. Co., 53 Wis. 657;
Garraty v. Kansas City, St. J. & C. B. R.
Co., 25 Fed. Rep. 258; *Hobson v. New*
Mexico & A. R. Co., (Ariz.) 11 Pac. Rep.
545; *Northern Pac. R. Co. v. O'Brien*, 1
Wash. 599; *Chicago & A. R. Co. v. Kelly*,
127 Ill. 637; *Howard v. Delaware & H.*
Canal Co., 40 Fed. Rep. 195; *Pike v. Chi-
cago & A. R. Co.*, 41 Fed. Rep. 95; *Evanc*
v. *Carbon Hill Coal Co.*, 47 Fed. Rep. 437.
—*Schlereth v. Missouri Pac. R. Co.*, 115 Mo.
87, 21 S. W. Rep. 1110. *Cook v. St. Louis,*
I. M. & S. R. Co., 8 Mo. App. 573. *Murphy*
v. *St. Louis & I. M. R. Co.*, 4 Mo. App. 565;
reversed on other grounds in 71 Mo. 202.

And in New Hampshire. *Hanley v.*
Grand Trunk R. Co., 62 N. H. 274.

And in New Jersey. *McAndrews v. Burns*,
39 N. J. L. 117. *Harrison v. Central R. Co.*,
31 N. J. L. 293.—REVIEWING *Farwell v.*
Boston & W. R. Corp., 4 Metc. (Mass.) 49.

And in New Mexico. *Lutz v. Atlantic &*
P. R. Co., (N. Mex.) 53 Am. & Eng. R. Cas.
478, 30 Pac. Rep. 912.

And in New York. *Vick v. New York C.*
& H. R. R. Co., 17 Am. & Eng. R. Cas. 609,
95 N. Y. 267. *Neubauer v. New York, L.*
E. & W. R. Co., 101 N. Y. 607, mem., 4 N.
E. Rep. 125; affirming 31 Hun 173, mem.
Donnelly v. Brooklyn City R. Co., 34 Am. &
Eng. R. Cas. 103, 109 N. Y. 16, 15 N. E.
Rep. 733. *Warner v. Erie R. Co.*, 39 N.
Y. 468. *Shiner v. Russell*, 6 N. Y. S. R.
78. *Slatterly v. New York, L. E. & W.*
R. Co., 21 N. Y. S. R. 552, 51 Hun 638, 4
N. Y. Supp. 910. *Ford v. Lake Shore &*
M. S. R. Co., 2 Silo. App. 460; affirming 17
N. Y. S. R. 393.—DISTINGUISHING *Bushby*
v. *New York, L. E. & W. R. Co.*, 107 N.
Y. 374, 12 N. Y. S. R. 9. FOLLOWING
Byrnes v. New York, L. E. & W. R. Co.,
113 N. Y. 251, 22 N. Y. S. R. 936.—*Burns*
v. *Staten Island R. T. R. Co.*, 10 N. Y.
S. R. 352, 35 Hun 592, mem. *Faulkner v.*
Erie R. Co., 49 Barb. (N. Y.) 324. *Coon v.*
Syracuse & U. R. Co., 6 Barb. (N. Y.) 231.

—QUOTED IN *Fones v. Phillips*, 39 Ark. 17.

And in North Carolina. *Hobbs v. Atlantic & N. C. R. Co.*, 107 N. Car. 1, 12 S. E. Rep. 124. *Hagins v. Cape Fear & Y. V. R. Co.*, 106 N. Car. 537, 11 S. E. Rep. 590.—FOLLOWED IN *Hobbs v. Atlantic & N. C. R. Co.*, 107 N. Car. 1.—*Webb v. Richmond & D. R. Co.*, 97 N. Car. 387, 2 S. E. Rep. 440.—APPROVED IN *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336.—*Kirk v. Atlanta & C. A. L. R. Co.*, 25 Am. & Eng. R. Cas. 507, 94 N. Car. 625, 55 Am. Rep. 621. *Dobbin v. Richmond & D. R. Co.*, 81 N. Car. 446.—FOLLOWING *Laning v. New York C. R. Co.*, 49 N. Y. 529.—QUOTED IN *Kirk v. Atlanta & C. A. L. R. Co.*, 25 Am. & Eng. R. Cas. 507, 94 N. Car. 625, 55 Am. Rep. 621.—*Hardy v. Carolina C. R. Co.*, 76 N. Car. 5, 14 Am. Ry. Rep. 309. *Ponton v. Wilmington & W. R. Co.*, 6 Jones (N. Car.) 245.—DISTINGUISHING *Jones v. Glass*, 13 Ired. (N. Car.) 305. FOLLOWING *Hutchinson v. York, N. & B. R. Co.*, 5 Ex. 343; *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49. NOT FOLLOWING *Little Miami R. Co. v. Stevens*, 20 Ohio 415.

And in North Dakota. *Ell v. Northern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 318, 1 N. Dak. 336.

And in Ohio. *Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 318.—APPROVING *Mackin v. Boston & A. R. Co.*, 15 Am. & Eng. R. Cas. 196, 135 Mass. 201.—*Pittsburgh, C. & St. L. R. Co. v. Ranney*, 5 Am. & Eng. R. Cas. 533, 37 Ohio St. 665. *Pittsburgh, Ft. W. & C. R. Co. v. Lewis*, 33 Ohio St. 196. *Whaalan v. Mad River & L. E. R. Co.*, 8 Ohio St. 249.—FOLLOWING *Little Miami R. Co. v. Stevens*, 20 Ohio 415; *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201.—APPLIED IN *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336. FOLLOWED IN *Pittsburgh, Ft. W. & C. R. Co. v. Devinney*, 17 Ohio St. 197. REVIEWED IN *Parker v. Hannibal & St. J. R. Co.*, 50 Am. & Eng. R. Cas. 321, 19 S. W. Rep. 1119.—*Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541.—FOLLOWING *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201. QUOTING *Keegan v. Western R. Co.*, 8 N. Y. 180.—QUOTED IN *Gibson v. Pacific R. Co.*, 46 Mo. 163.—*Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201.—COMMENTED ON IN *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 Miss. 258. FOLLOWED IN *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541; *Whaalan v. Mad*

River & L. E. R. Co., 8 Ohio St. 249. QUOTED IN *Columbus & X. R. Co. v. Webb*, 12 Ohio St. 475.

And in Oregon. *Anderson v. Bennett*, 38 Am. & Eng. R. Cas. 87, 16 Oreg. 515, 19 Pac. Rep. 765, 8 Am. St. Rep. 311.

And in Pennsylvania. *Johnston v. Pittsburg & W. R. Co.*, 114 Pa. St. 443, 7 Atl. Rep. 184. *Weger v. Pennsylvania R. Co.*, 55 Pa. St. 460. *Caldwell v. Brown*, 53 Pa. St. 453. *Mensch v. Pennsylvania R. Co.*, 53 Am. & Eng. R. Cas. 198, 150 Pa. St. 598, 25 Atl. Rep. 31, 30 W. N. C. 548.

And in South Carolina. *Boatwright v. Northeastern R. Co.*, 25 So. Car. 128.—FOLLOWING *Murray v. South Carolina R. Co.*, 1 McMull. 385.—*Murray v. South Carolina R. Co.*, 1 McMull. (So. Car.) 385.—APPROVED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758; *McMaster v. Illinois C. R. Co.*, 41 Am. & Eng. R. Cas. 486, 65 Miss. 264, 7 Am. St. Rep. 653, 4 So. Rep. 59; *Lagrone v. Mobile & O. R. Co.*, 67 Miss. 592, 7 So. Rep. 432; *Rohback v. Pacific R. Co.*, 43 Mo. 187. CRITICISED IN *Little Miami R. Co. v. Stevens*, 20 Ohio 415. DISTINGUISHED IN *Gill-enwater v. Madison & I. R. Co.*, 5 Ind. 339; *White v. Smith*, 12 Rich. (So. Car.) 595. FOLLOWED IN *Boatwright v. Northeastern R. Co.*, 25 So. Car. 128. LIMITED IN *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201. QUALIFIED IN *Gilmore v. Northern Pac. R. Co.*, 9 Sawy. (U. S.) 558, 18 Fed. Rep. 866. REVIEWED IN *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672; *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 Miss. 258; *Parker v. Hannibal & St. J. R. Co.*, 109 Mo. 362; *Anderson v. Bennett*, 38 Am. & Eng. R. Cas. 87, 16 Oreg. 515.

And in South Dakota. *Gates v. Chicago, M. & St. P. R. Co.*, 53 Am. & Eng. R. Cas. 245, 2 S. Dak. 422, 50 N. W. Rep. 907.

And in Texas. *Gulf, C. & S. F. R. Co. v. Blohn*, 73 Tex. 637, 4 L. R. A. 764, 11 S. W. Rep. 867. *Galveston, H. & S. A. R. Co. v. Faber*, 63 Tex. 344. *Houston & T. C. R. Co. v. Gilmore*, 62 Tex. 391. *Dallas v. Gulf, C. & S. F. R. Co.*, 21 Am. & Eng. R. Cas. 575, 61 Tex. 196. *Houston & T. C. R. Co. v. Willie*, 5 Am. & Eng. R. Cas. 541, 53 Tex. 318, 37 Am. Rep. 756. *Houston & G. N. R. Co. v. Miller*, 51 Tex. 270. *Robinson v. Houston & T. C. R. Co.*, 46 Tex. 540, 13 Am. Ry. Rep. 303.

And in West Virginia. *Benhring v.*

Ohio St. 249.
R. Co. v.

Bennett, 38
Oreg. 515, 19
111.

Stanton v. Pitts-
t. 443, 7 Atl.
Antonia R. Co.,
rown, 53 Pa.
ia R. Co., 53
a. St. 598, 25

Coatwright v.
r. 128.—Fol-
olina R. Co.,
uth Carolina
) 385.—AP-
M. & St. P.
s. 62, 5 Dak.
V. Rep. 758;
n. 41 Am. &
4, 7 Am. St.
one v. Mobile
60. Rep. 432;
43 Mo. 187.
Co. v. Stev-
ISHED IN Gill-
n. 5 Ind. 339;
o. Car.) 595.
Northeastern
ED IN Cleve-
y, 3 Ohio St.
558, 18 Fed.
ble & O. R.
ew Orleans,
9 Miss. 258;
Co., 109 Mo.
Am. & Eng.

s v. Chicago,
Eng. R. Cas.
ep. 907.
S. F. R. Co.
4, 764, 11 S.
v. S. A. R.
Houston &
391. Dal-
21 Am. &
Houston &
& Eng. R.
Rep. 756.
Hr, 51 Tex.
C. R. Co.,
93.
Beuhring v.

Chesapeake & O. R. Co., 37 W. Va. 502, 16
S. E. Rep. 435.—QUOTING Randall v. Balti-
more & O. R. Co., 109 U. S. 484; Madden
v. Chesapeake & O. R. Co., 28 W. Va. 618.
REVIEWING Texas & P. R. Co. v. Harrington,
62 Tex. 597.

And in Wisconsin. Dwyer v. American
Exp. Co., 53 Am. & Eng. R. Cas. 612, 82
Wis. 307, 52 N. W. Rep. 304.—REVIEWING
Brabbits v. Chicago & N. W. R. Co., 38
Wis. 289; Howland v. Milwaukee, L. S. &
W. R. Co., 54 Wis. 226.—Peschel v. Chicago,
M. & St. P. R. Co., 17 Am. & Eng. R. Cas.
545, 62 Wis. 338, 21 N. W. Rep. 269. Pease
v. Chicago & N. W. R. Co., 17 Am. & Eng.
R. Cas. 527, 61 Wis. 163, 20 N. W. Rep. 908.
Brabbits v. Chicago & N. W. R. Co., 38
Wis. 289.—DISTINGUISHED IN Peschel v.
Chicago, M. & St. P. R. Co., 17 Am. & Eng.
R. Cas. 545, 62 Wis. 338. QUOTED IN
Schultz v. Chicago, M. & St. P. R. Co., 48
Wis. 375; Heine v. Chicago & N. W. R.
Co., 58 Wis. 525. REVIEWED IN Flannagan
v. Chicago & N. W. R. Co., 2 Am. & Eng.
R. Cas. 150, 50 Wis. 462; Dwyer v. American
Exp. Co., 82 Wis. 307.—Cooper v. Mil-
waukee & P. du C. R. Co., 23 Wis. 668.
Moseley v. Chamberlain, 18 Wis. 700.—
OVERRULING Chamberlain v. Milwaukee &
M. R. Co., 11 Wis. 238.—APPLIED IN Sum-
merhays v. Kansas Pac. R. Co., 2 Colo. 484.
FOLLOWED IN Anderson v. Milwaukee &
St. P. R. Co., 37 Wis. 321. OVERRULED IN
Chamberlain v. Milwaukee & M. R. Co., 11
Wis. 238. REVIEWED IN Heine v. Chicago
& N. W. R. Co., 58 Wis. 525.—Chamberlain
v. Milwaukee & M. R. Co., 7 Wis. 425, 18
Wis. 700.—FOLLOWED IN Anderson v. Mil-
waukee & St. P. R. Co., 37 Wis. 321. RE-
VIEWED IN Heine v. Chicago & N. W. R.
Co., 58 Wis. 525.—Contra, see Chamberlain
v. Milwaukee & M. R. Co., 11 Wis. 238.—
DISAPPROVED IN Ohio & M. R. Co. v.
Hammersley, 28 Ind. 371; Pittsburgh, Ft. W.
& C. R. Co. v. Devinney, 17 Ohio St. 197.
OVERRULED IN Moseley v. Chamberlain, 18
Wis. 700.

And the rule has been followed and ap-
plied in the federal courts. Newport News
& M. V. Co. v. Howe, 52 Fed. Rep. 362, 6
U. S. App. 172, 3 C. C. A. 121. Crew v. St.
Louis, K. & N. W. R. Co., 20 Fed. Rep. 87.
Buckley v. Gould & C. Silver Min. Co., 8
Savvy. (U. S.) 394, 14 Fed. Rep. 833.—QUOT-
ING Holden v. Fitchburg R. Co., 129 Mass.
268. REVIEWING Cooper v. Milwaukee & P.
du C. R. Co., 23 Wis. 669.—Totten v. Penn-

sylvania R. Co., 11 Fed. Rep. 564. Gravelle
v. Minneapolis & St. L. R. Co., 3 McCrary
(U. S.) 352, 10 Fed. Rep. 711. Dillon v.
Union Pac. R. Co., 3 Dill. (U. S.) 319.
Maryland v. Baltimore & P. R. Co., 1
Hughes (U. S.) 337.

And in England. Vose v. Lancashire &
Y. R. Co., 2 H. & N. 728, 4 Jur. N. S. 364,
27 L. J. Ex. 249. Wigmore v. Jay, 5 Ex.
354, 14 Jur. 837, 19 L. J. Ex. 300. Hutchin-
son v. York, N. & B. R. Co., 6 Railw. Cas.
580, 5 Ex. 343, 19 L. J. Ex. 296.

And in Canada. McFarlane v. Gilmour,
5 Ont. 302.

2. Reasons for the rule.—The rule
respondet superior applies only to actions
sounding in tort, not where the relation of
master and servant exists between the par-
ties, the latter being a contractual relation.
Ohio & M. R. Co. v. Hammersley, 28 Ind.
371.

It is the relationship into which the par-
ties are brought by the nature of their
several employments which constitutes the
ground of liability or non-liability of the
master for the negligent acts of his servants
toward each other, in contradistinction from
an actual, present, and personal consocia-
tion of the individuals themselves in the
performance of their several duties at the
time of the injury. Chicago & A. R. Co. v.
Hoyt, 16 Ill. App. 237.

Among common laborers, constituting a
distinct class, no one of them, as between
himself and his co-equals, is the corpora-
tion's agent; and it is not liable to any one
of them for injuries resulting from the acts
or omissions of any other one of the class,
although each of the company's employes
would be its agent as to entire strangers to
it. Louisville & N. R. Co. v. Collins, 2 Duv.
(Ky.) 114.—APPROVED IN Chicago, M. &
St. P. R. Co. v. Ross, 112 U. S. 377; Louis-
ville & N. R. Co. v. Brooks, 83 Ky. 129.
DISAPPROVED IN Columbus, C. & I. C. R.
Co. v. Troesch, 68 Ill. 545. DISTINGUISHED
IN Casey v. Louisville & N. R. Co., 84 Ky.
79. FOLLOWED AND DISTINGUISHED IN
Louisville & N. R. Co. v. Robinson, 4 Bush
(Ky.) 507. QUOTED IN Louisville, C. & L.
R. Co. v. Cavens, 9 Bush (Ky.) 559.

Where a number of persons contract to
perform service for another, and the em-
ployes not being superior or subordinate the
one to another in its performance, and one
is injured through the negligence of an-
other, they are regarded as the agents of

each other, and no recovery can be had against the employer. *Louisville, C. & L. R. Co. v. Cavens*, 9 *Bush* (Ky.) 559.—QUOTED IN *Casey v. Louisville & N. R. Co.*, 84 Ky. 79.

Actions by employes against their employer for injuries caused by fellow-servants are based on the actual negligence of the defendant or of some representative who is held in law to personate him; and where the business requires the employment of many servants beyond the possible constant supervision of either the employer or of such representative, there can be no negligence without the failure to use such precautions in choosing agents and guarding against perils as diligent prudence and foresight require. *Smith v. Potter*, 2 *Am. & Eng. R. Cas.* 140, 46 *Mich.* 258, 9 *N. W. Rep.* 273.—QUOTED IN *Bennett v. Northern Pac. R. Co.*, 2 *N. Dak.* 112.

3. Negligence of fellow-servant deemed a risk assumed as an incident of the employment.—A master is not liable to his servant for injuries occasioned to him by a fellow-servant in the course of their common employment, provided the latter is a person of competent skill and care; because when the former engages in the service of the master, he undertakes, as between himself and the master, to incur all the ordinary risks of the service, which includes the risks incurred from the negligence of his fellow-servants in the same employment. *Flinn v. Philadelphia, W. & B. R. Co.*, 1 *Houst. (Del.)* 469. *Smoot v. Mobile & M. R. Co.*, 67 *Ala.* 13.—APPROVING *Mobile & O. R. Co. v. Thomas*, 42 *Ala.* 672; *Searle v. Lindsay*, 11 *C. B. N. S.* 429; *Wonder v. Baltimore & O. R. Co.*, 32 *Md.* 411; *Greenleaf v. Illinois C. R. Co.*, 29 *Iowa* 14; *Hard v. Vermont & C. R. Co.*, 32 *Vt.* 473.—*St. Louis, A. & T. R. Co. v. Triplett*, 48 *Am. & Eng. R. Cas.* 283, 54 *Ark.* 289, 15 *S. W. Rep.* 831, 16 *S. W. Rep.* 266.—QUOTING *Chicago, M. & St. P. R. Co. v. Ross*, 112 *U. S.* 377; *Brodeur v. Valley Falls Co.*, 16 *R. I.* 448, 17 *Atl. Rep.* 55; *Baird v. Pettit*, 70 *Pa. St.* 482.—*Illinois C. R. Co. v. Cox*, 21 *Ill.* 20. *Chicago, B. & Q. R. Co. v. Avery*, 17 *Am. & Eng. R. Cas.* 649, 109 *Ill.* 314; affirming 10 *Ill. App.* 210. *Ohio & M. R. Co. v. Hammersley*, 28 *Ind.* 371.—DISAPPROVING *Chamberlain v. Milwaukee & M. R. Co.*, 11 *Wis.* 238. QUOTING *Morgan v. Vale of Neath R. Co.*, *L. R.* 1 *Q. B.* 149.—*Columbus & I. C. R. Co. v.*

Arnold, 31 *Ind.* 174. *Cumberland & P. R. Co. v. State*, 44 *Md.* 283, 45 *Md.* 229. *Schaub v. Hannibal & St. J. R. Co.*, 106 *Mo.* 74, 16 *S. W. Rep.* 924. *Faulkner v. Erie R. Co.*, 49 *Barb. (N. Y.)* 324. *Anderson v. Bennett*, 38 *Am. & Eng. R. Cas.* 87, 16 *Oreg.* 515, 19 *Pac. Rep.* 765, 8 *Am. St. Rep.* 311.—QUOTING *Cleveland, C. & C. R. Co. v. Keary*, 3 *Ohio St.* 201; *Darrigan v. New York & N. E. R. Co.*, 52 *Conn.* 285. REVIEWING *Farwell v. Boston & W. R. Corp.*, 4 *Metc. (Mass.)* 49; *Murray v. South Carolina R. Co.*, 1 *McMull. (So. Car.)* 385.—DISTINGUISHED IN *Carlson v. Oregon S. L. & U. N. R. Co.*, 21 *Oreg.* 450.—*Miller v. Southern Pac. Co.*, 48 *Am. & Eng. R. Cas.* 294, 20 *Oreg.* 285, 26 *Pac. Rep.* 70. *Gulf, C. & S. F. R. Co. v. Schwabbe*, 1 *Tex. Civ. App.* 573, 21 *S. W. Rep.* 706. *Morgan v. Vale of Neath R. Co.*, 5 *B. & S.* 736, *L. R.* 1 *Q. B.* 149, 35 *L. J. Q. B.* 23, 13 *L. T.* 564, 34 *L. J. Q. B.* 23, 14 *W. R.* 144; affirming 5 *B. & S.* 570, 10 *Jur. N. S.* 1074, 33 *L. J. Q. B.* 260, 13 *W. R.* 1031.

As between a company and its servants there is no implied contract or guaranty of the care and diligence that employes shall observe toward each other. *Moss v. Pacific R. Co.*, 49 *Mo.* 167, 1 *Am. Ry. Rep.* 576. *Sizer v. Syracuse, B. & N. Y. R. Co.*, 7 *Lans. (N. Y.)* 67.

Where an employe of mature years and of ordinary intelligence and experience is directed to do a temporary work outside of the business for which he is engaged, and consents to do the work without objection for the want of knowledge, skill, or experience, no negligence can be charged to the employer. *Cole v. Chicago & N. W. R. Co.*, 33 *Am. & Eng. R. Cas.* 274, 71 *Wis.* 114, 5 *Am. St. Rep.* 201, 37 *N. W. Rep.* 84.—FOLLOWED IN *Hogan v. Northern Pac. R. Co.*, 53 *Am. & Eng. R. Cas.* 384, 53 *Fed. Rep.* 519.

Servants standing in relation to each other as fellow-servants are alone responsible for injuries occasioned by one to the other. *Cleveland, C. & C. R. Co. v. Keary*, 3 *Ohio St.* 201. *Pullman Palace Car Co. v. Laack*, 143 *Ill.* 242, 32 *N. E. Rep.* 285. *O'Connell v. Baltimore & O. R. Co.*, 20 *Md.* 212.

2. Scope and Extent of the Rule.

4. Generally.—The rule that an employer is not liable to his employe for injuries resulting from the negligence or

carelessness of a fellow-employé engaged in the same general business, if due care has been exercised in the selection of the employé, is fully established, but the court is not inclined to extend it beyond what is recognized by existing decisions. *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71.

If the act which the servant is required to perform pertains only to the duty of the operative, the employé performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow-servant for its improper performance. *Slaterly v. New York, L. E. & W. R. Co.*, 21 N. Y. S. R. 552, 51 Hun 638, 4 N. Y. Supp. 910.

The negligence of a fellow-servant that will relieve the master from liability for an injury to an employé is the omission of such fellow-servant to perform some act which it is made his duty to perform, or the doing of some act in the course of his duties that causes the injury. *Gates v. Chicago, M. & St. P. R. Co.*, 53 Am. & Eng. R. Cas. 245, 2 S. Dak. 422, 50 N. W. Rep. 907.

The rule *respondet superior* applies only to actions sounding in tort; and where the relation of master and servant exists, the duties and liabilities of the parties must be determined by the contract. *Ohio & M. R. Co. v. Hammersley*, 28 Ind. 371.

Plaintiff and others were engaged in handling rails; plaintiff claimed that, while assisting in carrying a rail, he was injured by the persons at the other end dropping the rail too soon, on an order given by the foreman. *Held*, that the injury resulted either from the carelessness of his fellow-servants in dropping the rail too soon, or from his own disobedience of the foreman's order in not dropping it soon enough, and hence there could be no recovery against the company. *Coffman v. Louisville & N. R. Co.*, (Ky.) 18 S. W. Rep. 1012.

5. As affecting degree of care demanded of company.—Where an employé of a railroad company is injured in running a train, and such injury is caused by the negligence of his co-employé, the company is only responsible for ordinary care. *Pittsburgh, Ft. W. & C. R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Ry. Rep. 199.

6. Negligence of fellow-servant coupled with other assumed risk.—The company is not responsible for a servant injured in its service where the injury was attributable to the risks incident to the

employment, coupled with the lack of care on the part of a fellow-servant, as well as the lack of care on his own part. *Kenfro v. Chicago, R. I. & P. R. Co.*, 86 Mo. 302.

7. —coupled with negligence of other person.—Rule of fellow-service applied where the fellow-servant's negligence contributed with that of another in causing the injury. *Chicago & N. W. R. Co. v. Snyder*, 28 Am. & Eng. R. Cas. 611, 117 Ill. 376, 7 N. E. Rep. 604; reversing 18 Ill. App. 640.

8. Threats and commands of fellow-servant.—A command, accompanied by a threat, is a command to which an employé is not bound to submit; under the contract of service, such command does not take the plaintiff out of the general line of his employment; and having received his injury through the negligence of his fellow-servant engaged in the same general employment, the master is not liable. *Capper v. Louisville, E. & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 525, 103 Ind. 305, 2 N. E. Rep. 749.—DISTINGUISHING *Lalor v. Chicago, B. & Q. R. Co.*, 52 Ill. 401, 4 Am. Rep. 616; *Union Pac. R. Co. v. Fort*, 17 Wall. (U. S.) 553; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Hurst v. Chicago, R. I. & P. R. Co.*, 49 Iowa 76; *Mann v. Oriental Print Works*, 11 R. I. 152.

9. Rule as applied to minor servants.—Where the person injured is a minor, who is, at the time he receives the injury, in the employ of a railway company for hire, and the injury is caused by his own negligence or the negligence of a fellow-servant engaged in the same general employment, an action cannot be maintained for the injury received, unless the company was negligent in hiring the co-servant by whose negligence the injury was caused. *Chicago & G. E. R. Co. v. Harney*, 28 Ind. 28. *Fisk v. Central Pac. R. Co.*, 72 Cal. 38, 13 Pac. Rep. 144. *Garland v. Toledo, W. & W. R. Co.*, 67 Ill. 498. *King v. Boston & W. R. Corp.*, 9 Cush. (Mass.) 112. *Houston & G. N. R. Co. v. Miller*, 51 Tex. 270.—APPROVED IN *Youll v. Sioux City & P. R. Co.*, 66 Iowa 346.—*Johnson v. Richmond & A. R. Co.*, 84 Va. 713, 5 S. E. Rep. 707.

10. Rule as applied to volunteers.—If a person undertakes voluntarily to perform service for a corporation, and an agent of the corporation assents to his performing such service, he stands in the relation of a servant of the corporation while so en-

gaged; and the rule that a master is not liable to his servant for an injury occasioned by the negligence of a fellow-servant in the course of their common employment applies to such volunteer. *Barstow v. Old Colony R. Co.*, 28 Am. & Eng. R. Cas. 473, 143 Mass. 535, 10 N. E. Rep. 255. *Degg v. Midland R. Co.*, 1 H. & N. 773, 3 Jur. N. S. 395, 26 L. J. Ex. 171.—DISTINGUISHED IN *Wright v. London & N. W. R. Co.*, 33 L. T. 830, L. R. 1 Q. B. D. 252, 45 L. J. Q. B. D. 570.

The plaintiff was requested by a brakeman of the defendant company to ascend a moving car of the defendant and set a brake, which he did, and while so engaged he was injured by other servants carelessly running other cars against the one he was upon. *Held*, that he could not recover of the defendant the damages he had sustained. *Everhart v. Terre Haute & I. R. Co.*, 4 Am. & Eng. R. Cas. 599, 78 Ind. 292, 41 Am. Rep. 567.—FOLLOWING *Degg v. Midland R. Co.*, 1 H. & N. 773; *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210; *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112.

In violation of the rules of a company, a boy attempted to get on a train which was being moved by a switch engine, and was injured without the knowledge of the train employes that he was on it. *Held*, that he could not claim any greater protection than an employé, and, regarding him as in the position of such, he could not recover from the company for injuries received, even if the train employes were negligent in not knowing that he was on the cars. *Chicago & A. R. Co. v. Lammert*, 12 Ill. App. 408.—REVIEWING *Chicago, B. & Q. R. Co. v. Stumps*, 55 Ill. 367; *Bulger v. Albany R. Co.*, 42 N. Y. 459.

11. Rule not affected by Sunday laws.—Persons who are fellow-servants of a railway company do not, in view of the rule which affects the liability of the company to one of them who may be injured by another one, cease to be such because the work on which they were employed at the time of the injury was being done on the Sabbath. The fact that the work was not of that character allowed by law to be done on the Sabbath does not affect the question. *Houston & T. C. R. Co. v. Rider*, 62 Tex. 267.

12. Action against lessor by servant of lessee.—An employé of the lessees of a railroad cannot recover against

the lessors for an injury resulting through the negligence of a fellow-servant. *Evans v. Sabine & E. T. R. Co.*, (Tex.) 18 S. W. Rep. 493.

3. Particular Applications of the Rule.

a. In General.

13. Negligence while erecting structures and buildings.*—Where a master employs competent workmen and provides suitable material for an appliance—e. g., staging—and intrusts the duty of its erection to the workmen as a part of the work which they are engaged to perform, the master is not liable to one of the workmen for injuries resulting to him from the falling of the structure. The negligence in such case resolves itself into the negligence of fellow-servants. *Bowen v. Chicago, B. & K. C. R. Co.*, 95 Mo. 268, 14 West. Rep. 744, 8 S. W. Rep. 230.—DISTINGUISHED IN *Carlson v. Oregon S. L. & U. N. R. Co.*, 21 Oreg. 450.—*Peschel v. Chicago, M. & St. P. R. Co.*, 17 Am. & Eng. R. Cas. 545, 62 Wis. 338, 21 N. W. Rep. 269.—DISTINGUISHING *Brabbits v. Chicago & N. W. R. Co.*, 38 Wis. 289; *Smith v. Chicago, M. & St. P. R. Co.*, 42 Wis. 520; *Dorsey v. Phillips & C. Constr. Co.*, 42 Wis. 585; *Wedgwood v. Chicago & N. W. R. Co.*, 44 Wis. 44; *Stetler v. Chicago & N. W. R. Co.*, 46 Wis. 497, 49 Wis. 609; *Bessex v. Chicago & N. W. R. Co.*, 45 Wis. 477; *Hulehan v. Green Bay, W. & St. P. R. Co.*, 58 Wis. 319; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Holden v. Fitchburg R. Co.*, 129 Mass. 268; *Hough v. Texas & P. R. Co.*, 100 U. S. 213; *Davis v. Central Vt. R. Co.*, 55 Vt. 84; *Baker v. Allegheny Valley R. Co.*, 95 Pa. St. 211; *Ellis v. New York, L. E. & W. R. Co.*, 95 N. Y. 546; *Kansas Pac. R. Co. v. Little*, 19 Kan. 267; *Kain v. Smith*, 89 N. Y. 376. REVIEWING *Whitwam v. Wisconsin & M. R. Co.*, 58 Wis. 408; *Shultz v. Chicago, M. & St. P. R. Co.*, 40 Wis. 589.

A railroad corporation is not liable to a brakeman on one of its trains for injuries suffered from the negligent setting up and use of a derrick by workmen employed in widening its railroad. *Holden v. Fitchburg R. Co.*, 2 Am. & Eng. R. Cas. 94, 129 Mass. 268, 37 Am. Rep. 343.—APPROVED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. &

* Liability of master for injury caused by fall of staging or scaffold, see note, 39 Am. & Eng. R. Cas. 343.

Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758.

14. Negligence while building or repairing bridges.—A bridge builder cannot recover from the company for the injuries received by a portion of a bridge falling through the negligence of his foreman and co-employé. *Yager v. Receivers*, 4 *Hughes* (U. S.) 192. — **DISTINGUISHING** *Hough v. Texas & P. R. Co.*, 100 U. S. 215; *Flike v. Boston & A. R. Co.*, 53 N. Y. 549. — *Johnson v. St. Paul & D. R. Co.*, 43 *Minn.* 222, 45 N. W. Rep. 156.

Rule applied in the case of the negligence of a temporary foreman of a bridge gang actually assisting in the work. *Texas & P. R. Co. v. Rogers*, 57 *Fed. Rep.* 378.

15. Negligence in the use of machinery, etc.—An employer is not liable for injuries resulting from the improper use of mechanical appliances by a fellow-servant of the plaintiff, when such appliances are of the ordinary construction, and such as are in common use in all similar establishments. *Worheide v. Missouri C. & F. Co.*, 32 *Mo. App.* 367. — **QUOTING** *Waldhier v. Hannibal & St. J. R. Co.*, 87 *Mo.* 46. — *Collyer v. Pennsylvania R. Co.*, 49 N. J. L. 59, 6 *Atl. Rep.* 437. *Peschel v. Chicago, M. & St. P. R. Co.*, 17 *Am. & Eng. R. Cas.* 545, 62 *Wis.* 338, 21 N. W. Rep. 269.

A master is not responsible to a servant for the act of a fellow-servant in negligently selecting a defective instrument, an iron hook, to which to attach a pulley to raise a heavy weight in a boiler shop, that being a proper detail of the work in which the servants were engaged. *Ling v. St. Paul, M. & M. R. Co.*, 50 *Minn.* 160, 52 N. W. Rep. 378.

Defect in machinery or material must be brought to the knowledge of the company to make it liable for the injury of a servant where the fellow-servant has been negligent. *Memphis & C. R. Co. v. Thomas*, 51 *Miss.* 637.

If the injury results to the employé from the negligence of a co-employé engaged in the same department of the common service, who used machinery for purposes and in a manner not designed in its construction, and whereby the injury resulted, but which would have been safe if properly used in work for which it was designed, the company would not be liable. *Texas & P. R. Co. v. Scott*, 64 *Tex.* 549.

A distinction is to be noted between neg-

ligence in furnishing unfit or defective machinery to the servant and the careless or improper manner in which machinery not defective is used by a fellow-servant. In the first instance the negligence is that of the master, for which he is responsible, and in the second that of the fellow-servant, for which the master would not be liable to another employé. *St. Louis & S. F. R. Co. v. McClain*, 80 *Tex.* 85, 15 S. W. Rep. 789.

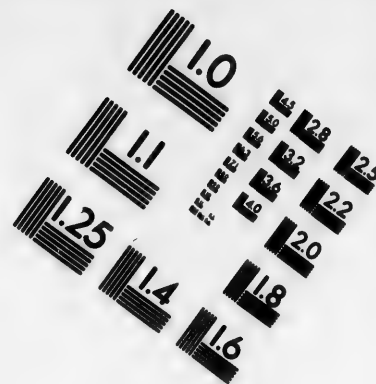
16. Neglect to report defects.—A section boss and a hand working with him are fellow-servants, and the company is not liable for an injury to the section hand through the negligence of the boss, who knew of a defect in a hand-car and failed to report it as he should for repairs. *Barringer v. Delaware & H. Canal Co.*, 19 *Hun* (N. Y.) 216.

One who has charge of a gang of construction men is a fellow-servant with the men, and cannot recover against the employer for the negligence of such men in using a hand-car which they knew to be defective; neither could he recover for the negligence of one intrusted with the duty of reporting defective cars, where the car had originally been sufficient, but had got out of repair without the knowledge of the employer. *Reynolds v. Kneeland*, 44 N. Y. S. R. 458, 63 *Hun* 283, 17 N. Y. Supp. 895.

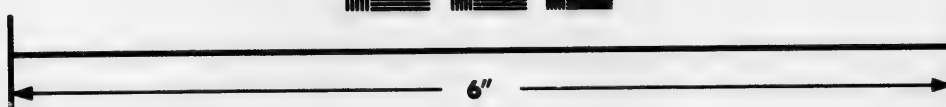
In such case it was error to instruct the jury that plaintiff might recover if he had no knowledge of the defective condition of the car, no matter how negligent his fellow-servants may have been in using the car. *Reynolds v. Kneeland*, 44 N. Y. S. R. 458, 63 *Hun* 283, 17 N. Y. Supp. 895.

The injury having occurred prior to the passage of the Ala. act approved February 15, 1885 (Sess. Acts 1884-85, p. 115), changing the rule as to the liability of the employer to one of his servants for injuries resulting from the negligence of other fellow-servants, the fact that a circumstance pointing to the defect was discovered, a few hours before the explosion, by other workmen, who failed to report it, would not render the company (or employer) liable. *Louisville & N. R. Co. v. Allen*, 28 *Am. & Eng. R. Cas.* 514, 78 *Ala.* 494.

17. Neglect to inspect and repair machinery and appliances.—The company is not liable to an employé injured through the negligence of a fellow-servant in discharging his duty with respect to inspection and repair of machinery, appli-



A resolution test chart featuring several groups of horizontal and vertical lines of varying thicknesses. Each group is accompanied by a numerical value indicating the resolution. The values include 1.0, 1.1, 1.25, 1.4, 1.6, 1.8, 2.0, 2.2, 2.5, 2.8, 3.2, 3.6, 4.0, 4.5, 5.0, 5.6, 6.3, 7.1, 8.0, 9.0, 10, 11.2, 12.5, 14, 16, 18, 20, 22.5, 25, 28, 32, 36, 40, 45, 50, 56, 63, 71, 80, 90, 100, 112, 125, 140, 160, 180, 200, 225, 250, 280, 320, 360, 400, 450, 500, 560, 630, 710, 800, 900, 1000, 1120, 1250, 1400, 1600, 1800, 2000, 2250, 2500, 2800, 3200, 3600, 4000, 4500, 5000, 5600, 6300, 7100, 8000, 9000, 10000, 11200, 12500, 14000, 16000, 18000, 20000, 22500, 25000, 28000, 32000, 36000, 40000, 45000, 50000, 56000, 63000, 71000, 80000, 90000, 100000, 112000, 125000, 140000, 160000, 180000, 200000, 225000, 250000, 280000, 320000, 360000, 400000, 450000, 500000, 560000, 630000, 710000, 800000, 900000, 1000000, 1120000, 1250000, 1400000, 1600000, 1800000, 2000000, 2250000, 2500000, 2800000, 3200000, 3600000, 4000000, 4500000, 5000000, 5600000, 6300000, 7100000, 8000000, 9000000, 10000000, 11200000, 12500000, 14000000, 16000000, 18000000, 20000000, 22500000, 25000000, 28000000, 32000000, 36000000, 40000000, 45000000, 50000000, 56000000, 63000000, 71000000, 80000000, 90000000, 100000000, 112000000, 125000000, 140000000, 160000000, 180000000, 200000000, 225000000, 250000000, 280000000, 320000000, 360000000, 400000000, 450000000, 500000000, 560000000, 630000000, 710000000, 800000000, 900000000, 1000000000, 1120000000, 1250000000, 1400000000, 1600000000, 1800000000, 2000000000, 2250000000, 2500000000, 2800000000, 3200000000, 3600000000, 4000000000, 4500000000, 5000000000, 5600000000, 6300000000, 7100000000, 8000000000, 9000000000, 10000000000, 11200000000, 12500000000, 14000000000, 16000000000, 18000000000, 20000000000, 22500000000, 25000000000, 28000000000, 32000000000, 36000000000, 40000000000, 45000000000, 50000000000, 56000000000, 63000000000, 71000000000, 80000000000, 90000000000, 100000000000, 112000000000, 125000000000, 140000000000, 160000000000, 180000000000, 200000000000, 225000000000, 250000000000, 280000000000, 320000000000, 360000000000, 400000000000, 450000000000, 500000000000, 560000000000, 630000000000, 710000000000, 800000000000, 900000000000, 1000000000000, 1120000000000, 1250000000000, 1400000000000, 1600000000000, 1800000000000, 2000000000000, 2250000000000, 2500000000000, 2800000000000, 3200000000000, 3600000000000, 4000000000000, 4500000000000, 5000000000000, 5600000000000, 6300000000000, 7100000000000, 8000000000000, 9000000000000, 10000000000000, 11200000000000, 12500000000000, 14000000000000, 16000000000000, 18000000000000, 20000000000000, 22500000000000, 25000000000000, 28000000000000, 32000000000000, 36000000000000, 40000000000000, 45000000000000, 50000000000000, 56000000000000, 63000000000000, 71000000000000, 80000000000000, 90000000000000, 100000000000000, 112000000000000, 125000000000000, 140000000000000, 160000000000000, 180000000000000, 200000000000000, 225000000000000, 250000000000000, 280000000000000, 320000000000000, 360000000000000, 400000000000000, 450000000000000, 500000000000000, 560000000000000, 630000000000000, 710000000000000, 800000000000000, 900000000000000, 1000000000000000, 1120000000000000, 1250000000000000, 1400000000000000, 1600000000000000, 1800000000000000, 2000000000000000, 2250000000000000, 2500000000000000, 2800000000000000, 3200000000000000, 3600000000000000, 4000000000000000, 4500000000000000, 5000000000000000, 5600000000000000, 6300000000000000, 7100000000000000, 8000000000000000, 9000000000000000, 10000000000000000, 11200000000000000, 12500000000000000, 14000000000000000, 16000000000000000, 18000000000000000, 20000000000000000, 22500000000000000, 25000000000000000, 28000000000000000, 32000000000000000, 36000000000000000, 40000000000000000, 45000000000000000, 50000000000000000, 56000000000000000, 63000000000000000, 71000000000000000, 80000000000000000, 90000000000000000, 100000000000000000, 112000000000000000, 125000000000000000, 140000000000000000, 160000000000000000, 180000000000000000, 200000000000000000, 225000000000000000, 250000000000000000, 280000000000000000, 320000000000000000, 360000000000000000, 400000000000000000,



Photographic Sciences Corporation

**23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503**

1.8
2.0
2.2
2.5
2.8
3.2
3.6
4.0
4.5
5.0
5.6
6.3
7.1
8.0
9.0
10.0
11.2
12.5
14.0
16.0
18.0
20.0
22.4
25.0
28.0
31.5
36.0
40.0
45.0
50.0
56.0
63.0
71.0
80.0
90.0
100.0

10
0.1
0.2
0.3
0.5
0.7
1.0
1.5
2.0
3.0
5.0
10.0
20.0
50.0
100.0

ances, and cars. *Mullen v. Philadelphia & S. M. Steamship Co.*, 9 Phila. (Pa.) 16. *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411. See also *Alabama G. S. R. Co. v. Carroll*, 53 Am. & Eng. R. Cas. 556, 97 Ala. 126, 11 So. Rep. 803. *St. Louis, I. M. & S. R. Co. v. Gaines*, 46 Ark. 555. *Seaver v. Boston & M. R. Co.*, 14 Gray (Mass.) 466. *Gibson v. Northern C. R. Co.*, 22 Hun (N. Y.) 289. *Little Miami R. Co. v. Fitzpatrick*, 17 Am. & Eng. R. Cas. 578, 42 Ohio St. 318. *Columbus & X. R. Co. v. Webb*, 12 Ohio St. 475. *Daniels v. Union Pac. R. Co.*, 6 Utah 357, 23 Pac. Rep. 152. *Dewey v. Detroit, G. H. & M. R. Co.*, 97 Mich. 329, 56 N. W. Rep. 756; reversing on rehearing 53 Am. & Eng. R. Cas. 550, 107 N. A. 342, 52 N. W. Rep. 942. *Smith v. ...*, 2 Am. & Eng. R. Cas. 140, 46 Mich. 258, 9 N. W. Rep. 273. — DISTINGUISHED IN *Dewey v. Detroit, G. H. & M. R. Co.*, 97 Mich. 329, 56 N. W. Rep. 756. — *McDonald v. New York C. & H. R. R. Co.*, 45 N. Y. S. R. 711, 63 Hun 587; affirmed in 138 N. Y. 663, mem., 53 N. Y. S. R. 932.

An employé cannot recover for an injury while attempting to couple one of a train of gravel cars loaded with stone to a stationary car which had a broken brake-head, so that the brake could not be set, and which a fellow-servant whose duty it was to see to it had neglected to set apart for repairs or to keep coupled to another car or engine, or if it was left alone on a side track, to trig or chock a wheel to prevent its moving. *Dodge v. Boston & A. R. Co.*, 155 Mass. 448, 29 N. E. Rep. 1086.

One of the brakemen on the train swore that the brakes were defective, and that the train therefore could not be stopped in obedience to the proper signal, which was up. It appeared, however, that the defects mentioned by him could have been removed by tightening a bolt or shortening a rod, which any one employed by the defendants could have done in a few minutes; and other witnesses swore that with the brakes as they were after the accident the train could have been stopped; that it came up at a speed showing no intention to stop at all, and with the engine reversed ran a quarter of a mile past the station, and that at the next station, on the same grade and with the same brakes, it was stopped without difficulty. Held, that these facts conclusively showed the negligence not to have been that of the defendants, but of their

servants engaged in a common employment with deceased, and for which, therefore, the defendants were not responsible. *Plant v. Grand Trunk R. Co.*, 27 U. C. Q. B. 78. — REVIEWING *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291.

Plaintiff reported to his superior that certain chisels which he used needed repairs, and he was told to send them to the shop. He did so, but they were returned with the points sharpened, but no repairs made to the heads, which were battered down, and which was the real matter complained of. Plaintiff again used them in this condition, and was injured by a scale flying from one of them and hitting him in the eye. Held, that the company was not liable for the negligence of the man in the shop who failed to repair the chisel heads. *Buchanan v. Rome, W. & O. R. Co.*, 10 N. Y. S. R. 326, 45 Hun 593.

In such case the one to whom the notice was given that the chisels needed repairs did not hold such relation to the company as to make him an *alter ego*, and therefore notice to him was not notice to the company; and it could not be held liable without notice of the defects. *Buchanan v. Rome, W. & O. R. Co.*, 10 N. Y. S. R. 326, 45 Hun 593.

In such case plaintiff could not recover, on the further ground that he continued to use the chisels with full knowledge of their defects. *Buchanan v. Rome, W. & O. R. Co.*, 10 N. Y. S. R. 326, 45 Hun 593.

18. Negligence while blasting.—One servant engaged in blasting rocks is a fellow-servant of another who is engaged in hauling them, so as to prevent a recovery against the master for an injury received by one through the negligence of the other. *Bogard v. Louisville, E. & St. L. R. Co.*, 100 Ind. 491.

The plaintiff, a servant of a third party, was engaged, under the direction of a servant of the defendant, in blasting rock. The two men pursued a method of withdrawing from the rock an unexploded charge of powder, which method proved to be dangerous. The two men worked together in this operation. Held, that the defendant was not responsible to the plaintiff for an injury suffered by him, upon the ground that the act was dangerous, for the employés were fellow-servants. *Cornelson v. Eastern R. Co.*, 50 Minn. 23, 52 N. W. Rep. 224.

19. Piling lumber too near track.—A brakeman injured while getting on his

train by coming in contact with lumber piled too near the track, cannot recover from his company, where the negligence in piling the lumber was that of a fellow-servant. *Gaffney v. New York & N. E. R. Co.*, 31 *Am. & Eng. R. Cas.* 265, 15 *R. I.* 456, 4 *N. Eng. Rep.* 33, 7 *Atl. Rep.* 284.

20. Disobeying rules.—Where the company has made all needed rules for the safety of its employes, it will not be liable to one servant for an injury growing out of the violation of such rules by another servant, unless it knew, or ought to have known, that the latter servant was incompetent. *Pittsburg, Ft. W. & C. R. Co. v. Powers*, 74 *Ill.* 341.—APPLIED IN *Carr v. North River Constr. Co.*, 17 *N. Y. S. R.* 945.—*Slater v. Jewett*, 5 *Am. & Eng. R. Cas.* 515, 85 *N. Y.* 61, 39 *Am. Rep.* 627.

The negligence of a foreman of a gang of car repairers in disobeying a rule to display a signal to prevent cars from backing against one on a repair track while a repairer is under it, will not make the company liable for an injury to the repairer, where there is no charge that the foreman was incompetent. *Peterson v. Chicago & N. W. R. Co.*, 31 *Am. & Eng. R. Cas.* 292, 67 *Mich.* 102, 10 *West. Rep.* 870, 34 *N. W. Rep.* 260.

b. In the Management and Operation of Engines, Cars, and Trains.

21. Negligence in the management of engines.—If a master uses reasonable care in employing suitable servants, in supplying and keeping in repair suitable structures and engines, and in giving proper directions and taking due precautions as to their use, he is not responsible to one servant for the negligence of another in the management and use of such structures and engines in carrying on the master's work. *Holden v. Fitchburg R. Co.*, 2 *Am. & Eng. R. Cas.* 94, 129 *Mass.* 268, 37 *Am. Rep.* 343.—QUOTED IN *Buckley v. Gould & C. Silver Min. Co.*, 8 *Sawyer (U. S.)* 394, 14 *Fed. Rep.* 833.

The engineer, fireman, brakemen, and shovelers on a gravel train engaged in loading, hauling, and unloading gravel in repair of the roadbed are fellow-servants engaged in the same common work, and the employer company is not liable, at common law, to one of such shovelers for personal injuries received in consequence of the

negligence of the engineer in putting the handling of his engine in the hands of his fireman, who was either careless or unskilled in the management of such machines. *Parrish v. Pensacola & A. R. Co.*, 28 *Fla.* 251, 9 *So. Rep.* 696.

Rule applied where the injured servant was hurt by a stick of wood thrown from a passing engine. *Whealan v. Mad River & L. E. R. Co.*, 8 *Ohio St.* 249.

22. Negligence resulting in explosion of boiler.—Where a fireman is killed by the explosion of the boiler, while the engine is standing on the track ready to start with a train of cars, and the engineer failed to come thirty minutes before the time of starting, as required by a rule of the company, it is error to charge the jury that if the proof satisfied them that the engineer had failed to comply with the rule, and they were further satisfied that his delay was the proximate cause of the accident, then plaintiff would be entitled to recover. *Nashville, C. & St. L. R. Co. v. Handman*, 13 *Lea (Tenn.)* 423.—QUOTED IN *Louisville & N. R. Co. v. Lahr*, 86 *Tenn.* 335, 6 *S. W. Rep.* 663; *Hanna v. Chattanooga & N. R. Co.*, 88 *Tenn.* 310, 6 *L. R. A.* 727, 12 *S. W. Rep.* 718.

Rule applied as between employes engaged in a repair shop, where one was killed by the explosion of a boiler of a locomotive. *Murphy v. Boston & A. R. Co.*, 8 *Am. & Eng. R. Cas.* 510, 88 *N. Y.* 146; *affirming* 24 *Hun* 142, 59 *How. Pr.* 197, 8 *Abb. N. Cas.* 41.

23. Negligence in failing to expose headlight.—Where, through the fault of persons in charge of a train, the headlight is not exposed in front of the engine in foggy weather, as expressly required by a rule of the company, the company is not responsible for the negligence of such persons resulting in injury to fellow-servants, unless it failed to exercise proper care in their selection, or retained them in its service with knowledge of their incompetency. *Pennsylvania R. Co. v. Wachter*, 15 *Am. & Eng. R. Cas.* 187, 60 *Md.* 395.—REVIEWED IN *Criswell v. Pittsburgh, St. L. & C. R. Co.*, 30 *W. Va.* 798.

24. Failure to supply sand-box with sufficient sand.—A yard engineer or "hostler," whose duty it is to supply a locomotive with fuel, water, sand, and other things before it starts on the road, and the engineer who runs the locomotive, are

fellow-servants with a brakeman on the train drawn by such engine; and if, on the run, an accident occurs by reason of the want of sand in sufficient quantity in the sand-box on the locomotive, whereby the brakeman is injured, the company is not liable therefor. *Louisville, N. O. & T. R. Co. v. Petty*, 41 *Am. & Eng. R. Cas.* 444, 67 *Miss.* 255, 7 *So. Rep.* 351.—FOLLOWED IN *Lagrone v. Mobile & O. R. Co.*, 67 *Miss.* 592, 7 *So. Rep.* 432.

25. Negligence in the operation of cars and trains, generally.—An engineer and fireman of a locomotive running alone are fellow-servants, so as to preclude the latter from recovering for injuries caused by the negligence of the former, although the rules of the company declare that when an engine is running under such circumstances the engineer shall be regarded as a conductor. *Baltimore & O. R. Co. v. Baugh*, 54 *Am. & Eng. R. Cas.* 328, 149 *U. S.* 368, 13 *Sup. Ct. Rep.* 914.—APPROVED IN *Dewey v. Detroit, G. H. & M. R. Co.*, 97 *Mich.* 329. FOLLOWED IN *Pullman Palace Car Co. v. Harkins*, 55 *Fed. Rep.* 932; *Little Rock & M. R. Co. v. Moseley*, 56 *Fed. Rep.* 1009; *What Cheer Coal Co. v. Johnson*, 56 *Fed. Rep.* 810; *New York & N. E. R. Co. v. Hyde*, 56 *Fed. Rep.* 188; *Harley v. Louisville & N. R. Co.*, 57 *Fed. Rep.* 144.

The conductor of a railroad train cannot recover for an injury received through the negligence and misconduct of the engineer in running the train while subject to his orders, unless he be free from fault and the company be negligent in employing or retaining the engineer in its service. *St. Louis, I. M. & S. R. Co. v. Morgart*, 45 *Ark.* 318.

One injured by the negligence of a fellow-servant in the operation and management of cars in a yard cannot recover of the company. *Besely v. New York C. & H. R. Co.*, 70 *N. Y.* 171; *reversing 9 Hun* 457. *Casey v. Louisville & N. R. Co.*, 84 *Ky.* 79.

Where cars in a yard are put in motion by some unknown person and injure an employé, the fact that their brakes were out of order will not make the company liable, where the injury results, not from such defects, but from a failure of other employés to set the brakes. *Harvey v. New York C. & H. R. R. Co.*, 32 *N. Y. S. R.* 817, 10 *N. Y. Supp.* 645, 57 *Hun* 589, *mem.*

The widow of one who, at the time of

receiving the injuries which resulted in his death, was a brakeman on a railway train cannot recover from the company damages on account of the death of her husband when the death resulted from the negligence of the engineer in operating the train, unless there was a want of due care on the part of the company in employing the engineer. *Texas & N. O. R. Co. v. Berry*, 31 *Am. & Eng. R. Cas.* 147, 67 *Tex.* 238, 5 *S. W. Rep.* 817.

Rule of fellow-service applied where a brakeman was injured through the negligence of a train dispatcher and a conductor. *Slater v. Jewett*, 5 *Am. & Eng. R. Cas.* 515, 85 *N. Y.* 61, 39 *Am. Rep.* 627.

Rule applied where the servant is injured by the negligence of fellow-servants in operating and managing a train. *Parker v. Hannibal & St. J. R. Co.*, 50 *Am. & Eng. R. Cas.* 521, 109 *Mo.* 362, 19 *S. W. Rep.* 1119. *Coon v. Syracuse & U. R. Co.*, 5 *N. Y.* 492; *affirming 6 Barb.* 231. *Boidt v. New York C. R. Co.*, 18 *N. Y.* 432. *Pennsylvania R. Co. v. Wachter*, 15 *Am. & Eng. R. Cas.* 187, 60 *Md.* 395. *St. Louis, A. & T. R. Co. v. Welch*, 38 *Am. & Eng. R. Cas.* 81, 72 *Tex.* 298, 2 *L. R. A.* 839, 10 *S. W. Rep.* 529. *Sullivan v. Toledo, W. & W. R. Co.*, 58 *Ind.* 26. *Foster v. Minnesota C. R. Co.*, 14 *Minn.* 360 (*Gil.* 277). *Prather v. Richmond & D. R. Co.*, 80 *Ga.* 427, 9 *S. E. Rep.* 530. *Hayes v. Western R. Corp.*, 3 *Cush. (Mass.)* 270. *Sherman v. Rochester & S. R. Co.*, 17 *N. Y.* 153; *affirming 15 Barb.* 574. *Becker v. Baltimore & O. R. Co.*, 57 *Fed. Rep.* 188. *Harvey v. New York C. & H. R. R. Co.*, 32 *N. Y. S. R.* 817, 57 *Hun* 589, *mem.*, 10 *N. Y. Supp.* 645. *Campbell v. Pennsylvania R. Co.*, 24 *Am. & Eng. R. Cas.* 427, 2 *Atl. Rep.* 489. *Louisville & N. R. Co. v. Martin*, 87 *Tenn.* 398, 3 *L. R. A.* 282, 10 *S. W. Rep.* 772. *Ewald v. Chicago & N. W. R. Co.*, 33 *Am. & Eng. R. Cas.* 326, 70 *Wis.* 420, 36 *N. W. Rep.* 12. *Collins v. St. Paul & S. C. R. Co.*, 8 *Am. & Eng. R. Cas.* 150, 30 *Minn.* 31.

Rule applied in the operation of trains over the same section. *Relyea v. Kansas City, Ft. S. & G. R. Co.*, 53 *Am. & Eng. R. Cas.* 578, 112 *Mo.* 86, 20 *S. W. Rep.* 480.

Rule applied in the operation of a wrecking train. *Beilfus v. New York, L. E. & W. R. Co.*, 29 *Hun (N. Y.)* 556.

Rule applied in the case of injury caused by the dumping of a car in the usual manner. *Lyon v. Cumberland Valley R. Co.*, 23 *Pa. St.* 384.

26. While injured servant is riding to or from work.

—Where an employé travels back and forth from his home to the place where his services are rendered upon the cars of the company, and his transportation, free of charge, constitutes part of the contract of service, while so traveling he is an employé, not a passenger, and for an injury to him through the negligence of a co-employé the company is not liable. *Vick v. New York C. & H. R. R. Co.*, 17 Am. & Eng. R. Cas. 609, 95 N. Y. 267.—APPLYING *Seaver v. Boston & M. R. Co.*, 14 Gray (Mass.) 466; *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291. DISTINGUISHING *Ross v. New York C. & H. R. R. Co.*, 74 N. Y. 617, 5 Hun 488; *Russell v. Hudson River R. Co.*, 17 N. Y. 134. FOLLOWING *Gillshannon v. Stony Brook R. Corp.*, 10 Cush. (Mass.) 228. OVERRULING *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239.—REVIEWED IN *Ewald v. Chicago & N. W. R. Co.*, 33 Am. & Eng. R. Cas. 326, 70 Wis. 420, 36 N. W. Rep. 12.—*Russell v. Hudson River R. Co.*, 17 N. Y. 134; reversing 5 Duer 39. *Seaver v. Boston & M. R. Co.*, 14 Gray (Mass.) 466.

An employé employed by the month to watch the ties along the road, to prevent their destruction, went in obedience to orders to procure a deed in favor of the company, and voluntarily got on its train, and after performing the duty was voluntarily returning on its train, when the train was thrown from the track and the employé injured. Held, that there was no error in a charge which instructed the jury that under such circumstances, no other facts being shown, the company was not liable in damages. *Dallas v. Gulf, C. & S. F. R. Co.*, 21 Am. & Eng. R. Cas. 575, 61 Tex. 196.—APPLIED IN *St. Louis, A. & T. R. Co. v. Welch*, 38 Am. & Eng. R. Cas. 81, 72 Tex. 298, 2 L. R. A. 839, 10 S. W. Rep. 529. FOLLOWED IN *Texas & P. R. Co. v. Rogers*, 57 Fed. Rep. 378; *Houston & T. C. R. Co. v. Rider*, 62 Tex. 267.

Rule applied where an employé was killed while riding upon a train through the negligence of the engineer. *Kumler v. Junction R. Co.*, 33 Ohio St. 150.

27. While injured servant was coupling or uncoupling cars.*—A person employed as conductor and brake-

man who is injured while coupling cars, owing to the alleged negligence of the engineer in moving the cars without a signal from the conductor, cannot recover for the injury from the company. *Long v. Coronado R. Co.*, 96 Cal. 269, 31 Pac. Rep. 170.

In the operation of coupling trains the relation between engineer and brakeman is that of fellow-servants, and subject to the rule that the master is not liable for injury occasioned to one servant by the fault of another servant. *Wallis v. Morgan's L. & T. R. & S. Co.*, 38 La. Ann. 156.

Where a brakeman uncoupling a car is injured in consequence of the sudden starting of a train, upon a signal improperly given by a fellow-servant, the negligence of such fellow-servant is considered to be the proximate cause, rather than defects in the couplings, which were difficult of operation. *Chicago & A. R. Co. v. Rush*, 84 Ill. 570.

Where a brakeman sues for an injury while uncoupling cars, and charges the company with negligence in using a defective draw-bar, the company cannot be held liable where there is no evidence to show where or by whom the coupling was made, but it does appear that both the coupling and the uncoupling were done by direction of a fellow-servant. *Whitman v. Wisconsin & M. R. Co.*, 12 Am. & Eng. R. Cas. 214, 58 Wis. 408, 17 N. W. Rep. 124.—APPLIED IN *Kelly v. Abbot*, 21 Am. & Eng. R. Cas. 633, 63 Wis. 307.

28. Negligence in making up trains.—A brakeman cannot recover from his company for an injury received through the negligence of ordinary employés in making up a train with uneven car platforms, under directions from the station master. *Hodgkins v. Eastern R. Co.*, 119 Mass. 419, 9 Am. Ry. Rep. 271.

29. Negligence in loading cars.*—One employed in a railroad coal-house, and injured by the negligence of a co-employé while loading coal upon a car, cannot recover of the company, because the injury in such case is not in any manner connected with "the use and operation of the railroad." *Luce v. Chicago, St. P., M. & O. R. Co.*, 67 Iowa 75, 24 N. W. Rep. 600.—FOLLOWING *Malone v. Burlington, C. R. & N. R. Co.*, 61 Iowa 326, 65 Iowa 417; *Foley v. Chicago, R. I. & P. R. Co.*, 64 Iowa 644.

* Fellow-servants. Injuries to servants in coupling cars, see note, 31 AM. & ENG. R. CAS. 167.

* Injury through negligence of fellow-servant in loading rails upon a flat car, see 41 AM. & ENG. R. CAS. 413, abstr.

The question of the application of the fellow-service rule is not affected by the fact that the car was loaded by the owner of the freight thereon. *Byrnes v. New York, L. E. & W. R. Co.*, 113 N. Y. 251, 21 N. E. Rep. 50, 22 N. Y. S. R. 936, 4 L. R. A. 151; *reversing* 14 N. Y. S. R. 554.

A brakeman on a construction train cannot recover from his employers for injuries received through the negligence of other employes in loading a car with stones so that one of them rolls under him while standing on the car, and throws him to the ground, causing the injury sued for. *Sweeney v. Paige*, 46 N. Y. S. R. 163, 64 Hun 172, 18 N. Y. Supp. 890.

Plaintiff, a brakeman upon a logging train, was injured by the falling of a log from the centre car of the train, which threw the car from the track. He testified that the falling of the log was the cause of the accident, and that he did not know whether the log was released because one of the stakes loosed or not. *Held*, that if such was the case, and if the stake came out because carelessly put in, that carelessness was directly chargeable to plaintiff, who placed most of the logs, or to one of his fellow-trainmen; and that if the log was thrown off by the jolting of the car over the rough road, as claimed, the jolting was, under the testimony, aggravated by the high rate of speed of the train, contrary to the rules of the defendant, of which plaintiff had notice, which negligence was that of plaintiff's fellow-servants, and chargeable to him, and that a verdict was properly directed for the defendant. *Conger v. Flint & P. M. R. Co.*, 86 Mich. 76, 48 N. W. Rep. 695. *Ford v. Lake Shore & M. S. R. Co.*, 41 Am. & Eng. R. Cas. 369, 117 N. Y. 638, 22 N. E. Rep. 946, 27 N. Y. S. R. 246; *reversing* 17 N. Y. S. R. 393, 2 N. Y. Supp. 1. — APPLYING *Byrnes v. New York, L. E. & W. R. Co.*, 113 N. Y. 251. DISTINGUISHING *Bushby v. New York, L. E. & W. R. Co.*, 107 N. Y. 374. — DISTINGUISHED IN *Dougherty v. Rome, W. & O. R. Co.*, 45 N. Y. S. R. 154. REVIEWED IN *Dewey v. Detroit, G. H. & M. R. Co.*, 97 Mich. 329.

30. Negligence in starting train.—A brakeman who is injured while under a car for the purpose of mending a brake-chain, by the negligence of his conductor in causing the train to start, cannot recover from the company. *Pease v. Chicago & N. W. R. Co.*, 17 Am. & Eng. R. Cas. 527, 61

Wis. 163, 20 N. W. Rep. 908. And see also *Heine v. Chicago & N. W. R. Co.*, 58 Wis. 525, 17 N. W. Rep. 420.

The conductor of a train directed plaintiff to open a switch and to cut off a car from the train and run it on a siding. In a moment he directed the engineer to make a slight movement forward, so as "to ease up on the pin," but the forward motion injured plaintiff. *Held*, that the conductor had a right to presume that plaintiff was in a proper place to make the uncoupling, and he was therefore not negligent in giving such order to the engineer. *Hudson v. Charleston, C. & C. R. Co.*, 55 Fed. Rep. 248.

31. — starting train suddenly.—Where a brakeman in uncoupling a car was thrown therefrom and injured, in consequence of the sudden starting of the train at a signal improperly and negligently given by a fellow-servant, Dooley, and the plaintiff himself had testified—"About the time I had it [the pin] up Dooley gave the order to go ahead," such negligence on the part of Dooley is the proximate cause of the injury, and not the condition of the coupling, which was new and tight and hard to get out. *Chicago & A. R. Co. v. Rush*, 84 Ill. 570.

32. — while injured servant was boarding.—An employé on a gravel train cannot recover from the company for injuries received through the negligence of a brakeman in failing to set the brakes, by reason of which the train started sooner than it otherwise would, and injured him while he was attempting to get on it. *Henry v. Staten Island R. Co.*, 2 Am. & Eng. R. Cas. 60, 81 N. Y. 373. — APPROVED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758.

33. Running at too high a rate of speed.—A railroad company is not liable for an injury to a fireman caused by the negligence of a conductor in running too rapidly over a short piece of road that was seldom used. *Stetler v. Chicago & N. W. R. Co.*, 46 Wis. 497, 21 Am. Ry. Rep. 402.

A track repairer on an elevated railway is a fellow-servant with an engineer thereon, and the former cannot recover from the company for injuries received through the negligence of the latter in running at too high a rate of speed. *Van Wickle v. Manhattan R. Co.*, 23 Blatchf. (U. S.) 422, 32

Fed. Rep. 278.—APPLIED IN *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336.

34. Negligence resulting in a collision.—An engineer and fireman are fellow-servants, and the company is not liable for an injury to the fireman through the gross negligence of the engineer in failing to obey orders, resulting in a collision. *Bull v. Mobile & M. R. Co.*, 67 Ala. 206.—FOLLOWING *Mobile & M. R. Co. v. Smith*, 59 Ala. 245.

Where a freight-train conductor is killed by a rear-end collision, and the negligence of his fellow-servants operating the second train was the proximate cause of the accident, and not the failure of the company to furnish a proper caboose, there can be no recovery. The complaint in this case, alleging negligence on the part of the company in failing to furnish a proper caboose, is demurrable upon this ground. *Lutz v. Atlantic & P. R. Co.*, (N. Mex.) 53 Am. & Eng. R. Cas. 478, 30 Pac. Rep. 912.

A conductor signaled an engineer to go forward so as to avoid colliding with a train approaching from behind on the same track, but the engineer discovered a train just ahead crossing the track. Instead of going ahead he backed and collided with the train in the rear, which drove his engine against the train in front and killed the conductor. *Held*, that the act of the engineer did not constitute wilful negligence, and did not render the company liable for the death of the conductor. *Chesapeake & O. R. Co. v. McMichael*, (Ky.) 15 S. W. Rep. 878.

A., an engineer, was in charge of a train proceeding southward. Several trains being not on time, the train dispatcher at a point to the north ordered train No. 6, southward bound, to "get orders at Grand Junction." On arriving at Grand Junction the engineer of No. 6 found no orders awaiting him and so proceeded to the south. While so doing he collided with the train upon which A. was engineer, and A. was in consequence killed. Suit being brought by A.'s widow to recover damages for her husband's death—*held*, that the same had been occasioned by the negligence of a fellow-servant of the deceased, and that therefore plaintiff was not entitled to recover. *Chicago, St. L. & N. O. R. Co. v. Doyle*, 8 Am. & Eng. R. Cas. 171, 60 Miss. 977.—FOLLOWED IN *McMaster v. Illinois C. R. Co.*, 41 Am. & Eng. R. Cas. 486, 65 Miss. 264, 7 Am. St. Rep. 653, 4 So. Rep. 59.

In an action for killing a fireman by a collision of trains, the evidence showed that the regulations of the company prescribed that when trains were behind time they should be moved according to special telegraphic instructions from the train dispatcher to local operators, and by them transmitted to the conductor and engineer. An order was sent directing where the colliding train should meet the one on which the fireman was, and the operator communicated it to the conductor, but not to the engineer; but the conductor, without authority, receipted for it in the name of both, and the dispatcher was advised that it had been properly delivered. The conductor failed to deliver the message to the engineer, who ran the train past the station, causing the collision. *Held*, that the negligence causing the death was of the fellow-servants of the fireman, and that the company was not liable. *Slater v. Jewett*, 5 Am. & Eng. R. Cas. 515, 85 N. Y. 61, 39 Am. Rep. 627.—DISTINGUISHED IN *Miller v. Southern Pac. Co.*, 20 Oreg. 385. QUOTED IN *Lewis v. Seifert*, 116 Pa. St. 628, 9 Cent. Rep. 755, 11 Atl. Rep. 514, 20 W. N. C. 145.

Rule of fellow-service applied in the operation of a train resulting in a collision. *Howard v. Denver & R. G. R. Co.*, 24 Am. & Eng. R. Cas. 448, 26 Fed. Rep. 837. *Ragsdale v. Northern Pac. R. Co.*, 42 Fed. Rep. 383. *Baltimore & O. R. Co. v. Andrews*, 53 Am. & Eng. R. Cas. 523, 50 Fed. Rep. 728, 1 C. C. A. 636. *Illinois C. R. Co. v. Hosler*, 45 Ill. App. 205. *International & G. N. R. Co. v. Ryan*, 82 Tex. 565, 18 S. W. Rep. 219. *Norfolk & W. R. Co. v. Donnelly*, 53 Am. & Eng. R. Cas. 571, 88 Va. 853, 14 S. E. Rep. 692. *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291, 12 Jur. N. S. 691.

35. — collision of train and wrecking train.—A person in the employ of a railway as a head blacksmith was, with a number of other employes, directed to proceed on a wrecking train to a place where a train had been wrecked, for the purpose of assisting in removing the rubbish and obstructions. The train carrying them was under the charge of the engineer, who acted also as conductor, and by his neglect to obey instructions the train collided with another, resulting in the death of the blacksmith. *Held*, that the blacksmith and all the other employes on the train, including the engineer and fire-

man, were fellow-servants of a common master, engaged in the same line of employment, within the rule excluding a recovery for the negligence of a fellow-servant. *Abend v. Terre Haute & I. R. Co.*, 17 Am. & Eng. R. Cas. 614, 111 Ill. 202.—QUOTED IN *Hobbold v. Chicago Sugar Refining Co.*, 44 Ill. App. 418.

36. — collision of train and detached part of same.—One of defendant's trains parted and the forward portion, on which were the engineer, fireman, and head brakeman, ran ahead of the rear portion, on which were the conductor and two other brakemen. When the forward portion was considerably in advance, the head brakeman discovered what had occurred and at once signaled the engine to back, while the rear portion continued to move on of its own momentum, and a collision occurred in which the conductor was killed. The conductor and two brakemen were all in the baggage car and did not know that the train had parted. *Held*: (1) that it was negligence on the part of the head brakeman to back the engine and cars attached, and as the brakeman and conductor are fellow-servants, the company is not liable for the negligence of the former resulting in an injury to the latter; (2) that there was negligence in not having the brakemen of the rear portion at their posts of duty so that they might have discovered that the train had parted; and in either event the company was not liable. *Brown v. Central Pac. R. Co.*, 72 Cal. 523, 14 Pac. Rep. 138; *reversing on rehearing* 12 Pac. Rep. 512.

37. — collision of hand-car with train or another hand-car.—A section hand while on a hand-car was run into by a train in charge of an engineer. *Held*, that they were fellow-servants, and the section hand could not recover. *Easton v. Houston & T. C. R. Co.*, 32 Fed. Rep. 893.—FOLLOWING *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322. NOT FOLLOWING *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 648, 6 Sup. Ct. Rep. 590.—QUOTED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758.

Hands working on a railroad were told by the foreman to go to their working place on a hand-car, that there was time enough before an expected train could overtake

them; the foreman's watch was slower than the conductor's; the train struck the hand-car and killed one of the hands. *Held*, that the company was not liable for his death. *Weger v. Pennsylvania R. Co.*, 55 Pa. St. 460. See also *Sherrin v. St. Joseph & St. L. R. Co.*, 103 Mo. 378, 15 S. W. Rep. 442. *Besel v. New York C. & H. R. R. Co.*, 70 N. Y. 171; *reversing* 9 Hun 457. *Casey v. Louisville & N. R. Co.*, 84 Ky. 79.

38. Negligence resulting in derailment.—An engineer ran his engine at a high rate of speed, and it left the track where it was defective, and injured a switchman, who was at the time riding on the engine under orders. *Held*, that the engineer and switchman were fellow-servants, and the company was not liable if the jury should find that the injury was caused by the negligence of the engineer, but otherwise if they should find that the accident was caused by the defect in the track. *Smith v. Memphis & L. R. R. Co.*, 18 Fed. Rep. 304.—FOLLOWED IN *Northern Pac. R. Co. v. Nickels*, 53 Am. & Eng. R. Cas. 388, 50 Fed. Rep. 718, 4 U. S. App. 369, 1 C. C. A. 625.

Applications of the doctrine of fellow-service where the servant is injured by the derailment of a train. *Waller v. Southeastern R. Co.*, 9 Jur. N. S. 501, 32 L. J. Ex. 205, 11 W. R. 731, 8 L. T. 325, 2 H. & C. 102. *Howland v. Milwaukee, L. S. & W. R. Co.*, 5 Am. & Eng. R. Cas. 578, 54 Wis. 226, 11 N. W. Rep. 529.

39. Negligence in backing engine or cars.—A yard clerk whose business it is to make a record of the seals of cars coming in or going out is a fellow-servant with a train engineer and the hands operating a train, and cannot recover damages for an injury received by the negligence of the latter in backing the train on him while engaged in his duties. *New York & N. E. R. Co. v. Hyde*, 56 Fed. Rep. 188.—DISTINGUISHING *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184. FOLLOWING *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914. QUOTING *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *Brodeur v. Valley Falls Co.*, 16 R. I. 448, 17 Atl. Rep. 54. REVIEWING *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590.

A track repairer cannot recover for injuries received through the carelessness of an engineer in backing a train against him without warning, where the company is not

chargeable with negligence in the employment of the engineer. *Rohback v. Pacific R. Co.*, 43 Mo. 187.—APPROVING *Priestley v. Fowler*, 3 M. & W. 1; *Murray v. South Carolina R. Co.*, 1 McMull. (So. Car.) 385; *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49. DISTINGUISHING *Schultz v. Pacific R. Co.*, 36 Mo. 13. REVIEWING *McDermott v. Pacific R. Co.*, 30 Mo. 115; *Whaalan v. Mad River & L. E. R. Co.*, 8 Ohio St. 249.—EXPLAINED IN *Parker v. Hannibal & St. J. R. Co.*, 109 Mo. 362. FOLLOWED IN *Brothers v. Cartter*, 52 Mo. 372. REVIEWED IN *Parker v. Hannibal & St. J. R. Co.*, 50 Am. & Eng. R. Cas. 521, 109 Mo. 362, 19 S. W. Rep. 1119.

40. — against other cars.—A switchman cannot recover from the company for injuries received while between cars through the negligence of the engineer in letting on steam and pushing the cars together. *Toms v. Buffalo Creek R. Co.*, 70 Hun 84, 53 N. Y. S. R. 640, 23 N. Y. Supp. 1112.

A car repairer who undertakes to repair a car on a repair track in the yards is a fellow-servant with others who have the charge of moving cars or trains, and cannot recover from the company for the negligence of the latter in negligently moving cars against the one that he is repairing. *Renfro v. Chicago, R. I. & P. R. Co.*, 86 Mo. 302. *Valdez v. Ohio & M. R. Co.*, 85 Ill. 500.—APPROVED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758. NOT FOLLOWED IN *Mele v. Delaware & H. Canal Co.*, 27 J. & S. (N. Y.) 367.

A car repairer cannot recover damages from the company for an injury received while between cars, upon a charge of negligence in not providing the cars with proper apparatus, where the evidence shows that the accident happened, not by reason of the defective apparatus, but by the engineer, who was his fellow-servant, in negligently backing upon him. *Fowler v. Chicago & N. W. R. Co.*, 17 Am. & Eng. R. Cas. 536, 61 Wis. 159, 21 N. W. Rep. 40.

41. Negligence while shunting or switching.—While P., plaintiff's intestate, engaged in the performance of his duties in inspecting cars, was standing between two cars upon a track used for cars awaiting inspection, two other cars were shunted upon the same track by other employes of defendant; these collided with one of those

between which P. was standing; he was caught between the bumpers and was killed. It was not claimed or proved that defendant had failed to employ sufficient and competent servants to do the work of shifting the cars, or that they were not present in the yard and engaged about the business at and prior to the accident, or that proper regulations had not been established defining the duties of employes and for the management of the business of the yard. The sole ground of liability alleged in the complaint was that there was no brakeman on the two cars. *Held*, that a refusal of the court to nonsuit was error; that assuming there was no brakeman upon the shunted cars, the negligence was that of a co-servant, not of defendant. *Potter v. New York C. & H. R. R. Co.*, 136 N. Y. 77, 32 N. E. Rep. 603, 48 N. Y. S. R. 843; *reversing* 46 N. Y. S. R. 895, 19 N. Y. Supp. 862.—CRITICISING *Murphy v. New York C. & H. R. R. Co.*, 118 N. Y. 527. DISTINGUISHING *Flike v. Boston & A. R. Co.*, 53 N. Y. 549; *Rose v. Boston & A. R. Co.*, 58 N. Y. 217.

42. Negligence in the management of switch.—A company employed A., who was careful and trusty in his general character, to tend the switches on their road; and after he had been long in their service they employed B. to run a passenger train of cars on the road, B. knowing the employment and character of A. *Held*, that the company were not answerable to B. for an injury received by him, while running the cars, in consequence of the carelessness of A. in the management of the switches. *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49.—APPROVED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758; *Shauck v. Northern C. R. Co.*, 25 Md. 462; *Rohback v. Pacific R. Co.*, 43 Mo. 187; *Sherman v. Rochester & S. R. Co.*, 17 N. Y. 153; *Houston & T. C. R. Co. v. Dunham*, 49 Tex. 181. CRITICISED IN *Little Miami R. Co. v. Stevens*, 20 Ohio 415; *Chamberlain v. Milwaukee & M. R. Co.*, 11 Wis. 238. DISAPPROVED IN *Parker v. Hannibal & St. J. R. Co.*, 109 Mo. 362. DISTINGUISHED IN *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 468; *Gillenwater v. Madison & I. R. Co.*, 5 Ind. 339; *Louisville & N. R. Co. v. Filbern*, 6 Bush (Ky.) 574; *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239. EXPLAINED IN *Dixon v. Chicago & A. R. Co.*, 109 Mo. 413.

FOLLOWED IN *Sullivan v. Mississippi & M. R. Co.*, 11 Iowa 421; *State v. Maine C. R. Co.*, 60 Me. 490; *Hayes v. Western R. Corp.*, 3 Cush. (Mass.) 270; *Ponton v. Wilmington & W. R. Co.*, 6 Jones (N. Car.) 245. LIMITED IN *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201; *Riley v. West Virginia C. & P. R. Co.*, 27 W. Va. 145. MODIFIED IN *Murray v. St. Louis C. & W. R. Co.*, 41 Am. & Eng. R. Cas. 446, 98 Mo. 573. QUALIFIED IN *Gilmore v. Northern Pac. R. Co.*, 9 Sawy. (U. S.) 558, 18 Fed. Rep. 866. QUOTED IN *Hobson v. New Mexico & A. R. Co.*, (Ariz.) 28 Am. & Eng. R. Cas. 360, 11 Pac. Rep. 545; *Herbert v. Northern Pac. R. Co.*, 8 Am. & Eng. R. Cas. 85, 3 Dak. 38; *McMaster v. Illinois C. R. Co.*, 41 Am. & Eng. R. Cas. 486, 65 Miss. 264, 7 Am. St. Rep. 653, 4 So. Rep. 59; *Proctor v. Hannibal & St. J. R. Co.*, 64 Mo. 112; *Young v. New York C. R. Co.*, 30 Barb. (N. Y.) 229; *Brodeur v. Valley Falls Co.*, 16 R. I. 448; *St. Louis, A. & T. R. Co. v. Welch*, 38 Am. & Eng. R. Cas. 81, 72 Tex. 298, 2 L. R. A. 839, 10 S. W. Rep. 529; *Cooper v. Pittsburg, C. & St. L. R. Co.*, 24 W. Va. 37. REFERRED TO IN *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441. REVIEWED IN *Parker v. Hannibal & St. J. R. Co.*, 50 Am. & Eng. R. Cas. 521, 109 Mo. 362, 19 S. W. Rep. 1119; *Corbett v. St. Louis, I. M. & S. R. Co.*, 26 Mo. App. 621; *Harrison v. Central R. Co.*, 31 N. J. L. 293; *Whaalan v. Mad River & L. E. R. Co.*, 8 Ohio St. 249; *Anderson v. Bennett*, 38 Am. & Eng. R. Cas. 87, 16 Oreg. 515.—See also *Chicago & A. R. Co. v. Rush*, 84 Ill. 570.

43. Negligence in giving signals or warnings.—A yard switchman and the foreman, having charge of him and others, are fellow-servants, and the former cannot recover from the company for an injury received through the negligence of the latter in giving a signal at an improper time, whereby a train runs over his foot. *Harley v. Louisville & N. R. Co.*, 57 Fed. Rep. 144.—FOLLOWING *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914.

44. Negligence in failing to give signals. The company is not responsible for the negligence of a fellow-servant in failing to notify or warn other servants of danger. *Shea v. Pennsylvania R. Co.*, (Pa.) 13 Atl. Rep. 193.

W. Va. Act of 1873, ch. 88, § 31, making railroad companies liable to "any person injured" by reason of a failure to ring a bell or blow a whistle sixty rods before reaching

a street or highway crossing, does not make the company liable, where the injury is to a fellow-servant of the engineer and fireman, who failed to comply with the statute. *Randall v. Baltimore & O. R. Co.*, 15 Am. & Eng. R. Cas. 243, 109 U. S. 478, 3 Sup. Ct. Rep. 322.—APPROVING *O'Donnell v. Providence & W. R. Co.*, 6 R. I. 211; *Harty v. Central R. Co.*, 42 N. Y. 468.—DISTINGUISHED IN *LeMay v. Canadian Pac. R. Co.*, 17 Ont. App. 293. FOLLOWED IN *Au v. New York, L. E. & W. R. Co.*, 29 Fed. Rep. 72; *Mealman v. Union Pac. R. Co.*, 37 Fed. Rep. 189, 2 L. R. A. 192; *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S. 189. QUOTED IN *Beuhring v. Chesapeake & O. R. Co.*, 37 W. Va. 502.

McC., plaintiff's intestate, was employed in the yard of defendant at H. P. to assist the yard master, L.; he was hired by L. and was under his control and supervision. While McC. was engaged, by the direction of L., in attaching a damaged car standing on a track in the yard to another car, L. negligently signaled to an engineer whose train stood upon the track to back the train, which he did without signal or warning, and in consequence McC. was crushed between the cars, receiving injuries causing his death. In an action to recover damages—held, that the yard master was to be deemed a fellow-servant with the deceased as to all acts done in the range of the common employment, except those done in the performance of some duty which defendant owed to its servants; that the act in question was not one of that character; and that, therefore, defendant was not liable. *McCosker v. Long Island R. Co.*, 5 Am. & Eng. R. Cas. 564, 84 N. Y. 77; reversing 21 Hun 500, 59 How. Pr. 258.—FOLLOWING *Crispin v. Babbitt*, 81 N. Y. 516.—APPLIED IN *Monaghan v. New York C. & H. R. Co.*, 45 Hun 113, 9 N. Y. S. R. 672. APPROVED IN *Houser v. Chicago, R. I. & P. R. Co.*, 8 Am. & Eng. R. Cas. 500, 60 Iowa 230, 46 Am. Rep. 65. DISTINGUISHED IN *Cullen v. Norton*, 52 Hun 9, 22 N. Y. S. R. 221, 4 N. Y. Supp. 774; *Wooden v. Western N. Y. & P. R. Co.*, 43 N. Y. S. R. 218. FOLLOWED IN *Brick v. Rochester, N. Y. & P. R. Co.*, 21 Am. & Eng. R. Cas. 605, 98 N. Y. 211. REVIEWED IN *Indiana Car Co. v. Parker*, 100 Ind. 181.

45. Disobeying rules and orders for management of trains.—A railroad company is not liable where the fire-

man on a freight train was hurt in consequence of the train being ditched through the engineer's neglect to obey signals which he saw and was bound by the company's rules to observe. *Henry v. Lake Shore & M. S. R. Co.*, 8 Am. & Eng. R. Cas. 110, 49 Mich. 495, 13 N. W. Rep. 832.—APPROVED IN *Toner v. Chicago, M. & St. P. R. Co.*, 28 Am. & Eng. R. Cas. 449, 31 Am. & Eng. R. Cas. 320, 69 Wis. 188, 33 N. W. Rep. 433.

The defendant company issued an order directing all car inspectors and repairmen, before going between or under any cars, to place the red signal flag on the end of the car or cars in the direction from which a train or engine could approach, and all trainmen were ordered not to back against or couple onto any car while such signal was displayed. The plaintiff, a car repairer, was injured while working under a car, owing to the negligence of a foreman in failing to remove the signal flag from the end of the train where plaintiff was working to the end of a second train which had been placed near the first one, and the negligence of the engineer of a switch engine in uncoupling certain cars which were in motion from his engine so that they struck the second train, which in turn struck and set in motion the train under which plaintiff was working, whereby he was injured. In an action against the company for damages—*held*, that the general order of defendant, if enforced and respected, was sufficient protection to employes; that as the injuries were the result of the negligence of plaintiff's fellow-servants, and there being no evidence that they were incompetent, plaintiff could not recover. *Peterson v. Chicago & N. W. R. Co.*, 31 Am. & Eng. R. Cas. 292, 67 Mich. 102, 10 West. Rep. 870, 34 N. W. Rep. 260.

A freight conductor, whose train was standing on the main track within the station limits, was killed by a freight train running into his train. A rule of the company required freight engineers, when approaching stations, to have their trains under full control, expecting to find trains using main tracks within station limits. It was conceded that the engineer and conductor, both of whom knew of the rule, were fellow-servants. *Held*, that the proximate cause of the accident was the failure of the engineer to obey the rule, and that the company was not liable for the consequent injury to the conductor upon the

ground that he was acting at the time under an erroneous order issued by its train dispatcher. *Enright v. Toledo, A. A. & N. M. R. Co.*, 93 Mich. 409, 53 N. W. Rep. 536.

Where it was the custom of train employes to switch cars while the train was running, and to make such switches on the order of the conductor, without his personal supervision, as required by a rule of the company, an employe who accepts service on the train subordinate to the conductor, with full knowledge of such custom, or who continues in the service after acquiring such knowledge, without any objection, and acquiesces in the custom, waives all right he might have against the company arising from such mode of doing the business, or from the neglect of the conductor in not personally superintending it, as required by the rule of the company; and if he be injured in making such customary switch through his own neglect, or that of a fellow-employe on the train having no control over him, no recovery therefor can be had against the company. *Lake Shore & M. S. R. Co. v. Knittel*, 33 Ohio St. 468.

46. Negligence in the operation of hand-car.—A section hand cannot recover from a railroad company for an injury caused by a water cask falling from a hand-car and overturning it, where the proofs show that the cask was placed on the car by a fellow-servant, with no directions from the foreman, except a general direction to the section men to place their things on the car before going home, though it appears that the jolting was caused by the looseness of the car handles, which had been called to the attention of the foreman, who had promised to have them fixed, but failed to do so. *Rose v. Gulf, C. & S. F. R. Co.*, (Tex.) 17 S. W. Rep. 789.

4. Limits and Exceptions to the Rule.

a. In General.

47. Limited to actions against the common master.—The rule of non-liability for the negligence of a fellow-servant applies only when the action is brought for an injury to a servant against the principal by whom such servant was himself employed. *Navy v. New York, O. & W. R. Co.*, 29 N. Y. S. R. 630, 9 N. Y. Supp. 153, 55 Hun 612, *mem.*; *affirmed in 125 N. Y. 759, mem.*, 27 N. E. Rep. 408, *mem.*, 30 N. Y. S. R. 1010, *mem.* *Schmidt v. Steinway &*

H. P. R. Co., 55 *Hun* 496, 29 *N. Y. S. R.* 201, 8 *N. Y. Supp.* 664, 9 *N. Y. Supp.* 939.—*APPLYING* *Young v. New York C. R. Co.*, 30 *Barb.* (N. Y.) 229.

An employé was injured in a collision between trains of railways at a crossing of their tracks. It was urged in defense that the collision was occasioned by the neglect of a fellow-servant of the plaintiff contributing. There being testimony of a common negligence—*held*, proper to refuse an instruction asked by the defendant that the neglect of a fellow-servant of the plaintiff, jointly with that of the defendant, would be a defense. An employé does not assume such risks. He can recover for an injury caused by the joint wrong of a fellow-servant and a stranger. *Ft. Worth & D. C. R. Co. v. Mackney*, 83 *Tex.* 410, 18 *S. W. Rep.* 949.—*APPROVING* *Perry v. Lansing*, 17 *Hun* (N. Y.) 34. *REVIEWING* *Gray v. Philadelphia & R. R. Co.*, 22 *Am. & Eng. R. Cas.* 351, 24 *Fed. Rep.* 168.

48. Negligence of fellow-servant must be the proximate cause.—The negligence of a fellow-servant must have been the proximate cause of the injury, to exempt the company from liability. *Chicago & A. R. Co. v. Rush*, 84 *Ill.* 570.

49. Servants must be in the common service of the same company.—The two servants must have been engaged in the same general employment and have been employed by the common master, to exempt such master from liability to the one injured by the negligence of the other. *Mobile & O. R. Co. v. Thomas*, 42 *Ala.* 672. *Alabama & F. R. Co. v. Waller*, 48 *Ala.* 459.

The doctrine has no application unless the one injured and the one at fault were engaged in the same general employment; and whatever conflict has arisen in cases has been as to what should be considered the same general employment. *Sadowski v. Michigan Car Co.*, 84 *Mich.* 100, 47 *N. W. Rep.* 598.

With respect to passengers and persons generally who are not in the employ of the company, the company is responsible for the negligence of its agents or servants. *Dow v. Kansas Pac. R. Co.*, 8 *Kan.* 642, 5 *Am. Ry. Rep.* 401.

50. Effect of special agreement or contract.—The rule of fellow-service may be changed by express contract on the part

of the company, making itself an insurer of the safety of its servants. *Ohio & M. R. Co. v. Hammersley*, 28 *Ind.* 371.

But the company is not such an insurer in the absence of a contract to that effect. *Columbus & I. C. R. Co. v. Arnold*, 31 *Ind.* 174.

Where there are several servants or agents, each stipulates for the performance of his several part; they are not liable to the company for the conduct of each other, nor is the company liable to one for the misconduct of another. *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 *Miss.* 258.

51. No chance for mutual influence promotive of carefulness.—The fellow-servant rule does not apply to a case where the respective situations of the servants allow no opportunity for the exertion of a mutual influence upon each other's carefulness. *Cooper v. Mullins*, 30 *Ga.* 146. —*FOLLOWED IN* *Western & A. R. Co. v. Drysdale*, 51 *Ga.* 644.

Where there is no right or opportunity of supervision, or where there is no independent will, and no right or opportunity to take measures to avoid the negligent acts of another without disobedience to the orders of an immediate superior, the doctrine exempting the master can have no application. *North Chicago Rolling Mill Co. v. Johnson*, 114 *Ill.* 57.

52. Where injured servant is not engaged in the performance of his duties.—Damages may be recovered against a railroad company for the killing of one who, although a regular employé thereof, was not engaged in the performance of his duty at the time of the killing, when it appears that the accident resulted directly from the want of ordinary care and prudence on the part of the agents of the company, and not from the want of ordinary care and prudence by the deceased, directly contributing to the accident. *Baltimore & O. R. Co. v. State*, 33 *Md.* 542.—*REVIEWED IN* *State v. Western Md. R. Co.*, 21 *Am. & Eng. R. Cas.* 503, 63 *Md.* 433.—*Washburn v. Nashville & C. R. Co.*, 3 *Head (Tenn.)* 638.—*APPLIED IN* *Smith v. Wabash, St. L. & P. R. Co.*, 31 *Am. & Eng. R. Cas.* 331, 92 *Mo.* 359.

Plaintiff was a member of a gang of trackmen, and was about to get on a train during working hours to be carried to a pay station, and was injured by being struck by a hand-

car operated by another gang of men. *Held*, that they were fellow-servants, and plaintiff could not recover from the company. *O'Brien v. Boston & A. R. Co.*, 138 *Mass.* 387, 52 *Am. Rep.* 279.

53. Gross or wilful negligence—

Kentucky doctrine.—The implied undertaking between a railroad company and its employes in the same class of service does not exonerate the company from liability for damage resulting to one of such co-agents from the extraordinary or gross negligence of another of them in the same line of service. *Louisville & N. R. Co. v. Robinson*, 4 *Bush* (Ky.) 507.—FOLLOWING AND DISTINGUISHING *Louisville & N. R. Co. v. Collins*, 2 *Duv.* (Ky.) 114.—FOLLOWED IN *Louisville & N. R. Co. v. Sheets*, (Ky.) 41 *Am. & Eng. R. Cas.* 470, 13 *S. W. Rep.* 248; *Louisville & N. R. Co. v. Filbern*, 6 *Bush* (Ky.) 574. QUOTED IN *Gulf, C. & S. F. R. Co. v. Levy*, (Tex.) 19 *Am. & Eng. R. Cas.* 151. REVIEWED IN *Louisville & N. R. Co. v. Fox*, 11 *Bush* (Ky.) 495.—*Louisville & N. R. Co. v. Filbern*, 6 *Bush* (Ky.) 574.—FOLLOWED IN *Louisville & N. R. Co. v. Sheets*, (Ky.) 41 *Am. & Eng. R. Cas.* 470, 13 *S. W. Rep.* 248.—*Louisville & N. R. Co. v. Moore*, 24 *Am. & Eng. R. Cas.* 443, 83 *Ky.* 675.

The failure of the engineer to obey an order of the conductor to go forward for the purpose of avoiding a collision, does not constitute such wilful negligence as would make the company liable for an injury to the conductor, where it appeared that by going forward he would have collided with another train crossing the track just ahead. *Chesapeake & O. R. Co. v. McMichael*, (Ky.) 15 *S. W. Rep.* 878.

54. Exception where a hired slave is injured.—Where a hired slave is injured by the negligent act of a co-employé, the master may recover damages against the hirer. *White v. Smith*, 12 *Rich. (So. Car.)* 595.—DISTINGUISHING *Murray v. South Carolina R. Co.*, 1 *McMull. (So. Car.)* 385.

55. Exception where wife is injured by negligence of husband's fellow-servant.—The fellow-servant rule does not apply to personal injuries received by the servant's family; and does not defeat the right of an employé to recover consequential damages for an injury to his wife. *Gannon v. Housatonic R. Co.*, 112 *Mass.* 234.

b. Company's Concurring Negligence.*

56. Generally.—The rule as to the non-liability of a company to its employes for injuries resulting from the negligence of fellow-servants does not apply where the company itself is guilty of negligence to the injured party. *Crew v. St. Louis, K. & N. W. R. Co.*, 20 *Fed. Rep.* 87. *Colorado C. R. Co. v. Ogden*, 3 *Colo.* 499. *Warmington v. Atchison, T. & S. F. R. Co.*, 46 *Mo. App.* 159. *Hanley v. Grand Trunk R. Co.*, 62 *N. H.* 274. *Harrison v. Central R. Co.*, 31 *N. J. L.* 293. *Keegan v. Western R. Co.*, 8 *N. Y.* 175.—FOLLOWED IN *Sherman v. Rochester & S. R. Co.*, 17 *N. Y.* 153. QUOTED IN *Mad River & L. E. R. Co. v. Barber*, 5 *Ohio St.* 541. REVIEWED IN *Gibson v. Pacific R. Co.*, 46 *Mo.* 163; *Warner v. Erie R. Co.*, 39 *N. Y.* 468.—*Pittsburgh, Ft. W. & C. R. Co. v. Lewis*, 33 *Ohio St.* 196. *Houston & T. C. R. Co. v. Gilmore*, 62 *Tex.* 391.

For injuries proceeding from its personal fault the company is under the same liability to its servants as to a third person toward whom it sustains no special relation. *Smoot v. Mobile & M. R. Co.*, 67 *Ala.* 13.

The rule of fellow-service is inapplicable where the negligent act complained of, as committed by a fellow-servant, pertained to a matter in respect to which the company owed a direct duty to the servant injured. *Dwyer v. American Exp. Co.*, 53 *Am. & Eng. R. Cas.* 612, 82 *Wis.* 307, 52 *N. W. Rep.* 304.

The only ground of liability of the master to an employé for injuries resulting from the carelessness of a co-employé, which the law recognizes, is that which arises from personal negligence, or from want of proper care and prudence, in the management of his affairs, or in the selection of appliances, etc. *Warner v. Erie R. Co.*, 39 *N. Y.* 468; reversing 49 *Barb.* 558.

The rule has no application to a case where a company has failed to provide a suitable roadbed, engine, cars, or other necessary appliances, so that the injury is not entirely caused by the negligence of the fellow-servant, but is the result, in part at least, of the omission of duty on the part of the company. *Ellis v. New York, L. E.*

* Negligence of master and servant combined. Liability of master for injury, see notes, 44 *AM. & ENG. R. CAS.* 623; 29 *AM. REP.* 102; 7 *L. R. A.* 503; 16 *Id.* 819.

& *W. R. Co.*, 95 *N. Y.* 546. *Donohue v. Brooklyn City R. Co.*, 38 *N. Y. S. R.* 485, 14 *N. Y. Supp.* 639.

Where an employer is sued for injuries to a young and inexperienced servant, and is charged with negligence in not properly instructing and warning the servant, it is no defense that the injured servant was acting at the time under the orders of a fellow-servant; and it is proper to instruct the jury that if proper instructions from the company would have put the injured employé on his guard against the negligence of his fellow-servant, and the accident would thereby have been prevented, then the employer was liable. *Thall v. Carme*, 24 *N. Y. S. R.* 270, 5 *N. Y. Supp.* 244.

57. Where negligence of company and fellow-servant both contribute.

—If an injury results to a servant from the combined negligence of the master and a fellow-servant, the master is responsible notwithstanding the contributory negligence of the fellow-servant. *Faren v. Sellers*, 39 *La. Ann.* 1011, 3 *So. Rep.* 363. *Union Pac. R. Co. v. Callaghan*, 56 *Fed. Rep.* 988. *Grand Trunk R. Co. v. Cummings*, 11 *Am. & Eng. R. Cas.* 254, 12 *Am. & Eng. R. Cas.* 204, 106 *U. S.* 700, 1 *Sup. Ct. Rep.* 493.—DISTINGUISHED IN *Baltimore & O. R. Co. v. Andrews*, 53 *Am. & Eng. R. Cas.* 523, 50 *Fed. Rep.* 728, 1 *C. C. A.* 636. FOLLOWED IN *Morrissey v. Hughes*, 65 *Vt.* 553. QUOTED IN *Young v. New Jersey & N. Y. R. Co.*, 46 *Fed. Rep.* 160; *Richmond & D. R. Co. v. George*, 88 *Va.* 223.—*Fisk v. Central Pac. R. Co.*, 72 *Cal.* 38, 13 *Pac. Rep.* 144. *Pullman Palace Car Co. v. Laack*, 143 *Ill.* 242, 32 *N. E. Rep.* 285. *Smith v. Potter*, 2 *Am. & Eng. R. Cas.* 140, 46 *Mich.* 258, 9 *N. W. Rep.* 273. *Hunn v. Michigan C. R. Co.*, 41 *Am. & Eng. R. Cas.* 452, 78 *Mich.* 513, 7 *L. R. A.* 500, 44 *N. W. Rep.* 502.—QUOTING *Paulmier v. Erie R. Co.*, 34 *N. J. L.* 155.—*Franklin v. Winona & St. P. R. Co.*, 31 *Am. & Eng. R. Cas.* 211, 37 *Minn.* 409, 34 *N. W. Rep.* 898, 5 *Am. St. Rep.* 856.—DISTINGUISHED IN *Chicago, B. & Q. R. Co. v. Barnard*, 32 *Neb.* 306.—*Bluedorn v. Missouri Pac. R. Co.*, 108 *Mo.* 439, 18 *S. W. Rep.* 1103. *Murphy v. St. Louis & I. M. R. Co.*, 4 *Mo. App.* 565; reversed on other grounds in 71 *Mo.* 202. *Paulmier v. Erie R. Co.*, 34 *N. J. L.* 151.—QUOTED IN *Stetler v. Chicago & N. W. R. Co.*, 46 *Wis.* 497.—*Pullitro v. Delaware, L. & W. R. Co.*, 27 *N. Y. S. R.*

63, 7 *N. Y. Supp.* 510.—QUOTING *Laning v. New York C. R. Co.*, 49 *N. Y.* 535.—*St. Louis & S. F. R. Co. v. McClain*, 80 *Tex.* 85, 15 *S. W. Rep.* 789. *Gulf, C. & S. F. R. Co. v. Johnson*, 83 *Tex.* 628, 19 *S. W. Rep.* 151. *Morrissey v. Hughes*, 65 *Vt.* 553, 27 *Atl. Rep.* 205.—FOLLOWING *Grand Trunk R. Co. v. Cummings*, 106 *U. S.* 700; *Elmer v. Locke*, 135 *Mass.* 575.—*Stetler v. Chicago & N. W. R. Co.*, 46 *Wis.* 497, 21 *Am. Ry. Rep.* 402.—QUOTING *Paulmier v. Erie R. Co.*, 34 *N. J. L.* 151.—*Cowan v. Chicago, M. & St. P. R. Co.*, 80 *Wis.* 284, 50 *N. W. Rep.* 180.

That the negligence of the master is slight does not take the case out of the rule, provided such negligence contributed to produce the injury. *O'Laughlin v. New York C. & H. R. Co.*, 9 *N. Y. S. R.* 384, 45 *Hun* 588, *mem.*; affirmed in 113 *N. Y.* 623, *mem.*, 20 *N. E. Rep.* 876, *mem.*, 22 *N. Y. S. R.* 992, *mem.*

In such case the injured person may sue one or both of the parties causing the injury. *Busch v. Buffalo Creek R. Co.*, 29 *Hun* (N. Y.) 112.—APPLYING *Chapman v. New Haven R. Co.*, 19 *N. Y.* 341; *Colegrove v. New York & H. R. Co.*, 20 *N. Y.* 492; *Sheridan v. Brooklyn & N. R. Co.*, 36 *N. Y.* 39.—FOLLOWED IN *Gray v. Philadelphia & R. R. Co.*, 22 *Am. & Eng. R. Cas.* 351, 24 *Fed. Rep.* 168, 23 *Blatchf. (U. S.)* 265.

58. Where the company's negligence was the proximate cause.*—The company is liable for an injury to one servant by his fellow-servant, where its own negligence concurred as a proximate cause of such injury. *Crew v. St. Louis, K. & N. W. R. Co.*, 20 *Fed. Rep.* 87. *Shiner v. Russell*, 6 *N. Y. S. R.* 78.—FOLLOWING *Flike v. Boston & A. R. Co.*, 53 *N. Y.* 549, 13 *Am. Rep.* 545; *Sheehan v. New York C. & H. R. Co.*, 9 *N. Y.* 332; *Dana v. New York C. & H. R. Co.*, 92 *N. Y.* 639.—QUOTED IN *Hankins v. New York, L. E. & W. R. Co.*, 55 *Hun* 51, 28 *N. Y. S. R.* 59, 8 *N. Y. Supp.* 272.

The negligence of the company concurring with that of a fellow-servant must have been the proximate cause, to warrant a recovery against the company. *Whittaker v. Delaware & H. Canal Co.*, 49 *Hun* 400, 22 *N. Y. S. R.* 405, 3 *N. Y. Supp.* 576. *Grand*

* Liability for injury to employé resulting from combined negligence of master and fellow-servant. Proximate cause, see note, 48 *Am. & Eng. R. Cas.* 336.

Trunk R. Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. Rep. 493. *Cincinnati, I., St. L. & C. R. Co. v. Lang*, 38 Am. & Eng. R. Cas. 25, 118 Ind. 579, 21 N. E. Rep. 317.

59. — without which the injury would not have been caused.—Negligence of a servant does not excuse the master from liability to a co-servant for an injury which would not have happened had the master performed his duty. *Coppins v. New York C. & H. R. R. Co.*, 44 Am. & Eng. R. Cas. 618, 122 N. Y. 557, 25 N. E. Rep. 915, 34 N. Y. S. R. 214; *affirming* 48 Hun 292, 17 N. Y. S. R. 916. *New Jersey & N. Y. R. Co. v. Young*, 49 Fed. Rep. 723, 1 U. S. App. 96, 1 C. C. A. 428; *affirming* 46 Fed. Rep. 160. *Knahtla v. Oregon S. L. & U. N. R. Co.*, 21 Oreg. 136, 27 Pac. Rep. 91.

Where there are several causes contributing to an injury to an employé, one of which is the master's negligence, he is not liable unless the accident would not have happened without his negligence. *Whittaker v. Delaware & H. Canal Co.*, 49 Hun 400, 22 N. Y. S. R. 405, 3 N. Y. Supp. 576.

60. Exposure to unnecessary risks.—To the general fellow-servant rule there are well-defined exceptions, one of which arises from the obligation of the master not to expose his servant, in conducting his business, to perils which might be guarded against by proper diligence on his part. *Gardner v. Michigan C. R. Co.*, 150 U. S. 349, 14 Sup. Ct. Rep. 140. — FOLLOWING *Texas & P. R. Co. v. Cox*, 145 U. S. 593. REVIEWING *Hough v. Texas & P. R. Co.*, 100 U. S. 213; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441.—*Herbert v. Northern Pac. R. Co.*, 8 Am. & Eng. R. Cas. 85, 3 Dak. 38, 13 N. W. Rep. 349. — QUOTING *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49; *Laning v. New York C. R. Co.*, 49 N. Y. 521.—APPROVED IN *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112.—*Hobbs v. Atlantic & N. C. R. Co.*, 107 N. Car. 1, 12 S. E. Rep. 124.

61. Negligence in construction and repair of its road.—A company is liable to employés for injuries resulting from the unskilful, improper, or negligent manner of constructing the road; and the rule exempting the company from liability for injury to one employé through the negligence of another does not apply. *Trask v. California Southern R. Co.*, 11 Am. & Eng. R. Cas. 192, 63 Cal. 96.

The company may be liable for an injury caused by the falling of a bridge, where the defects therein were attributable to the fault of the company. *McDermott v. Pacific R. Co.*, 30 Mo. 115.

The negligence of a bridge builder and road master in caring for a culvert, in law, was the negligence of the defendant; and notice to the former of a defective construction was notice to the latter; hence it is not a question of whether the servant whose negligence caused the injury and the servant injured were fellow-servants, nor whether the former was ordinarily skilful, nor whether the defendant was negligent in employing them. *Davis v. Central Vt. R. Co.*, 55 Vt. 84, 45 Am. Rep. 590.—FOLLOWING *Hard v. Vermont & C. R. Co.*, 32 Vt. 473.—APPROVED IN *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336. DISTINGUISHED IN *Peschel v. Chicago, M. & St. P. R. Co.*, 17 Am. & Eng. R. Cas. 545, 62 Wis. 338. FOLLOWED IN *Howard v. Delaware & H. Canal Co.*, 40 Fed. Rep. 195. REVIEWED IN *Near v. Delaware & H. Canal Co.*, 32 Hun (N. Y.) 557.

Plaintiff's intestate and others were engaged in removing a wreck from the track, when he was killed by a derrick swinging round and striking him, claimed to have been caused by one side of the track having settled. *Held*, that the company could not avoid liability on the ground that the accident resulted from the negligence of fellow-servants, where the work was in the immediate charge and presence of the company's road master. *Atchison, T. & S. F. R. Co. v. Wilson*, 48 Fed. Rep. 57, 4 U. S. App. 25, 1 C. C. A. 25.—FOLLOWING *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184.—FOLLOWED IN *Woods v. Lindvall*, 48 Fed. Rep. 62, 4 U. S. App. 49, 1 C. C. A. 37.

62. — defective track.—Where an employé of a railroad is injured by reason of a defective track, the company cannot shield itself from responsibility because another employé had neglected to repair the track as he had been directed to do. *Missouri Pac. R. Co. v. James*, (Tex.) 10 S. W. Rep. 332. *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495.—QUOTING *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441; *Ford v. Fitchburg R. Co.*, 110 Mass. 240. REVIEWING *Flike v. Boston & A. R. Co.*, 53 N. Y. 549.—*Texas & P. R. Co. v. Kirk*, 62 Tex. 227.—FOLLOWING *Texas Mex. R. Co. v. Whitmore*, 58 Tex. 277.—*Stetler v. Chi-*

cago & N. W. R. Co., 49 *Wis.* 609, 6 *N. W. Rep.* 303, 21 *Am. Ry. Rep.* 89.

If the negligent act of the servant at once injures a fellow-servant, he cannot recover; but when the negligent act of the servant consisted in rendering dangerous the track which it was the company's duty to use ordinary care to keep free from obstructions, and it failed to discover and remove them within a reasonable time, then the negligence of the servant becomes that of the master; and it might be a question whether such negligence would not from the first be charged to the master. *Texas & P. R. Co. v. Hohn*, 1 *Tex. Civ. App.* 36, 21 *S. W. Rep.* 942.

63. — defective trestle-work. — Where the track over a trestle-work was not capable of supporting an engine, and the engineer in charge had orders not to put his engine thereon, which orders he disobeyed, and the intestate of the plaintiff, who was a fireman on said engine and who was unaware of said orders or of the danger, was thereby killed, the said trestle-work giving way—*held*, that the plaintiff was entitled to recover, on the ground that such death was occasioned in part by the want of care in the defendant, the railroad company, with respect to said trestle-work. *Paulmier v. Erie R. Co.*, 34 *N. J. L.* 151.—APPLIED IN *Gray v. Philadelphia & R. R. Co.*, 22 *Am. & Eng. R. Cas.* 351, 24 *Fed. Rep.* 168, 23 *Blatchf. (U. S.)* 265.

64. Negligence with respect to machinery and appliances.—A company is liable for negligence in failing to provide safe machinery, whereby a servant is injured, although the negligence of a fellow-servant contributes to the injury. *McMahon v. Henning*, 1 *McCrary (U. S.)* 516, 3 *Fed. Rep.* 353. *Young v. New Jersey & N. Y. R. Co.*, 46 *Fed. Rep.* 160.—QUOTING *Grand Trunk R. Co. v. Cummings*, 106 *U. S.* 700, 1 *Sup. Ct. Rep.* 493; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 *U. S.* 469.—*Northern Pac. R. Co. v. Charless*, 51 *Am. & Eng. R. Cas.* 198, 51 *Fed. Rep.* 562, 7 *U. S. App.* 359, 2 *C. C. A.* 380.—QUOTING *Hough v. Texas & P. R. Co.*, 100 *U. S.* 213; *Chicago, M. & St. P. R. Co. v. Ross*, 112 *U. S.* 377, 5 *Sup. Ct. Rep.* 184; *Northern Pac. R. Co. v. Herbert*, 116 *U. S.* 642, 6 *Sup. Ct. Rep.* 590; *Ford v. Fitchburg R. Co.*, 110 *Mass.* 440; *Flike v. Boston & A. R. Co.*, 53 *N. Y.* 549; *Cone v. Delaware, L. & W. R. Co.*, 81 *N. Y.* 206; *Lewis v. Seifert*, 116 *Pa.*

St. 628, 11 *Atl. Rep.* 514.—DISTINGUISHED IN *Cincinnati, N. O. & T. P. R. Co. v. Clark*, 57 *Fed. Rep.* 125.—*St. Louis, I. M. & S. R. Co. v. Harper*, 44 *Ark.* 524. *Atchison, T. & S. F. R. Co. v. Holt*, 11 *Am. & Eng. R. Cas.* 206, 29 *Kan.* 149. *Towns v. Vicksburg, S. & P. R. Co.*, 37 *La. Ann.* 630, 55 *Am. Rep.* 508. *Gibson v. Pacific R. Co.*, 46 *Mo.* 163.—APPROVING *Snow v. Housatonic R. Co.*, 8 *Allen (Mass.)* 441; *Seaver v. Boston & M. R. Co.*, 14 *Gray (Mass.)* 466. QUOTING *Mad River & L. E. R. Co. v. Barber*, 5 *Ohio St.* 541; *Wright v. New York C. R. Co.*, 25 *N. Y.* 565. REVIEWING *McGatrick v. Wason*, 4 *Ohio St.* 566; *Keegan v. Western R. Co.*, 8 *N. Y.* 175; *Fifield v. Northern R. Co.*, 42 *N. H.* 225.—FOLLOWED IN *Brothers v. Cartter*, 52 *Mo.* 372; *Dale v. St. Louis, K. C. & N. R. Co.*, 63 *Mo.* 455; *Long v. Pacific R. Co.*, 65 *Mo.* 225; *Warrington v. Atchison, T. & S. F. R. Co.*, 46 *Mo. App.* 159; *Elliot v. St. Louis & I. M. R. Co.*, 67 *Mo.* 272; *Cowles v. Richmond & D. R. Co.*, 2 *Am. & Eng. R. Cas.* 90, 84 *N. Car.* 309, 37 *Am. Rep.* 620. MODIFIED IN *Clowers v. Wabash, St. L. & P. R. Co.*, 21 *Mo. App.* 213.—*Harper v. Indianapolis & St. L. R. Co.*, 47 *Mo.* 567.—APPROVING *Illinois C. R. Co. v. Jewell*, 46 *Ill.* 99; *Wright v. New York C. R. Co.*, 25 *N. Y.* 565; *Warner v. Erie R. Co.*, 39 *N. Y.* 471. QUOTING *Brickner v. New York C. R. Co.*, 2 *Lans. (N. Y.)* 506; *Snow v. Housatonic R. Co.*, 8 *Allen (Mass.)* 444; *Gilman v. Eastern R. Corp.*, 10 *Allen* 233.—*Cone v. Delaware, L. & W. R. Co.*, 2 *Am. & Eng. R. Cas.* 57, 81 *N. Y.* 206, 37 *Am. Rep.* 491; *affirming* 15 *Hun* 172.—APPLIED IN *Williams v. Delaware, L. & W. R. Co.*, 39 *Hun* 430. DISTINGUISHED IN *White v. Sharp*, 27 *Hun* 94.—*Ellis v. New York, L. E. & W. R. Co.*, 17 *Am. & Eng. R. Cas.* 641, 95 *N. Y.* 546; *reversing* 29 *Hun* 278.—DISTINGUISHED IN *Coppins v. New York C. & H. R. R. Co.*, 43 *Hun* 26, 6 *N. Y. S. R.* 572; *Peschel v. Chicago, M. & St. P. R. Co.*, 17 *Am. & Eng. R. Cas.* 545, 62 *Wis.* 338.—*Weger v. Pennsylvania R. Co.*, 55 *Pa. St.* 460.

The rule is the same, although the defect may have been brought about by the negligence of another employé. *McDade v. Washington & G. R. Co.*, 26 *Am. & Eng. R. Cas.* 325, 5 *Mackey (D. C.)* 144.—QUOTING *Northern Pac. R. Co. v. Herbert*, 116 *U. S.* 652; *Beeson v. Green Mountain Gold Min. Co.*, 57 *Cal.* 20.

And although the machinery, by the exer-

cise of care and caution, might have been operated so as not to cause injury. *Stringham v. Stewart*, 100 N. Y. 516, 3 N. E. Rep. 575; reversing 27 Hun 562, 64 How. Pr. 5. *Ransier v. Minneapolis & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 601, 32 Minn. 331, 20 N. W. Rep. 332.—DISTINGUISHED IN *McLaren v. Williston*, 48 Minn. 299.

The negligence of the company with respect to unprotected machinery, when concurring with the negligence of a fellow-servant, must have been the proximate cause of the servant's death to render the company liable therefor. *Pullman Palace Car Co. v. Harkins*, 55 Fed. Rep. 932.

Plaintiff's husband was killed while employed in car shops. The evidence showed that the proximate cause of the death was his being caught by unprotected machinery, the dangers of which he was ignorant. *Held*, that it was proper to refuse to instruct the jury that there could be no recovery if the injury resulted from the negligence of a fellow-servant; and it was proper instead to charge that it was the duty of the company to take reasonable precautions to protect its employes against dangerous machinery, a duty which could not be delegated. *Pullman Palace Car Co. v. Harkins*, 55 Fed. Rep. 932.—FOLLOWING *Hough v. Texas & P. R. Co.*, 100 U. S. 213; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914.

65. — defective jack.—It is the duty of a company to furnish its employes with safe tools and appliances. So where two employes are engaged in jacking up a car, the company cannot avoid liability for an injury to one caused by the other getting for use a defective jack, where the selection was made without the aid of the injured employe. *Williams v. New York, L. E. & W. R. Co.*, 21 N. Y. Supp. 259.

In such case it is error to withdraw the case from the jury on a charge of contributory negligence on the part of the plaintiff in going under the car when the jack would have raised it high enough to have avoided the necessity, or in failing to use other supports that might have prevented the car from falling. *Williams v. New York, L. E. & W. R. Co.*, 21 N. Y. Supp. 259.

66. Negligence with respect to engines.—Where an employe was injured by the sudden starting of a locomotive, caused by its being defective and out of repair, of

which defects the corporation had notice—*held*, that it was no defense that the engineer could have so managed the engine as to have prevented the accident. *Cone v. Delaware, L. & W. R. Co.*, 2 Am. & Eng. R. Cas. 57, 81 N. Y. 206, 37 Am. Rep. 491; affirming 15 Hun 172.—DISTINGUISHED IN *Cregan v. Marston*, 126 N. Y. 568. FOLLOWED IN *Hall v. Cooperstown & S. V. R. Co.*, 49 Hun 373, 19 N. Y. S. R. 646, 3 N. Y. Supp. 584. QUOTED IN *Northern Pac. R. Co. v. Charless*, 51 Am. & Eng. R. Cas. 198, 51 Fed. Rep. 562, 7 U. S. App. 359, 2 C. C. A. 380. REVIEWED IN *Murtaugh v. New York C. & H. R. R. Co.*, 49 Hun 456, 23 N. Y. S. R. 636.—*Crutchfield v. Richmond & D. R. Co.*, 76 N. Car. 320, 14 Am. Ry. Rep. 292.—APPROVED IN *Burlington & C. R. Co. v. Liehe*, 17 Colo. 280.

67. — defective boiler.—In an action against a railroad company to recover damages for the death of an engineer and fireman upon its road, caused by the explosion of the boiler of a locomotive which had recently come from the repair shop of the company and had been insufficiently repaired, the company is not exempt from liability on the allegation that the workmen in the repair shop who did the work were fellow-servants of the deceased, although it appear that they were under the same general superintendent. *Pennsylvania & N. Y. C. & R. Co. v. Mason*, 109 Pa. St. 296.

Where an engineer was killed by the explosion of the boiler of his engine—*held*, to have been the duty of the company to furnish the deceased with a safe engine, and if this duty was neglected, the company could not relieve itself from liability on the ground that its mechanics, whose duty it was to build and keep in safe repair its engines, were derelict in the discharge of their duty, such duty not being in the same line of employment with that of the deceased. *Toledo, W. & W. R. Co. v. Moore*, 77 Ill. 217.—QUOTING *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197.—FOLLOWED IN *Kranz v. White*, 8 Ill. App. 583.

68. Negligence with respect to cars.—As respects the duty of a company to have its cars inspected so that they may be maintained in a safe condition for use by its servants, the master is not exonerated from liability to a servant for the neglect of this duty upon the ground that its car inspector, and the servant injured by reason of his neglect, were fellow-servants. *Macy*

v. St. Paul & D. R. Co., 35 Minn. 200, 28 N. W. Rep. 249.—FOLLOWING *Tierney v. Minneapolis & St. L. R. Co.*, 33 Minn. 311, 23 N. W. Rep. 229; *Fay v. Minneapolis & St. L. R. Co.*, 30 Minn. 231, 15 N. W. Rep. 241.

69. — insufficient brakes.*—When the accident was caused by the negligence of the company in not providing sufficient brakes to hold a car on the side track where it was placed, the negligence is that of the company and not of a fellow-servant. *Henry v. Wabash Western R. Co.*, 109 Mo. 488, 19 S. W. Rep. 239.—DISTINGUISHING *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74.

70. Negligence in the operation and manning of trains.—A railroad company which neglects to see that there are a sufficient number of brakemen on a train when it starts on its trip, is liable to a servant consequently injured without contributory negligence on his part, although the immediate negligence in so starting was that of a co-servant. *Booth v. Boston & A. R. Co.*, 73 N. Y. 38.—FOLLOWING *Flike v. Boston & A. R. Co.*, 53 N. Y. 550.—APPLIED IN *Smith v. Wabash, St. L. & P. R. Co.*, 31 Am. & Eng. R. Cas. 331, 92 Mo. 359. APPROVED IN *Quill v. New York C. & H. R. R. Co.*, 16 Daly (N. Y.) 313. DISTINGUISHED IN *Newell v. Ryan*, 40 Hun (N. Y.) 286. FOLLOWED IN *Fuller v. Jewett*, 1 Am. & Eng. R. Cas. 109, 80 N. Y. 46. QUOTED IN *Stephens v. Hudson Valley Knitting Co.*, 69 Hun 375. REVIEWED IN *Southern Pac. Co. v. Lafferty*, 57 Fed. Rep. 536; *Mann v. Delaware & H. Canal Co.*, 12 Am. & Eng. R. Cas. 199, 91 N. Y. 495.

Where the negligence of an engineer of a train in running it is contributory with that of the company in not sending a sufficient number of brakemen, and both together cause an injury to an employé, the negligence of the engineer does not relieve the company from liability. *Booth v. Boston & A. R. Co.*, 73 N. Y. 38.

Where an action is brought against a railroad company by one of its employés to recover damages for personal injuries sustained by the enforcement of an order made by the superintendent of the company as to the management of a particular train, which order was unreasonable and the enforce-

ment of the same was dangerous to such employé, the fact that the negligence of a fellow-servant of the injured person, while executing such order, contributed in producing the injury affords no defense to the action. *Pittsburgh, C. & St. L. R. Co. v. Henderson*, 5 Am. & Eng. R. Cas. 529, 37 Ohio St. 549.—APPLIED IN *Smith v. Wabash, St. L. & P. R. Co.*, 31 Am. & Eng. R. Cas. 331, 92 Mo. 359. REVIEWED IN *Dick v. Indianapolis, C. & L. R. Co.*, 8 Am. & Eng. R. Cas. 101, 38 Ohio St. 389.

Another company whose road connected with defendant's made arrangements to run a train over both roads, to be governed while on defendant's road by its rules and it to have control of the hands; but the other company was at liberty to employ such engines and hands as it might please. Plaintiff, a brakeman on such train, was injured by a collision with a train of defendant company. *Held*, that the conductor on defendant's train was not a fellow-servant with plaintiff; but a failure to employ a suitable conductor, or to have a reasonably safe system for directing its trains, would render defendant liable. *Zeigler v. Danbury & N. R. Co.*, 23 Am. & Eng. R. Cas. 400, 52 Conn. 543.

71. Negligence with respect to materials and structures.—The employer, though he may act through others, is bound to use ordinary care in providing competent servants and safe materials and structures, and is responsible to any servant who is injured by negligence in this respect; the rule as to "fellow-servants" does not extend to such a case. *Dillon v. Union Pac. R. Co.*, 3 Dill. (U. S.) 319.

Plaintiff's intestate, a carpenter, was directed by his foreman to go on a scaffolding which was apparently properly constructed and safe, but which in fact was constructed of insufficient material and by incompetent persons, and it gave way, causing his death. *Held*, that the company was liable, as such a case did not come within the rule exempting the employer from liability for injury to one employé through the negligence of another. *Brickner v. New York C. R. Co.*, 2 Lans. (N. Y.) 506; affirmed in 49 N. Y. 672, mem.—QUOTING *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 444; *Hutchinson v. York, N. & B. R. Co.*, 5 Ex. 352; *Gilman v. Eastern R. Corp.*, 10 Allen (Mass.) 233. RECONCILING *Wright v. New York C. R. Co.*, 25 N. Y. 564; *Warner*

* Brakeman knocked off cars by co-employé may recover if the injury was caused by a defective brake, see 33 AM. & ENG. R. CAS. 356, *abstr.*

v. Erie R. Co., 39 N. Y. 471.—EXPLAINED IN *Tinney v. Boston & A. R. Co.*, 62 Barb. (N. Y.) 218. QUOTED IN *Harper v. Indianapolis & St. L. R. Co.*, 47 Mo. 567. REVIEWED IN *Dobbin v. Richmond & D. R. Co.*, 81 N. Car. 446.

72. Concurring negligence of vice-principal.—A master is liable to his servant for an injury caused by his own negligence and the concurrent negligence of a fellow-servant; and the same rule applies where the master acts by a vice-principal. *Northwestern Fuel Co. v. Danielson*, 57 Fed. Rep. 915.

II. SUPERIOR-SERVANT OR VICE-PRINCIPAL RULE.*

1. Statement of the Rule.

73. Generally.—A master is responsible to his servant for an injury sustained by him in consequence of the negligence of a fellow-servant, (1) when the latter, having authority over the former, orders him to do an act not within the scope of his employment, whereby he is exposed to a danger not contemplated in his contract of service, and he is injured in so doing; (2) where the master has charged the latter with the duty of providing proper material and appliances for carrying on a work, in which he is personally engaged with the former or not, and by his neglect to do so the former is injured. *Gilmore v. Northern Pac. R. Co.*, 15 Am. & Eng. R. Cas. 304, 9 Sawy. (U. S.) 558, 18 Fed. Rep. 866.—DISTINGUISHED AND COMMENTED ON IN *Hogan v. Northern Pac. R. Co.*, 53 Am. & Eng. R. Cas. 384, 53 Fed. Rep. 519. REVIEWED IN

* Liability of master for injury to servant caused by negligence of vice-principal, see notes, 2 L. R. A. 193; 4 *Id.* 852; 7 *Id.* 501.

When employé does not assume risk of negligence of employer's representative or vice-principal, see note, 6 L. R. A. 585.

Criterion for determining when employé or agent becomes vice-principal, for whose negligence master is liable, see notes, 38 AM. & ENG. R. CAS. 102; 67 AM. DEC. 590; 35 AM. ST. REP. 140; 4 L. R. A. 794; 18 *Id.* 827.

When an employé may be both a vice-principal and a fellow-servant, according to duties to be performed, see note, 48 AM. & ENG. R. CAS. 317.

Road master as vice-principal, see note, 15 AM. & ENG. R. CAS. 315.

Liability of master for the injury to servant caused by defects in machinery or appliances when the work is intrusted to a superintendent, see note, 21 AM. REP. 579.

Couch v. Charlotte, C. & A. R. Co., 28 Am. & Eng. R. Cas. 331, 22 So. Car. 557.

When an employer places one person in his employ under the direction of another also in his employ, such employer is liable for injuries to the person placed in the subordinate situation by the negligence of his superior. *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541.—FOLLOWING *Little Miami R. Co. v. Stevens*, 20 Ohio 415.—*Chicago & A. R. Co. v. May*, 15 Am. & Eng. R. Cas. 320, 108 Ill. 288.—APPLIED IN *Pullman Palace Car Co. v. Laack*, 143 Ill. 242. FOLLOWED IN *Fanter v. Clark*, 15 Ill. App. 470. QUOTED IN *Fitzgerald v. Honkomp*, 44 Ill. App. 365; *Hobbold v. Chicago Sugar Refining Co.*, 44 Ill. App. 418.—*Palmer v. Utah & N. R. Co.*, 2 Idaho 290, 13 Pac. Rep. 425.—FOLLOWING *Hough v. Texas & P. R. Co.*, 100 U. S. 213; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184.—*Louisville, C. & L. R. Co. v. Cavens*, 9 Bush (Ky.) 559.—QUOTING *Louisville & N. R. Co. v. Collins*, 2 Duv. (Ky.) 117.—*Louisville & N. R. Co. v. Moore*, 24 Am. & Eng. R. Cas. 443, 83 Ky. 675. *Murphy v. Holbrook*, 20 Ohio St. 137. *Pittsburgh, Ft. W. & C. R. Co. v. Lewis*, 33 Ohio St. 196.—FOLLOWED IN *Pittsburg, C. & St. L. R. Co. v. Ranney*, 37 Ohio St. 665.—*Pittsburg, C. & St. L. R. Co. v. Ranney*, 5 Am. & Eng. R. Cas. 533, 37 Ohio St. 665.—FOLLOWING *Pittsburgh, Ft. W. & C. R. Co. v. Lewis*, 33 Ohio St. 196; *Little Miami R. Co. v. Stevens*, 20 Ohio 416; *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201; *Lake Shore & M. S. R. Co. v. Lavalley*, 36 Ohio St. 221.—APPROVED IN *Alexander v. Pennsylvania Co.*, 48 Ohio St. 623.—*Haynes v. East Tenn. & G. R. Co.*, 3 Coldw. (Tenn.) 222.—DISAPPROVED IN *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478. QUOTED IN *Louisville & N. R. Co. v. Bowler*, 9 Heisk. (Tenn.) 866. REVIEWED IN *Nashville & C. R. Co. v. Carroll*, 6 Heisk. (Tenn.) 347.—*Louisville & N. R. Co. v. Bowler*, 9 Heisk. (Tenn.) 866, 20 Am. Ry. Rep. 65.

The negligence of the vice principal is the negligence of the company. *Drymala v. Thompson*, 26 Minn. 40, 1 N. W. Rep. 255. *Cooper v. Pittsburgh, C. & St. L. R. Co.*, 24 W. Va. 37. *Chicago, M. & St. P. R. Co. v. Ross*, 17 Am. & Eng. R. Cas. 501, 112 U. S. 377, 5 Sup. Ct. Rep. 184. *Au v. New York, L. E. & W. R. Co.*, 29 Fed. Rep. 72. *Fagundes v. Central Pac. R. Co.*, 79 Cal. 97.

3 *L. R. A.* 824, 21 *Pac. Rep.* 437. *McMaster v. Illinois C. R. Co.*, 41 *Am. & Eng. R. Cas.* 486, 65 *Miss.* 264, 7 *Am. St. Rep.* 653, 4 *So. Rep.* 59. *Denver, S. P. & P. R. Co. v. Driscoll*, 38 *Am. & Eng. R. Cas.* 105, 12 *Colo.* 520, 21 *Pac. Rep.* 708. *Wabash, St. L. & P. R. Co. v. Hawk*, 31 *Am. & Eng. R. Cas.* 306, 121 *Ill.* 259, 12 *N. E. Rep.* 253, 10 *West. Rep.* 137. *Illinois C. R. Co. v. Pirtle*, 47 *Ill. App.* 498. *McLeod v. Ginther*, 8 *Am. & Eng. R. Cas.* 162, 80 *Ky.* 399. *Miller v. Missouri Pac. R. Co.*, 53 *Am. & Eng. R. Cas.* 598, 109 *Mo.* 350, 19 *S. W. Rep.* 58. *Russ v. Wabash Western R. Co.*, 112 *Mo.* 45, 20 *S. W. Rep.* 472. *Clowers v. Wabash, St. L. & P. R. Co.*, 21 *Mo. App.* 213. *Smith v. Sioux City & P. R. Co.*, 17 *Am. & Eng. R. Cas.* 561, 15 *Neb.* 583, 19 *N. W. Rep.* 638. *O'Brien v. American Dredging Co.*, 53 *N. J. L.* 291, 21 *Atl. Rep.* 324. *Corcoran v. Holbrook*, 59 *N. Y.* 517.—APPLIED IN *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 34 *Fed. Rep.* 616. DISTINGUISHED IN *Cregan v. Marston*, 126 *N. Y.* 568; *Miller v. Southern Pac. Co.*, 20 *Oreg.* 285.—*Patton v. Western N. C. R. Co.*, 31 *Am. & Eng. R. Cas.* 298, 96 *N. Car.* 455. *Cleveland, C. & C. R. Co. v. Keary*, 3 *Ohio St.* 201. *Davis v. Central Vt. R. Co.*, 55 *Vt.* 84, 45 *Am. Rep.* 590. *Missouri Pac. R. Co. v. James*, (*Tex.*) 10 *S. W. Rep.* 332. *Texas & P. R. Co. v. Kirk*, 62 *Tex.* 227. *Lewis v. St. Louis & I. M. R. Co.*, 59 *Mo.* 495. *Riley v. West Virginia C. & P. R. Co.*, 27 *W. Va.* 145. *Criswell v. Pittsburgh, St. L. & C. R. Co.*, 33 *Am. & Eng. R. Cas.* 232, 30 *W. Va.* 798, 6 *S. E. Rep.* 31. *Haney v. Pittsburgh, C., C. & St. L. R. Co.*, 38 *W. Va.* 570, 18 *S. E. Rep.* 748.

Where the master delegates to another the performance of a duty to his servants which he has impliedly contracted to perform in person, or which rests upon him as an absolute duty, such as supplying safe machinery, appliances, etc., he is liable for the manner in which that duty is performed, as the one to whom such duty is intrusted stands in the place of the master; but as to all other matters he is but a fellow-servant; and the fact that one acts as a foreman does not destroy the relation. *Fones v. Phillips*, 39 *Ark.* 17.—QUOTING *Coon v. Syracuse & U. R. Co.*, 6 *Barb.* (*N. Y.*) 231; *Wright v. New York C. R. Co.*, 25 *N. Y.* 563. REVIEWING *Flike v. Boston & A. R. Co.*, 53 *N. Y.* 549; *Fort v. Union Pac. R. Co.*, 2 *Dill.* (*U. S.*) 259, 17 *Wall.* 553.—*Colorado Midland R. Co.*

v. Naylor, 17 *Colo.* 501, 30 *Pac. Rep.* 249. *Loughlin v. State*, 105 *N. Y.* 159, 6 *N. Y. S. R.* 826, 11 *N. E. Rep.* 371. *Ell v. Northern Pac. R. Co.*, 48 *Am. & Eng. R. Cas.* 318, 1 *N. Dak.* 336.—APPROVING *Davis v. Central Vt. R. Co.*, 55 *Vt.* 84; *Copper v. Louisville, E. & St. L. R. Co.*, 103 *Ind.* 305, 2 *N. E. Rep.* 749; *Olson v. St. Paul, M. & M. R. Co.*, 38 *Minn.* 117, 35 *N. W. Rep.* 866; *Webb v. Richmond & D. R. Co.*, 97 *N. Car.* 387, 2 *S. E. Rep.* 440. DISAPPROVING *Chicago, M. & St. P. R. Co. v. Ross*, 112 *U. S.* 377, 5 *Sup. Ct. Rep.* 184. QUOTING *Crispin v. Babbitt*, 81 *N. Y.* 516.—*Ross v. Walker*, 139 *Pa. St.* 42, 21 *Atl. Rep.* 157.

When an employer acts through an agent, he undertakes that his agent shall be a capable person for the position he holds. *Stewart v. Philadelphia, W. & B. Co.*, (*Del.*) 17 *Atl. Rep.* 639.

A master is responsible for acts of his servant done within the scope of his business and in furtherance of his interests, but done in excess or even in disobedience of his orders, express or implied; in employing the servant the master takes the risk of his disobedience. He is therefore liable for the injuries resulting from such acts, not only to outsiders, but to subordinate fellow-employees. *Chicago & N. W. R. Co. v. Bayfield*, 37 *Mich.* 205.—NOT FOLLOWED IN *O'Brien v. American Dredging Co.*, 53 *N. J. L.* 291.

It is only where the master withdraws from the management of the business, intrusting it to a middleman or superior servant, or where, as in case of a corporation, the business is of such a nature that the general management and control thereof are necessarily committed to agents, that the master can be held liable to a subordinate for the negligent acts of one thus acting in his stead. *Malone v. Hathaway*, 64 *N. Y.* 5.—EXPLAINING *Laning v. New York C. R. Co.*, 49 *N. Y.* 521; *Flike v. Boston & A. R. Co.*, 53 *N. Y.* 549.

A marked change from the old rule is taking place in the law as to servants clothed with partial authority only, such as a foreman or superior servants; and the principle upon which such change is based is that when a master delegates any duty which he owes to his servants he is liable for its proper performance. *Anderson v. Bennett*, 38 *Am. & Eng. R. Cas.* 87, 16 *Oreg.* 515, 19 *Pac. Rep.* 765, 8 *Am. St. Rep.* 311.—QUOTING *Chicago, M. & St. P. R. Co. v.*

Ross, 112 U. S. 377; *Flike v. Boston & A. R. Co.*, 53 N. Y. 553.

When the master or superior places the entire charge of his business, or a distinct branch of it, in the hands of an agent or subordinate, exercising no discretion or oversight of his own, the master is liable for the negligence of such agent or subordinate. *Lewis v. Seifert*, 116 Pa. St. 628, 9 Cent. Rep. 751, 11 Atl. Rep. 514, 20 W. N. C. 145.

When a superintendent, agent, or foreman is empowered to select, employ, and discharge such servants as operate under him, he is bound to use the same care in protecting such servants from injury as is imposed on the master; and for any failure in this respect, resulting injuriously to the servant, the master must respond. *Douglas v. Texas Mex. R. Co.*, 63 Tex. 564. *Chicago, B. & Q. R. Co. v. Blank*, 24 Ill. App. 438.

Where injury is caused by the negligence of the vice-principal to an employé under him, the law views the act in the same light as if the master had been personally present and committed the negligent act. *Sweeney v. Gulf, C. & S. F. R. Co.*, 84 Tex. 433, 19 S. W. Rep. 555.

74. Reason for the rule—Respondent superior.—The liability of railroad companies for injuries caused to their servants by the carelessness of other employés who are placed in authority and control over them is founded upon considerations of public policy. *Lake Shore & M. S. R. Co. v. Spangler*, 28 Am. & Eng. R. Cas. 319, 44 Ohio St. 471, 8 N. E. Rep. 467.—**DISTINGUISHING** *Western & A. R. Co. v. Bishop*, 50 Ga. 465.—**APPROVED IN** *Runt v. Herring*, 21 N. Y. Supp. 244.

While the master is not liable unless the negligent servant was the superior of the one injured, yet, as the conductor in this case, who was a party to the neglect, was the superior of the injured brakeman, the rule of *respondent superior* applies, and the company is liable. *Newport News & M. V. Co. v. Dentzel*, 91 Ky. 42, 14 S. W. Rep. 958. See also *Louisville & N. R. Co. v. Bowler*, 9 Heisk. (Tenn.) 866, 20 Am. Ry. Rep. 65.

After a train on the defendant road had arrived in the yards at Nashville, and while, according to the evidence, it was doubtful whether it was under the control of the conductor or the yard master, the conductor ordered the deceased, the foreman of the car repairers, to go under a car and repair a brake; and while he was so engaged, and

this was known to the conductor, the train started and the car repairer was run over and killed. In an action by his administratrix to recover damages of the company for causing his death—*held*, that if the conductor was in charge of the train the company is liable under the rule of *respondent superior*. *Ritt v. Louisville & N. R. Co.*, (Ky.) 31 Am. & Eng. R. Cas. 289, 4 S. W. Rep. 796.

75. Vice-principal's negligence not an assumed risk.—An employé assumes all the risks incident to the service he enters; but he does not assume a risk created by the negligent act of the master's representative in making unsafe work which he specifically orders the employé to perform. *Taylor v. Evansville & T. H. R. Co.*, 41 Am. & Eng. R. Cas. 437, 121 Ind. 124, 22 N. E. Rep. 876, 6 L. R. A. 584, 41 Alb. L. J. 173.

2. Scope and Extent of the Rule.

76. Depends upon nature of service, not on rank of servant.—The true test whether an employer is liable to one employé for an injury received through the negligence of another employé depends upon the character of the act performed, which causes the injury, and not upon the rank or grade of the person performing it. If it be neglect of one of the duties the employer has impliedly contracted to perform, he is liable, no matter what the rank or grade of the person he has designated to perform it, because that person is an agent and not a servant. *Galveston, H. & S. A. R. Co. v. Smith*, 44 Am. & Eng. R. Cas. 598, 76 Tex. 611, 13 S. W. Rep. 562.—**QUOTING** *Wall v. Texas & P. R. Co.*, 2 Tex. Unrep. Cas. 432; *Galveston, H. & S. A. R. Co. v. Farmer*, 73 Tex. 85.—*Colorado Midland R. Co. v. Naylor*, 17 Colo. 501, 30 Pac. Rep. 249. *Loughlin v. State*, 105 N. Y. 159. *Ell v. Northern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 318, 1 N. Dak. 336. *Dwyer v. American Exp. Co.*, 53 Am. & Eng. R. Cas. 612, 82 Wis. 307, 52 N. W. Rep. 304.

The question is, Were they fellow-servants? If they were, there can be no recovery against the master for injuries caused by the negligence of the co-employé. *Taylor v. Evansville & T. H. R. Co.*, 121 Ind. 124, 22 N. E. Rep. 876, 6 L. R. A. 584, 41 Alb. L. J. 173.

A railway superintendent, although hav-

ing power to employ men or to represent the master in other respects, is, in the management of machinery, a fellow-servant of the other operatives. *Slatterly v. New York, L. E. & W. R. Co.*, 21 N. Y. S. R. 552, 51 Hun 638, *mem.*, 4 N. Y. Supp. 910.

77. — nor upon the department of service.—The master is liable for negligence of a vice-principal, regardless of the department of service in which he is working. *Galveston, H. & S. A. R. Co. v. Smith*, 44 Am. & Eng. R. Cas. 598, 76 Tex. 611, 13 S. W. Rep. 562.

78. Degree of care.—A vice-principal is bound to use the same care in protecting his subordinates as is imposed upon the master himself. *Douglas v. Texas Mex. R. Co.*, 63 Tex. 564.

79. Negligence in performance of duties by law imposed upon company.—An act or duty which a master is bound to perform for the safety and protection of his servant cannot be delegated so as to exonerate him from liability for an injury to the servant caused by an omission to perform it, or by its negligent performance; and this, whether the misfeasance or non-feasance is that of a superior or inferior officer, agent, or servant, to whom the doing of the act or the performance of the duty has been committed. The act or omission is that of the master also, irrespective of the question whether it was or was not practicable for the master to act personally, or whether he did or did not do all that he personally could do to secure the safety of the servant. *Fuller v. Jewett*, 1 Am. & Eng. R. Cas. 109, 80 N. Y. 46. — APPROVING *Malone v. Hathaway*, 64 N. Y. 5. — DISTINGUISHED IN *Cregan v. Marston*, 126 N. Y. 568. REVIEWED IN *Mann v. Delaware & H. Canal Co.*, 12 Am. & Eng. R. Cas. 199, 91 N. Y. 495. — *Pike v. Chicago & A. R. Co.*, 41 Fed. Rep. 95. *St. Louis, A. & T. R. Co. v. Triplett*, 48 Am. & Eng. R. Cas. 283, 54 Ark. 289, 15 S. W. Rep. 831, 16 S. W. Rep. 266. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. Rep. 285. — APPLYING *Chicago & A. R. Co. v. May*, 108 Ill. 288. — *Capper v. Louisville, E. & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 525, 103 Ind. 305, 2 N. E. Rep. 749. — EXPLAINING *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134. — APPROVED IN *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336. — *Lindvall v. Woods*, 39 Am. & Eng. R. Cas. 339, 41 Minn. 212, 4 L. R. A. 793, 42 N. W. Rep. 1020. — DISTIN-

GUISHING *Cook v. St. Paul, M. & M. R. Co.*, 34 Minn. 45, 24 N. W. Rep. 311. — *Flike v. Boston & A. R. Co.*, 53 N. Y. 549, 5 Am. Ry. Rep. 392. — APPROVED IN *Long v. Pacific R. Co.*, 65 Mo. 225. DISTINGUISHED IN *Yager v. Receivers*, 4 Hughes (U. S.) 192; *Chicago & E. I. R. Co. v. Geary*, 110 Ill. 383; *Potter v. New York C. & H. R. R. Co.*, 136 N. Y. 77; *Beilfus v. New York, L. E. & W. R. Co.*, 29 Hun (N. Y.) 556; *Newell v. Ryan*, 40 Hun 286; *Miller v. Southern Pac. Co.*, 20 Oreg. 285. FOLLOWED IN *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Shiner v. Russell*, 6 N. Y. S. R. 78. QUOTED IN *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 34 Fed. Rep. 616. REVIEWED IN *Mann v. Delaware & H. Canal Co.*, 12 Am. & Eng. R. Cas. 199, 91 N. Y. 495; *Ross v. New York C. & H. R. R. Co.*, 5 Hun 488. — *Knahtla v. Oregon S. L. & U. N. R. Co.*, 21 Oreg. 136, 27 Pac. Rep. 91. *Texas & P. R. Co. v. Hohn*, 1 Tex. Civ. App. 36, 21 S. W. Rep. 942. *Madden v. Chesapeake & O. R. Co.*, 28 W. Va. 610, 57 Am. Rep. 695. — QUOTED IN *Beuhring v. Chesapeake & O. R. Co.*, 37 W. Va. 502. — *Brabbits v. Chicago & N. W. R. Co.*, 38 Wis. 289.

Negligence on the part of a foreman or superintendent resulting in injury to an employé does not in all cases make the company liable. It is only where the negligence relates to a duty which the law imposes upon the company, that it is liable. If it relate to such work as properly belongs to an employé, the company is not liable simply because the negligent party was a foreman or superintendent. *Stockmeyer v. Reed*, 55 Fed. Rep. 259. — QUOTING *Crispin v. Babbitt*, 81 N. Y. 516. — *Fones v. Phillips*, 39 Ark. 17.

80. Exposing subordinate to undue danger.—The company is responsible for the acts of its vice-principal in exposing his subordinates to an extraordinary or undue danger. *Gilmore v. Northern Pac. R. Co.*, 15 Am. & Eng. R. Cas. 304, 9 Sawy. (U. S.) 558, 18 Fed. Rep. 866.

81. Promises and assurances made.—The company is responsible for the promises and assurances of its vice-principal with reference to repairing defects in machinery, etc. *Louisville & N. R. Co. v. Kenley*, 92 Tenn. 207, 21 S. W. Rep. 326. *Lytle v. Chicago & W. M. R. Co.*, 84 Mich. 289, 47 N. W. Rep. 571.

An assurance from one representing the master, that the machinery or apparatus

being used is all right, and an order from him to his servant to use it, notwithstanding a complaint of the servant as to its sufficiency, amounts to a guaranty of safety, and the master will be liable for any injury then resulting from its prudent use. *Rowland v. Missouri Pac. R. Co.*, 20 Mo. App. 463.—FOLLOWING *McGowan v. St. Louis & I. M. R. Co.*, 61 Mo. 532; *Moore v. Wabash, St. L. & P. R. Co.*, 84 Mo. 481.

A promise on the part of a vice-principal that an incompetent fireman shall not handle an engine while switching is being done, is a promise on the part of the company on which the switchman has a right to rely for a reasonable time and to a reasonable extent. *Lytle v. Chicago & W. M. R. Co.*, 84 Mich. 289, 47 N. W. Rep. 571.

The servant of a railway company may rely on the vice-principal's promise to protect him while at work on a side track, notwithstanding the existence of a rule of the company requiring servants to protect themselves by putting out flags while engaged in such work. *Moore v. Wabash, St. L. & P. R. Co.*, 21 Am. & Eng. R. Cas. 509, 85 Mo. 588.—DISTINGUISHED IN *Ring v. Missouri Pac. R. Co.*, 112 Mo. 220.

A foreman in repair shops, with power to employ and discharge men, represents the company, and is not a fellow-servant with men under him; and the company is liable where such foreman promises to protect a car repairer while necessarily under the car, but fails to do so; and the fact that the car repairer has asked others to keep watch, will not affect the company's liability. *Missouri Pac. R. Co. v. Williams*, 75 Tex. 4, 12 S. W. Rep. 835.

In an action by one injured by the giving way of a hoisting apparatus, used in connection with a train, it appeared that the plaintiff had reason to believe at the time that the apparatus was unsafe, but relied on the assurance of the conductor that it was "all right," and so was injured. But there was no proof that the conductor had the superintendence or control over the men or the work, or power to provide or replace machinery. Held, that the conductor was, *quoad* the casualty, a fellow-servant merely, and not a vice-principal, and his reassurance to plaintiff, and representation that there was no danger, would not bind the company and render it responsible. But contrariwise, when the facts showed that he represented the company in the premises,

such assurance would amount to a guaranty on its part, and would bind it for any resulting damage. *McGowan v. St. Louis & I. M. R. Co.*, 61 Mo. 528.—DISTINGUISHED IN *Travers v. Kansas Pac. R. Co.*, 63 Mo. 421. FOLLOWED IN *Rowland v. Missouri Pac. R. Co.*, 20 Mo. App. 463.

82. Gross or wilful neglect—Kentucky doctrine.—When its servants are of the same department of service, and one has authority to control the action of the other, the company will be responsible for the gross negligence of the servant superior in authority. *McLeod v. Ginther*, 8 Am. & Eng. R. Cas. 162, 80 Ky. 399.

The engineer and a brakeman on the train are not co-equals, and the railroad company is liable for the death of the latter, if caused by the wilful neglect of the former. *Louisville & N. R. Co. v. Brooks*, 83 Ky. 129.—APPROVING *Louisville & N. R. Co. v. Collins*, 2 Duv. (Ky.) 118. QUOTING *Louisville, C. & L. R. Co. v. Cavens*, 9 Bush (Ky.) 559.—NOT FOLLOWED IN *Newport News & M. V. Co. v. Howe*, 52 Fed. Rep. 362, 6 U. S. App. 172, 3 C. C. A. 121.

83. Notice to vice-principal is notice to company.—Notice to a vice-principal is notice to the company. *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492. *Lytle v. Chicago & W. M. R. Co.*, 84 Mich. 289, 47 N. W. Rep. 571. *McGowan v. St. Louis & I. M. R. Co.*, 61 Mo. 528. *Missouri Pac. R. Co. v. Sasse*, (Tex. Civ. App.) 22 S. W. Rep. 187. *Davis v. Central Vt. R. Co.*, 55 Vt. 84, 45 Am. Rep. 590.

And knowledge of the vice-principal is considered notice to the company. *Louisville & N. R. Co. v. Kenley*, 92 Tenn. 207, 21 S. W. Rep. 326.

Thus knowledge on the part of the vice-principal, that an incompetent fireman is handling the engine while switching is being done, is knowledge of the company. *Lytle v. Chicago & W. M. R. Co.*, 84 Mich. 289, 47 N. W. Rep. 571.

The carelessness of a section foreman and his knowledge of an obstruction in the path of a switchman are imputable to the company. *Hall v. Missouri Pac. R. Co.*, 8 Am. & Eng. R. Cas. 106, 74 Mo. 298.

Where an injured employé seeks to recover from the company for the negligence of a superior, he must show that the relation of fellow-servant did not exist; and in order to establish negligence, must show that the superior knew of the danger, or by

the exercise of ordinary care might have known of it, and that the danger could not have been known to the plaintiff by the exercise of such care. *Thompson v. Chicago, M. & St. P. R. Co.*, 5 *McCrary* (U. S.) 542, 18 *Fed. Rep.* 239.

Where a railroad employé is killed through the negligence of a superior who does not stand in the relation of a fellow-servant, it is error to limit the right of recovery to cases where such superior actually knew of the peril, and the person killed did not. The true rule, making the defendant liable in such case, is when the superior knew, or in the exercise of reasonable care might have known, of the existence of the peril. *Louisville & N. R. Co. v. Shively*, (Ky.) 18 *S. W. Rep.* 944.

84. — but not notice to subordinate servant.—Notice to a vice-principal is not notice to the employés under him. *Illinois C. R. Co. v. Pirtle*, 47 *Ill. App.* 498.

85. Effect of notice to temporary vice-principal.—Notice to a temporary vice-principal, when acting as such, of defective materials, etc., is notice to the company. *Baldwin v. St. Louis, K. & N. W. R. Co.*, 75 *Iowa* 297, 39 *N. W. Rep.* 507.

3. Particular Applications of the Rule.

86. Generally.—The under boss of a gravel-train gang was directed by his immediate superior to take men and dig out a car which had been partly covered and derailed by a fall of gravel from a high bank near by. He proceeded to dig out the car, and while so employed was killed by the embankment caving in. Prior to that time the custom had been to station a watchman to give notice to the workmen of danger from the falling bank, but this was omitted on that occasion. *Held*, that the company was liable. *Burlington & M. R. R. Co. v. Crockett*, 24 *Am. & Eng. R. Cas.* 390, 19 *Neb.* 138, 26 *N. W. Rep.* 921.—FOLLOWED IN *Sioux City & P. R. Co. v. Smith*, 22 *Neb.* 775.

A section hand was directed by his foreman to take up a rail upon the track, and was assured, after inquiries, that it was free from the ties, when in fact one spike remained in it, which caused a rebound when the attempt was made, and the section hand was injured. *Held*, that the company was liable. *Rowland v. Missouri Pac. R. Co.*, 20 *Mo. App.* 463.

Rule of superior service applied where a foreman was guilty of negligence in putting a car repairer to work under a car and failing to protect him from danger arising from the running back of cars against the defective car in the course of switching and making up of a train. *Lake Shore & M. S. R. Co. v. Lavalley*, 5 *Am. & Eng. R. Cas.* 549, 36 *Ohio St.* 221.

87. Failure to choose safest course of action.—Where a gang of track hands under a section foreman, working with a hand-car, were placed in imminent danger by the approach of a train, and it appeared that there were several lines of action open to the foreman, the fact that he was known to have chosen a more dangerous line than he need to have chosen, is insufficient to charge him, or through him the company, with negligence. *Gunn v. Chicago, St. P. & M. R. Co.*, 5 *Am. & Eng. R. Cas.* 583, 52 *Wis.* 672, 10 *N. W. Rep.* 11.

88. Failure to warn or instruct.—A company is responsible for the negligence of its vice-principal in failing to instruct or warn other employés. *Kansas City, Ft. S. & G. R. Co. v. Kier*, 38 *Am. & Eng. R. Cas.* 119, 41 *Kan.* 661, 671, 21 *Pac. Rep.* 770. *Drymala v. Thompson*, 26 *Minn.* 40, 1 *N. W. Rep.* 255.

If, for the purpose of instructing a promoted servant, the master selects another servant in his employ, the latter must be not simply as competent as the master, but absolutely competent; if he is incompetent or negligent while performing the duty of instructor, or if he discontinues his instruction before completion, and in consequence the promoted servant is injured, the master is liable. *Brennan v. Gordon*, 118 *N. Y.* 489, 23 *N. E. Rep.* 810, 29 *N. Y. S. R.* 829; *reversing* 14 *Daly* 47, 3 *N. Y. S. R.* 604.

It is the duty of a company to know where its trains are, and to inform its servants, and to warn them of what is necessary to avoid collisions. Accordingly, where the superintendent of a company neglects to give proper orders to a working train to look out for a special train, this is the negligence of the company; and if an employé on such working train is injured he is entitled to recover, and the doctrine of fellow-servants has no application. *Galveston, H. & S. A. R. Co. v. Smith*, 44 *Am. & Eng. R. Cas.* 598, 76 *Tex.* 611, 13 *S. W. Rep.* 562.

A lot of men were employed to break up

an ice gorge and to remove the ice. Some were to break it up with dynamite cartridges and others to remove the ice afterwards, among whom was plaintiff. An open fire was built to thaw out the cartridges in pails, and an explosion occurred which injured the plaintiff. The evidence showed that proper care had not been taken in either building the fire or in warning the men as to the danger. *Held*, that the duty of thawing out cartridges was the work of the company, and it was liable for the injury. *Stewart v. New York, O. & W. R. Co.*, 8 N. Y. Supp. 19.—QUOTING *Laning v. New York C. R. Co.*, 49 N. Y. 521.

89. Failure to promulgate rules.—Where a contractor intrusts the work to a superintendent, without publishing suitable or needful rules and regulations for the proper conduct of the work and the safety of employes, the same duty devolves upon the superintendent with reference thereto as upon the contractor; and the superintendent must exercise such care in the management of the work and must make such rules as to render it reasonably safe for the employes under him. *Anderson v. Bennett*, 38 Am. & Eng. R. Cas. 87, 16 Oreg. 515, 19 Pac. Rep. 765, 8 Am. St. Rep. 311.—QUOTING *Fraker v. St. Paul, M. & M. R. Co.*, 32 Minn. 54.

90. Giving orders, directions, and commands.—A company is liable to an employe injured by the negligence of a superior fellow-servant whose commands he was bound to obey. *Cowles v. Richmond & D. R. Co.*, 2 Am. & Eng. R. Cas. 90, 84 N. Car. 309, 37 Am. Rep. 620.

Where a servant was commanded to do a specific thing by one who, acting for the master, was in charge of the shop where the servant was employed—men, machinery, and work being under his control—and the servant was injured through the negligence of the master's representative, he was not injured by the act of a fellow-servant, and the master is liable. *Taylor v. Evansville & T. H. R. Co.*, 41 Am. & Eng. R. Cas. 437, 121 Ind. 124, 22 N. E. Rep. 876, 6 L. R. A. 584, 41 Alb. L. J. 173.

A direction by a superior servant to a subordinate to do an ordinary service in the line of his employment, about the doing of which there is nothing unusual, is not such a special direction as to make the company liable for an injury that happens

while performing it. *Davis v. Detroit & M. R. Co.*, 20 Mich. 105.—DISTINGUISHED IN *Dobbin v. Richmond & D. R. Co.*, 81 N. Car. 446.

If an assistant superintendent of a railway company does not exercise ordinary care in directing an employe in digging down a telegraph pole, and it falls on him, and the employe was ignorant and inexperienced, and was exercising ordinary care, the company will be liable for the injury. *East St. Louis Connecting R. Co. v. Enright*, 47 Ill. App. 494.

91. Giving dangerous orders.—If the master, or another servant standing towards the servant injured in the relation of superior or vice-principal, orders the latter into a situation of greater danger than in the ordinary course of his duty he would have incurred, and he obeys, and is thereby injured, the master is liable, unless the danger is so apparent that to obey would be an act of recklessness. *Miller v. Union Pac. R. Co.*, 5 McCrary (U. S.) 300, 17 Fed. Rep. 67.—DISTINGUISHED IN *Hogan v. Northern Pac. R. Co.*, 53 Am. & Eng. R. Cas. 384, 53 Fed. Rep. 519.—*Gilmore v. Northern Pac. R. Co.*, 15 Am. & Eng. R. Cas. 304, 9 Sawy. (U. S.) 558, 18 Fed. Rep. 866. *Pittsburgh, C. & St. L. R. Co. v. Henderson*, 5 Am. & Eng. R. Cas. 529, 37 Ohio St. 549.

A company is liable for the negligence of a foreman who orders an infant employe under him to do hazardous work which is not within the scope of his ordinary duties. In such case the rule exempting the employer from liability for an injury to one servant through the negligence of another, does not apply. *Fort v. Union Pac. R. Co.*, 2 Dill. (U. S.) 259.—REVIEWED IN *Fones v. Phillips*, 39 Ark. 17.—*Union Pac. R. Co. v. Fort*, 17 Wall. (U. S.) 553.—DISTINGUISHED IN *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478; *Capper v. Louisville, E. & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 525, 103 Ind. 305; *Hanrath v. Northern C. R. Co.*, 46 Md. 280; *Leary v. Boston & A. R. Co.*, 23 Am. & Eng. R. Cas. 383, 139 Mass. 580, 52 Am. Rep. 733; *Cole v. Chicago & N. W. R. Co.*, 33 Am. & Eng. R. Cas. 274, 71 Wis. 114.

Plaintiff, a plumber in repair shops, was directed by his master mechanic to hold a piece of timber between the tender and an approaching locomotive, so as to break the force of their coming together; and when getting it in a certain position asked if that

was right, and was told that "that will do"; but the bumper of the engine was higher than that on the tender, which was unknown to plaintiff, causing the timber to be thrown against him, producing the injury sued for. *Held*, that the company was liable. *Douglas v. Texas Mex. R. Co.*, 63 *Tex.* 564.

92. Failure to provide safe working place.—If the company delegates to a person the duty of providing a safe place in which the employes may work, such person acts for the company, and if the duty is negligently performed, the company is responsible. *Louisville, N. A. & C. R. Co. v. Graham*, 124 *Ind.* 89, 24 *N. E. Rep.* 668.

A company is responsible for the negligence of its servants in failing to erect a safe scaffolding upon which other servants are required to work. *Brickner v. New York C. R. Co.*, 2 *Lans. (N. Y.)* 506; *affirmed* in 49 *N. Y.* 672, *mem.*

The company is responsible for the negligence of its vice-principal resulting in the falling of a derrick, occasioning personal injury to laborers under his charge. *Kansas Pac. R. Co. v. Little*, 19 *Kan.* 267, 17 *Am. Ry. Rep.* 455.

One whose business it was to repair cars on certain repair tracks which were always protected, was ordered by his foreman to repair a car standing upon another side track. While necessarily under such car, and without knowledge of any danger, the car was struck by an advancing train and pushed over him, causing an injury. The company's answer admitted "that while cars are being repaired upon other than repair tracks, ordinary prudence, care, and the customs and regulations of the company require that such work should not be done except while the car is being protected by watchmen, or other suitable protection." There was no proof that a watchman had been placed, or other precaution taken, to protect the car. *Held*, that a nonsuit was improperly ordered. (Cassoday and Taylor, JJ., dissenting, on the ground that the negligence was the negligence of a fellow-servant.) *Luebke v. Chicago, M. & St. P. R. Co.*, 15 *Am. & Eng. R. Cas.* 183, 59 *Wis.* 127, 17 *N. W. Rep.* 870, 48 *Am. Rep.* 483.

93. Failure to keep road in repair.—A company is liable to any one of its employes operating its road for the negligence of either one of its officers or employes whose duty it is to keep the road in

a reasonably safe condition, and who culpably fails to perform such duty. *Kansas City, Ft. S. & G. R. Co. v. Kier*, 38 *Am. & Eng. R. Cas.* 119, 41 *Kan.* 661, 671, 21 *Pac. Rep.* 770.—*QUOTING* *Atchison, T. & S. F. R. Co. v. Holt*, 29 *Kan.* 152; *Atchison, T. & S. F. R. Co. v. Moore*, 29 *Kan.* 633, 31 *Kan.* 197.

Where the roadmaster, whose duty it is to direct repairs and keep the road in safe condition, is culpably negligent in the performance of his duty, the company, even under the rule of the common law, is liable for the damages resulting from such negligence to one of its other servants or employes. *Atchison, T. & S. F. R. Co. v. Moore*, 15 *Am. & Eng. R. Cas.* 312, 31 *Kan.* 197, 1 *Pac. Rep.* 644.—*QUOTED IN* *Kansas City, Ft. S. & G. R. Co. v. Kier*, 38 *Am. & Eng. R. Cas.* 119, 41 *Kan.* 661, 671, 21 *Pac. Rep.* 770 *Babcock v. Old Colony R. Co.*, 150 *Mass.* 467, 23 *N. E. Rep.* 325.

The company is liable for an injury to a train employe through the negligence of a section foreman in taking up a rail while repairing the track, without putting out the proper signals to warn approaching trains. *Drymala v. Thompson*, 26 *Minn.* 40, 1 *N. W. Rep.* 255.—*EXPLAINED IN* *Hughes v. Winona & St. P. R. Co.*, 27 *Minn.* 137.

94. Failure to furnish safe machinery, appliances, etc.—The company is responsible to its servants injured by the act of a vice-principal in failing to provide proper materials and appliances for carrying on the work. *Gilmore v. Northern Pac. R. Co.*, 15 *Am. & Eng. R. Cas.* 304, 9 *Sawy. (U. S.)* 558, 18 *Fed. Rep.* 866. *Indiana Car Co. v. Parker*, 100 *Ind.* 181. *Ohio & M. R. Co. v. Pearce*, 128 *Ind.* 197, 27 *N. E. Rep.* 479.

Negligence in a failure to furnish safe instrumentalities for doing work, makes the company responsible for an injury to a servant, notwithstanding this negligence was the act of a servant to whom the company had delegated the performance of its duties. *Chicago, B. & Q. R. Co. v. Avery*, 17 *Am. & Eng. R. Cas.* 649, 109 *Ill.* 314; *affirming* 10 *Ill. App.* 210. *Northern Pac. R. Co. v. Charless*, 51 *Am. & Eng. R. Cas.* 198, 51 *Fed. Rep.* 562, 7 *U. S. App.* 359, 2 *C. C. A.* 380. *McDade v. Washington & G. R. Co.*, 26 *Am. & Eng. R. Cas.* 325, 5 *Mackey (D. C.)* 144. *Drymala v. Thompson*, 26 *Minn.* 40, 1 *N. W. Rep.* 255.—*DISTINGUISHING* *Foster v. Minnesota C. R. Co.*, 14 *Minn.* 360.—*DISTIN-*

GUISHED IN *Brown v. Minneapolis & St. L. R. Co.*, 31 Minn. 553.

It is the duty of a railroad company not only to furnish reasonably well constructed and safe machinery and appliances for its cars for the use of its employes engaged in operating its road, but also to exercise continued supervision over the same to keep them in good and safe repair; and such company cannot divest itself of this duty, so as to relieve itself from responsibility for the non-performance thereof, by delegating its duty to any of its servants in any of its departments; and if it does delegate this duty to any of its servants and vest him with controlling or superior authority in regard thereto, the negligence of such servant is the negligence of the company. *Cooper v. Pittsburgh, C. & St. L. R. Co.*, 24 W. Va. 37.—QUOTING *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49. REVIEWING *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Flike v. Boston & A. R. Co.*, 53 N. Y. 549; *Chicago & N. W. R. Co. v. Taylor*, 69 Ill. 461; *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492; *Brann v. Chicago, R. I. & P. R. Co.*, 53 Iowa 595.—FOLLOWED IN *Riley v. West Virginia C. & P. R. Co.*, 27 W. Va. 145.

A servant who represents a company in purchasing a locomotive, stands in the place of the master with reference to those who operate it. *Cumberland & P. R. Co. v. State*, 44 Md. 283, 45 Md. 229. *Lawless v. Connecticut River R. Co.*, 18 Am. & Eng. R. Cas. 96, 136 Mass. 1.

A person in railroad shops who is employed as a helper to do whatever work is assigned him, may recover damages caused by a hammer flying off the handle and striking him, while in the hands of another laborer, where it appears that plaintiff had at first selected a hammer which was apparently all right, but which the superintendent had taken away and given him the one causing the injury. *Missouri Pac. R. Co. v. Hill*, 3 Tex. App. (Civ. Cas.) 454.—QUOTING *International & G. N. R. Co. v. McCarthy*, 64 Tex. 632; *Texas & P. R. Co. v. Bradford*, 66 Tex. 732.

95. Failure to inspect and repair machinery, appliances, etc.—A fireman injured by an unsafe coupling on an engine is not barred from recovery of damages on the ground that the failure of the engineer to inspect the engine was the negligence of a fellow-servant. It is the duty of the company to properly inspect appli-

ances furnished employes, and the negligence of the engineer was the negligence of the company. *Sabine & E. T. R. Co. v. Ewing*, 1 Tex. Civ. App. 531, 21 S. W. Rep. 700. See also *Hough v. Texas & P. R. Co.*, 100 U. S. 213, 21 Am. Ry. Rep. 451.

Prior to Wisconsin Laws 1875, ch. 173, plaintiff was injured by a defective pile-driver while in the employ of defendant company as one of a crew engaged in working such machine under A., defendant's foreman in charge of the same, who had full authority to have it repaired when out of repair, and to hire and discharge the crew, and who knew that the machine was in a dangerous condition, in time to have it repaired before the injury. *Held*, that the foreman's negligence was the negligence of defendant, and rendered it liable for the injury. *Schultz v. Chicago, M. & St. P. R. Co.*, 48 Wis. 375, 4 N. W. Rep. 399.—DISTINGUISHING *Rourke v. White Moss Colliery Co.*, L. R. 1 C. P. D. 556. QUOTING *Brabbits v. Chicago & N. W. R. Co.*, 38 Wis. 289.—REVIEWED IN *Flannagan v. Chicago & N. W. R. Co.*, 2 Am. & Eng. R. Cas. 150, 50 Wis. 462.

The company is responsible for a failure on the part of its vice-principal to repair defects in machinery, etc. *Kansas Pac. R. Co. v. Little*, 19 Kan. 267, 17 Am. Ry. Rep. 455. *Central Trust Co. v. Texas & St. L. R. Co.*, 32 Fed. Rep. 448.

Rule of superior service applied where the superior servant was negligent in failing to inspect and repair cars. *Johnson v. Chesapeake & O. R. Co.*, 36 W. Va. 73, 14 S. E. Rep. 433. *Condon v. Missouri Pac. R. Co.*, 78 Mo. 567. *King v. Ohio & M. R. Co.*, 8 Am. & Eng. R. Cas. 119, 11 Biss. (U. S.) 362, 14 Fed. Rep. 277. *Little Rock & M. R. Co. v. Moseley*, 56 Fed. Rep. 1009. *Cincinnati, H. & D. R. Co. v. McMullen*, 38 Am. & Eng. R. Cas. 165, 117 Ind. 439, 20 N. E. Rep. 287. *Brann v. Chicago, R. I. & P. R. Co.*, 53 Iowa 595, 21 Am. Ry. Rep. 184, 6 N. W. Rep. 5. *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492. *Daniels v. Union Pac. R. Co.*, 6 Utah 357, 23 Pac. Rep. 762. *Long v. Pacific R. Co.*, 65 Mo. 225. *Missouri Pac. R. Co. v. Dwyer*, 36 Kan. 58, 12 Pac. Rep. 352. *Tierney v. Minneapolis & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 545, 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. Rep. 229. *Dewey v. Detroit, G. H. & M. R. Co.*, 53 Am. & Eng. R. Cas. 550, 16 L. R. A. 342, 52 N. W. Rep. 942; reversed on rehearing in 97 Mich. 329, 56 N.

W. Rep. 756. *Cooper v. Pittsburgh, C. & St. L. R. Co.*, 24 *W. Va.* 37.

96. Negligence in the management and operation of engines and cars.

—If, in disobedience of the rules of a railroad company, a person in charge of an engine failed to stop or slow up in approaching a switch in the railroad yard, and injury resulted therefrom, the defendant is liable for the resulting damage, unless the plaintiff contributed to the injury. *Louisville & N. R. Co. v. Mothershed*, 97 *Ala.* 261, 12 *So. Rep.* 714.

Where it is left to the judgment of a conductor as to the best method of running a train on a down grade, the decision of the conductor is that of the company, making the latter liable for an injury to a brakeman through the negligent manner adopted by the conductor of letting the train run down of its own gravity. *Wooden v. Western N. Y. & P. R. Co.*, 43 *N. Y. S. R.* 218, 16 *N. Y. Supp.* 840; *adhered to in* 18 *N. Y. Supp.* 768.—**DISTINGUISHING** *McCosker v. Long Island R. Co.*, 84 *N. Y.* 77; *Besel v. New York C. & H. R. R. Co.*, 70 *N. Y.* 171; *Neubauer v. New York, L. E. & W. R. Co.*, 18 *Wkly. Dig.* 402; *Beilfus v. New York, L. E. & W. R. Co.*, 29 *Hun* 556.

A conductor in charge of a train is not chargeable with knowledge of every defect in the roadway, or things therewith connected, where a brakeman was injured by the conductor's alleged fault, because the railroad company is chargeable with notice of it. *Georgia Pac. R. Co. v. Davis*, 92 *Ala.* 300, 9 *So. Rep.* 252.—**LIMITING** *Mobile & M. R. Co. v. Smith*, 59 *Ala.* 245.

Rule of superior service applied to the operation of a train. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 38 *Fed. Rep.* 816. *Northern Pac. R. Co. v. Cavanaugh*, 51 *Fed. Rep.* 517, 2 *C. C. A.* 358. *Wooden v. Western N. Y. & P. R. Co.*, 46 *N. Y. S. R.* 77. *Richmond & D. R. Co. v. Williams*, 39 *Am. & Eng. R. Cas.* 326, 86 *Va.* 165, 9 *S. E. Rep.* 990.

The rule applied in the case of a collision. *Daniel v. Chesapeake & O. R. Co.*, 53 *Am. & Eng. R. Cas.* 503, 36 *W. Va.* 397, 16 *L. R. A.* 383, 15 *S. E. Rep.* 162.

97. Negligence resulting in collision.—Where a fireman on a "wild" train, or one running irregularly, is injured through the negligence of an agent and telegraph operator in failing to observe proper regulations for the government of

running trains, the company is liable *Sheehan v. New York C. & H. R. R. Co.*, 12 *Am. & Eng. R. Cas.* 235, 91 *N. Y.* 332; *reversing* 25 *Hun* 310.—**EXPLAINING** *Slater v. Jewett*, 85 *N. Y.* 61, 39 *Am. Rep.* 627.—**APPLIED IN** *Smith v. Wabash, St. L. & P. R. Co.*, 31 *Am. & Eng. R. Cas.* 331, 92 *Mo.* 359; *Sutherland v. Troy & B. R. Co.*, 46 *Hun* 372, 11 *N. Y. S. R.* 841; *Carr v. North River Constr. Co.*, 17 *N. Y. S. R.* 945; *Nary v. New York, O. & W. R. Co.*, 29 *N. Y. S. R.* 630, 9 *N. Y. Supp.* 153. **DISTINGUISHED IN** *Kennedy v. Manhattan R. Co.*, 33 *Hun* 457. **FOLLOWED IN** *Dana v. New York C. & H. R. R. Co.*, 92 *N. Y.* 639; *Shiner v. Russell*, 6 *N. Y. S. R.* 78; *O'Laughlin v. New York C. & H. R. R. Co.*, 9 *N. Y. S. R.* 384, 45 *Hun* 588. **QUOTED IN** *Darrigan v. New York & N. E. R. Co.*, 23 *Am. & Eng. R. Cas.* 438, 52 *Conn.* 285, 52 *Am. Rep.* 590; *Hankins v. New York, L. E. & W. R. Co.*, 55 *Hun* 51, 28 *N. Y. S. R.* 59, 8 *N. Y. Supp.* 272.

98. Negligence while backing cars.

—It is negligence for an employé (foreman) in charge of a train to move it back against a standing car without a signal from a switchman who is to couple it, thereby causing an injury to the switchman. *Louisville & N. R. Co. v. Wallingford, (Ky.)* 22 *S. W. Rep.* 439.

In order that a woman may recover for a personal injury received while cleaning cars, which was caused by the cars being backed with too much force against a bunting-post, it must appear that the negligence in backing the cars was caused by some one who had charge of the train—that is, of the engineer or conductor—and not a failure of the brakeman to apply the brakes and stop the train. *Devine v. Boston & A. R. Co.*, 159 *Mass.* 348, 34 *N. E. Rep.* 539.

A foreman in charge of a gang of hands whose business is to repair freight cars while standing on the track in the company's yard, it being the duty of the foreman to help the hands in their work, is nevertheless their vice-principal. *So held*, where one of the hands was injured by a car running back against a car on which he was working. *Lake Shore & M. S. R. Co. v. Lavalley*, 5 *Am. & Eng. R. Cas.* 549, 36 *Ohio St.* 221.

Plaintiff was engaged as a car repairer by one company at a point where defendant company's tracks connected. A conductor of a train on defendant's road requested plaintiff to repair a car which was to be

transferred, and before going between the car and another, plaintiff displayed the usual danger signal, where it might have been seen by looking. While between the cars, which stood with their bumpers a few inches separated, the conductor, who was on the tracks with an engine, in transferring certain cars pushed a car against one of the cars, causing them to come together and crush plaintiff's arm. *Held*, that no relation of fellow-servant existed, and defendant company was liable. *Murphy v. New York C. & H. R. R. Co.*, 118 N. Y. 527, 23 N. E. Rep. 812, 29 N. Y. S. R. 941; *affirming* 10 N. Y. S. R. 156, 44 Hun 242.

99. Negligence while loading cars.

—A laborer engaged in loading cars under a boss, may recover from the company for an injury received through the negligence of the boss. *Proctor v. Missouri, K. & T. R. Co.*, 42 Mo. App. 124.

100. Negligence in the operation of hand-cars.—A company is responsible for the negligence of its vice-principal in the management of a hand-car, resulting in injury to the servants under him. *Hoben v. Burlington & M. R. R. Co.*, 20 Iowa 562. *St. Louis City & P. R. Co. v. Smith*, 22 Neb. 775, 36 N. W. Rep. 285.

Where a foreman of a hand-car knows that a train is following and would be close upon him, he is negligent in not stopping and taking the car off the track. *Slette v. Great Northern R. Co.*, 53 Minn. 341, 55 N. W. Rep. 137.

Where a section foreman under whom plaintiff was employed, directed a water keg to be placed on the front end of a hand-car for his seat, so that he could look ahead and observe the track, and while the car was in motion got up and allowed the keg to fall off, thus causing the car to leave the track and injure plaintiff, the injury was occasioned by the negligence of the foreman in the line of his duty, and the company is responsible therefor. *Russ v. Wabash Western R. Co.*, 112 Mo. 45, 20 S. W. Rep. 472.

101. Negligence of vice-principal in the selection of servants.

—Where a superior servant employs and discharges the subalterns, and the principal withdraws from the management of the business, or the business is of such a nature that it is necessarily committed to agents, as in the case of corporations, the principal is liable for the neglect and omissions of duty of the one charged with the selection of other ser-

vants, in employing and selecting such servants, and in the general conduct of the business committed to his care. *Rowland v. Missouri Pac. R. Co.*, 20 Mo. App. 463.—*FOLLOWING* *Marshall v. Schricker*, 63 Mo. 308.

A master who delegates his power to another, to employ, discharge, manage and control servants in a given work, is responsible to a servant for an injury received by him through the incompetency of a servant so employed, when such incompetency was known to the person so authorized to make the employment, and was not known, and by the exercise of due care could not have been known, to the person injured. *Texas Mex. R. Co. v. Whitmore*, 11 Am. & Eng. R. Cas. 195, 58 Tex. 276.

4. Limits and Exceptions to the Rule.

102. Company not liable notwithstanding superior rank of negligent servant.

—Railroad companies are not liable to one employé for injuries occasioned by another, where both are engaged in the same general undertaking; nor does it make any difference that the injury in the given case happens to one employé by the negligence of an employé of higher authority, to whom the injured employé is subject, and from the consequences of whose negligence he cannot guard. *Thayer v. St. Louis, A. & T. H. R. Co.*, 22 Ind. 26. *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174.—*NOT FOLLOWING* *Gillenwater v. Madison & I. R. Co.*, 5 Ind. 339. *Fitzpatrick v. New Albany & S. R. Co.*, 7 Ind. 436.—*Lawler v. Androscoggin R. Co.*, 62 Me. 463.—*QUOTING* *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291.—*Blake v. Maine C. R. Co.*, 70 Me. 60. *O'Connell v. Baltimore & O. R. Co.*, 20 Md. 212.—*FOLLOWED IN* *Shauck v. Northern C. R. Co.*, 25 Md. 462.—*Shauck v. Northern C. R. Co.*, 25 Md. 462.—*APPROVING* *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49. *FOLLOWING* *O'Connell v. Baltimore & O. R. Co.*, 20 Md. 212.—*Holten v. Fitchburg R. Co.*, 2 Am. & Eng. R. Cas. 94, 129 Mass. 268, 37 Am. Rep. 343.—*EXPLAINING* *Ford v. Fitchburg R. Co.*, 110 Mass. 240.—*APPROVED IN* *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336. *DISTINGUISHED IN* *Peschel v. Chicago, M. & St. P. R. Co.*, 62 Wis. 338. *QUOTED AND CRITICISED IN* *Darrigan v. New York & N. E. R. Co.*, 23 Am. & Eng. R. Cas. 438, 52 Conn. 285, 52 Am. Rep. 590. RE-

VIEWS IN *Mackin v. Boston & A. R. Co.*, 15 Am. & Eng. R. Cas. 196, 135 Mass. 201.—*Brown v. Winona & St. P. R. Co.*, 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. Rep. 484.—FOLLOWED IN *Gonsior v. Minneapolis & St. L. R. Co.*, 36 Minn. 385, 31 N. W. Rep. 515. REVIEWED IN *Lindvall v. Woods*, 39 Am. & Eng. R. Cas. 339, 41 Minn. 212, 4 L. R. A. 793, 42 N. W. Rep. 1020; *Indiana Car Co. v. Parker*, 100 Ind. 181.—*Sherman v. Rochester & S. R. Co.*, 17 N. Y. 153; *affirming* 15 Barb. 574.—APPROVING *Priestley v. Fowler*, 3 M. & W. 1; *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49.—DISAPPROVED IN *Dobbin v. Richmond & D. R. Co.*, 81 N. Car. 446. FOLLOWED IN *Boldt v. New York C. R. Co.*, 18 N. Y. 432.—*Hard v. Vermont & C. R. Co.*, 32 Vt. 473.—FOLLOWING *Noyes v. Smith*, 28 Vt. 59. REVIEWING *Wright v. New York C. R. Co.*, 25 N. Y. 562; *Little Miami R. Co. v. Stevens*, 20 Ohio 415.

The fact that one of several servants, in the habit of working together and in the same line of employment for a common master, has power to control and direct the actions of the others with respect to such employment, will not render the master liable for his negligence resulting in an injury to one of the others, unless the negligence complained of arises out of, and is the direct result of, the exercise of such authority. *Chicago, R. I. & P. R. Co. v. Touhy*, 26 Ill. App. 99. *Fanter v. Clark*, 15 Ill. App. 470.—FOLLOWING *Chicago & A. R. Co. v. May*, 108 Ill. 288.—*Hobbs v. Atlantic & N. C. R. Co.*, 107 N. Car. 1, 12 S. E. Rep. 124.

An employé cannot recover from the company for an injury received by the negligence of another employé in the same line of employment, but of a superior grade, unless he occupies the position of vice-principal; and this rule includes injured minor employés. *Pittsburgh, C. & St. L. R. Co. v. Adams*, 23 Am. & Eng. R. Cas. 408, 105 Ind. 151, 5 N. E. Rep. 187. *Nashville, C. & St. L. R. Co. v. Handman*, 13 Lea (Tenn.) 423.—FOLLOWING *Nashville & C. R. Co. v. Elliott*, 1 Coldw. (Tenn.) 611. QUOTING *Nashville, C. & St. L. R. Co. v. Wheelless*, 10 Lea 741.

A company is liable, as principal, for injuries received by a person who was employed by the conductor of a freight train as a brakeman during the trip, while acting under the orders of the conductor in coup-

ling cars; but not if the person so acting and injured was only a passenger, who was not employed by the conductor, nor under any obligation to obey his orders. *Georgia Pac. R. Co. v. Propst*, 83 Ala. 518, 3 So. Rep. 764.

The negligence of a foreman, when acting as such, occasioning an injury to a fellow-servant, does not necessarily render the company liable. *Fones v. Phillips*, 39 Ark. 17.

103. Negligent servant acting merely as a fellow-servant.—If the negligence complained of consists of some act done or omitted by a superior servant, which relates to his duty as a co-laborer with those under his control, and which might as readily happen with one of them having no such authority, the common master will not be liable. *Chicago & A. R. Co. v. May*, 15 Am. & Eng. R. Cas. 320, 108 Ill. 288. *Fitzgerald v. Honkomp*, 44 Ill. App. 365. *Krueger v. Louisville, N. A. & C. R. Co.*, 31 Am. & Eng. R. Cas. 329, 111 Ind. 51, 9 West. Rep. 247, 11 N. E. Rep. 957. *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. Rep. 905, 36 N. Y. S. R. 359; *reversing* 29 N. Y. S. R. 700, 9 N. Y. Supp. 174.—DISTINGUISHING *Pantzar v. Tilly Foster Iron Min. Co.*, 99 N. Y. 368; *Kranz v. Long Island R. Co.*, 123 N. Y. 1; *McGovern v. Central Vt. R. Co.*, 123 N. Y. 280. LIMITING *Tendrup v. Stephenson Co.*, 121 N. Y. 681.

The duty to close a switch which has been opened by a section foreman to let a hand-car pass in upon the side track, is a duty belonging to a servant, and is not a personal duty which the company owes to a section hand employed by the foreman, while engaged in the performance of his duties as its employé, and the company is not liable for the death of such employé, caused by the negligence of the foreman in leaving the switch open; but such negligence is the negligence of a fellow-servant employed in the same general business, within the meaning of section 1970 of the Cal. Civil Code, and the risk of such negligence is a risk impliedly assumed by the section hand in accepting the employment. *Daves v. Southern Pac. R. Co.*, 98 Cal. 19, 32 Pac. Rep. 708.—REVIEWING *Congrave v. Southern Pac. R. Co.*, 88 Cal. 360; *Fagundes v. Central Pac. R. Co.*, 79 Cal. 97.

While a master is liable to a servant for injuries resulting from the negligence of a fellow-servant who has been charged with

the performance, in place of the master, of duties owed by the master to the servant, where the negligence relates to the performance of those duties, he is not liable for the negligence of a competent fellow-servant who does not thus stand in the place of the master, although he may have some authority and power of direction over the injured servant. *Hofnagle v. New York C. & H. R. Co.*, 55 N. Y. 608; *reversing 1 T. & C. 346*.—REFERRING TO *Laning v. New York C. R. Co.*, 49 N. Y. 521; *Flike v. Boston & A. R. Co.*, 53 N. Y. 549.—APPLIED IN *Van Ostran v. New York C. & H. R. Co.*, 35 Hun (N. Y.) 590; *Williams v. Delaware, L. & W. R. Co.*, 39 Hun 430; *Monaghan v. New York C. & H. R. Co.*, 45 Hun 113, 9 N. Y. S. R. 672; *Mars v. Delaware & H. Canal Co.*, 54 Hun 625.

The negligence of the foreman of a gang in failing to block a pile which was shoved against plaintiff, injuring him, because it was not blocked, is the negligence of a fellow-servant, although the foreman had authority to employ and discharge plaintiff, and plaintiff was under his superintendence and control in doing the work in the performance of which he was injured. *Ell v. Northern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 318, 1 N. Dak. 336.—APPROVING *Holden v. Fitchburg R. Co.*, 129 Mass. 268.

104. Negligent servant acting in his individual capacity.—If an employé is taken from his work for the company by his superior, and is directed to perform an individual service for the latter, the company is not liable for an accident occurring while he is in the performance of such service; but if he simply be taken from one place of employment to another, in the company's service, it is liable for the results of its negligence therein. *Hurst v. Chicago, R. I. & P. R. Co.*, 49 Iowa 76.—DISTINGUISHED IN *Capper v. Louisville, E. & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 525, 103 Ind. 305.

The fact that a "boss" personally acted in a negligent manner, whereby plaintiff was injured, will not relieve the company of liability, where the act was done within the scope of the authority of the "boss" to direct and control as the representative of the master. *Dayharsh v. Hannibal & St. J. R. Co.*, 103 Mo. 570, 15 S. W. Rep. 554.—DISTINGUISHED IN *Ring v. Missouri Pac. R. Co.*, 112 Mo. 220. FOLLOWED IN *Parker v. Hannibal & St. J. R. Co.*, 109 Mo. 362;

Hutson v. Missouri Pac. R. Co., 50 Mo. App. 300.

Plaintiff was injured by a fall from a trestle while in defendant's employ as a carpenter. Desiring to descend from an upper to a lower bent of the trestle, he caught a hanging rope, which his foreman by mistake informed him was fastened above, and proceeded to let himself down. The rope was not fastened and he fell. This rope was used to lower tools. There were other ropes which the hands were accustomed to use to descend. There was no proof that plaintiff was ordered to descend, or that the foreman knew he intended to do so, or that any duty was assumed by or imposed upon the foreman to provide safe means of descent by the ropes. *Held*, that the accident resulted from personal negligence of the foreman, for which the master is not liable. *Louisville & N. R. Co. v. Lahr*, 86 Tenn. 335, 6 S. W. Rep. 663.—QUOTING *Nashville, C. & St. L. R. Co. v. Handman*, 13 Lea (Tenn.) 425.

105. Where company retains general supervision of work.—A master is not responsible to an employé for the negligent act of a competent and proper foreman to whom there has been no delegation of power and control of the business or a branch thereof, but who is simply charged with special duties, performing them under the direction of the master, the latter retaining general control and supervision. *Malone v. Hathaway*, 64 N. Y. 5.—APPROVED IN *Fuller v. Jewett*, 1 Am. & Eng. R. Cas. 109, 80 N. Y. 46.

A foreman is not a vice-principal where the common master retains general supervision of the work, notwithstanding the injured servant was obliged to obey the foreman's order. *Kirk v. Atlanta & C. A. L. R. Co.*, 25 Am. & Eng. R. Cas. 507, 94 N. Car. 625, 55 Am. Rep. 621.

III. SERVANTS IN DIFFERENT DEPARTMENTS; SERVANTS OF DIFFERENT COMPANIES.

1. Servants in Different Departments.

a. Statement of the Rule.

106. Generally.*—It is not the law that a master is released from liability in all

*Independent employment as affecting master's liability for injuries to employes, see note, 7 L. R. A. 501.

When persons engaged in different employ-

cases in which a servant is injured by the negligence of a fellow-servant. The master's immunity is limited to cases where the servants are engaged in the same common employment—i.e., in the same department of duty; but it does not extend to cases where the servants are engaged in departments essentially foreign to each other. *King v. Ohio & M. R. Co.*, 8 *Am. & Eng. R. Cas.* 119, 11 *Biss. (U. S.)* 362, 14 *Fed. Rep.* 277. *Kidley v. Belcher Silver Min. Co.*, 3 *Savvy. (U. S.)* 437.—REVIEWING *Ford v. Fitchburg R. Co.*, 110 *Mass.* 240.—*Pittsburg, Ft. W. & C. R. Co. v. Powers*, 74 *Ill.* 341. *Louisville & N. R. Co. v. Sheets*, (Ky.) 41 *Am. & Eng. R. Cas.* 470, 13 *S. W. Rep.* 248. *Union Pac. R. Co. v. Billeter*, 41 *Am. & Eng. R. Cas.* 431, 28 *Neb.* 422, 44 *N. W. Rep.* 483. *Richmond & D. R. Co. v. Norment*, 84 *Va.* 167, 4 *S. E. Rep.* 211. *Madden v. Chesapeake & O. R. Co.*, 28 *W. Va.* 610, 57 *Am. Rep.* 695.

A servant cannot be held to have contemplated in the adjustment of his wages those dangers which arise from the carelessness of fellow-servants, without any reference whatever to the nature of their employment or duties. *King v. Ohio & M. R. Co.*, 8 *Am. & Eng. R. Cas.* 119, 11 *Biss. (U. S.)* 362, 14 *Fed. Rep.* 277.

Where a servant whose duty it was, with others, to repair and keep in order a section of the road, while engaged in such duty, and standing some five or six feet from the track to avoid a passing train, was struck by a lump of coal which was carelessly cast by the fireman of the train from the tender, from the effects of which the person injured died—held, that the company was liable to his personal representative for damages, under the statute. The track repairer and the fireman were not fellow-servants. *Chicago & N. W. R. Co. v. Moranda*, 93 *Ill.* 302.—FOLLOWED IN *Pike v. Chicago & A. R. Co.*, 41 *Fed. Rep.* 95; *Ohio & M. R. Co. v. Robb*, 36 *Ill. App.* 627. QUOTED IN *Chicago, B. & Q. R. Co. v. Fitzgerald*, 40 *Ill. App.* 476; *Brodeur v. Valley Falls Co.*, 16 *R. I.* 448; *Hobbold v. Chicago Sugar Refining Co.*, 44

ments are not fellow-servants, see note, 4 *L. R. A.* 794.

Who are fellow-servants. Employés on different trains, see 39 *AM. & ENG. R. CAS.* 347, *abstr.*

Negligence of conductor of one train causing injury to a fireman on another train. Not fellow-servants, see 44 *AM. & ENG. R. CAS.* 597, *abstr.*

Ill. App. 418. RECONCILED IN *Chicago & A. R. Co. v. May*, 108 *Ill.* 288.

Whether the principle that the master is not liable for an injury received by one servant from the negligence of another, while both are acting in the common business of the same master, is applicable to servants of a railroad company, in different grades, when they are subordinate the one to the other, or not in the same employment, *quere. Washburn v. Nashville & C. R. Co.*, 3 *Head (Tenn.)* 638.

In Mississippi it has been held error to charge that the plaintiff can recover if the injury may be referred to the carelessness of other agents and servants of the defendant, employed in a department distinct from that in which the plaintiff was engaged, and over whom he had no control. *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 *Miss.* 258.—REVIEWING *Coon v. Syracuse & U. R. Co.*, 5 *N. Y.* 492.

107. Reason for the rule—Respondent superior.—The rule *respondent superior* applies where an employé of a company is injured by reason of negligence in the discharge of duty of another employé of the same company, engaged in a separate and distinct department, having no immediate or necessary connection with that in which the injured employé is engaged. *Nashville & C. R. Co. v. Carrol*, 6 *Heisk. (Tenn.)* 347, 12 *Am. Ry. Rep.* 20.—APPROVING *Louisville & N. R. Co. v. Collins*, 2 *Duv. (Ky.)* 114. QUOTING *Washburn v. Nashville & C. R. Co.*, 3 *Head (Tenn.)* 638. REVIEWING *Nashville & C. R. Co. v. Elliott*, 1 *Coldw. (Tenn.)* 616; *Memphis & C. R. Co. v. Jones*, 2 *Head* 517; *Haynes v. East Tenn. & G. R. Co.*, 3 *Coldw.* 223.—DISTINGUISHED IN *Miller v. Southern Pac. Co.*, 20 *Oreg.* 285. FOLLOWED IN *Louisville & N. R. Co. v. Bowler*, 9 *Heisk.* 866. REVIEWED IN *Parker v. Hannibal & St. J. R. Co.*, 109 *Mo.* 362; *Dixon v. Chicago & A. R. Co.*, 109 *Mo.* 413.

Servants in the employ of a company controlling and directing the movements of one train are, with reference to those in the same company upon another train, to be regarded as the agents of the company, and not the agents of each other. And where a servant on one train is injured by the negligence of a servant upon the other, the maxim *respondent superior* applies, and the company is liable. *Kentucky C. R. Co. v. Ackley*, 87 *Ky.* 278, 12 *Am. St. Rep.* 480, 8 *S.*

W. Rep. 691, 10 *Ky. L. Rep.* 170.—FOLLOWING Louisville, C. & L. R. Co. v. Cavens, 9 Bush (Ky.) 559.—REVIEWED IN Parker v. Hannibal & St. J. R. Co., 109 Mo. 362.

b. Scope and Extent of the Rule,

108. Generally.—The rule first suggested in *Priestley v. Fowler*, that a master who has exercised due care and skill in the employment and retention of his servants is not responsible for an injury sustained by one of them in the course of his employment by the negligence of another, however distinct the grade or different the labor of such servants, or how widely separated the locality of their several employments, is being modified by the course of judicial opinion and decision, so as to meet the ends of justice in cases since arising of corporations and others engaged in varied and widely extended operations under one nominal and invisible head, but in reality divided into separate parts or divisions, under the direction and control of local bosses, superintendents, or heads of departments, who to all intents and purposes represent and stand for the corporation with practically unqualified power to employ, direct, and discharge workmen, and to provide the necessary material and appliances for their convenient and safe employment. *Gilmore v. Northern Pac. R. Co.*, 15 *Am. & Eng. R. Cas.* 304, 9 *Sawy.* (U. S.) 558, 18 *Fed. Rep.* 866.—QUALIFYING *Priestley v. Fowler*, 3 M. & W. 1; *Murray v. South Carolina R. Co.*, 1 McMull. (So. Car.) 385; *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49.

In Indiana a railroad company is liable to a servant for an injury occasioned by the negligence of other servants of the company, where the duties of the latter, in connection with which the injury happened, were not common nor in the same department with those of the injured servant, and where the negligence of the injured servant did not contribute to produce the injury. *Gillenwater v. Madison & I. R. Co.*, 5 *Ind.* 339.—DISTINGUISHING *Priestley v. Fowler*, 3 M. & W. 1; *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49; *Murray v. South Carolina R. Co.*, 1 McMull. (So. Car.) 385.—NOT FOLLOWED IN *Summerhays v. Kansas Pac. R. Co.*, 2 *Colo.* 484.—*Fitzpatrick v. New Albany & S. R. Co.*, 7 *Ind.* 436.—DISTINGUISHED IN *Eaton v. Delaware, L. & W.*

R. Co., 57 N. Y. 382. NOT FOLLOWED IN *Columbus & I. C. R. Co. v. Arnold*, 31 *Ind.* 174; *Ross v. New York C. & H. R. R. Co.*, 5 *Hun* (N. Y.) 488.

This doctrine is not followed in New York. *Ross v. New York C. & H. R. R. Co.*, 5 *Hun* (N. Y.) 488; *affirmed in* 74 N. Y. 617, *mem.*—NOT FOLLOWING *Ryan v. Chicago & N. W. R. Co.*, 60 *Ill.* 171; *Lalor v. Chicago, B. & Q. R. Co.*, 52 *Ill.* 401; *Fitzpatrick v. New Albany & S. R. Co.*, 7 *Ind.* 438.

In Tennessee, where servants of the same company are engaged in different departments of a common service, or one is the superior of another in the same department, either temporarily or permanently, they are not fellow-servants. *East Tenn. V. & G. R. Co. v. De Armond*, 86 *Tenn.* 73, 6 *Am. St. Rep.* 816, 5 *S. W. Rep.* 600.

But the doctrine has not been extended to other than employés of railway companies. *Coal Creek Min. Co. v. Davis*, 90 *Tenn.* 711, 18 *S. W. Rep.* 387.

In Wisconsin the fact that the servant was engaged at the immediate point where the negligence occurred might furnish some grounds to implicate him in the negligence; but where he is engaged in a different department, or where he performed his whole duty with skill and care, it is entirely immaterial whether he was injured by the negligence of one working in the same department or in another. The company is liable because, on setting a force in motion to be used for its own benefit, it is bound to see to it that it is employed with proper care and skill. *Chamberlain v. Milwaukee & M. R. Co.*, 11 *Wis.* 238.—CRITICISING *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49.

109. Illinois doctrine—Gross negligence.—Where the employment of a person working for a railway is in a different department from other servants, and he is not associated with such others in the performance of their duty, the company is liable for the gross negligence of other servants, resulting in injury or death to such person. *Toledo, W. & W. R. Co. v. O'Connor*, 77 *Ill.* 391.

110. Kentucky doctrine—Ordinary negligence.—Where the servants are not employed in the same department, but in the same common employment, the company is liable for their ordinary neglect causing injury to each other. *McLeod v.*

Ginther, 8 Am. & Eng. R. Cas. 162, 80 Ky. 399.

c. Limits and Exceptions to the Rule.

111. Generally.—There is no good reason for limiting the rule exempting the company from liability to one servant who is injured through the negligence of another, to cases where the servants are in the same general employment. It can make no difference whether a brakeman is injured by the carelessness of another brakeman or by that of an engineer or conductor; nor whether a fireman is injured by the negligence of the engineer or by that of a machinist who is charged with fitting the engine for the road. The company's obligation should be the same in all cases. *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672. —APPROVED IN *Smoot v. Mobile & M. R. Co.*, 67 Ala. 13.

Plaintiff was in the employ of a company as a bridge watchman, but at the time he was injured was on a train going to court as a witness in certain litigation against the company. The train was stopped by rocks that had fallen from the roof of a tunnel, and some one called out, "All railroad hands get out and help clear the track," and plaintiff, with others, obeyed, but was injured by the falling of other stones. It turned out that the person calling upon the trainmen to assist was a special agent of the company, whose duties were limited to looking after injured stock and litigation against the company. *Held*, that he exceeded his authority in the command to the railroad men, and the company was not liable. *Nashville & C. R. Co. v. McDaniel*, 17 Am.

Eng. R. Cas. 604, 12 Lea (Tenn.) 386.—

APPROVED IN *Bradley v. Nashville, C. & S. R. Co.*, 14 Lea 374.

112. In different departments but same master.—Persons may be fellow-servants although not strictly in the same line of employment. One person may be employed to transact business of one department and another may be employed by the same master to transact a different and distinct branch of business; but if their usual duties bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution, such persons may be regarded as fellow-servants. *Joliet Steel Co. v. Shielts*, 146 Ill. 603, 34 N. E. Rep. 1108.

113. In different departments but in the same common employment.

A master, guilty of no personal negligence or misconduct, is not liable to one servant for injuries caused by the negligence or misconduct of a fellow-servant engaged in the same general business, even though the two servants are engaged in separate and distinct departments of the same general business. *Foster v. Minnesota C. R. Co.*, 14 Minn. 360 (Gil. 277).—DISTINGUISHED IN *Drymala v. Thompson*, 26 Minn. 40.—*Faulkner v. Erie R. Co.*, 49 Barb. (N. Y.) 324. *Conlin v. Charleston City Council*, 15 Rich. (So. Car.) 201.

A servant who is injured as a consequence of the negligence of a fellow-servant is debarred of recovery against the master, although the two servants were not engaged in a common work under one common employment. *Corbett v. St. Louis, I. M. & S. R. Co.*, 26 Mo. App. 621.—DISTINGUISHING *Vautrain v. St. Louis, I. M. & S. R. Co.*, 8 Mo. App. 543, 78 Mo. 44; *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495; *Porter v. Hannibal & St. J. R. Co.*, 71 Mo. 78; *Hall v. Missouri Pac. R. Co.*, 74 Mo. 298. QUOTING *Schultz v. Pacific R. Co.*, 36 Mo. 29. REVIEWING *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49.

This rule applies though the employments of the servants are distinct, when both are necessary in the prosecution of a common enterprise. *Coon v. Syracuse & U. R. Co.*, 5 N. Y. 492; affirming 6 Barb. 231.—FOLLOWING *Hayes v. Western R. Corp.*, 3 Cush. (Mass.) 270; *Hutchinson v. York, N. & B. R. Co.*, 14 Jur. 837.—APPROVED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N.W. Rep. 758. REVIEWED IN *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 Miss. 258.

It is immaterial that the injured servant was not employed in the same kind of work as that of the servants who were negligent, provided they were negligent in furthering the same object, and there is one general object in attaining which the injured servant was exposed to risk. *Blake v. Maine C. R. Co.*, 70 Me. 60.

All who serve the same master, work under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, though in different grades and departments of it, are fellow-servants, each taking the risk of the other's negligence. *Wonder v. Baltimore*

& O. R. Co., 32 Md. 411.—APPROVED IN *Smoot v. Mobile & M. R. Co.*, 67 Ala. 13. NOT FOLLOWED IN *Little Rock & M. R. Co. v. Moseley*, 56 Fed. Rep. 1009.—*Mele v. Delaware & H. Canal Co.*, 27 J. & S. 367, 14 N. Y. Supp. 630, 39 N. Y. S. R. 153.—FOLLOWING *Boldt v. New York C. R. Co.*, 18 N. Y. 432. NOT FOLLOWING *Chicago & A. R. Co. v. Keefe*, 47 Ill. 110; *Ryan v. Chicago & N. W. R. Co.*, 60 Ill. 171; *Valtez v. Ohio & M. R. Co.*, 85 Ill. 500; *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239.—*New York, L. E. & W. R. Co. v. Bell*, 28 Am. & Eng. R. Cas. 338, 112 Pa. St. 400, 4 Atl. Rep. 50. *Brodeur v. Valley Falls Co.*, 16 R. I. 448, 17 Atl. Rep. 54.—DISTINGUISHING *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377; *Moon v. Richmond & A. R. Co.*, 78 Va. 745. QUOTING *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302; *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49.—QUOTED IN *New York & N. E. R. Co. v. Hyde*, 56 Fed. Rep. 188; *St. Louis, A. & T. R. Co. v. Triplett*, 48 Am. & Eng. R. Cas. 283, 54 Ark. 289.—*Houston & T. C. R. Co. v. Rider*, 62 Tex. 267.—FOLLOWING *Dallas v. Gulf, C. & S. F. R. Co.*, 61 Tex. 196.—APPLIED IN *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336. FOLLOWED IN *Texas & P. R. Co. v. Rogers*, 57 Fed. Rep. 378.—*Texas & P. R. Co. v. Harrington*, 21 Am. & Eng. R. Cas. 571, 62 Tex. 597.—FOLLOWED IN *Texas & P. R. Co. v. Rogers*, 57 Fed. Rep. 378. REVIEWED IN *Beuhning v. Chesapeake & O. R. Co.*, 37 W. Va. 502.—*Missouri Pac. R. Co. v. Watts*, 22 Am. & Eng. R. Cas. 277, 63 Tex. 549.—FOLLOWED IN *Texas & P. R. Co. v. Rogers*, 57 Fed. Rep. 378.—*Douglas v. Texas Mex. R. Co.*, 63 Tex. 564. *Norfolk & W. R. Co. v. Donnelly*, 53 Am. & Eng. R. Cas. 571, 88 Va. 853, 14 S. E. Rep. 692, 16 Va. L. J. 214. *Morgan v. Vale of Neath R. Co.*, 5 B. & S. 736, L. R. 1 Q. B. 149, 35 L. J. Q. B. 23, 13 L. T. 564, 34 L. J. Q. B. 23, 14 W. R. 144; affirming 5 B. & S. 570, 10 Jur. N. S. 1074, 33 L. J. Q. B. 260, 13 W. R. 1031.—FOLLOWED IN *Warburton v. Great Western R. Co.*, L. R. 2 Ex. 30, 36 L. J. Ex. 9, 15 L. T. 361, 15 W. R. 108, 4 H. & C. 695.

Where a company gives a contract to an individual to deliver wood to the company, the company to furnish the trains to move it, and the men on the trains to be subject to the orders of such contractor, a servant employed to load the wood on a train is a fellow-servant with the trainmen,

and cannot recover from the company for an injury received by being negligently thrown from the train. *Illinois C. R. Co. v. Cox*, 21 Ill. 20.—DISTINGUISHED IN *Lalor v. Chicago, B. & Q. R. Co.*, 52 Ill. 401; *Chicago & N. W. R. Co. v. Taylor*, 69 Ill. 461. FOLLOWED IN *Moss v. Johnson*, 22 Ill. 633; *Chicago & A. R. Co. v. Keefe*, 47 Ill. 108. NOT FOLLOWED IN *Louisville, N. O. & T. R. Co. v. Conroy*, 63 Miss. 562.

A company's construction and repair shops were divided into several sub-departments, known as the car shop, paint shop, blacksmith shop, machine shop, boiler shop, round house, foundry, and lumber yard. All of these were under a general superintendent, with a foreman for each shop. Gangs of men from two of the shops were out moving cars when plaintiff's husband, a member of one gang, was killed by the negligence of the members of the other gang in pushing a car against the one who was assisting in moving. Held, that the deceased was a fellow-servant with all the other men, and no recovery could be had against the company. *Chicago & A. R. Co. v. O'Bryan*, 15 Ill. App. 134.

d. What Servants are Deemed to be in Different Departments within the Rule.

114. Generally.—Two servants under a common master are not fellow-servants when they are not in the same employment. *Washburn v. Nashville & C. R. Co.*, 3 Head (Tenn.) 638. *Relyea v. Kansas City, Ft. S. & G. R. Co.*, 53 Am. & Eng. R. Cas. 578, 112 Mo. 86, 20 S. W. Rep. 480. *Daniels v. Union Pac. R. Co.*, 6 Utah 357, 23 Pac. Rep. 762.

A person engaged in loading freight cars is not a fellow-servant with the switch tender, so as to defeat a recovery against the company for an injury received by one through the negligence of the other; but such switch tender is a fellow-servant with an engineer on a switch engine. *Chicago, R. I. & P. R. Co. v. Henry*, 7 Ill. App. 322.—FOLLOWING *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302.

A master machinist, though acting in a distinct and special employment in making the selection of an engine, is, nevertheless, a fellow-servant with those who operate the machine. *Cumberland & P. R. Co. v. State*, 44 Md. 283, 45 Md. 229. *Nashville & D. R.*

Co. v. Jones, 9 Heisk. (Tenn.) 27, 19 Am. Ry. Rep. 261.

All those servants included in the different departments of the work of constructing a railroad trestle are fellow-servants, as the trestle is not a structure furnished by the defendants for their employes to work on, but is a part of the construction of the road and a part of the work they themselves are employed to perform under the common service. *Lindvall v. Woods, 39 Am. & Eng. R. Cas. 339, 41 Minn. 212, 4 L. R. A. 793, 42 N. W. Rep. 1020.* — REVIEWING *Brown v. Winona & St. P. R. Co., 27 Minn. 162, 6 N. W. Rep. 484; Gonsior v. Minneapolis & St. L. R. Co., 36 Minn. 385, 31 N. W. Rep. 515; Olson v. St. Paul, M. & M. R. Co., 38 Minn. 117, 35 N. W. Rep. 866; Brown v. Minneapolis & St. L. R. Co., 31 Minn. 553, 18 N. W. Rep. 834; Fraker v. St. Paul, M. & M. R. Co., 32 Minn. 54, 19 N. W. Rep. 349; Tierney v. Minneapolis & St. L. R. Co., 33 Minn. 311, 23 N. W. Rep. 229.*

A department superintendent directed a car inspector to go upon cars and inspect them as soon as a train arrived in the yards, which he did as soon as the train came to a full stop; but when he was about to step from one car to another, the engineer, without warning, suddenly started his engine with such force as to part the train, causing the inspector to fall to the ground, whereby he was injured. The evidence showed that the engineer's duty ceased, except moving his locomotive to the engine house, whenever the train came to a certain place. *Held*, that the engineer and inspector were not fellow-servants, and that the company was liable for the injury. *Chicago & A. R. Co. v. Hoyt, 31 Am. & Eng. R. Cas. 309, 122 Ill. 369, 9 West. Rep. 785, 12 N. E. Rep. 225.*

In such case the duties of the engineer ceased at or before the inspector's began, so that it was impossible for the one to have exercised any influence whatever over the other, and therefore an instruction based upon the theory of their being fellow-servants was properly refused. *Chicago & A. R. Co. v. Hoyt, 31 Am. & Eng. R. Cas. 309, 122 Ill. 369, 12 N. E. Rep. 225, 9 West. Rep. 785.*

A railroad superintendent employed the messenger of an express company, who was entitled to be carried over the road, to act as brakeman for a single trip, and he was injured through the negligence of the engineer. *Held*, that he had a right to recover

from the company whether he be regarded as a passenger or as an employe. *Chamberlain v. Milwaukee & M. R. Co., 11 Wis. 238.* — DISAPPROVED IN *Randall v. Baltimore & O. R. Co., 109 U. S. 478.*

The following servants have been held to be in different departments of service within the rule denying exemption to the company in such cases:

A master mechanic and a watchman. *St. Louis, I. M. & S. R. Co. v. Harper, 44 Ark. 524.*

One employed to erect mail catchers along a line of railroad and a fireman on a locomotive. *Chicago, B. & Q. R. Co. v. Gregory, 58 Ill. 272, 11 Am. Ry. Rep. 75.*

One who is putting in new machinery and an employe of a person for whom the machinery is set up. *Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32 N. E. Rep. 285.*

A train dispatcher or division superintendent under whose orders trains are run and an engineer running under his orders. *Chicago, B. & Q. R. Co. v. Young, 26 Ill. App. 115.*

Those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools for labor, and those who are to use the place or appliances when provided. *Sadowski v. Michigan Car Co., 84 Mich. 100, 47 N. W. Rep. 598.* — FOLLOWING *Ford v. Fitchburg R. Co., 110 Mass. 240.*

A section foreman and train hands on a wood train. *Drymala v. Thompson, 26 Minn. 40, 1 N. W. Rep. 255.*

A car inspector and a brakeman. *Daniels v. Union Pac. R. Co., 6 Utah 357, 23 Pac. Rep. 762.*

An express messenger and an engineer on the same train. *Baltimore & O. R. Co. v. McKenzie, 24 Am. & Eng. R. Cas. 395, 81 Va. 71.*

115. Members of different gangs. — A section hand of one gang is in the same department of service and to be considered a fellow-servant of the boss of another section gang employed by the same railroad company. *Clarke v. Pennsylvania Co., 132 Ind. 199, 31 N. E. Rep. 808.*

The foremen of two separate crews employed in switching cars in the same yard are not fellow-servants with the members of the crew not under their individual control. *Armstrong v. Oregon S. L. & U. N. R. Co., 8 Utah 420, 32 Pac. Rep. 693.*

116. Section hands and trainmen. — A section master is not a fellow-servant of

a locomotive engineer, injured while running a train over a defective track, caused by the negligence of the section master, as they are not servants in the same department of service. *Calvo v. Charlotte, C. & A. R. Co.*, 28 Am. & Eng. R. Cas. 327, 23 So. Car. 526, 55 Am. Rep. 28. *St. Louis & S. F. R. Co. v. Weaver*, 28 Am. & Eng. R. Cas. 341, 35 Kan. 412, 11 Pac. Rep. 408.

A section boss is in a different department of service from a brakeman on a train. *Hulehan v. Green Bay, W. & St. P. R. Co.*, 31 Am. & Eng. R. Cas. 322, 68 Wis. 520, 32 N. W. Rep. 529.

Section hands are not within the same department of service as a brakeman uncoupling cars. *Vautrain v. St. Louis, I. M. & S. R. Co.*, 8 Mo. App. 538; affirmed on other grounds in 78 Mo. 44.

117. Trainmen on different trains.

—The employés of a railroad company controlling and directing the movements of one train must, with reference to those controlling another, be regarded as the agents of the company, and the company is responsible for injuries to a person of the one class resulting from the negligence of one of the other. *Louisville, C. & L. R. Co. v. Cavens*, 9 Bush (Ky.) 559.—FOLLOWED IN *Kentucky C. R. Co. v. Ackley*, 87 Ky. 278, 12 Am. St. Rep. 480, 8 S. W. Rep. 691, 10 Ky. L. Rep. 170.

Trainmen of a wild train are not fellow-servants with trainmen on a gravel train, not being under the same common employment. *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599, 21 Pac. Rep. 32.

An engineer of one company operating a train, through whose negligence the engineer of another company is injured, is not a fellow-servant of the latter, they being in the employ of different companies. *Texas & P. R. Co. v. Easton*, 2 Tex. Civ. App. 378, 21 S. W. Rep. 575.

A brakeman, working a switch for his train on one track, is not in a different department from an engineman on another train in the same yard, through whose negligence he was injured; but they being fellow-servants, there can be no recovery against the company unless it is shown that the company employed an unfit and incompetent engineman. *Randall v. Baltimore & O. R. Co.*, 15 Am. & Eng. R. Cas. 243, 109 U. S. 478, 3 Sup. Ct. Rep. 222.—DISAPPROVING *Chamberlain v. Milwaukee & M. R. Co.*, 11 Wis. 248; *Haynes v. East Tenn.*

5 D. R. D.—44.

& G. R. Co., 3 Coldw. (Tenn.) 222. DISTINGUISHING *Hough v. Texas & P. R. Co.*, 100 U. S. 213; *Union Pac. R. Co. v. Fort*, 17 Wall. (U. S.) 533; *Wabash R. Co. v. McDaniels*, 107 U. S. 454.—APPLIED IN *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336. APPROVED IN *Toner v. Chicago, M. & St. P. R. Co.*, 28 Am. & Eng. R. Cas. 449, 31 Am. & Eng. R. Cas. 320, 69 Wis. 188, 33 N. W. Rep. 433; *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758; *McMaster v. Illinois C. R. Co.*, 41 Am. & Eng. R. Cas. 486, 65 Miss. 264, 7 Am. St. Rep. 653, 4 So. Rep. 59. DISTINGUISHED IN *Howard v. Delaware & H. Canal Co.*, 40 Fed. Rep. 195; *Pike v. Chicago & A. R. Co.*, 41 Fed. Rep. 95. FOLLOWED IN *Baltimore & O. R. Co. v. Andrews*, 53 Am. & Eng. R. Cas. 523, 50 Fed. Rep. 728, 1 C. C. A. 636; *Easton v. Houston & T. C. R. Co.*, 32 Fed. Rep. 893; *Naylor v. New York C. & H. R. Co.*, 33 Fed. Rep. 801; *Van Avery v. Union Pac. R. Co.*, 35 Fed. Rep. 40; *Newport News & M. V. Co. v. Howe*, 52 Fed. Rep. 362, 6 U. S. App. 172, 3 C. C. A. 121. QUOTED IN *New York & N. E. R. Co. v. Hyde*, 56 Fed. Rep. 188; *Hobson v. New Mexico & A. R. Co.*, (Ariz.) 28 Am. & Eng. R. Cas. 360, 11 Pac. Rep. 545; *Hobbs v. Atlantic & N. C. R. Co.*, 44 Am. & Eng. R. Cas. 592, 107 N. Car. 1, 12 S. E. Rep. 124. REVIEWED IN *Parker v. Hannibal & St. J. R. Co.*, 50 Am. & Eng. R. Cas. 521, 109 Mo. 362, 19 S. W. Rep. 1119.

118. Trainmen and car cleaners.

—After a passenger train had reached a station a woman entered certain coaches for the purpose of cleaning them; a conductor was in charge of the cars for the purpose of distributing them to different tracks, who gave directions where they should be put. Two coaches, one of which the woman was on, were backed against a bunting-post with unusual force, and injured her. *Held*, that if they were sent with too much force, so that the brakeman could not stop them, then the injury was due to the negligence of the conductor, and the company would be liable. *Devine v. Boston & A. R. Co.*, 159 Mass. 348, 34 N. E. Rep. 539.

119. Trainmen and men employed to unload cars.—A laborer employed to unload cars, who was subject to the orders of the conductor, was injured by the engineer moving the train under orders

of the same conductor, but without giving a preliminary signal, as required by the rules of the company. *Held*, that he could not recover from the company for the negligence of the engineer, if due diligence had been exercised in his selection. *Chicago & A. R. Co. v. Keefe*, 47 Ill. 108.—FOLLOWING *Honner v. Illinois C. R. Co.*, 15 Ill. 550; *Illinois C. R. Co. v. Cox*, 21 Ill. 20; *Moss v. Johnson*, 22 Ill. 633.—DISTINGUISHED IN *Chicago & N. W. R. Co. v. Taylor*, 69 Ill. 461. EXPLAINED IN *Chicago & A. R. Co. v. Murphy*, 53 Ill. 336. NOT FOLLOWED IN *Mele v. Delaware & H. Canal Co.*, 27 J. & S. (N. Y.) 367. QUOTED IN *Ryan v. Chicago & N. W. R. Co.*, 60 Ill. 171.

120. Trainmen and quarrymen.—A laborer working in defendant's quarry, under direction of a foreman having no connection with the train service, is not a fellow-servant of employes operating a passenger train on defendant's line. *Dixon v. Chicago & A. R. Co.*, 53 Am. & Eng. R. Cas. 589, 109 Mo. 413, 19 S. W. Rep. 412.—EXPLAINING *McDermott v. Pacific R. Co.*, 30 Mo. 116; *Hutchinson v. York, N. & B. R. Co.*, 5 Ex. 343; *Lovell v. Howell*, L. R. 1 C. P. D. 161; *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49.

121. Trainmen and servants being merely transported on train.—A laborer on a gravel train, who, under contract, is entitled to be carried to and from his place of loading on a train, is not a fellow-servant with the engineer of the locomotive that draws the train, and may recover from the company for an injury received through the gross negligence of such engineer. *Fitzpatrick v. New Albany & S. R. Co.*, 7 Ind. 436.—DISAPPROVED IN *Moss v. Johnson*, 22 Ill. 633. DISTINGUISHED IN *Whaalan v. Mad River & L. E. R. Co.*, 8 Ohio St. 249; *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366; *Moss v. Johnson*, 22 Ill. 633. DOUBTED IN *Slattery v. Toledo & W. R. Co.*, 23 Ind. 81.

A mechanic who worked for a railroad, was carried to and from his work on a train as part of his wages. *Held*, that he was not a fellow-servant with those running the train, so as to prevent a recovery for an injury received. *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239.—DISTINGUISHING *Gillshannon v. Stony Brook R. Corp.*, 10 Cush. (Mass.) 228; *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291; *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49;

Morgan v. Vale of Neath R. Co., L. R. 1 Q. B. 149.—DISTINGUISHED IN *Miller v. Southern Pac. Co.*, 20 Oreg. 285. NOT FOLLOWED IN *Mele v. Delaware & H. Canal Co.*, 27 J. & S. (N. Y.) 367.

Trainmen are fellow-servants of a tunnel repairer being transported from one place to another on the company's cars. *Copper v. Louisville, E. & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 525, 103 Ind. 305, 2 N. E. Rep. 749.

122. Trainmen and shopmen.—The doctrine that an action will not lie by a servant against a railroad for an injury sustained through the default of a fellow-servant—*held*, not to apply to a case where a carpenter, employed in the company's shops, was injured in crossing the track, by an engine, after leaving the shops and while going home. *Ryan v. Chicago & N. W. R. Co.*, 60 Ill. 171, 12 Am. Ky. Rep. 327.—QUOTING *Chicago & A. R. Co. v. Keefe*, 47 Ill. 110.—DISTINGUISHED IN *Miller v. Southern Pac. Co.*, 20 Oreg. 285. NOT FOLLOWED IN *Ross v. New York C. & H. R. R. Co.*, 5 Hun (N. Y.) 488; *Mele v. Delaware & H. Canal Co.*, 27 J. & S. (N. Y.) 367.

123. Trainmen and telegraph operators.—A telegraph operator at a way station, who has no control of, or connection with, the running of trains, except as a medium through which orders from the superintendent's office are communicated to servants of the company in charge of its trains, is not the fellow-servant of a conductor. The operator is not only engaged in a different department of the service, but is, in a certain sense, the conductor's superior, as an aid or helper to the superintendent of trains. *East Tenn., V. & G. R. Co. v. De Armond*, 86 Tenn. 73, 6 Am. St. Rep. 816, 5 S. W. Rep. 600.—QUOTING *Dobbin v. Richmond & D. R. Co.*, 81 N. Car. 446.

124. Trainmen and trackmen.—Section hands, engaged in ballasting the track with stone, which is hauled to them on a construction train, and is unloaded by the trainmen, are not fellow-servants with the trainmen, where the two groups are independent of each other and work under different foremen, to whose orders they are respectively subject. (Sherwood, C. J., Gantt and Macfarlane, JJ., dissenting.) *Parker v. Hannibal & St. J. R. Co.*, 109 Mo. 362, 19 S. W. Rep. 1119.—APPROVING *Louisville & N. R. Co. v. Moore*, 83 Ky. 675; *Madden v. Chesapeake & O. R. Co.*, 28 W.

Va. 610; *Moon v. Richmond & A. R. Co.*, 78 Va. 745; *Richmond & D. R. Co. v. Williams*, 86 Va. 165, 9 S. E. Rep. 990; *Johnson v. Richmond & A. R. Co.*, 84 Va. 713, 5 S. E. Rep. 707; *Boatwright v. Northeastern R. Co.*, 25 So. Car. 128; *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599, 21 Pac. Rep. 32; *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201. DISAPPROVING *Priestley v. Fowler*, 3 M. & W. 1; *Murray v. South Carolina R. Co.*, 1 McMull. (So. Car.) 385; *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49. DISTINGUISHING *Miller v. Missouri Pac. R. Co.*, 109 Mo. 350. EXPLAINING *Kohback v. Pacific R. Co.*, 43 Mo. 187. FOLLOWING *Dayharsh v. Hannibal & St. J. R. Co.*, 103 Mo. 570. OVERRULING *McDermott v. Pacific R. Co.*, 30 Mo. 115. QUOTING *Chicago & N. W. R. Co. v. Moranda*, 108 Ill. 580; *Cooper v. Mullins*, 30 Ga. 146, 76 Am. Dec. 638; *Hobson v. New Mexico & A. R. Co.*, (Ariz.) 28 Am. & Eng. R. Cas. 360; *Howard v. Delaware & H. Canal Co.*, 40 Fed. Rep. 195; *Chicago, M. & St. P. R. Co. v. Ross*, 17 Am. & Eng. R. Cas. 501, 112 U. S. 377. RECONCILING *Murray v. St. Louis C. & W. R. Co.*, 98 Mo. 573. REVIEWING *Barry v. Hannibal & St. J. R. Co.*, 98 Mo. 62; *Kentucky C. R. Co. v. Ackley*, 87 Ky. 278; *Nashville & C. R. Co. v. Carroll*, 6 Heisk. (Tenn.) 347.

In an action by a section foreman for an injury caused by the negligence of a company's servants in running a freight train on a bridge being repaired, the court instructed the jury for the plaintiff that if at the time of the injury the plaintiff and the men in charge of the freight train were employed in different departments and were not associated with each other in the performance of their duties, but were wholly separated and disconnected from each other in the performance of their duties, they were not fellow-servants. *Held*, proper. *Peoria, D. & E. R. Co. v. Rice*, 144 Ill. 227, 33 N. E. Rep. 951.

The following have been held not to be fellow-servants in such a sense as to exempt the company:

A laborer working under a boss in distributing rails for relaying the track, and an engineer operating an engine used for the general business of the company, and not connected with the relaying of the track. *Garrahy v. Kansas City, St. J. & C. B. R. Co.*, 25 Fed. Rep. 258.—FOLLOWING *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S.

377, 5 Sup. Ct. Rep. 184.—FOLLOWED IN *Pike v. Chicago & A. R. Co.*, 41 Fed. Rep. 95. QUOTED IN *Mase v. Northern Pac. R. Co.*, 57 Fed. Rep. 283; *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758. REVIEWED IN *McKaig v. Northern Pac. R. Co.*, 42 Fed. Rep. 288; *Dixon v. Chicago & A. R. Co.*, 109 Mo. 413.

A teamster who hauls ties to be used in constructing a railroad, and the engineer of a train that carries the workmen to and from the place where they get their meals. *Hobson v. New Mexico & A. R. Co.*, (Ariz.) 28 Am. & Eng. R. Cas. 360, 11 Pac. Rep. 545.

An engineer employed on an engine and a trackman employed to repair the track of the same company. *Chicago & N. W. R. Co. v. Bliss*, 6 Ill. App. 411.

An engineer, and an employé under charge of a foreman whose business is the erection of fences along the right of way. *Louisville, E. & St. L. Con. R. Co. v. Hawthorn*, 45 Ill. App. 635.

A subcontractor for the building of bridges on the line, and those employed by the corporation in operating the road and managing the trains thereon. *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa 280.

A track walker, and those who are in charge of a train by which he was struck and killed. *Sullivan v. Missouri Pac. R. Co.*, 97 Mo. 113, 10 S. W. Rep. 852. *Howard v. Delaware & H. Canal Co.*, 41 Am. & Eng. R. Cas. 473, 40 Fed. Rep. 195.

An engineer upon a train and a section hand walking along the track. *McKenna v. Missouri Pac. R. Co.*, 54 Mo. App. 161.

2. Servants of Different Companies.

125. Rule of fellow-service not applicable, generally.—A porter of a railway company using the station of another company may recover damages for an injury caused by the negligence of the servants of such latter company. The offending servants in such case do not act in the course of any common employment with the plaintiff. *Wardburton v. Great Western R. Co.*, L. R. 2 Ex. 30, 36 L. J. Ex. 9, 4 H. & C. 695, 15 W. R. 108, 15 L. T. 361.

126. — between servants of two railroad companies.—Where a fireman on a railroad train is injured by a collision at a crossing of two roads, brought about

by the concurring negligence of the engineer on his train and of the employés of the other road, his right to recover damages for such injury from the other road will not be defeated by reason of the negligence of the engineer. *Gray v. Philadelphia & R. R. Co.*, 22 *Am. & Eng. R. Cas.* 351, 24 *Fed. Rep.* 168, 23 *Blatchf. (U. S.)* 265.—APPLYING *Robinson v. New York C. & H. R. R. Co.*, 66 *N. Y.* 11; *Dyer v. Erie R. Co.*, 71 *N. Y.* 228; *Paulmier v. Erie R. Co.*, 34 *N. J. L.* 151. FOLLOWING *Perry v. Lansing*, 17 *Hun (N. Y.)* 34; *Busch v. Buffalo Creek R. Co.*, 29 *Hun* 112. NOT FOLLOWING *Thorogood v. Bryan*, 8 *C. B.* 115; *Armstrong v. Lancashire & Y. R. Co.*, *L. R.* 10. *Ex. 47*.—REVIEWED IN *Ft. Worth & D. C. R. Co. v. Mackney*, 83 *Tex.* 410.—*Chicago & E. I. R. Co. v. O'Connor*, 119 *Ill.* 586, 9 *N. E. Rep.* 263; *affirming* 19 *Ill. App.* 591.

Where railroads cross each other and one company allows its train to be on a crossing when trains of the other company have the exclusive right, and when such a train is seen approaching very near, it is negligence in the first company, making it liable for an injury to the employés of the other. *Chesapeake & O. R. Co. v. McMichael*, (Ky.) 15 *S. W. Rep.* 878.

An agreement between connecting lines for the through passage of trains does not have the effect of making the employés of one company fellow-servants with the employés of the other, where each company employs and pays its own men. *Philadelphia, W. & B. R. Co. v. State*, 10 *Am. & Eng. R. Cas.* 792, 58 *Md.* 372.

Where an injury to the employé of one of connecting companies occurs on the road of another of said companies, and is caused by the imperfect condition of said road, the principle that every employé assumes the risk of the negligence of his co-employés, is not applicable to him. *Philadelphia, W. & B. R. Co. v. State*, 10 *Am. & Eng. R. Cas.* 792, 58 *Md.* 372.

Where no delivery of goods is intended at the point where two railroads connect with each other, but the delivery takes place in the yards of the connecting company beyond the point where the roads meet, the operation of trains by the first company in the yards of the second company is not in performance of a duty which the second company is required to do, and employés of the two companies are not fellow-servants

within the meaning of the Pa. Act of April 4, 1868. *Vannatta v. Central R. Co.*, 154 *Pa. St.* 262, 26 *Atl. Rep.* 384.

Where a station is jointly occupied by two railway companies, a servant of one, injured by the negligence of the servants of the other, is entitled to recover damages from the company the employés of which were in fault. Such employés are not fellow-servants of the injured employé. *Vose v. Lancashire & Y. R. Co.*, 2 *H. & N.* 728, 4 *Jur. N. S.* 364, 27 *L. J. Ex.* 249.

Where two railway stations closely abut, and a signalman employed by one of the companies, and in its uniform, discharges duties in connection with the trains of both companies, and is injured by the negligence of the employés of the company not employing him, he is not the fellow-servant of such employés. *Swainson v. Northeastern R. Co.*, 47 *L. J. Ex. D.* 372, 38 *L. T.* 201, 26 *W. R.* 413, *L. R.* 3 *Ex. D.* 341; *reversing* 37 *L. T.* 102, 25 *W. R.* 676.

Upon finding his own track obstructed, a section foreman transferred a hand-car to a track of another company, and while on the track the car was run into by a train and an employé under the foreman was injured. It appeared that the foreman had frequently transferred cars before, but without the knowledge or consent of either company. *Held*, that the company employing such foreman was liable to the employé for the injury. *Pittsburgh, C. & St. L. R. Co. v. Kirk*, 102 *Ind.* 399, 52 *Am. Rep.* 675, 1 *N. E. Rep.* 849.—DISTINGUISHED IN *Clarke v. Pennsylvania Co.*, 132 *Ind.* 199.

The plaintiff's intestate was employed in tightening fish plates at a point where a switch connected the track of the company employing him with defendant's track, and was killed by defendant's cars being pushed over the switch on him. *Held*, that the fact that the rules of the company employing the intestate were to govern in the movement of such trains, did not make the persons pushing defendant's train employés of the company owning the switch, so as to make them fellow-servants with the intestate. *Noonan v. New York C. & H. R. R. Co.*, 42 *N. Y. S. R.* 41, 62 *Hun* 618, 16 *N. Y. Supp.* 678; *affirmed* in 131 *N. Y.* 594, *mem.*, 42 *N. Y. S. R.* 949.—REVIEWING *Sullivan v. Tioga R. Co.*, 112 *N. Y.* 646, 21 *N. Y. S. R.* 827.

127. — between servants of lessor and those of lessee company.—Where

one company leases the privilege of running its trains over a portion of another company's road, to be governed by the rules and orders of the company owning the track, the employes of the two companies are not fellow-servants. *Phillips v. Chicago, M. & St. P. R. Co.*, 23 *Am. & Eng. R. Cas.* 453, 64 *Wis.* 475, 25 *N. W. Rep.* 544.—DISTINGUISHING *Clark v. Chicago, B. & O. R. Co.*, 92 *Ill.* 43.

A railroad company is liable for an injury to servants of another company using its tracks, which is caused by a want of repair in its roadbed, and the doctrine applicable to a claim for damages caused by the carelessness of a fellow-servant against a common employer can have no bearing on the rights of the parties. *Snow v. Housatonic R. Co.*, 8 *Allen (Mass.)* 441.—REFERRING TO *Farwell v. Boston & W. R. Corp.*, 4 *Metc. (Mass.)* 49.—APPROVED IN *Long v. Pacific R. Co.*, 65 *Mo.* 225; *Hooper v. Columbia & G. R. Co.*, 21 *So. Car.* 541. DISTINGUISHED IN *Indianapolis & St. L. R. Co. v. Watson*, 33 *Am. & Eng. R. Cas.* 334, 114 *Ind.* 20, 12 *West. Rep.* 285, 14 *N. E. Rep.* 721; *Warner v. Erie R. Co.*, 39 *N. Y.* 468. LIMITED IN *Harrison v. Central R. Co.*, 31 *N. J. L.* 293. QUOTED IN *Le Clair v. First Div. St. P. & P. R. Co.*, 20 *Minn.* 9 (*Gil.* 1); *Harper v. Indianapolis & St. L. R. Co.*, 47 *Mo.* 567; *Lewis v. St. Louis & I. M. R. Co.*, 59 *Mo.* 495; *Flynn v. Kansas City, St. J. & C. B. R. Co.*, 78 *Mo.* 195; *Brickner v. New York C. R. Co.*, 2 *Lans. (N. Y.)* 506. REVIEWED IN *Colorado C. R. Co. v. Ogden*, 3 *Colo.* 499; *Gilman v. Eastern R. Co.*, 13 *Allen (Mass.)* 433; *Huhn v. Missouri Pac. R. Co.*, 31 *Am. & Eng. R. Cas.* 221, 92 *Mo.* 440, 10 *West. Rep.* 405, 4 *S. W. Rep.* 937; *Cooper v. Pittsburgh, C. & St. L. R. Co.*, 24 *W. Va.* 37.

Where by arrangement between two companies, trains run over both tracks, a brakeman on a train of one company is not a fellow-servant of a conductor of a train belonging to the other company. (*Granger and Sanford, JJ.*, dissenting.) *Zeigler v. Danbury & N. R. Co.*, 23 *Am. & Eng. R. Cas.* 400, 52 *Conn.* 543.

A track repairer in the employ of a company owning the track is not a fellow-servant with persons running a train of another company over the track by permission of the owners. *Catawissa R. Co. v. Armstrong*, 49 *Pa. St.* 186.—FOLLOWING *O'Donnell v. Allegheny R. Co.*, 50 *Pa. St.* 490.—

QUOTED IN *Pennsylvania R. Co. v. Price*, 1 *Am. & Eng. R. Cas.* 234, 96 *Pa. St.* 256.

An engineer of one company running a train over a section of road belonging to another company is not a fellow-servant with the employes of the company owning the track, and may recover for injuries received through the negligence of employes of the latter company. *Sawyer v. Rutland & B. R. Co.*, 27 *Vt.* 370.—QUOTING *Langridge v. Levy*, 2 *M. & W.* 519; *Gerhard v. Bates*, 20 *Eng. L. & Eq.* 130.—REVIEWED IN *East Line & R. R. Co. v. Culberson*, 38 *Am. & Eng. R. Cas.* 225, 72 *Tex.* 375, 3 *L. R. A.* 567, 10 *S. W. Rep.* 706.

Defendant company had permission to use a switch track and turntable belonging to another company, and plaintiff's intestate was employed by the company owning the switch track to tend an ash pit under the switch, and he was injured by one of defendant's engines in charge of an engineer and fireman, while on the switch. While in the yard defendant's engines were subject to the rules of the other company. *Held*, that the engineer and fireman were not fellow-servants with the intestate so as to prevent a recovery against the defendant. *Sullivan v. Tigua R. Co.*, 112 *N. Y.* 643, 20 *N. E. Rep.* 569, 21 *N. Y. S. R.* 827, 8 *Am. St. Rep.* 793; *affirming* 44 *Hun* 304, 7 *N. Y. S. R.* 627, 12 *Civ. Pro.* 301.—REVIEWED IN *Noonan v. New York C. & H. R. Co.*, 42 *N. Y. S. R.* 41.

128. — between servants of railroad company and of coal company.

—Defendant railroad company maintained tracks over the dock of a coal company for the purpose of delivering coal to the latter, and a brakeman employed by the coal company was injured through the negligence of an engineer employed by the railroad company. *Held*, that the two were not engaged under a common employer, and were therefore not fellow-servants. *Central R. Co. v. Stoermer*, 51 *Fed. Rep.* 518, 1 *U. S. App.* 276, 2 *C. C. A.* 360.—DISTINGUISHING *Ewan v. Lippincott*, 47 *N. J. L.* 192; *Johnson v. Boston*, 118 *Mass.* 114; *Rourke v. White Moss Colliery Co.*, 46 *L. J. C. P.* 283.

129. — between servants of railroad company and of contractor.

—The servants of an employer and those of his contractor are not fellow-servants, so as to prevent the latter from bringing an action against the employer for the negligence of his servants. *Turner v. Great Eastern R. Co.*, 33 *L. T.* 431.

M. contracted with a railroad company to do certain grading for it. The company furnished an engineer and a train to move the dirt. The engineer was engaged and paid by the company, and was under its control and direction, except that M. gave the signals when the train was to move. While such train was being run under the exclusive management of the engineer, except in the particular just indicated, it ran over a cow, was thrown from the track, and C., a laborer employed by M. to throw dirt to and from the train, was injured. *Held*, that the engineer, being the servant of the railroad company, was not a fellow-servant with C., and an action by the latter against the railroad company for the injury thus sustained could not be defeated by the defense that plaintiff and the engineer were fellow-servants. *Louisville, N. O. & T. R. Co. v. Conroy*, 63 Miss. 562.—CRITICISING *Wiggett v. Fox*, 11 Ex. 832. NOT FOLLOWING *Johnson v. Boston*, 118 Mass. 114; *Harkins v. Standard Sugar Refinery*, 122 Mass. 400; *Illinois C. R. Co. v. Cox*, 21 Ill. 20. REVIEWING *Woodley v. Metropolitan R. Co.*, L. R. 2 Ex. D. 384; *Swainson v. Northeastern R. Co.*, L. R. 3 Ex. D. 341.—FOLLOWED IN *McMaster v. Illinois C. R. Co.*, 41 Am. & Eng. R. Cas. 486, 65 Miss. 264, 7 Am. St. Rep. 653, 4 So. Rep. 59.

130. — between servants of two independent contractors.—Employés of two independent contractors, engaged in separate branches of labor upon a common enterprise, are not fellow-servants. *Dixon v. Chicago & A. R. Co.*, 53 Am. & Eng. R. Cas. 589, 109 Mo. 413, 19 S. W. Rep. 412.

131. Limits and exceptions to the rule—Contrary doctrine.—Two men pursuing the same work, such as blasting rock, working together, are fellow-servants, notwithstanding the one injured was a servant of a third party, provided, while injured, he was working under the directions and in conjunction with the servant of defendant. *Cornelson v. Eastern R. Co.*, 50 Minn. 23, 52 N. W. Rep. 224.

The defendant railroad, chartered by the state of V., uses the track of the W. R. Co. by agreement. Plaintiff, an employé of the W. R. Co., while flagging defendant's trains over the road of the W. R. Co., must for the time be considered the servant of the defendant, and is not entitled to recover for any injury occasioned by the negligence of another servant, without showing that

defendant was guilty of negligence in selecting the servant by whose fault the accident happened. *Mills v. Orange, A. & M. R. Co.*, 2 MacArth. (D. C.) 314.

IV. INCOMPETENCY OF FELLOW-SERVANTS.

1. Company's Duty to Select Competent Servants.*

a. In General.

132. Statement of the rule.—A master is bound as towards all the world, so far as reasonable care in their selection can accomplish that end, to employ none but competent and trustworthy servants; and if he fails in this respect, by taking into his service those whom he knows to be incompetent or careless, he must answer to his other servants for the consequences which may happen to them from such neglect. *Chicago & G. E. R. Co. v. Harney*, 28 Ind. 28.—QUOTED IN *Ohio & M. R. Co. v. Colarn*, 5 Am. & Eng. R. Cas. 554, 73 Ind. 261, 38 Am. Rep. 134.—*Harper v. Indianapolis & St. L. R. Co.*, 47 Mo. 567. *Texas Mex. R. Co. v. Whitmore*, 11 Am. & Eng. R. Cas. 195, 58 Tex. 276. *Rowland v. Missouri Pac. R. Co.*, 20 Mo. App. 463. *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. Rep. 157. *Galveston, H. & S. A. R. Co. v. Farmer*, 38 Am. & Eng. R. Cas. 75, 73 Tex. 85, 11 S. W. Rep. 156.—QUOTING *Wall v. Texas & P. R. Co.*, 2 Tex. Unrep. Cas. 432.—FOLLOWED IN *Ft. Worth & D. C. R. Co. v. Wilson*, 3 Tex. Civ. App. 583.

A railroad company owes its employés the duty of employing, so far as it can with reasonable care, only competent men in the management of its road—that is, men who can be relied upon to execute the rules of the master, unless prevented by causes beyond their control. *Coppins v. New York C. & H. R. R. Co.*, 44 Am. & Eng. R. Cas. 618, 122 N. Y. 557, 25 N. E. Rep. 915, 34 N. Y. S. R. 214; affirming 48 Hun 292, 17 N. Y. S. R. 916.—APPLIED IN *Sutton v. New York, L. E. & W. R. Co.*, 50 N. Y. S. R. 514.

But this rule does not mean that every neglect, either in method of doing work or

* Duty of master to provide servants with competent fellow-servants, see notes, 17 AM. & ENG. R. CAS. 578, 636; 5 *Id.* 525; 33 *Id.* 318; 36 AM. DEC. 285.

Duty of master to employ competent servants and provide safe machinery, see note, 59 AM. REP. 75.

ence in select-
the accident
A. & M. R.

W-SERVANTS.

Competent

rule. — A

the world, so
selection can
loy none but
vants; and if
king into his
to be incom-
answer to his
quences which
uch neglect.
urney, 28 Ind.
R. Co. v. Col-
4, 73 Ind. 261,
Indianapolis
Texas Mex.
& Eng. R.
ad v. Missouri
463. Ross v.
Atl. Rep. 157.
v. Farmer, 38
Tex. 85, 11 S.
v. Texas & P.
—FOLLOWED
v. Wilson, 3

employés the
it can with
nt men in the
is, men who
the rules of
d by causes
v. New York
Eng. R. Cas.
ep. 915, 34 N.
un 292, 17 N.
tton v. New
Y. S. R. 514.
an that every
ing work or

ants with com-
17 AM. & ENG.
4, 318; 36 AM.

petent servants
note, 59 AM.

in the manner of its execution, shall be evi-
dence of fault in the master. *Burns v. Staten Island R. T. R. Co.*, 10 N. Y. S. R. 352, 45 Hun 592, *mem.*

Plaintiff was in the employ of a railroad company as a blacksmith and was injured by an unskilful or negligent blow by a helper or striker. *Held*, that while it was the duty of the company to employ helpers reasonably skilful, yet where the employment was through a foreman, the company was not liable if ordinary care was exercised in the employment of the striker; and if he was reasonably skilful, and the injury was the result of negligence, there could be no recovery. *Melville v. Missouri River, Ft. S. & G. R. Co.*, 48 Fed. Rep. 820.

133. What constitutes a performance of this duty.—The fellow-servant must be a person of competent skill and care. *Flinn v. Philadelphia, W. & B. R. Co.*, 1 Houst. (Del.) 469.

The competency of a servant depends not alone upon physical or mental attributes, but upon the disposition with which he performs his duties. *Coppins v. New York C. & H. R. R. Co.*, 44 Am. & Eng. R. Cas. 618, 122 N. Y. 557, 25 N. E. Rep. 915, 34 N. Y. S. R. 214; *affirming* 48 Hun 292, 17 N. Y. S. R. 916.—APPLIED IN *Burke v. Syracuse, B. & N. Y. R. Co.*, 52 N. Y. S. R. 813.

In an action by a servant against the master, the negligence of a fellow-servant of whatever grade—unless the duty neglected was one of those which the law imposes upon the master himself, such as employing competent servants—is attributable to the master only where he has failed to prescribe adequate and proper rules and regulations for the government of the fellow-servant in the performance of his duties, the care always to be proportioned to the importance or difficulty of the duties to be performed. *Hankins v. New York, L. E. & I. R. Co.*, 55 Hun 51, 28 N. Y. S. R. 59, 8 N. Y. Supp. 272.

134. Must be free from negligence in selection of negligent servant.—The master must not be at fault as to the selection of his servants through whose negligence an injury is caused. *Louisville, N. O. & T. R. Co. v. Petty*, 41 Am. & Eng. R. Cas. 444, 67 Miss. 255, 7 So. Rep. 351, *Totten v. Pennsylvania R. Co.*, 11 Fed. Rep. 564, *St. Louis, I. M. & S. R. Co. v. Morgart*, 45 Ark. 318. *Sullivan v. New York,*

N. H. & H. R. Co., 62 Conn. 209, 25 Atl. Rep. 711. *Stafford v. Chicago, B. & Q. R. Co.*, 114 Ill. 244, 2 N. E. Rep. 185; *affirming* 16 Ill. App. 84. *Chicago & G. E. R. Co. v. Harney*, 28 Ind. 28. *Bogard v. Louisville, E. & St. L. R. Co.*, 100 Ind. 491. *Wallis v. Morgan's L. & T. R. & S. Co.*, 38 La. Ann. 156. *McAndrews v. Burns*, 39 N. J. L. 117. *Miller v. Southern Pac. Co.*, 48 Am. & Eng. R. Cas. 294, 20 Oreg. 285, 26 Pac. Rep. 70. *Texas & N. O. R. Co. v. Berry*, 31 Am. & Eng. R. Cas. 147, 67 Tex. 238, 5 S. W. Rep. 817. *Dwyer v. American Exp. Co.*, 53 Am. & Eng. R. Cas. 612, 82 Wis. 307, 52 N. W. Rep. 304.

135. Degree of care demanded.*—The same care required of the company in providing machinery must be observed in the selection and attention of the employes themselves. *Wabash R. Co. v. McDaniels*, 11 Am. & Eng. R. Cas. 158, 107 U. S. 454, 2 Sup. Ct. Rep. 932.

136. — due care.—The master must have exercised due care in the selection of competent servants. *Buckley v. Gould & C. Silver Min. Co.*, 8 Sawy. (U. S.) 394, 14 Fed. Rep. 833. *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672. *Mobile & M. R. Co. v. Smith*, 50 Ala. 245. *Chicago & N. W. R. Co. v. Sweet*, 45 Ill. 197. *St. Louis & S. E. R. Co. v. Britz*, 72 Ill. 256. *Kranz v. White*, 8 Ill. App. 583. *Pennsylvania R. Co. v. Wachter*, 15 Am. & Eng. R. Cas. 187, 60 Md. 395. *Memphis & C. R. Co. v. Thomas*, 51 Miss. 637.

A railroad is only bound to use due care in selecting, employing, or retaining its servants. *Trinity & S. R. Co. v. Mitchell*, 72 Tex. 609, 10 S. W. Rep. 698.

137. — reasonable care.—A company is bound to use reasonable care in selecting its servants. *Holden v. Fitchburg R. Co.*, 2 Am. & Eng. R. Cas. 94, 129 Mass. 268, 37 Am. Rep. 343. *O'Connell v. Baltimore & O. R. Co.*, 20 Md. 212. *Ponton v. Wilmington & W. R. Co.*, 6 Jones (N. Car.) 245.

The care to be exercised by a master in the selection of servants employed and retained by him is such as is reasonable and proper in view of the nature and character of the business and the consequences likely to flow from a negligent or unskilful execu-

* Degree of care required of master in the selection of servants, see 33 AM. & ENG. R. CAS. 319, *abstr.*

tion of the work. *Wall v. Delaware, L. & W. R. Co.*, 54 *Hun* 454, 28 *N. Y. S. R.* 132, 7 *N. Y. Supp.* 709; *affirmed in* 125 *N. Y.* 727, *mem.*, 26 *N. E. Rep.* 757, 35 *N. Y. S. R.* 995.

138. — ordinary care.—The master must use ordinary care in employing and retaining competent and suitable servants; this is a personal duty resting on the master, and he is liable for a failure to perform it which results in an injury to a fellow-servant. *Williams v. Missouri Pac. R. Co.*, 109 *Mo.* 475, 18 *S. W. Rep.* 1098. *Daves v. Southern Pac. R. Co.*, 98 *Cal.* 19, 32 *Pac. Rep.* 708. *Caldwell v. Brown*, 53 *Pa. St.* 453. *Chicago, B. & Q. R. Co. v. Merckes*, 36 *Ill. App.* 195. *Langlois v. Maine C. R. Co.*, 84 *Me.* 161, 24 *Atl. Rep.* 804. *Quibell v. Union Pac. R. Co.*, 7 *Utah* 122, 25 *Pac. Rep.* 734. *Louisville & N. R. Co. v. Kenley*, 92 *Tenn.* 207, 21 *S. W. Rep.* 326. *Craig v. Chicago & A. R. Co.*, 54 *Mo. App.* 523. *Missouri Furnace Co. v. Abend*, 107 *Ill.* 44; *affirming* 9 *Ill. App.* 319. *Chicago & N. W. R. Co. v. Scheuring*, 4 *Ill. App.* 533. *McDermott v. Pacific R. Co.*, 30 *Mo.* 115. *Pittsburg, Ft. W. & C. R. Co. v. Devinney*, 17 *Ohio St.* 197.

The rule of fellow-service does not apply where it appears that the company did not exercise ordinary care in the employment of the negligent servant, his incompetency having been the proximate cause of the injury. *Harper v. Indianapolis & St. L. R. Co.*, 47 *Mo.* 567. *Faulkner v. Erie R. Co.*, 49 *Barb. (N. Y.)* 324.

The responsibility of a railroad company for injuries resulting from the negligence or unskilfulness of its engineers is graduated by the classes of persons injured by the engineer's neglect or want of skill. As to strangers, ordinary negligence is sufficient; as to subordinate employes associated with the engineer in conducting the cars, the negligence must be gross; but as to employes in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient. *Louisville & N. R. Co. v. Collins*, 2 *Duv. (Ky.)* 114.—FOLLOWED IN *Louisville & N. R. Co. v. Filbern*, 6 *Bush (Ky.)* 574. QUOTED IN *Louisville & N. R. Co. v. Bowler*, 9 *Heisk. (Tenn.)* 866. REVIEWED IN *Louisville & N. R. Co. v. Fox*, 11 *Bush* 495.

Ordinary care on the part of such corporation implies, as between it and its employes, not simply the degree of diligence

which is customary among those intrusted with the management of railroad property, but such as, having respect to the exigencies of the particular service, ought reasonably to be observed. It is such care as, in view of the consequences that may result from negligence on the part of employes, is fairly commensurate with the perils or dangers likely to be encountered. *Wabash R. Co. v. McDaniels*, 11 *Am. & Eng. R. Cas.* 158, 107 *U. S.* 454, 2 *Sup. Ct. Rep.* 932.—DISTINGUISHED IN *Randall v. Baltimore & O. R. Co.*, 109 *U. S.* 478. QUOTED IN *Cronk v. Chicago, M. & St. P. R. Co.*, (S. Dak.) 54 *Am. & Eng. R. Cas.* 525, 52 *N. W. Rep.* 420.

The master is bound to use ordinary care—such care as men of ordinary prudence exercise under like circumstances for their own protection—in the selection of careful and skilful servants, and in furnishing fit and safe material, and appliances or machinery necessary and proper for the service; and for injuries arising from a breach of this duty in either particular he is liable to a servant; but he is not to be understood as insuring or warranting the safety or fitness of the materials furnished, nor the diligence and competency of the other servants in the performance of their respective duties. *Smoot v. Mobile & M. R. Co.*, 67 *Ala.* 13.—FOLLOWING *Mobile & O. R. Co. v. Thomas*, 42 *Ala.* 672.

Ordinary care and diligence in the selection and supervision of servants or employes is not sufficient. There must be due or reasonable care and diligence proportionable to the hazard of the business. *Alabama & F. R. Co. v. Waller*, 48 *Ala.* 459.—FOLLOWING *Mobile & O. R. Co. v. Thomas*, 42 *Ala.* 715.

Where plaintiff's intestate and the engineer through whose negligence it is claimed that the accident occurred are co-employes in the same general business, the railway company can only be liable for the negligent act of the engineer whereby deceased lost his life, upon the theory that it neglected to use ordinary care in the employment or retention of such engineer. *Brown v. Central Pac. R. Co.*, (Cal.) 12 *Pac. Rep.* 512.

139. — reasonable and ordinary care.—It is the duty of a railroad company to exercise reasonable and ordinary diligence in the selection of its employes, having respect to the exigencies of the particular service required, to the end that it

may ascertain their competency and fitness to be intrusted in such service. *Evansville & T. H. R. Co. v. Guyton*, 33 *Am. & Eng. R. Cas.* 311, 115 *Ind.* 450, 14 *West. Rep.* 301, 17 *N. E. Rep.* 101.

The limit of the duty of the company to its employes is to exercise ordinary and reasonable care in procuring faithful and competent employes. *Shauck v. Northern C. R. Co.*, 25 *Md.* 462. *Wonder v. Baltimore & C. R. Co.*, 32 *Md.* 411. *Maryland v. Baltimore & P. R. Co.*, 1 *Hughes (U. S.)* 337.

140. Company does not warrant competency of servant.—The master does not warrant the competency of any of his servants to the others. The extent of his undertaking is that he will exercise reasonable care in the selection of an employe, and if his incompetency is discovered, will dismiss him from service. The master will be liable where the injury is imputable directly to his personal negligence in the selection of the servant, or in retaining him after his incompetency is known. *Columbus, C. & I. C. R. Co. v. Troesch*, 68 *Ill.* 545.—DISAPPROVING *Louisville & N. R. Co. v. Collins*, 2 *Duv. (Ky.)* 114.—FOLLOWED IN *Kranz v. White*, 8 *Ill. App.* 583.—*Holland v. Tennessee C. I. & R. Co.*, 91 *Ala.* 444, 8 *So. Rep.* 524. *Buckley v. Gould & C. Silver Min. Co.*, 8 *Sawy. (U. S.)* 394, 14 *Fed. Rep.* 833.—QUOTING *Cooper v. Milwaukee & P. du C. R. Co.*, 23 *Wis.* 671.—*Deppe v. Chicago, R. I. & P. R. Co.*, 36 *Iowa* 52.

The company is not liable if it has made careful inquiry into the habits of its employes, and, upon such inquiry, hires them, believing them to be sober, competent, and careful. *Moss v. Pacific R. Co.*, 49 *Mo.* 167, 1 *Am. Ry. Rep.* 576.

141. Right to presume that competent servants have been selected.

—An operative has a right to expect that the master will intrust the handling of dangerous materials, such as explosives, only to experienced and careful workmen, and that the methods employed will be such as are reasonably safe. *Stewart v. New York, O. & W. R. Co.*, 28 *N. Y. S. R.* 215, 54 *Hun* 638, 5 *Silo. Sup. Ct.* 198, 8 *N. Y. Supp.* 19; affirmed in 126 *N. Y.* 631, *mem.*, 27 *N. E. Rep.* 410, 36 *N. Y. S. R.* 1013, *mem.*

Plaintiff was a blacksmith in defendant's shops, and was injured through the alleged negligence of a helper or striker. Held, that it was the duty of the company to supply suitable helpers, and plaintiff had a

right, in the absence of knowledge to the contrary, to presume that helpers employed were sufficiently skilled; but this obligation was fully discharged if ordinary care was exercised by the foreman in the employment of helpers. *Melville v. Missouri River, Ft. S. & G. R. Co.*, 4 *McCrary (U. S.)* 194.

If the helper was sufficiently skilled for the work for which he was engaged, and struck the blow which caused the injury negligently or carelessly, the defendant is not liable. The consequences of such acts are to be borne by those engaged in the common work. *Melville v. Missouri River, Ft. S. & G. R. Co.*, 4 *McCrary (U. S.)* 194.

b. Liability for Failure to Perform this Duty.*

142. Generally.—A servant injured through the incompetency and unskillfulness of a fellow-servant may recover of the company for injuries received. *Chicago & A. R. Co. v. Sullivan*, 63 *Ill.* 293. *Dillon v. Union Pac. R. Co.*, 3 *Dill. (U. S.)* 319. *Chio & M. R. Co. v. Hammersley*, 28 *Ind.* 371. *Peterson v. Chicago & N. W. R. Co.*, 31 *Am. & Eng. R. Cas.* 292, 67 *Mich.* 102, 10 *West. Rep.* 870, 34 *N. W. Rep.* 260. *Lee v. Michigan C. R. Co.*, 48 *Am. & Eng. R. Cas.* 356, 87 *Mich.* 574, 49 *N. W. Rep.* 909.

Where one employe is injured through the negligence of another employe, the company is liable if it was negligent in employing the negligent employe. *Crew v. St. Louis, K. & N. W. R. Co.*, 20 *Fed. Rep.* 87. *Mobile & M. R. Co. v. Smith*, 59 *Ala.* 245. *Little Rock & Ft. S. R. Co. v. Duffey*, 4 *Am. & Eng. R. Cas.* 637, 35 *Ark.* 602. *Hogan v. Central Pac. R. Co.*, 49 *Cal.* 128. *Congrave v. Southern Pac. R. Co.*, 48 *Am. & Eng. R. Cas.* 337, 88 *Cal.* 360, 26 *Pac. Rep.* 175. *Indianapolis & St. L. R. Co. v. Johnson*, 102 *Ind.* 352, 26 *N. E. Rep.* 200. *Evansville & T. H. R. Co. v. Guyton*, 33 *Am. & Eng. R. Cas.* 311, 115 *Ind.* 450, 17 *N. E. Rep.* 101, 14 *West. Rep.* 301. *Blake v. Maine C. R. Co.*, 70 *Me.* 60.—REVIEWED IN *Indiana Car Co. v. Parker*, 100 *Ind.* 181.—*Marquette & O. R. Co. v. Taft*, 28 *Mich.* 289, 12 *Am. Ry. Rep.* 279. *McMahon v. Davidson*, 12 *Minn.* 357 (*Gal.* 232). *McDermott v. Pacific R. Co.*,

* Injury to employes through negligence of incompetent fellow-servants, see note, 48 *AM. & ENG. R. CAS.* 362. See also 41 *AM. & ENG. R. CAS.* 362, *abstr.*

30 Mo. 115. *Keegan v. Western R. Co.*, 8 N. Y. 175. *Warner v. Erie R. Co.*, 39 N. Y. 468; reversing 49 *Earb.* 558. *Hardy v. Carolina C. R. Co.*, 76 N. Car. 5, 14 Am. Ry. Rep. 309. *Weger v. Pennsylvania R. Co.*, 55 Pa. St. 460. *Galveston, H. & S. A. R. Co. v. Faber*, 63 Tex. 344. *Houston & T. C. R. Co. v. Willie*, 5 Am. & Eng. R. Cas. 541, 53 Tex. 318, 37 Am. Rep. 756. *Gulf, W. T. & P. R. Co. v. Ryan*, 69 Tex. 665, 7 S. W. Rep. 83. *Noyes v. Smith*, 28 Vt. 59.—FOLLOWED IN *Hard v. Vermont & C. R. Co.*, 32 Vt. 473. QUOTED IN *Columbus, C. & I. C. R. Co. v. Troesch*, 68 Ill. 545.—*Wigmore v. Jay*, 5 Ex. 354, 14 Jur. 837, 19 L. J. Ex. 300. S. P., *Hutchinson v. York, N. & B. R. Co.*, 6 Railw. Cas. 580, 5 Ex. 343, 19 L. J. Ex. 296.

The rule exempting the master from liability for an injury to one servant through the negligence of another does not apply where the negligent servant is wanting in skill or prudence, which is known to the employer, or could have been known by reasonable inquiry. *Alabama & F. R. Co. v. Waller*, 48 Ala. 459.

A carpenter engaged with others in constructing a depot, who is injured by the falling of scaffolding which had been erected under the direction of a superintendent who was shown to have only worked a few weeks at the carpenter's trade, and was wholly incompetent to superintend the erection of such a building, may recover against the company. *Bunnell v. St. Paul, M. & M. R. Co.*, 29 Minn. 305, 13 N. W. Rep. 129.

143. Scope and extent of the liability.—If a fellow-servant is not shown to have been incompetent, the company is not liable for his negligence resulting in injury to another servant. *Toner v. Chicago, M. & St. P. R. Co.*, 28 Am. & Eng. R. Cas. 449, 31 Am. & Eng. R. Cas. 320, 69 Wis. 188, 31 N. W. Rep. 104, 33 N. W. Rep. 433.

Negligence for which a company may be responsible to its employés may consist in the employment of incompetent persons in the management of the road and train. *Thayer v. St. Louis, A. & T. H. R. Co.*, 22 Ind. 26.

Employers may be negligent in the selection of servants as well as in their retention. *Lee v. Michigan C. R. Co.*, 48 Am. & Eng. R. Cas. 356, 87 Mich. 574, 49 N. W. Rep. 999.

If the master has wrongfully and unjustifiably enhanced the risk to which the ser-

vant is exposed, beyond the natural risk of the employment, which must be presumed to have been in contemplation when the employment was accepted—as by knowingly or negligently employing incompetent or unfit servants, or supplying defective machinery—in such cases the master may be held liable for the consequences of such negligence. *Cumberland & P. R. Co. v. State*, 44 Md. 283, 45 Md. 229.

If one in the employ of a railway company, while in the discharge of his duty, is injured by the negligence or incompetency of his fellow-servants, and it is made to appear that the company had not used reasonable care in selecting such fellow-servants, or that, after being informed of their incompetency, it retained them in its service, it would be liable in damages for the injury sustained. *Houston & T. C. R. Co. v. Myers*, 8 Am. & Eng. R. Cas. 114, 55 Tex. 110.—QUOTED AND DISTINGUISHED IN *Texas & P. R. Co. v. Kane*, (Tex.) 15 Am. & Eng. R. Cas. 218.—*New Orleans, J. & G. N. R. Co. v. Hughes*, 49 Miss. 258.

The master is liable to his servant for an injury happening through the misconduct or personal negligence of the master, which may consist in the employment of unfit and incompetent servants or agents, or in furnishing for work to be done, or for the use of the servant, machinery or other implements which are unsafe and improper for the purpose for which they are to be used. *Sizer v. Syracuse, B. & N. Y. R. Co.*, 7 Lans. (N. Y.) 67.—QUOTING *Wright v. New York C. R. Co.*, 25 N. Y. 562.

The company is responsible for the incompetency of one servant who is selected for the purpose of giving instruction to another. *Brennan v. Gordon*, 118 N. Y. 489, 23 N. E. Rep. 810, 29 N. Y. S. R. 829; reversing 14 *Daly* 47, 3 N. Y. S. R. 604.

A railway company cannot evade liability to a plaintiff who was injured in its employment by the incompetency of another employé, by showing that the plaintiff at the time of his injury was not acting in the discharge of duties in the line of his employment, provided it was customary for the company's employés to do work for them other than the regular duty assigned them when ordered so to do by those placed over them, and that he was obeying such an order when he was injured. *East Line & R. R. Co. v. Scott*, 68 Tex. 694, 5 S. W. Rep. 501.

144. Immaterial whether incompetent servant was fellow-servant or superior.—Where an employé is injured by the negligent act of another servant, resulting from the latter's intoxication, and the employer knew of his intemperate habits and the plaintiff did not, the employer is liable for the injury. It is immaterial to a recovery in such case whether the servant causing the injury was a fellow-servant of the one injured, or his superior. *Maxwell v. Hannibal & St. J. R. Co.*, 85 Mo. 95. *Cumberland & P. R. Co. v. State*, 44 Md. 283, 45 Md. 229.

The company should employ inspectors not only at its *termini*, but at convenient stations along its line; and where it knowingly employs and retains an incompetent inspector, it will be liable for an injury resulting from his incompetency, although the person injured is a fellow-servant of such inspector. *St. Louis, I. M. & S. R. Co. v. Rice*, 51 Ark. 467, 4 L. R. A. 173, 11 S. W. Rep. 699.

145. Negligence of one to whom the performance of the duty is delegated.—A corporation is liable for a personal injury to one servant through the negligence of a general servant in selecting an incompetent or an unfit fellow-servant. The company cannot avoid liability by showing that such general servant was competent, as his mistakes are the mistakes of the company. *Tyson v. South & N. Ala. R. Co.*, 61 Ala. 554.—**DISTINGUISHING** *Mobile & M. R. Co. v. Smith*, 59 Ala. 245. **QUOTING** *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672.—*Brown v. Southern Pac. R. Co.*, 7 Utah 288, 26 Pac. Rep. 579.

Where the employment of servants is intrusted to a general agent, the company is liable for an injury to one servant by another incompetent or unskilled servant thus employed, whether the incompetency or want of skill existed when the fellow-servant was employed or has come upon him since the hiring, and he has been continued with knowledge of the fact, or under circumstances charging the company with knowledge. *Laning v. New York C. R. Co.*, 49 N. Y. 521.—**NOT FOLLOWING** *Wright v. New York C. R. Co.*, 25 N. Y. 562; *Warner v. Erie R. Co.*, 39 N. Y. 468. **DISTINGUISHING** *Hard v. Vermont & C. R. Co.*, 32 Vt. 473.—**APPLIED IN** *Williams v. Delaware, L. & W. R. Co.*, 39 Hun (N. Y.) 430; *Wright v. Delaware & H. Canal Co.*, 40 Hun 343. **AP-**

PROVED IN *Bridges v. St. Louis, I. M. & S. R. Co.*, 6 Mo. App. 389. **DISTINGUISHED IN** *Mann v. Delaware & H. Canal Co.*, 12 Am. & Eng. R. Cas. 199, 91 N. Y. 495. **EXPLAINED IN** *Malone v. Hathaway*, 64 N. Y. 5. **FOLLOWED IN** *Brickner v. New York C. R. Co.*, 49 N. Y. 672; *Kirkpatrick v. New York C. & H. R. R. Co.*, 79 N. Y. 240; *Dobbin v. Richmond & D. R. Co.*, 81 N. Car. 446. **QUOTED IN** *Herbert v. Northern Pac. R. Co.*, 8 Am. & Eng. R. Cas. 85, 3 Dak. 38; *Pullutro v. Delaware, L. & W. R. Co.*, 27 N. Y. S. R. 63, 7 N. Y. Supp. 510. **REFERRED TO IN** *Hofnagle v. New York C. & H. R. R. Co.*, 55 N. Y. 608. **REVIEWED IN** *Ross v. New York C. & H. R. R. Co.*, 5 Hun 488.

The servant to whom the master delegates his duty of instructing and warning his employé, must not simply be as competent as the master, but absolutely competent. *Brennan v. Gordon*, 118 N. Y. 489, 23 N. E. Rep. 810, 29 N. Y. S. R. 829; *reversing* 14 Daly 47, 3 N. Y. S. R. 604.

146. Particular illustrations.—A company is responsible to a servant for negligence in employing an incompetent conductor. *Zeigler v. Danbury & N. R. Co.*, 23 Am. & Eng. R. Cas. 400, 52 Conn. 543. *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104.—**DISAPPROVED IN** *Baulec v. New York & H. R. Co.*, 59 N. Y. 356.—*Huntingdon & B. T. M. R. & C. Co. v. Decker*, 82 Pa. St. 119, 15 Am. Ky. Rep. 425. A failure to apply the usual examination to a conductor who has recently been promoted and put in charge of a wild train constitutes negligence in his promotion. *Evansville & T. H. R. Co. v. Guyton*, 33 Am. & Eng. R. Cas. 311, 110 Ind. 450, 17 N. E. Rep. 101, 14 West. Rep. 301.

Where a foreman in railroad machine shops directs an ignorant apprentice boy to obey the call and direction of another employé who is unskilled, but directing a work which requires a skilled mechanic, the company is liable for any injury to the boy that occurs while attempting to obey instructions. *Missouri Pac. R. Co. v. Peregoy*, 36 Kan. 424, 14 Pac. Rep. 7.

A company is responsible to a brakeman injured through the negligence of a fellow-servant, where it appears that the company was guilty of negligence in the latter's selection. *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411.

Where an engineer, with authority so to do, places an inexperienced and incompe-

tent fireman in charge of an engine, the company is liable for unavoidable injuries that result to other employés by such fireman's unskilful management of the engine, for the reason that it is a breach of the duty the company owes to its employés to exercise ordinary care in providing and retaining competent servants. *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. Rep. 596.

It is not negligence in a railroad company to employ as brakeman a boy twenty-two years old, who is physically and mentally qualified for the business, merely because he has not yet had experience. *Gorman v. Minneapolis & St. L. R. Co.*, 78 Iowa 509, 43 N. W. Rep. 393.

One servant cannot recover from the master on mere proof of an injury occurring through the negligence of a fellow-servant. He must further show either negligence in the employment of the fellow-servant, or that he was retained after he was known to be unfit. *Cooper v. Milwaukee & P. du C. R. Co.*, 23 Wis. 668.—FOLLOWED IN *Toner v. Chicago, M. & St. P. R. Co.*, 28 Am. & Eng. R. Cas. 449, 31 Am. & Eng. R. Cas. 320, 69 Wis. 188, 33 N. W. Rep. 433; *Anderson v. Milwaukee & St. P. R. Co.*, 37 Wis. 321. REVIEWED IN *Buckley v. Gould & C. Silver Min. Co.*, 8 Sawy. (U. S.) 394, 14 Fed. Rep. 833; *Heine v. Chicago & N. W. R. Co.*, 58 Wis. 525.

B. was the foreman of a gang of laborers, and it was his duty to take the oversight of and to handle dynamite cartridges used in blasting. He received a higher compensation than the rest of the gang. In preparing a cartridge he negligently allowed it to explode, causing a serious injury to one of the workmen. The court properly found that the company was not guilty of negligence in employing B. as a competent person for the duty, and that he was a fellow-servant with the rest of the gang. *Sullivan v. New York, N. H. & H. R. Co.*, 62 Conn. 209, 25 Atl. Rep. 711.

147. Selection of incompetent person must have been due to company's negligence.—Where one receives injury through the incompetency of a fellow-servant, the employer is not liable unless he employed such incompetent servant without reasonable inquiry as to his qualifications, or continued him in service after a knowledge of his incompetency.

Union Pac. R. Co. v. Milliken, 8 Kan. 647, 5 Am. Ry. Rep. 406.—FOLLOWING *Dow v. Kansas Pac. R. Co.*, 8 Kan. 642. QUOTING *Tarrant v. Webb*, 18 C. B. 797, 37 Eng. L. & Eq. 281.—*McAndrews v. Burns*, 39 N. J. L. 117.—QUOTED IN *McKaig v. Northern Pac. R. Co.*, 42 Fed. Rep. 288; *Baltimore & O. R. Co. v. McKenzie*, 24 Am. & Eng. R. Cas. 395, 81 Va. 71.—*Holland v. Southern Pac. Co.*, 100 Cal. 240, 34 Pac. Rep. 666. *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411. *McDermott v. Pacific R. Co.*, 30 Mo. 115.—FOLLOWED IN *Warming-ton v. Atchison, T. & S. F. R. Co.*, 46 Mo. App. 159. REVIEWED IN *Rohback v. Pacific R. Co.*, 43 Mo. 187.—*Proctor v. Hannibal & St. J. R. Co.*, 64 Mo. 112, 9 Am. Ry. Rep. 440.—QUOTING *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49.—FOLLOWED IN *Elliott v. St. Louis & I. M. R. Co.*, 67 Mo. 272. REVIEWED IN *Sullivan v. Missouri Pac. R. Co.*, 97 Mo. 113, 10 S. W. Rep. 852.—*Pilkinton v. Gulf, C. & S. F. R. Co.*, 70 Tex. 226, 7 S. W. Rep. 805.

148. Incompetency must have been the proximate cause.—The company is responsible for an injury to one servant through the carelessness of another servant, where the incompetency of the latter caused the injury, and his employment is attributable to the want of care on the part of the company. *Gibson v. Pacific R. Co.*, 46 Mo. 163.

A company is not liable for an injury to one employé, caused by the negligence or unskilfulness of another employé, simply because of the unskilfulness of the latter, unless it appears that the injury resulted from such unskilfulness. *Wright v. New York C. R. Co.*, 25 N. Y. 562; reversing 28 Barb. 80.—APPLIED IN *Rose v. Boston & A. R. Co.*, 58 N. Y. 217. APPROVED IN *Harper v. Indianapolis & St. L. R. Co.*, 47 Mo. 567. DISTINGUISHED IN *Louisville & N. R. Co. v. Filbern*, 6 Bush (Ky.) 574; *Stone v. Western Transp. Co.*, 38 N. Y. 240. NOT FOLLOWED IN *Laning v. New York C. R. Co.*, 49 N. Y. 521. QUOTED IN *Fones v. Phillips*, 39 Ark. 17; *Gibson v. Pacific R. Co.*, 46 Mo. 163; *Haskin v. New York C. & H. R. R. Co.*, 65 Barb. (N. Y.) 129; *Sizer v. Syracuse, B. & N. Y. R. Co.*, 7 Lans. (N. Y.) 67; *Bailey v. Rome, W. & O. R. Co.*, 19 N. Y. S. R. 656, 49 Hun 377, 3 N. Y. Supp. 585; *Powers v. New York C. & H. R. R. Co.*, 60 Hun 19, 38 N. Y. S. R. 558, 14 N. Y. Supp. 408; *Caldwell v. Brown*,

53 Pa. St. 453. RECONCILED IN *Brickner v. New York C. R. Co.*, 2 Lans. 506. REVIEWED IN *Gilman v. Eastern R. Co.*, 13 Allen (Mass.) 433; *Warner v. Erie R. Co.*, 39 N. Y. 468; *Ross v. New York C. & H. R. Co.*, 5 Hun 488; *Hard v. Vermont & C. R. Co.*, 32 Vt. 473.—*Kersey v. Kansas City, St. J. & C. B. R. Co.*, 17 Am. & Eng. R. Cas. 638, 79 Mo. 362. *Holland v. Southern Pac. Co.*, 100 Cal. 240, 34 Pac. Rep. 666. *Sizer v. Syracuse, B. & N. Y. R. Co.*, 7 Lans. (N. Y.) 67.

The negligence of the company in employing an incompetent servant, to exempt the company from liability for an injury claimed to have been caused by the incompetent servant's fault, must have been the proximate cause of the injury. *Harrington v. New York C. & H. R. Co.*, 19 N. Y. S. R. 20, 50 Hun 602, mem., 4 N. Y. Supp. 640.

The rule of fellow-service is not changed by reason of the fact that the fellow-servant is sick or worn out in continuous service, provided the negligence which caused the injury did not proximately result from his sickness or worn-out condition. *Johnston v. Pittsburgh & W. R. Co.*, 114 Pa. St. 443, 7 All. Rep. 184.

Where it is sought to charge a company for the death of a fireman caused by the negligence of an engineer, it is necessary to show that the death was proximately caused by such negligence, and that the engineer was incompetent, and that the company was negligent either in employing him or in retaining him. *Stevens v. San Francisco & N. P. R. Co.*, 100 Cal. 554, 35 Pac. Rep. 165.—FOLLOWING *Holland v. Southern Pac. Co.*, 100 Cal. 240.

A company placing one of its brakemen in a position where peculiar fitness is required, without being assured of his competency by instituting special inquiries, or from previous like service, is liable for any injuries which may happen to a fellow-servant, without notice, the proximate cause of which was the incompetency of such brakeman. *Evansville & T. H. R. Co. v. Guyton*, 33 Am. & Eng. R. Cas. 311, 115 Ind. 450, 14 West. Rep. 301, 17 N. E. Rep. 101.

When an action is founded on the incompetency of a fireman temporarily in charge of an engine, the plaintiff must prove (1) that the fireman was so inexperienced in the management of an engine that it was not

an exercise of ordinary care to place him in charge thereof, he not being reasonably safe and fit for the employment; (2) that he was guilty of mismanagement of the engine by reason of his inexperience and unskillfulness; (3) that such mismanagement was the proximate cause of the plaintiff's injury. *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. Rep. 596.

2. Retaining Incompetent Servants in Service.

149. Duty to discharge.—The company must not fail to exercise proper care to discharge its servants when it has knowledge of their incompetency. *Pennsylvania R. Co. v. Wachter*, 15 Am. & Eng. R. Cas. 187, 60 Md. 395. *St. Louis, I. M. & S. R. Co. v. Morgart*, 45 Ark. 318. *Louisville, N. O. & T. R. Co. v. Petty*, 41 Am. & Eng. R. Cas. 444, 67 Miss. 255, 7 So. Rep. 351.

The same degree of negligence which unfits a party for employment in the first place will equally unfit him for a continuance therein, his negligent conduct being known to his employer. *Harper v. Indianapolis & St. L. R. Co.*, 44 Mo. 488.

A servant, competent when employed, is presumed to continue so until the contrary appears, and in such case the employer is not bound to discharge him until he ascertains that the servant has become unfit, or by the exercise of reasonable care ought to know it; and the employer is entitled to a reasonable time within which to discharge the incompetent servant and supply his place. *Bonner v. Whitcomb*, 80 Tex. 178, 15 S. W. Rep. 899.—APPROVING *International & G. N. R. Co. v. Hall*, 78 Tex. 657.—*Lake Shore & M. S. R. Co. v. Stupak*, 41 Am. & Eng. R. Cas. 382, 123 Ind. 210, 23 N. E. Rep. 246.

Where the officers of a railroad company have had their attention directed to the intemperate habits of an employé, it is their duty to make careful and frequent investigation as to the fact if they retain him in their service. The weight and importance of evidence that they knew of it is for the jury to pass upon. *Michigan C. R. Co. v. Gilbert*, 2 Am. & Eng. R. Cas. 230, 46 Mich. 176, 9 N. W. Rep. 243.—FOLLOWING *Davis v. Detroit & M. R. Co.*, 20 Mich. 124.

There is no law requiring intelligent men of good habits, who are engineers or brakemen or switchmen, to be invariably dis-

charged for the first error or act of negligence they commit; nor will a company necessarily be liable for a second error or negligent act of a servant, to all other servants of such companies, when the latter sustain damages by reason thereof. *Baulec v. New York & H. R. Co.*, 62 *Barb.* (N. Y.) 623, 5 *Lans.* 436, 12 *Abb. Pr. N. S.* 310; affirmed in 59 *N. Y.* 356, 17 *Am. Rep.* 325.

150. Liability for failure to discharge.*—If the servant of a company is injured through the incompetency and unskillfulness of a fellow-servant, and the company is guilty of negligence in the employment and retention of such servant, it is liable in damages. *Chicago & A. R. Co. v. Sullivan*, 63 *Ill.* 293. *St. Louis, I. M. & S. R. Co. v. Rice*, 51 *Ark.* 467, 4 *L. R. A.* 173, 11 *S. W. Rep.* 699. *Lake Shore & M. S. R. Co. v. Stupak*, 41 *Am. & Eng. R. Cas.* 382, 123 *Ind.* 210, 23 *N. E. Rep.* 246. *Wallis v. Morgan's L. & T. R. & S. Co.*, 38 *La. Ann.* 156. *Proctor v. Hannibal & St. J. R. Co.*, 64 *Mo.* 112, 9 *Am. Ry. Rep.* 440. *Neilon v. Kansas City, St. J. & C. B. R. Co.*, 28 *Am. & Eng. R. Cas.* 386, 85 *Mo.* 599. *McAndrews v. Burns*, 39 *N. J. L.* 117. *Baulec v. New York & H. R. Co.*, 59 *N. Y.* 356, 48 *How. Pr.* 399; affirming 62 *Barb.* 623.—APPROVING *Pittsburgh, Ft. W. & C. R. Co. v. Ruby*, 38 *Ind.* 294. DISAPPROVING *Frazier v. Pennsylvania R. Co.*, 38 *Pa. St.* 104.—QUOTED IN *Ohio & M. R. Co. v. Collarn*, 5 *Am. & Eng. R. Cas.* 554, 73 *Ind.* 261, 38 *Am. Rep.* 134.—*Weger v. Pennsylvania R. Co.*, 55 *Pa. St.* 460.

A master cannot knowingly employ or retain incompetent or habitually negligent servants. Where one servant is injured by reason of the negligence of his fellow-servant who is incompetent or habitually negligent, of which the master has knowledge and of which a servant has no notice, the master is liable. *St. Louis, A. & T. H. R. Co. v. Corgan*, 49 *Ill. App.* 229.

The continuance of an incompetent servant in a company's employment is as much a breach of duty and a ground for liability as the original employment of an incompetent servant. *Gilman v. Eastern R. Co.*, 13 *Allen (Mass.)* 433.—DISTINGUISHING *Albro v. Agawam Canal Co.*, 6 *Cush. (Mass.)*

75; *Feltham v. England*, *L. R.* 2 *Q. B.* 33; *King v. Boston & W. R. Corp.*, 9 *Cush.* 112. REFERRING TO *Eaton v. Boston & L. R. Co.*, 11 *Allen* 500. REVIEWING *Snow v. Housatonic R. Co.*, 8 *Allen* 441; *Wright v. New York C. R. Co.*, 25 *N. Y.* 562; *Hard v. Vermont & C. R. Co.*, 32 *Vt.* 473; *Walker v. Southeastern R. Co.*, 2 *H. & C.* 102; *Lovegrove v. London, B. & S. C. R. Co.*, 16 *C. B. N. S.* 669; *Hall v. Johnson*, 3 *H. & C.* 589; *Morgan v. Vale of Neath R. Co.*, 5 *B. & S.* 570, 736, *L. R.* 1 *Q. B.* 149.—QUOTED IN *Texas Mex. R. Co. v. Whitmore*, 11 *Am. & Eng. R. Cas.* 195, 58 *Tex.* 276.

To justify a recovery from proof of a single former instance of negligence, it must appear not only to have been intentional or in some way that it was a characteristic of the employé, but want of due care in the corporation in investigating the occurrence and retaining the employé in its service must also be shown. *Baulec v. New York & H. R. Co.*, 59 *N. Y.* 356, 48 *How. Pr.* 399; affirming 62 *Barb.* 623.—APPLIED IN *McCaffrey v. Twenty-third St. R. Co.*, 47 *Hun (N. Y.)* 404. QUOTED IN *Powers v. New York C. & H. R. R. Co.*, 38 *N. Y. S. R.* 558.

Where a fellow-servant seeks to recover from the company for an injury which he claims was the result of incompetency or recklessness of another fellow-servant, being an engineer, proof that several months prior to the accident the engineer had run a train in daytime faster than schedule time, but without injuring any one of which the officers of the company have knowledge, is not sufficient to establish negligence on the part of the company in retaining him. *Holland v. Southern Pac. Co.*, 100 *Cal.* 240, 34 *Pac. Rep.* 666.

The mere fact that one is injured by a locomotive operated by an engineer who is shown to have been near sighted will not of itself establish negligence on the part of the company in retaining him in its employment. *Texas & P. R. Co. v. Harrington*, 21 *Am. & Eng. R. Cas.* 571, 62 *Tex.* 597.—QUOTING *Texas & P. R. Co. v. Burnes*, 2 *Tex. Unrep. Cas.* 239.

Where a company sets up contributory negligence of a fellow-servant to an action brought by an employé for a personal injury, the defense is good unless the plaintiff shows that the company was negligent either in employing or retaining the fellow-

*Negligence of master in the retention of servants, see 33 *AM. & ENG. R. CAS.* 321, *abstr.*

When question of competency is properly raised, see 44 *AM. & ENG. R. CAS.* 626, *abstr.*

servant, who was shown to be incompetent. *International & G. N. R. Co. v. Roth*, 2 *Tex. Unrep. Cas.* 245.

An engine used in operating a pile driver was defective and the engineer was negligent and reckless in running it. Both of these facts were known to the superintendent of the company owning and operating them, who had personal supervision of the work, with power to employ and discharge men. A workman who had no knowledge of the defect in the engine, or of the character of the engineer, was injured through the negligence of the engineer. *Held*, that the company was liable. *Texas Mex. R. Co. v. Whitmore*, 11 *Am. & Eng. R. Cas.* 195, 58 *Tex.* 276.—QUOTING *Ford v. Fitchburg R. Co.*, 110 *Mass.* 241; *Gilman v. Eastern R. Co.*, 13 *Allen (Mass.)* 440.—FOLLOWED IN *Ft. Worth & D. C. R. Co. v. Wilson*, 3 *Tex. Civ. App.* 583.

151. Liability after knowledge of incompetency.—There must have been no negligence on the part of the company in its retention of a servant after notice of his incompetency. *Totten v. Pennsylvania R. Co.*, 11 *Fed. Rep.* 564. *Hobbs v. Atlantic & N. C. R. Co.*, 107 *N. Car.* 1, 12 *S. E. Rep.* 124. *Bogard v. Louisville, E. & St. L. R. Co.*, 100 *Ind.* 491. *Higgins v. Missouri Pac. R. Co.*, 104 *Mo.* 413, 16 *S. W. Rep.* 409. *Coppins v. New York C. & H. R. Co.*, 44 *Am. & Eng. R. Cas.* 618, 122 *N. Y.* 557, 25 *N. E. Rep.* 915, 34 *N. Y. S. R.* 214; *affirming* 48 *Hun* 292, 17 *N. Y. S. R.* 916. *East Tenn., V. & G. R. Co. v. Gurley*, 17 *Am. & Eng. R. Cas.* 568, 12 *Lea (Tenn.)* 46. *Texas & P. R. Co. v. Wagner*, 2 *Tex. App. (Civ. Cas.)* 291.

The company must not retain an incompetent servant after it should, by the use of care, have known of his incompetency. *Crew v. St. Louis, K. & N. W. R. Co.*, 20 *Fed. Rep.* 87.

An intemperate person is unfit to be a freight conductor, and it is negligence on the part of a company to employ such person if it knew the fact, or if by proper diligence it might have known it; and if after his employment it is advised of his intemperate habits, or by the exercise of proper care it could have ascertained the fact, a failure to discharge him is negligence which will render the company liable to a fellow-servant who may be injured by him. *Crew v. St. Louis, K. & N. W. R. Co.*, 20 *Fed. Rep.* 87.

A conductor of a railroad train cannot recover from the company for an injury resulting from the negligence or misconduct of the engineer in running the train, on the ground that he was retained in service after the notice of his unfitness, without proving that the company retained him after they had reasonable grounds to believe, either from his general reputation or his conduct on particular occasions, that he was not a suitable person to intrust with an engine. *St. Louis, I. M. & S. R. Co. v. Morgart*, 45 *Ark.* 318.

152. Rule as to servants habitually negligent, etc.—If a railroad company retains in its employ an engineer known to have been intoxicated, and to be in the habit of using intoxicating liquors, it is liable to a fellow-servant whose injuries result from this cause. *Hilts v. Chicago & G. T. R. Co.*, 17 *Am. & Eng. R. Cas.* 628, 55 *Mich.* 437, 21 *N. W. Rep.* 878.

Its duty in respect to the employment of servants is not satisfied by the hiring of capable and competent persons in the first instance; it must also exercise such an oversight and supervision of them that, if a servant becomes habitually or notoriously incompetent or unfit, from carelessness or bad habits, to perform his duties, it will discover and guard against it; and if it fails to do this, it is liable to another servant for injuries caused by the negligent acts of the incompetent servant. *Whittaker v. Delaware & E. Canal Co.*, 126 *N. Y.* 544, 27 *N. E. Rep.* 1042, 38 *N. Y. S. R.* 523; *affirming* 58 *Hun* 606, *mem.*, 34 *N. Y. S. R.* 822, 11 *N. Y. Supp.* 914.

It is not necessary that such incompetency should be brought to the knowledge of the company; if it continued for such a length of time that a careful and diligent supervision would have discovered it, it is chargeable with notice of its existence. *Whittaker v. Delaware & H. Canal Co.*, 126 *N. Y.* 544, 27 *N. E. Rep.* 1042, 38 *N. Y. S. R.* 523; *affirming* 58 *Hun* 606, *mem.*, 34 *N. Y. S. R.* 822, 11 *N. Y. Supp.* 914.

In order for a servant to predicate a recovery against his master on the ground of the intemperate habits of a fellow-servant producing the injury, he must show that such habits were known to the master prior to the injury, or that they might have been known upon reasonable inquiry. *Zumwalt v. Chicago & A. R. Co.*, 35 *Mo. App.* 661,—

QUOTING *Huffman v. Chicago*, R. I. & P. R. Co., 78 Mo. 50.

Where a conductor on a railroad is habitually intemperate and unfit for the services, and his habits and unfitness are known to the superintendent of the railroad, intrusted with power to employ and discharge, and who employed and retained him in service, the company is liable in damages for the death of a fellow-employé, resulting from the carelessness and incompetency of such conductor. *Huntingdon & B. T. R. & C. Co. v. Decker*, 84 Pa. St. 419.

Contrary to the rules of the company forbidding firemen to handle engines, a fireman undertook to run an engine into a round house and injured plaintiff, who was a track repairer. The evidence showed that the company's master mechanic lived near by and knew that it was a habit to allow firemen to handle the engines, but no steps had been taken to remove the engineers who thus surrendered their engines to the firemen. *Held*, sufficient to make the company liable for the injury. *Ohio & M. R. Co. v. Collarn*, 5 Am. & Eng. R. Cas. 554, 73 Ind. 261, 38 Am. Rep. 134.—QUOTING *Chicago & G. E. R. Co. v. Harney*, 28 Ind. 28.—EXPLAINED IN *Capper v. Louisville, E. & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 525, 103 Ind. 305.

3. Notice or Knowledge of Incompetency.

a. On the Part of the Company.

153. Necessity of notice of incompetency.—Where a company has employed a competent servant of good habits it is not liable to another employé on the ground that the servant has since become incompetent by reason of intemperance or other bad habits, without showing that the company had notice of such incompetency, or was in possession of such knowledge as was equivalent to notice. *Chapman v. Erie R. Co.*, 55 N. Y. 579, 7 Am. Ry. Rep. 357; *reversing* 1 T. & C. 526.—FOLLOWING *Laning v. New York C. R. Co.*, 49 N. Y. 521; *Flike v. Boston & A. R. Co.*, 53 N. Y. 549.—APPLIED IN *Powers v. New York C. & H. R. Co.*, 60 Hun (N. Y.) 19.—*Crew v. St. Louis, K. & N. W. R. Co.*, 20 Fed. Rep. 87. *Melville v. Missouri River, Ft. S. & G. R. Co.*, 4 McCrary (U. S.) 194. *Pittsburg, Ft. W. & C. R. Co. v. Powers*, 74 Ill. 341. *Memphis & C. R. Co. v. Thomas*, 51 Miss. 637. *Huffman v. Chicago, R. I. & P. R. Co.*,

17 Am. & Eng. R. Cas. 625, 78 Mo. 50.—QUOTED IN *Zumwalt v. Chicago & A. R. Co.*, 35 Mo. App. 661.—*Hanley v. Grand Trunk R. Co.*, 62 N. H. 274. *Wall v. Delaware, L. & W. R. Co.*, 54 Hun 454, 28 N. Y. S. R. 132, 7 N. Y. Supp. 709; *affirmed in* 125 N. Y. 727, *mem.*, 26 N. E. Rep. 757, 35 N. Y. S. R. 995, *mem.* *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 25 Atl. Rep. 175. *Galveston, H. & S. A. R. Co. v. Faber*, 63 Tex. 344. *Dallas v. Gulf, C. & S. F. R. Co.*, 21 Am. & Eng. R. Cas. 575, 61 Tex. 196.

A company is not liable for an injury to one employé through the negligence of another employé, unless the latter was habitually careless or unskilful or incompetent, of which the company had notice. *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484, 20 Am. Ry. Rep. 359.—APPROVING *Moseley v. Chamberlain*, 18 Wis. 700; *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 182; *Pittsburg, Ft. W. & C. R. Co. v. Devinney*, 17 Ohio St. 212. NOT FOLLOWING *Gillenwater v. Madison & I. R. Co.*, 5 Ind. 339; *Little Miami R. Co. v. Stevens*, 20 Ohio 415.

Where a servant, competent at the time of his employment, becomes incompetent, or indulges in a habit which renders him incompetent during its indulgence, notice of such incompetency or habit must be brought home to the master, or it must be so notorious as to charge the master with knowledge; but when the incompetency existed at the time of the employment, proof of notice to the master is unnecessary. *Lee v. Michigan C. R. Co.*, 48 Am. & Eng. R. Cas. 356, 87 Mich. 574, 49 N. W. Rep. 909.

Where the company has notice of the fact that a fellow-servant is an habitual drunkard, and it is shown that the accident was directly caused by such drunkenness, it is responsible to a fellow-servant injured thereby. *So held*, where the carpenter employed to repair cars was injured by the negligence of a switchman. *Gilman v. Eastern R. Corp.*, 10 Allen (Mass.) 233.

154. What deemed sufficient as notice, generally.*—To constitute actual negligence or misfeasance of the principal, actual notice to him of the defect in the materials or machinery through which the

*Evidence which is admissible to show incompetency of fellow-servants, see note, 48 AM. & ENG. R. CAS. 274. See also 33 AM. & ENG. R. CAS. 324, *abstr.*

injury in question occurred, or of the unskillfulness or unfitness of the servant through whose negligence or unskillfulness it occurred, must be shown; and such notice must be averred in the complaint. *Anderson v. New Jersey Steamboat Co.*, 7 Robt. (N. Y.) 611.

In an action for injuries to a brakeman, claimed to have been caused by the negligence of the engineer, who, it is alleged, was an incompetent and unfit person for the service because of intemperate habits, the fact that the foreman of defendant's round house, whose duty it was to look after the engines and men and make reports to his superior, had heard that the engineer was drinking too much, was sufficient evidence from which the jury might conclude that defendant knew of such habits. *Williams v. Missouri Pac. R. Co.*, 109 Mo. 475, 18 S. W. Rep. 1098.—DOUBTING Pennsylvania R. Co. v. Books, 57 Pa. St. 339.

155. Notice to vice-principal.—A master is chargeable with his vice-principal's knowledge of the incompetence and carelessness of a servant under his superintendence and control. *McDermott v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 528, 87 Mo. 285.

To charge a company with knowledge of incompetency of one of its section foremen, it is sufficient to prove that the road master, whose duty it was to employ and discharge such foremen, had such knowledge. *McDermott v. Hannibal & St. J. R. Co.*, 2 Am. & Eng. R. Cas. 85, 73 Mo. 516, 39 Am. Rep. 526.

Notice to the master mechanic is notice to the company, where it appears that the company had conferred the power upon him of employing and discharging the servant, knowledge of whose incompetency he had. *Kidwell v. Houston & G. N. R. Co.*, 3 Woods (U. S.) 313.

In a suit by a brakeman for injuries resulting from the negligence of the conductor, the point was made that the conductor was incompetent, which was known to the company. *Held*, that notice of the incompetency to the superintendent of the department that employed conductors, was notice to the company. *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104.—FOLLOWED IN *Couch v. Watson Coal Co.*, 46 Iowa 17.

Notice of the incompetency of a telegraph operator given to the chief train dispatcher of a railroad is not sufficient to

5 D. R. D.—45.

charge the company, where it appears that the dispatcher had no power to employ or discharge operators. *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 25 Atl. Rep. 175.

156. Habitual carelessness, drunkenness, etc.—The servant may recover for injuries caused by the negligence of a fellow-servant, where the company had notice of the fact that the fellow-servant was habitually careless, and the injured servant had no knowledge of this fact. *Melville v. Missouri River, Ft. S. & G. R. Co.*, 48 Fed. Rep. 820. *Hugh v. New Orleans & C. R. Co.*, 6 La. Ann. 495.

If a person employed by a railroad corporation at the time of an accident alleged to have been caused by his negligence was an habitual drunkard, evidence that he was generally reputed to be so in the place where he lived is competent for the purpose of showing that his intemperate habits ought to have been known to the officers of the corporation. *Gilman v. Eastern R. Co.*, 13 Allen (Mass.) 433.

Notice of the habitual negligence of a fellow-servant to another fellow-servant is not notice to the company. *Kidwell v. Houston & G. N. R. Co.*, 3 Woods (U. S.) 313.

b. On the Part of the Injured Servant.

157. Generally.—A servant is not bound to investigate at his peril whether the master has used reasonable care in the selection of his fellow-servants; but he may presume that the master has discharged his duty in this respect, and may act upon that presumption until he has notice to the contrary. *United States Rolling Stock Co. v. Wilder*, 25 Am. & Eng. R. Cas. 414, 116 Ill. 100, 5 N. E. Rep. 92.

The fact that a servant, injured through the negligence of his fellow-servant, had knowledge for a reasonable time before the injury, of such fellow-servant's incompetence, is no defense to an action against the master for negligence in choosing an incompetent fellow-servant. The question whether the injured servant was guilty of negligence by reason of having such knowledge should be submitted to the jury. *Hoey v. Dublin & B. J. R. Co.*, 5 Ir. R., C. L. 206.

158. Duty to report incompetency to the company.—Where a servant finds any of his fellow-servants incompetent, so that his position is extrahazardous, it is his duty to notify his employer; and if the latter

fails to discharge the incompetent or unfit servants, unless he quits such employment, he will be deemed to have assumed the extrahazardous position. *St. Louis, A. & T. H. R. Co. v. Corgan*, 49 Ill. App. 229.

One employé cannot recover from the company on the ground that his co-employés were incompetent or unfit, where it appears that the plaintiff had full knowledge of such facts and failed to make complaint. *Davis v. Milwaukee R. Co.*, 1 Mich. N. P. [Supp.] xxvi.—REFERRING TO Michigan C. R. Co. v. Leahey, 10 Mich. 199. —Chicago & A. R. Co. v. Rush, 84 Ill. 570. *Davis v. Detroit & M. R. Co.*, 20 Mich. 105. —APPROVING *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 564.

159. Duty to quit service after notice of incompetency.—If an employé discovers that the service has become more hazardous than usual, or than he had anticipated, by reason of the retention of unfaithful fellow-servants, the rule is that he must quit the service or assume the extra risk. *Missouri Furnace Co. v. Abend*, 107 Ill. 44; affirming 9 Ill. App. 319.

160. Remaining in service after knowledge of incompetency.*—If an employé knows that another employé is incompetent or habitually negligent, or that the materials with which he works are defective, and he continues his work without objection, and without being induced by his employer to believe that a change will be made, he will be deemed to have assumed the risk of such incompetency, negligence, or defects, and cannot recover for an injury resulting therefrom. *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 472, 8 Pac. Rep. 780. *Dillon v. Union Pac. R. Co.*, 3 Dill. (U. S.) 319. *United States Rolling Stock Co. v. Wilder*, 25 Am. & Eng. R. Cas. 414, 116 Ill. 100, 5 N. E. Rep. 92.—APPROVING *Stafford v. Chicago, B. & Q. R. Co.*, 114 Ill. 244. DISTINGUISHING *Chicago, R. I. & P. R. Co. v. Clark*, 108 Ill. 113.—*Chicago, B. & Q. R. Co. v. Stafford*, 16 Ill. App. 84.—QUOTING *Missouri Furnace Co. v. Abend*, 107 Ill. 44. —*McDermott v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 528, 87 Mo. 285. *Warmington v. Atchison, T. & S. F. R. Co.*, 46 Mo. App. 159. *Porter v. Western N. C. R. Co.*, 97 N. Car. 66, 2 Am. St. Rep. 272,

2 S. E. Rep. 580. *Frasier v. Pennsylvania R. Co.*, 38 Pa. St. 104.—DISAPPROVED IN *Pittsburgh, Ft. W. & C. R. Co. v. Ruby*, 38 Ind. 294.

And the rule is the same where the negligent servant is a vice-principal. *McDermott v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 528, 87 Mo. 285.

Where a servant remains in the employment of his master after he knows that a fellow-servant is incompetent, he does not contract by implication to take the risk, but if prevented from recovering on this ground, it will be by reason of contributory negligence. *Porter v. Western N. C. R. Co.*, 97 N. Car. 66, 2 Am. St. Rep. 272, 2 S. E. Rep. 580.

The question of contributory negligence in such a case is for the jury. *Northern Pac. R. Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. Rep. 321. *Williams v. Missouri Pac. R. Co.*, 109 Mo. 475, 18 S. W. Rep. 1098.

A servant who has been promised by the master that an incompetent and unsafe fellow-servant shall be removed, may remain for a time in the service without being conclusively chargeable, as a matter of law, with contributory negligence, even though, without such promise, he would have been so chargeable. *Lyberg v. Northern Pac. R. Co.*, 39 Minn. 15, 38 N. W. Rep. 632. *Lytelle v. Chicago & W. M. R. Co.*, 84 Mich. 289, 47 N. W. Rep. 571.

A company is not liable for the negligence of a fellow-servant of plaintiff if it furnished adequate means and rules for the protection of plaintiff while at work, nor would it be liable, although the means furnished and the rules established were inadequate, if the plaintiff had knowledge thereof, or by the exercise of ordinary diligence might have had, and voluntarily continued in its service. But if the precautions taken by defendant were inadequate, and plaintiff did not know what precautions were being taken, and was not chargeable with want of ordinary care in failing to ascertain them, then defendant would be liable. *International & G. N. R. Co. v. Hall*, 1 Tex. Civ. App. 221, 21 S. W. Rep. 1024.

Plaintiff was in the employ of defendant company as a carpenter, and after a safe ladder had been provided by the company, went on a temporary one which had been constructed of defective lumber by a helper or hand under him, known to be careless, and was injured by its giving way. *Held*,

* Risks assumed by employés continuing in service with knowledge of incompetency of fellow-servants, see note, 48 AM. & ENG. R. CAS. 273.

that he could not recover, though the company had failed to discharge the helper as promised. *Bolton v. Georgia Pac. R. Co.*, 83 Ga. 659, 10 S. E. Rep. 352.

161. Effect of ignorance of incompetency.*—A railroad company whose agent knowingly employs and retains an incompetent switchman is liable for injuries to a fellow-switchman sustained through the incompetency of the switchman so employed and retained, when it appears that the injured switchman did not know, and had not the means of knowing, of the incompetency of his fellow-servant. *Chesapeake, O. & S. W. R. Co. v. McMannon*, (Ky.) 33 Am. & Eng. R. Cas. 308, 8 S. W. Rep. 18.

In an action by a servant for damages occasioned by the incompetency and carelessness of a vice-principal, the master is liable whether he knew of such incompetency and carelessness or not, provided they were unknown to the person injured. *McDermott v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 528, 87 Mo. 285.

An employé, not knowing the efficiency of fellow-servants nor having the means of knowing it, has the right to rely upon the implied promise of the company that it would take proper care that the other servants should be fit and competent for the performance of the duties assigned to them. *Bonner v. Whitcomb*, 80 Tex. 178, 15 S. W. Rep. 899.

A railroad company is liable for an injury resulting from their negligence in employing incompetent persons to keep the track in order, where it is not shown that deceased knew of the defective condition of the track and of the track walker's incompetency. *Texas & P. R. Co. v. Robertson*, 82 Tex. 657, 17 S. W. Rep. 1041.

162. Servant having same means of knowledge as the company.—A servant cannot recover from his employer for injuries resulting from the unskillfulness of his fellow-servants if he has the same knowledge, or means of knowledge, of such unskillfulness that the employer has. *Hasikin v. New York C. & H. R. R. Co.*, 65 Barb. (N. Y.) 129; affirmed in 56 N. Y. 608, mem. QUOTING Wright v. New York C. R. Co., 25 N. Y. 562.—*Sizer v. Syracuse, B. & N. Y. R. Co.*, 7 Lans. (N. Y.) 67.

* Knowledge of incompetency by employer and ignorance by employé, see 53 AM. & ENG. R. CAS. 534, abstr.

V. STATUTORY REGULATIONS.

1. In the United States.

a. In General.

163. Constitutionality.*—Code of Iowa of 1873, ch. 5, §§ 1288, 1307, making railroad companies and their lessees, or persons operating the same, liable to employes for injuries by fellow-employes—held, not in conflict with the fourteenth amendment to the U. S. constitution, guaranteeing equal protection of the law. *Chicago & N. W. R. Co. v. McLaughlin*, 119 U. S. 566, 7 Sup. Ct. Rep. 1366. *Pierce v. Central Iowa R. Co.*, 73 Iowa 140, 34 N. W. Rep. 783. *Rayburn v. Central Iowa R. Co.*, 74 Iowa 637, 35 N. W. Rep. 606, 38 N. W. Rep. 520.—FOLLOWING *Bucklew v. Central Iowa R. Co.*, 64 Iowa 603.—See also *Herrick v. Minneapolis & St. L. R. Co.*, 11 Am. & Eng. R. Cas. 256, 31 Minn. 11. *McAunich v. Mississippi & M. R. Co.*, 20 Iowa 338. *Deppe v. Chicago, R. I. & P. R. Co.*, 36 Iowa 52.

The statute of Kansas of 1874, ch. 93, § 1, p. 143, Comp. Laws Kansas 1881, p. 784, which provides that "every railroad company organized or doing business in this state shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes, to any person sustaining such damage," does not deprive a railroad company of its property without due process of law, and does not deny to it the equal protection of the laws, and is not in conflict with the fourteenth amendment to the constitution of the United States in either of these respects. *Missouri Pac. R. Co. v. Mackey*, 33 Am. & Eng. R. Cas. 390, 127 U. S. 205, 8 Sup. Ct. Rep. 1161; affirming 22 Am. & Eng. R. Cas. 306, 33 Kan. 298, 6 Pac. Rep. 291.—APPROVED IN *Schoolcraft v. Louisville & N. R. Co.*, 92 Ky. 233. FOLLOWED IN *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210. QUOTED IN *Lavallee v. St. Paul, M. & M. R. Co.*, 38 Am. & Eng. R. Cas. 115, 40 Minn. 249, 41 N. W. Rep. 974.—*Missouri Pac. R. Co. v. Mackey*, 22 Am. & Eng. R. Cas. 306, 33 Kan. 298, 6 Pac. Rep. 291.—FOLLOWING *Missouri Pac. R. Co. v. Haley*, 25 Kan. 35.

* Constitutionality of Alabama act requiring railroad employes to be examined at the expense of the company, see 38 AM. & ENG. R. CAS. 5, abstr.

QUOTING *Monroe v. Lattin*, 25 Kan. 354.—DISTINGUISHED IN *Beeson v. Busenbark*, 44 Kan. 669.

Neither is said statute unconstitutional as class legislation. *Atchison, T. & S. F. R. Co. v. Kochler*, 31 Am. & Eng. R. Cas. 312, 37 Kan. 463, 15 Pac. Rep. 567.

Nor does it make an unconstitutional discrimination against railroad companies. *Missouri Pac. R. Co. v. Mackey*, 22 Am. & Eng. R. Cas. 306, 33 Kan. 298, 6 Pac. Rep. 291.—FOLLOWING *Missouri Pac. R. Co. v. Haley*, 25 Kan. 35. QUOTING *Monroe v. Lattin*, 25 Kan. 354.

This act was adopted by the legislature of Kansas from the statute of Iowa, and the judicial construction given to the statute in that state follows it in Kansas; therefore, within the Iowa decisions it embraces only those persons engaged in the hazardous business of railroading. The care or diligence the statute exacts toward the employé is that degree of diligence which men in general exercise in respect to their own concerns, and contributory negligence of the injured employé bars a recovery under the statute, as in other cases. *Missouri Pac. R. Co. v. Haley*, 5 Am. & Eng. R. Cas. 594, 25 Kan. 35.—FOLLOWED IN *Missouri Pac. R. Co. v. Mackey*, 22 Am. & Eng. R. Cas. 306, 33 Kan. 298. REVIEWED IN *Lavallee v. St. Paul, M. & M. R. Co.*, 38 Am. & Eng. R. Cas. 115, 40 Minn. 249, 41 N. W. Rep. 974.

An objection to the Georgia statute on the same ground has been held unavailing. *Georgia R. Co. v. Ivey*, 28 Am. & Eng. R. Cas. 392, 73 Ga. 499.

And to the Wisconsin statute. *Ditberner v. Chicago, M. & St. P. R. Co.*, 47 Wis. 138, 2 N. W. Rep. 69.

164. Extraterritorial effect.*—The Alabama law regarding fellow-service will be applied in a Tennessee court in an action involving negligence based on an Alabama statute, notwithstanding the law in Tennessee is different. *Nashville, C. & St. L. R. Co. v. Foster*, 11 Am. & Eng. R. Cas. 180, 10 Lea (Tenn.) 351. To same effect see *Atchison, T. & S. F. R. Co. v. Moore*, 11 Am. & Eng. R. Cas. 243, 29 Kan. 632.—QUOTED IN *Hannibal & St. J. R. Co. v. Fox*, 15 Am. & Eng. R. Cas. 325, 31 Kan. 586; *Anderson v.*

Bennett, 38 Am. & Eng. R. Cas. 87, 16 Oreg. 515; *Kansas City, Ft. S. & G. R. Co. v. Kier*, 38 Am. & Eng. R. Cas. 119, 41 Kan. 661, 671, 21 Pac. Rep. 770.—*Alexander v. Pennsylvania Co.*, 48 Ohio St. 623, 30 N. E. Rep. 69.—APPROVING *Pittsburgh, C. & St. L. R. Co. v. Ranney*, 37 Ohio St. 665. FOLLOWING *Knowlton v. Erie R. Co.*, 19 Ohio St. 260.

An action will not lie in Wisconsin (prior to St. 1875, ch. 173) by a servant against his master for injuries received through the negligence of a fellow-servant; and where the injury is received in Iowa, where by statute a right of action is granted in such case, and suit is brought in Wisconsin, the right of recovery is governed by the *lex fori*, and not according to the Iowa statute. *Anderson v. Milwaukee & St. P. R. Co.*, 37 Wis. 321.—FOLLOWING *Chamberlain v. Milwaukee & M. R. Co.*, 7 Wis. 425; *Moseley v. Chamberlain*, 18 Wis. 700; *Cooper v. Milwaukee & P. du C. R. Co.*, 23 Wis. 668.—DISAPPROVED IN *Herrick v. Minneapolis & St. L. R. Co.*, 11 Am. & Eng. R. Cas. 256, 31 Minn. 11, 47 Am. Rep. 771; *Knight v. West Jersey R. Co.*, 26 Am. & Eng. R. Cas. 485, 108 Pa. St. 250. DISTINGUISHED IN *Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169. FOLLOWED IN *Toner v. Chicago, M. & St. P. R. Co.*, 28 Am. & Eng. R. Cas. 449, 31 Am. & Eng. R. Cas. 320, 69 Wis. 188, 33 N. W. Rep. 433; *Bettys v. Milwaukee & St. P. R. Co.*, 37 Wis. 323. NOT FOLLOWED IN *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848.

Plaintiff, a track repairer, was injured through the negligence of his superintendent, in Iowa, and sued in a federal court sitting in Minnesota. According to the Wisconsin decisions plaintiff and his superintendent were fellow-servants, and a recovery could not be had; but according to well-established federal decisions they were not fellow-servants. *Held*, that the court would not follow the state decisions, as the question did not involve the construction of a state statute. *Northern Pac. R. Co. v. Peterson*, 51 Fed. Rep. 182, 4 U. S. App. 574, 2 C. C. A. 157.

165. Contracts in contravention of statutes.*—A railroad company cannot contract in advance with its employés for the waiver and release of the statutory liability imposed upon every railroad company organized or doing business in Kan-

* Injury in another state than that where suit is brought. Conflict of laws, see 53 AM. & ENG. R. CAS. 569, *abstr.*

Cas. 87, 16
& G. R. Co.
119, 41 Kan.
Alexander v.
623, 30 N.
burgh, C. &
io St. 665.
R. Co., 19

onsin (prior
vant against
through the
and where
a, where by
oted in such
sconsin, the
the *lex fori*,
wa statute.
P. R. Co.,
burgh, C. &
berlain v.
25; Moseley
Cooper v.
Wis. 668.—
nneapolis &
Cas. 256, 31
ight v. West
R. Cas. 485,
ED IN Burns
113 Ind. 169.
go, M. & St.
Cas. 449, 31
is. 188, 33 N.
kee & St. P.
OLLOWED IN
24 Neb. 848.
was injured
superintend-
federal court
diding to the
nd his super-
and a recov-
according to
ns they were
at the court
isions, as the
construction
Pac. R. Co. v.
S. App. 574.

travention
company can-
its employes
the statutory
railroad com-
ness in Kan-

sas by chapter 93, Laws 1874; and a con-
tract in contravention of this statute is void
and no defense to an action brought by an
employé for damages done to him in conse-
quence of the negligence or mismanagement
of a co-employé. *Kansas Pac. R. Co. v.*
Peavey, 11 *Am. & Eng. R. Cas.* 260, 29 *Kan.*
169, 44 *Am. Rep.* 630.—DISTINGUISHING
Indianapolis, P. & C. R. Co. v. Petty, 25 *Ind.*
413.—APPROVED IN *Runt v. Herring*, 21 *N.*
Y. Supp. 244. FOLLOWED IN *Kansas Pac.*
R. Co. v. Peavey, 34 *Kan.* 472.

b. Interpretation and Effect of Particular Statutes.*

166. Alabama.—The act approved
February 15, 1885 (Sess. Acts 1884-85, p.
115), changed the rule as to the liability of
the company to its servant injured by the
negligence of a fellow-servant. *Louisville*
& N. R. Co. v. Allen, 28 *Am. & Eng. R.*
Cas. 514, 78 *Ala.* 494.

Under the Employers' Liability Act the
master is liable for injuries to a servant
which result from the negligence of another
servant who has superintendence intrusted
to him, or who has in his charge or control
signal points, cars, etc., although such per-
son, when negligent, is voluntarily assisting
in manual labor. *Kansas City, M. & B. R.*
Co. v. Burton, 53 *Am. & Eng. R. Cas.* 115,
97 *Ala.* 240, 12 *So. Rep.* 88.

The superintendence contemplated by §
2590, subd. 2, of the code is not necessarily
that of superintendence over the injured
person; but if the negligence of such super-
intendent results in injury to any other
servant of the common master, the latter is
liable by the terms of the statute. *Kansas*
City, M. & B. R. Co. v. Burton, 53 *Am. &*
Eng. R. Cas. 115, 97 *Ala.* 240, 12 *So. Rep.*
88.

One charged with the control of cars for
placing them in proper position on a side
track, who negligently leaves a car at rest
in dangerous proximity to the main track,
from which injury results, is guilty of ac-
tionable negligence. *Kansas City, M. & B.*
R. Co. v. Burton, 53 *Am. & Eng. R. Cas.*
115, 97 *Ala.* 240, 12 *So. Rep.* 88.

The liability of the employer under sec-
tion 2590 of the code does not spring from

the contract of employment, the only office
of which is to establish the relation of
master and servant; and it is alone upon
the incidents of that relation that the sta-
tute operates. Hence a servant injured in
another state by the negligence of a fellow-
servant, under such circumstances as would
create no right of action against the master
in that state, cannot recover against the
latter in Alabama, although the contract
was entered into and the services partly
performed there. *Alabama G. S. R. Co. v.*
Carroll, 97 *Ala.* 126, 11 *So. Rep.* 803.

When the action is not founded on the
statute (code, §§ 2590-92), but seeks to hold
the master liable in damages for injuries
resulting from his alleged negligence (1) in
not providing safe machinery and appli-
ances, (2) in not employing careful and
competent workmen, and (3) in not in-
forming plaintiff's intestate, who was in-
jured, of a latent peril in the service
which he was directed to perform, a recov-
ery cannot be had for injuries resulting
from the negligence of another servant
engaged in the same work, in direct viola-
tion of the orders of the superintendent.
Holland v. Tennessee C., I. & R. Co., 91 *Ala.*
444, 8 *So. Rep.* 524.

167. — illustrations.—If the plain-
tiff, a switchman, gave proper signals to the
fireman, whose duty it was to receive and
transmit them to the engineer, but who
failed to transmit them properly, and injury
resulted to plaintiff, the railroad company
is, under statutory provisions (code, § 2590),
liable for such negligence. *Richmond &*
D. R. Co. v. Jones, 92 *Ala.* 218, 9 *So. Rep.*
276.

A lever car, or car propelled by hand,
such as is in general use on railroads by the
workmen engaged in repairing and keeping
up the track, is within the spirit and terms
of the statute which gives an action against
the employer for injuries suffered by an
employé by reason of the negligence of any
person in the service who has charge of
"any signal points, locomotive, engine,
switch, car, or train upon a railway." *Kan-*
sas City, M. & B. R. Co. v. Crocker, 95 *Ala.*
412, 11 *So. Rep.* 262.

If a person in his superintendence of the
tracks and cars in the yards of a railroad
either directs or allows a car to be placed
too near another track, or, it being there
without his fault, suffers it to remain, this is
negligence while in the exercise of "super-

* Construction of various state statutes,
changing common law rule making master
liable for injuries between fellow-servants, see
notes, 11 *AM. & ENG. R. CAS.* 272; 31 *Id.* 317;
44 *Id.* 635; 36 *AM. DEC.* 289.

intendence" within the meaning of the Employers' Liability Act. *Kansas City, M. & B. R. Co. v. Burton*, 53 *Am. & Eng. R. Cas.* 115, 97 *Ala.* 240, 12 *So. Rep.* 88.

An averment that such yard master was intrusted with superintendence "in the placing and position of cars," is sufficient to bring the action within the Employers' Liability Act. To bring the case within this act it is not necessary that the superintendence should be a superintendence over the person who complains of the negligence of the person intrusted with it. *Kansas City, M. & B. R. Co. v. Burton*, 53 *Am. & Eng. R. Cas.* 115, 97 *Ala.* 240, 12 *So. Rep.* 88.—DISTINGUISHING *Georgia Pac. R. Co. v. Davis*, 92 *Ala.* 300.

168. California.—The law respecting the negligence of a fellow-servant, where there is no want of ordinary care upon the part of the employer, as set forth in section 1970 of the civil code, recognizes no distinction growing out of the grades of employment of the respective employés, nor does it give effect to the circumstance that the fellow-servant through whose negligence the injury was received, was the superior of the plaintiff in the general service in which they were both employed. *Daves v. Southern Pac. Co.*, 98 *Cal.* 19, 32 *Pac. Rep.* 708.

A conductor and the brakeman are "employed by the same employer in the same general business," within the meaning of § 197, Civil Code 1873, providing that "an employer is not bound to indemnify his employé for losses suffered in consequence of the ordinary risks of business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé." *Congrave v. Southern Pac. R. Co.*, 48 *Am. & Eng. R. Cas.* 337, 88 *Cal.* 360, 26 *Pac. Rep.* 175.—DISTINGUISHING *Chicago, M. & St. P. R. Co. v. Ross*, 112 *U. S.* 377. REVIEWING *McLean v. Blue Point Gravel Min. Co.*, 51 *Cal.* 255.—REVIEWED IN *Daves v. Southern Pac. Co.*, 98 *Cal.* 19.

169. Colorado.—The purpose of Gen. Laws, p. 342, is to provide for the survival of a cause of action after death of a person killed by wrongful act; and the statute does not abrogate the common law rule that an employer is not liable for injuries to one employé, caused by the negligence of a co-

employé, notwithstanding that the statute provides for a right of action whenever "any person shall die from an injury" resulting from negligence, unskilfulness, etc., of another employé, agent, or servant. *Atchison, T. & S. F. R. Co. v. Farrow*, 11 *Am. & Eng. R. Cas.* 239, 6 *Colo.* 498.—FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Headland*, 18 *Colo.* 477.

Engineers employed on different trains are fellow-servants under the Colorado laws, and the company is not liable for an injury to one caused by the negligence of the other. *Van Avery v. Union Pac. R. Co.*, 35 *Fed. Rep.* 40.—FOLLOWING *Randall v. Baltimore & O. R. Co.*, 109 *U. S.* 478, 3 *Sup. Ct. Rep.* 322. REVIEWING *Chicago, M. & St. P. R. Co. v. Ross*, 112 *U. S.* 377, 5 *Sup. Ct. Rep.* 184; *Northern Pac. R. Co. v. Herbert*, 116 *U. S.* 642, 6 *Sup. Ct. Rep.* 590.—APPLIED IN *Ell v. Northern Pac. R. Co.*, 1 *N. Dak.* 336.

170. Florida.—The act of June 7, 1887, changing the common law rule of the liability of railroad companies for an injury resulting to one employé through the negligence of another, is adopted from the statutes of Georgia, and according to the well-settled rule, any known and settled construction placed upon the statute by the courts of that state, is adopted also, so far as it is not in conflict with the spirit and policy of the general legislation of Florida on the same subject. *Duval v. Hunt*, 34 *Fla.* 85, 15 *So. Rep.* 876.

Section 2 of the above statute provides that if one employé is injured by another employé, "and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery." Held, that an injured employé cannot recover unless he is entirely free from fault himself. *Duval v. Hunt*, 34 *Fla.* 85, 15 *So. Rep.* 876.

Under this provision of the statute an employé cannot recover damages from the company for injuries sustained by him on account of the negligence or carelessness of another employé, unless wholly without fault himself, even though in performing the act that results in the injury he was acting under the orders of a superior. *Duval v. Hunt*, 34 *Fla.* 85, 15 *So. Rep.* 876.

Where an employé uses defective and dangerous tools and appliances, with knowledge of their defectiveness and dangerousness, and is injured thereby, he cannot be

said to be without fault, and cannot recover of the company, under this statute, even though his use of them was by the direct command of a superior officer, who was also an employé of the same company. *Duval v. Hunt*, 34 Fla. 85, 15 So. Rep. 876.

171. Georgia.—An employé of a railroad is, by the code, § 3036, only entitled to recover for an injury caused by the negligence of a co-employé when the injured party is without fault. *East Tenn., V. & G. R. Co. v. Duggan*, 51 Ga. 212, 6 Am. Ry. Rep. 195. *Thompson v. Central R. & B. Co.*, 54 Ga. 509. *McDade v. Georgia R. Co.*, 60 Ga. 119. *Baker v. Western & A. R. Co.*, 68 Ga. 699.

The servant, to recover damages from the company, must show that he was in the exercise of ordinary care and diligence and without fault or negligence; that he did nothing to contribute to his injury, and neglected to do nothing to prevent the consequence of the negligence of the other servants. *Central R. & B. Co. v. Lanier*, 83 Ga. 587, 10 S. E. Rep. 279.

Any presumption of negligence would apply as well to him as to others participating in the common act; and to be benefited by a presumption against them, he must rebut it as to himself. *Gassaway v. Georgia Southern R. Co.*, 69 Ga. 347.

The question of negligence belongs peculiarly to the jury, and except in a clear case, where there is no conflicting evidence as to whether the employé was in fault or was negligent, the court should not withhold the case from the jury by awarding a nonsuit. Where the evidence upon this point is doubtful, it should have been submitted to the jury, and to grant a nonsuit was error. *Redding v. East Tenn., V. & G. R. Co.*, 74 Ga. 385. — DISTINGUISHED IN *Smith v. Central R. & B. Co.*, 41 Am. & Eng. R. Cas. 490, 80 Ga. 801, 10 S. E. Rep. 111.

Under the provisions of the code, §§ 3033, 3036, a company is liable to one servant for injuries received through the negligence or misconduct of a fellow-servant, if the injured servant is free from fault, whether the services in which they were engaged at the time were connected with the running of trains or not. *Georgia R. Co. v. Ivey*, 28 Am. & Eng. R. Cas. 392, 73 Ga. 499. — EXPLAINING *Henderson v. Walker*, 55 Ga. 481. FOLLOWING *Thompson v. Central R. & B. Co.*, 54 Ga. 509. — ADHERED TO IN Georgia

R. & B. Co. v. Brown, 86 Ga. 320. — *Thompson v. Central R. & B. Co.*, 54 Ga. 509. — ADHERED TO IN Georgia *R. & B. Co. v. Brown*, 86 Ga. 320. DISTINGUISHED IN *Central R. Co. v. Gleason*, 69 Ga. 200. FOLLOWED IN Georgia *R. Co. v. Ivey*, 28 Am. & Eng. R. Cas. 392, 73 Ga. 499; Georgia *R. & B. Co. v. Miller*, 90 Ga. 571. REVIEWED IN *Lavallee v. St. Paul, M. & M. R. Co.*, 38 Am. & Eng. R. Cas. 115, 40 Minn. 249, 41 N. W. Rep. 974.

That a rule of liability not applied to other classes of employers is thus imposed upon railroad companies does not render those statutes obnoxious to the fourteenth amendment of the United States, as denying to such companies the equal protection of the laws. *Georgia R. & B. Co. v. Miller*, 90 Ga. 571, 16 S. E. Rep. 939. — FOLLOWING *Thompson v. Central R. & B. Co.*, 54 Ga. 509; Georgia *R. Co. v. Ivey*, 73 Ga. 499; Georgia *R. & B. Co. v. Brown*, 86 Ga. 320. — APPLIED IN *Savannah & W. R. Co. v. Phillips*, 90 Ga. 829.

If the plaintiff was an employé of the road, and was injured by co-employés engaged in business other than the running of trains, it does not matter that he was not connected with them in regard to the pit where the injury occurred. *Central R. Co. v. Henderson*, 69 Ga. 715.

Though one may be a train hand in the employment of a railroad, if he is injured without fault on his part by the negligence and carelessness of other agents of the company, he may recover. *Central R. Co. v. De Bray*, 71 Ga. 406. — FOLLOWING *Central R. Co. v. Mitchell*, 63 Ga. 181.

By act of 1863 (acts, p. 182) the Western & Atlantic R. Co. is subject to the same liability for injuries by fellow-servants as other railroads, and such liability extends back before the passage of the act, so as to embrace actions brought theretofore. *Canon v. Rowland*, 34 Ga. 422.

A workman employed to work as an ordinary laborer on the track, who is injured while being carried on a train, comes within the provisions of sections 2083 and 3034 of the code, so far as his right to recover damages for the injury is affected by the question of negligence on his part. *Atlanta & R. A. L. R. Co. v. Ayers*, 53 Ga. 12.

A person employed by the receivers of a railroad is not employed by the railroad, within the contemplation of the code, §§ 2083, 3033, 3036, rendering railroads liable

for injuries to an employé sustained through the negligence of another employé. *Henderson v. Walker*, 55 Ga. 481.—EXPLAINED IN *Georgia R. Co. v. Ivey*, 28 Am. & Eng. R. Cas. 392, 73 Ga. 499. FOLLOWED IN *Thurman v. Cherokee R. Co.*, 56 Ga. 376.

Under the code, §§ 2083, 2202, 3033, and 3036, an employé who is free from fault can recover for the negligence of any other employé, whether the two are engaged in the same business or not. *Georgia R. & B. Co. v. Goldwire*, 56 Ga. 196.

Although the contract of plaintiff to take all risks was, in its letter, confined to the roadbed of the Western & Atlantic R. Co., yet when he voluntarily accompanied a train run by the company which employed him, on the track of another company, the spirit of his contract to assume all risks accompanied him there, and he cannot recover for an injury by the company or his co-employés. *Galloway v. Western & A. R. Co.*, 57 Ga. 512.

Section 3033 of the code makes railroad companies liable for damages done by, not to, any person in their employment. *Western & A. R. Co. v. Vandiver*, 85 Ga. 470, 11 S. E. Rep. 781.

These statutes are not special laws, and are not obnoxious to the provision in the constitution that "laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an existing general law." Nor is this a special law affecting private rights, which is unconstitutional as varying the general law without the "free consent in writing of all persons to be affected thereby." *Georgia R. Co. v. Ivey*, 28 Am. & Eng. R. Cas. 392, 73 Ga. 499.—FOLLOWED IN *Georgia R. & B. Co. v. Miller*, 90 Ga. 571.

Plaintiff was running as an extra brakeman on a train, and was told by his conductor to get off at night, while the train was running some four miles an hour, and in doing so was injured by alighting on some timbers that train hands had left near the track. *Held*, that the company was liable for the injury; and it was no defense that the conductor, under the rules of the company, was not authorized to order him to get off the moving train. The test is whether he did order him to do so, and he was injured in attempting to obey. *Central R. Co. v. De Bray*, 71 Ga. 406.—APPLIED IN

Mason v. Richmond & D. R. Co., 111 N. Car. 482.

172. Iowa—Act of 1853, section 14.—A principal is not liable for damages sustained by an employé from the negligence of a co-employé in the same general service, and the act entitled "An act to grant to railroad companies the right of way," does not change the general rule of law upon this subject. *Sullivan v. Mississippi & M. R. Co.*, 11 Iowa 421.—FOLLOWING *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49. NOT FOLLOWING *Little Miami R. Co. v. Stevens*, 20 Ohio 415.—DISTINGUISHED IN *McAunich v. Mississippi & M. R. Co.*, 20 Iowa 338. FOLLOWED IN *Peterson v. Whitebreast C. & M. Co.*, 50 Iowa 673. QUOTED IN *Houser v. Chicago, R. I. & P. R. Co.*, 8 Am. & Eng. R. Cas. 500, 60 Iowa 230, 46 Am. Rep. 65; *Philo v. Illinois C. R. Co.*, 33 Iowa 47.

173. Iowa—Laws 1862, ch. 160, section 7.—While this provision gives to an employé the right to recover of a company for injury caused by the negligence of a co-employé, the liability of the company is nevertheless measured by a different standard and rule as to negligence from what it is in the case of injuries to passengers. *Hunt v. Chicago & N. W. R. Co.*, 26 Iowa 363.

The act of 1862 provides that "every railroad company shall be liable for all damages sustained by any person, including employés of the company, in consequence of any neglect of its agents or by any mismanagement of its engineer or other employés of the company." *Held*, while the statute should be limited to employés engaged in the hazardous business of operating the road, that it would, nevertheless, include an employé engaged in connection with the dirt train, and who was injured while loading a car, by the falling of an impending bank. *Deppe v. Chicago, R. I. & P. R. Co.*, 36 Iowa 52.—DISTINGUISHED IN *Malone v. Burlington, C. R. & N. R. Co.*, 11 Am. & Eng. R. Cas. 165, 61 Iowa 326, 47 Am. Rep. 813; *Malone v. Burlington, C. R. & N. R. Co.*, 17 Am. & Eng. R. Cas. 644, 65 Iowa 417, 54 Am. Rep. 11; *Foley v. Chicago, R. I. & P. R. Co.*, 64 Iowa 644; *Smith v. Burlington, C. R. & N. R. Co.*, 6 Am. & Eng. R. Cas. 149, 59 Iowa 73. FOLLOWED IN *Handelun v. Burlington, C. R. & N. R. Co.*, 72 Iowa 709, 32 N. W. Rep. 4. NOT FOLLOWED IN *Union Pac. R. Co. v. Harris*, 21 Am. & Eng. R.

Cas. 584, 33 Kan. 416. QUOTED IN *Lavallee v. St. Paul, M. & M. R. Co.*, 38 Am. & Eng. R. Cas. 115, 40 Minn. 249, 41 N. W. Rep. 974.

A person employed as a section hand, whose duty it is with others to keep a certain distance of the railroad in repair, and to go with them on the track in a hand-car for that purpose, is within the statute. *Frandsen v. Chicago, R. I. & P. R. Co.*, 36 Iowa 372.—FOLLOWED IN *Rayburn v. Central Iowa R. Co.*, 74 Iowa 637, 38 N. W. Rep. 520.

174. Iowa Code, section 1307—Applies to what servants.*—Section 1307, rendering railway companies liable to their employes for injuries resulting from the negligence of their co-employes, applies only to accidents growing out of the use and operation of their roads. Whether or not the character of plaintiff's employment brings him within the provisions of that section is a question of fact for the jury. *Schroeder v. Chicago, R. I. & P. R. Co.*, 41 Iowa 344.—FOLLOWED IN *Lane v. Burlington & S. W. R. Co.*, 52 Iowa 18; *Smith v. Burlington, C. R. & N. R. Co.*, 6 Am. & Eng. R. Cas. 149, 59 Iowa 73.

All railroad employes who are engaged in the business of operating railroads, or who by the nature of their employment are exposed to the hazards incident to moving trains, though they are not engaged in operating them, are within the provisions of section 1307, making railroads liable for injuries to employes caused by the negligence or mismanagement of co-employes. *Smith v. Humeston & S. R. Co.*, 41 Am. & Eng. R. Cas. 278, 78 Iowa 583, 43 N. W. Rep. 545.

Plaintiff was not precluded from bringing his action against the company under section 1307, on the ground that the negligence complained of was in no manner connected with the use and operation of the railroad. *Rayburn v. Central Iowa R. Co.*, 74 Iowa 637, 35 N. W. Rep. 606, 38 N. W. Rep. 520.—FOLLOWING *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa 375; *McKnight v. Iowa & M. R. Constr. Co.*, 43 Iowa 406; *Frandsen v. Chicago, R. I. & P. R. Co.*, 36 Iowa 372;

Pyne v. Chicago, B. & Q. R. Co., 54 Iowa 223; *Crowley v. Burlington, C. R. & N. R. Co.*, 65 Iowa 658; *Farley v. Chicago, R. I. & P. R. Co.*, 56 Iowa 337.

175. — Illustrations.—An employe who stands in the relation of vice-principal to the men under his control is an employe within the meaning of section 1307, and can recover of a railroad company by reason of the negligence of the men selected by himself, and whom he may discharge or retain in his employment (or the employment of the company) as he sees fit. It is not provided that the negligent and the injured employe shall be co-employes in the same general employment, in the sense that they must be equal in power and authority; all that is required is that both shall be employes of the corporation. *Houser v. Chicago, R. I. & P. R. Co.*, 8 Am. & Eng. R. Cas. 500, 60 Iowa 230, 46 Am. Rep. 65, 14 N. W. Rep. 778.—APPROVING *McCosker v. Long Island R. Co.*, 84 N. Y. 77. QUOTING *Sullivan v. Mississippi & M. R. Co.*, 11 Iowa 421.

The working of a ditching machine on a railroad, which is operated by the movement along the track of the train of which it forms a part, is an employment "connected with the use and operation" of the railroad, within the meaning of section 1307. *Nelson v. Chicago, M. & St. P. R. Co.*, 73 Iowa 576, 35 N. W. Rep. 611.

Where a "wiper" has temporary charge of an engine in making up a train, the company is liable for his negligence resulting in injury to a brakeman in coupling cars. *Whalen v. Chicago, R. I. & P. R. Co.*, 38 Am. & Eng. R. Cas. 141, 75 Iowa 563, 39 N. W. Rep. 894.

Section 1307 has been held to apply to the following servants, so as to render the company liable for injuries received by them:

A section hand injured through the negligence of a section foreman in the management and running of a hand-car upon which they are riding. *Chicago, M. & St. P. R. Co. v. Artery*, 44 Am. & Eng. R. Cas. 573, 137 U. S. 507, 11 Sup. Ct. Rep. 129.

An employe who was engaged in tearing down and removing a bridge, and was required to ride a short distance on a train carrying away the timbers of the bridge for the purpose of unloading them, and was injured while so riding. *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa 375, 14 Am. Rep. 359.—DISTINGUISHED IN *Smith v.*

* Construction of section 1307 Iowa Code, imposing on railroad companies liability for injuries to their employes, see notes, 38 AM. & ENG. R. CAS. 146; 28 *Id.* 548.

When servants are engaged in "operating railway" within meaning of Iowa statute, see note, 17 AM. & ENG. R. CAS. 648.

Burlington, C. R. & N. R. Co., 6 Am. & Eng. R. Cas. 149, 59 Iowa 73. FOLLOWED IN Rayburn v. Central Iowa R. Co., 74 Iowa 637, 38 N. W. Rep. 520.

One employed by defendant as a private detective, and who, while walking upon the track in the performance of his duties as such employé, and in obedience to the orders of his principal, was injured, without negligence on his part, through the negligence of an engineer of a passing train. *Pyne v. Chicago, B. & Q. R. Co.*, 54 Iowa 223, 37 Am. Rep. 198, 6 N. W. Rep. 281.—REVIEWING *Potter v. Chicago, R. I. & P. R. Co.*, 46 Iowa 399.—FOLLOWED IN Rayburn v. Central Iowa R. Co., 74 Iowa 637, 38 N. W. Rep. 520.

One who was engaged in shoveling gravel from a construction train, and had nothing to do with operating it. *McKnight v. Iowa & M. R. Constr. Co.*, 43 Iowa 406, 14 Am. Ry. Rep. 465.—FOLLOWED IN Rayburn v. Central Iowa R. Co., 74 Iowa 637, 38 N. W. Rep. 520.—*Handelun v. Burlington, C. R. & N. R. Co.*, 72 Iowa 709, 32 N. W. Rep. 4.—FOLLOWING *Deppe v. Chicago, R. I. & P. R. Co.*, 36 Iowa 52.

An employé on a hand-car, injured through the negligence of employés on another hand-car, in failing to apply the brakes and colliding with his car. *Lombard v. Chicago, R. I. & P. R. Co.*, 47 Iowa 494.—DISTINGUISHED IN *Lake Shore & M. S. R. Co. v. Parker*, 41 Am. & Eng. R. Cas. 339, 131 Ill. 557, 23 N. E. Rep. 237.

An employé of car shops, injured while removing screens from car windows, through the negligence of the trainmen in starting the train while he is so engaged. *Pierce v. Central Iowa R. Co.*, 73 Iowa 140, 34 N. W. Rep. 783.

A person who is engaged to remove snow and ice from the track, and is required to ride from one place of work to another on a caboose. *Smith v. Humeston & S. R. Co.*, 41 Am. & Eng. R. Cas. 278, 78 Iowa 583, 43 N. W. Rep. 545.—DISTINGUISHED IN *Maggee v. Chicago & N. W. R. Co.*, 82 Iowa 249.

A "clinkerman" employed in a round house. *Butler v. Chicago, B. & Q. R. Co.*, 87 Iowa 206, 54 N. W. Rep. 208. And see also *Njus v. Chicago, M. & St. P. R. Co.*, 47 Minn. 92, 49 N. W. Rep. 527.

176. Iowa Code, section 1307, does not apply to what servants.—The statute does not extend beyond the employés

engaged in the business of operating railways, and is not intended to embrace all persons who are employed by such corporations, without regard to their employment, such as workmen in their machine shops. *Potter v. Chicago, R. I. & P. R. Co.*, 46 Iowa 399, 16 Am. Ry. Rep. 57.—REVIEWED IN *Pyne v. Chicago, B. & Q. R. Co.*, 54 Iowa 223, 37 Am. Rep. 198.—*Manning v. Burlington, C. R. & N. R. Co.*, 64 Iowa 240, 20 N. W. Rep. 169.

177. — Illustrations.—Section 1307 does not apply to a section hand engaged at the time in loading a car. *Smith v. Burlington, C. R. & N. R. Co.*, 6 Am. & Eng. R. Cas. 149, 59 Iowa 73, 12 N. W. Rep. 763.—DISTINGUISHING *Deppe v. Chicago, R. I. & P. R. Co.*, 36 Iowa 52; *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa 375. FOLLOWING *Schroeder v. Chicago, R. I. & P. R. Co.*, 41 Iowa 344.—DISTINGUISHED IN *Union Pac. R. Co. v. Harris*, 21 Am. & Eng. R. Cas. 584, 33 Kan. 416.

Nor to one whose duty it was to wipe defendant's engines and do other work about the round house, and to open the doors of the round house so as to allow the engines to pass in and out, and who, while endeavoring to shut these doors, was injured by the carelessness of his co-employés, who were at the time engaged with him in the same effort. *Malone v. Burlington, C. R. & N. R. Co.*, 11 Am. & Eng. R. Cas. 165, 61 Iowa 326, 47 Am. Rep. 813, 16 N. W. Rep. 203.—DISTINGUISHING *Deppe v. Chicago, R. I. & P. R. Co.*, 36 Iowa 52.—DISTINGUISHED IN *Union Pac. R. Co. v. Harris*, 21 Am. & Eng. R. Cas. 584, 33 Kan. 416. FOLLOWED IN *Luce v. Chicago, St. P., M. & O. R. Co.*, 67 Iowa 75; *Matson v. Chicago, R. I. & P. R. Co.*, 68 Iowa 22. QUOTED IN *Union Pac. R. Co. v. Harris*, 21 Am. & Eng. R. Cas. 584, 33 Kan. 416.

Nor to a sweeper engaged in a round house who was injured by falling in a hole negligently left open by another employé. *Manning v. Burlington, C. R. & N. R. Co.*, 64 Iowa 240, 20 N. W. Rep. 169.

Nor to a car repairer, whose duty it was to repair cars on the track, but who had nothing to do with cars in motion, except to ride on passenger or freight trains to and from the places where his services were required. *Foley v. Chicago, R. I. & P. R. Co.*, 64 Iowa 644, 21 N. W. Rep. 124.—DISTINGUISHING *Deppe v. Chicago, R. I. & P. R. Co.*, 36 Iowa 52.—FOLLOWED IN *Luce v.*

Chicago, St. P., M. & O. R. Co., 67 Iowa 75; *Matson v. Chicago, R. I. & P. R. Co.*, 68 Iowa 22.

Nor to a member of a construction gang injured by the negligence of a fellow-servant in allowing a heavy stone to fall upon his hand. *Matson v. Chicago, R. I. & P. R. Co.*, 68 Iowa 22, 25 N. W. Rep. 911.—FOLLOWING *Malone v. Burlington, C. R. & N. R. Co.*, 65 Iowa 417, 21 N. W. Rep. 756; *Foley v. Chicago, R. I. & P. R. Co.*, 64 Iowa 644, 21 N. W. Rep. 124.

Nor to one whose sole duty is to elevate coal to a platform convenient for delivering it to the tenders of engines. *Stroble v. Chicago, M. & St. P. R. Co.*, 28 Am. & Eng. R. Cas. 510, 70 Iowa 555, 31 N. W. Rep. 63.

178. Kansas—Act of 1874, ch. 93, section 1.—Negligence is not to be presumed, but must be proven; and where the evidence in an action against a railroad company, under the statute of February 26, 1874, shows that all the co-employés exercised toward the injured employé that degree of care and diligence which prudent persons would ordinarily exercise under like circumstances, no liability is established against the company. *Missouri Pac. R. Co. v. Haley*, 5 Am. & Eng. R. Cas. 594, 25 Kan. 35.

Notwithstanding the statute now provides that every railroad company shall be liable for all damages done to any employé in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employés, the knowledge or notice, act or omission, for which the company is responsible must be that of some agent or employé having authority or duty in the premises. *Solomon R. Co. v. Jones*, 15 Am. & Eng. R. Cas. 201, 30 Kan. 601, 2 Pac. Rep. 557.

The act of 1874, ch. 93 (Comp. Laws of 1879, ch. 84, § 4914), making railroad companies liable for injuries to one employé through the negligence of a co-employé, does not change the rule of contributory negligence. *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 472, 8 Pac. Rep. 780.

179. — applies to what servants, generally.—A person employed upon a construction train to carry water for the men working with the train and to gather up tools and put them in the caboose or tool car is within the statute making railroad companies liable to their employés for injuries resulting from the negligence of

co-employés. *Missouri Pac. R. Co. v. Haley*, 5 Am. & Eng. R. Cas. 594, 25 Kan. 35.—DISTINGUISHED IN *Beeson v. Busenbark*, 44 Kan. 669.

K. was in the service of a railroad company, engaged on the track and in the yard of the company. He assisted in loading a car of iron rails which were to be taken to other portions of the company's road. The rails to be loaded were in a pile ten feet high and ten feet from the track. The manner of loading was to place rails as skids, one end on the top of the rail pile, and the other on the middle of the track below. Two employés of the company who were on top of the pile placed the rails on the skids and allowed them to slide down, until ten of them were so lowered. They would then wait until eight men who were on the ground would lift the rails and shove them into a car which was standing on the track near by, and also until these men had stepped aside out of danger, when those on top would lower a like number of rails, which would in turn be placed in the car by the eight men on the ground. K. was one of the men engaged in placing the rails in the car, and after lifting the last rail of a certain lot, but before he had stepped aside, and without waiting the usual time to do so, the employés on top lowered another rail, which struck him with great force, crushing his leg, and from the effects of which he died. There was nothing to prevent those on top from seeing that K. had not reached a place of safety. *Held*, that he had a right to expect that the rail would not be thrown down until he was safely out of the way, or at least until he had sufficient time to get away after warning had been given; and that the employés on top of the rail pile were guilty of culpable negligence in lowering the rail as they did. *Atchison, T. & S. F. R. Co. v. Koehler*, 31 Am. & Eng. R. Cas. 312, 37 Kan. 463, 15 Pac. Rep. 567.—FOLLOWING *Union Pac. R. Co. v. Harris*, 33 Kan. 416.

The character of the employment and service of K. at the time of the injury places him within the provisions of the act which makes railroad companies liable to their employés for damages resulting from the negligent acts of other employés (Laws 1874, ch. 93), which act is held to be valid. *Atchison, T. & S. F. R. Co. v. Koehler*, 31 Am. & Eng. R. Cas. 312, 37 Kan. 463, 15 Pac. Rep. 567.

180. — section men.—Under the act of February 26, 1874, making all railroads of Kansas liable "for all damages done to an employé of a company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employés," one section hand who is injured while riding on a hand-car, through the negligence of those in charge of another hand-car carelessly running into him, may recover from the company. *Union Trust Co. v. Thomason*, 5 Am. & Eng. R. Cas. 589, 25 Kan. 1. — APPROVED IN *Hornsby v. Eddy*, 56 Fed. Rep. 461.

And so may a section man, employed to repair the roadbed and to take up old rails out of its track and put in new ones, who is injured, without his fault, by the negligence of his co-employés in permitting an iron rail, intended to be placed on the track, to fall upon him while he is assisting in removing the rail from a push-car on the track. *Union Pac. R. Co. v. Harris*, 21 Am. & Eng. R. Cas. 584, 33 Kan. 416, 6 Pac. Rep. 571. — DISTINGUISHING *Smith v. Burlington, C. R. & N. R. Co.*, 59 Iowa 73; *Malone v. Burlington, C. R. & N. R. Co.*, 61 Iowa 326. NOT FOLLOWING *Deppe v. Chicago, R. I. & P. R. Co.*, 36 Iowa 52. QUOTING *Malone v. Burlington, C. R. & N. R. Co.*, 65 Iowa 417. — FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Koehler*, 31 Am. & Eng. R. Cas. 312, 37 Kan. 463, 15 Pac. Rep. 567. REVIEWED IN *Lavallee v. St. Paul, M. & M. R. Co.*, 38 Am. & Eng. R. Cas. 115, 40 Minn. 249, 41 N. W. Rep. 974.

And a section man injured while unloading ties from a car, for the purpose of repairing the company's track. *Atchison, T. & S. F. R. Co. v. Brassfield*, 51 Kan. 167, 32 Pac. Rep. 814.

181. — trainmen.—Under the act of 1874, ch. 93, a fireman in charge of a switch engine, who is injured by the engineer of another switch engine negligently running his engine so as to collide with the engine on which the fireman is employed, may recover from the company. *Missouri Pac. R. Co. v. Mackey*, 22 Am. & Eng. R. Cas. 306, 33 Kan. 298, 6 Pac. Rep. 291.

It was the duty of the plaintiff, a brakeman, when his train was backing out of the station, to take a position on the platform of the car nearest the main line, and, when he neared the switch, to step off and adjust the switch and connect the main line. While performing this duty he received in-

juries in the following manner: The ground on the west side of the switch on the morning of the injury was level and hard, and had been in that condition for a long time. He passed the station, going east, at 8.21 in the morning, and returned to the station after dark, at 6.37 in the evening. After his trip down the road, and a short time before his return, the railroad company caused several car-loads of cinders to be unloaded in and about the switch for ballast. They were thrown up in heaps and piles on either side of the track and not properly smoothed down, and were so thrown that the ground on either side of the track was raised to the height of several inches, and left soft and spongy. According to his usual practice the plaintiff, without any notice or knowledge of the changed and unsafe condition of the track or roadbed, stepped from the moving train for the purpose of turning the switch, when his feet struck the cinders in such a way as to cause him to lose his balance and be thrown under the train, thereby crushing and mangling his left foot to such an extent that amputation was necessary. Held, that in the absence of contributory negligence on his part, the plaintiff was entitled to recover against the railroad company. *Kansas City, Ft. S. & G. R. Co. v. Kier*, 38 Am. & Eng. R. Cas. 119, 41 Kan. 661, 671, 21 Pac. Rep. 770. — NOT FOLLOWING *Hathaway v. East Tenn., V. & G. R. Co.*, 29 Fed. Rep. 489.

182. — not affected by receiver-ship.—The right of a railroad employé to recover under the Kansas statute for an injury received through the negligence of a co-employé is not affected by the fact that the railroad is, at the time, in the hands of a receiver and operated by him. *Hornsby v. Eddy*, 56 Fed. Rep. 461. — APPROVING *Union Trust Co. v. Thomason*, 25 Kan. 1. DISTINGUISHING *Beeson v. Busenbark*, 44 Kan. 669, 25 Pac. Rep. 48.

183. Kentucky.—The rule that where two servants are in the same field of labor and in the same grade of employment, the one not superior or subordinate to the other, neither can recover of his master for an injury caused by the neglect of his co-laborer, applies as well to an action under the statute for wilful neglect as to a common law action for neglect. *Casey v. Louisville & N. R. Co.*, 84 Ky. 79. — QUOTING *Louisville, C. & L. R. Co. v. Cavens*, 9 Bush (Ky.) 565.

Before a brakeman can recover for a personal injury, under the statute, caused by the negligent manner of the moving of a train, it must appear that the persons operating the train were his superiors in authority and control, and that they were guilty of gross negligence. *Greer v. Louisville & N. R. Co.*, 94 Ky. 169, 21 S. W. Rep. 649.

Where a brakeman is injured while going between cars to uncouple them, through the gross negligence of the conductor and others in charge of the train, the company will not be relieved of liability even though the jury believe from the evidence that the risk and danger of going between the cars were apparent to the brakeman. *Greer v. Louisville & N. R. Co.*, 94 Ky. 169, 21 S. W. Rep. 649.

It is wilful negligence in a conductor who knows that a car is loaded with projecting lumber, so as to be dangerous to one attempting to couple it to a moving train, to notify a brakeman who is ignorant of the danger, to make the coupling, without notifying him of the danger, saying that he thought the brakeman would take care of himself. *Louisville & N. R. Co. v. Robinson*, (Ky.) 16 S. W. Rep. 707.

184. Maine.—The common law rule that an action for damages for an injury occasioned by the carelessness of a fellow-servant in the same service cannot be maintained unless there be some contributing fault on the part of the master, is not changed in its application to railroad corporations by the provision of Rev. St. 1841, ch. 81, § 21. *Carle v. Bangor & P. C. & R. Co.*, 43 Me. 269.

185. Massachusetts.—In an action on the Pub. St. ch. 112, § 212, as amended by the St. of 1883, ch. 243, for causing the death of an employé through the negligent employment of an incompetent engineer, there was no evidence of the engineer's incompetency aside from the single act of negligence causing the death, and it did not appear that his conduct and appearance as a witness before the jury were such as to justify such an inference. *Held*, that the company could not be said to have been negligent in employing the engineer in that capacity, and that a verdict was properly directed for the defendant. *Peaslee v. Fitchburg R. Co.*, 152 Mass. 155, 25 N. E.

* Massachusetts act changing common law rule as to fellow-servants, construed, see note, 43 AM. & ENG. R. CAS. 373.

Rep. 71.—**EXPLAINING Keith v. New Haven & N. Co.**, 140 Mass. 175.

Since the passage of St. of 1887, ch. 270, § 2, as well as before, an action cannot be maintained, under the Pub. St. ch. 112, § 212, as amended by the St. of 1883, ch. 43, for the death of an employé caused by the negligence of a fellow-servant. *Dacey v. Old Colony R. Co.*, 153 Mass. 112, 26 N. E. Rep. 437.

The provisions of the St. of 1887, ch. 270, § 1, cl. 3, which provide for recovery in case of personal injury caused to an employé "by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine, or train upon a railroad," include, in the case of a railroad corporation, every person, and must be deemed to mean any person in the service of the company who has charge or control for the time being of the train by which the employé was injured. *Steffe v. Old Colony R. Co.*, 156 Mass. 262, 30 N. E. Rep. 1137.

If the negligence of a superintendent is relied on in an action under the St. of 1887, ch. 270, for personal injuries sustained by a workman while in the defendant's employ, such negligence must be shown to have occurred, not only during the superintendence, but substantially in the exercise of it. *Fitzgerald v. Boston & A. R. Co.*, 156 Mass. 293, 31 N. E. Rep. 7.

A track repairer who is required to be stooping while about his work, and cannot observe the approach of trains, has a right to depend upon his foreman to warn him of danger; and if he fails to do so, and the laborer is injured by an approaching train, he may maintain an action against the company, under the Employers' Liability Act of 1887, ch. 270. *Davis v. New York, N. H. & H. R. Co.*, 159 Mass. 532, 34 N. E. Rep. 1070.—**DISTINGUISHING** *Tyler v. Old Colony R. Co.*, 157 Mass. 336.

186. Minnesota.—**Laws 1887, ch. 13.**—Under Gen. Laws 1887, ch. 13, a railroad company is liable for injuries to an employé caused by negligence of a co-employé. *Northern Pac. R. Co. v. Behling*, 57 Fed. Rep. 1037.

A company operating a line composed of

* Construction of Minnesota statute making railroad companies liable to an employé for injuries caused by the negligence of a co-employé, see notes, 44 AM. & ENG. R. CAS. 590; 48 *Id.* 366.

the lines or tracks of several different companies comes within the provisions of ch. 13, laws 1887; but work done in constructing a yard with tracks in it, to be used in connection with and as a part of a line of railroad already open to the public, does not come within the proviso to that act. *Moran v. Eastern R. Co.*, 48 Minn. 46, 50 N. W. Rep. 930. *Schneider v. Chicago, B. & N. R. Co.*, 42 Minn. 68, 43 N. W. Rep. 783.

187. — applies to what servants, generally.—Chapter 13, laws 1887, applies only to employés of railway corporations exposed to the peculiar hazards connected with the use and operation of a road. *Johnson v. St. Paul & D. R. Co.*, 43 Minn. 222, 45 N. W. Rep. 156.—FOLLOWING *Lavallee v. St. Paul, M. & M. R. Co.*, 40 Minn. 249, 41 N. W. Rep. 974.—*Lavallee v. St. Paul, M. & M. R. Co.*, 38 Am. & Eng. R. Cas. 115, 40 Minn. 249, 41 N. W. Rep. 974.—QUOTING *Deppe v. Chicago, R. I. & P. R. Co.*, 36 Iowa 52; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205. REVIEWING *Thompson v. Central R. & B. Co.*, 54 Ga. 509; *Ditberner v. Chicago, M. & St. P. R. Co.*, 47 Wis. 138; *Missouri Pac. R. Co. v. Haley*, 25 Kan. 35; *Union Pac. R. Co. v. Harris*, 33 Kan. 416; *Herrick v. Minneapolis & St. L. R. Co.*, 31 Minn. 11.—FOLLOWED IN *Johnson v. St. Paul & D. R. Co.*, 43 Minn. 222.

188. — section men.—St. of 1887 applies to the alleged negligence of a locomotive engineer in operating his engine, resulting in injury to a section hand at work on the road. *Smith v. St. Paul & D. R. Co.*, 44 Minn. 17, 46 N. W. Rep. 149.

A railroad section hand whose duties require the use of a hand-car, and who is injured through the negligence of a fellow-servant in operating it, may recover from the company. *Steffenson v. Chicago, M. & St. P. R. Co.*, 45 Minn. 355, 47 N. W. Rep. 1068; further appeal 48 Minn. 285, 51 N. W. Rep. 610.

A crew of section men, of which plaintiff was one, was engaged in loading railroad iron from the ground upon a flat car, when some of the crew negligently let one of the iron rails fall upon plaintiff's arm. *Held*, that the injury was not the result of any danger peculiar to, or directly connected with, the use and operation of the railroad, and hence not within the provisions of laws 1887, ch. 13, making railroad companies liable to an employé for injuries caused by the negligence of a co-employé. *Pearson v.*

Chicago, M. & St. P. R. Co., 48 Am. & Eng. R. Cas. 364, 47 Minn. 9, 49 N. W. Rep. 302.

189. Mississippi—Code of 1857, article 43.—Code 1857, art. 43, does not embrace, nor was it so intended, the agents and employés of a railroad company, but they stand upon their common law rights. *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 Miss. 258.

190. — constitution 1890, section 193.—A fireman on an engine and a telegraph operator at one of the company's stations are engaged in different departments of labor, or "about a different piece of work," within the meaning of Const. 1890, § 193, and the company is liable for an injury to or death of the fireman by a collision resulting from the negligence of the operator. *Illinois C. R. Co. v. Hunter*, 70 Miss. 471, 12 So. Rep. 482.

A company is not liable for injury to a brakeman resulting from negligence of the engineer, who, after signaling for brakes, caused a sudden start of the train while the brakeman was applying the brakes in obedience to the signal. While thus engaged in their routine duties in the operation of the train, the engineer is not "the superior agent or officer," or "person having the right to control or direct the services" of the brakeman, within the meaning of Const. 1890, § 193, regulating the liability of railroad companies for injuries to employés. *Evans v. Louisville, N. O. & T. R. Co.*, 70 Miss. 527, 12 So. Rep. 581.

191. Missouri.—A section man was walking along the track of the master's railway when a train was derailed and a car fell upon him and killed him. *Held*, that he was not a fellow-servant of the engineer of the train, and the master's liability, if any, came under the first division of section 4425. *McKenna v. Missouri Pac. R. Co.*, 54 Mo. App. 161.

192. Montana.—A conductor on one train is the "superior" of a fireman on another train, within the meaning of Comp. St. § 697, providing that "the liability of the corporation to an employé acting under the orders of his superior shall be the same in the case of injury sustained by default or wrongful act of his superior, or to an employé not appointed or controlled by him, as if such servant or employé were a passenger," so as to make the company liable for the negligence of the superior. *Rags-*

dale v. Northern Pac. R. Co., 42 Fed. Rep. 383.—REVIEWING Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. Rep. 184.

103. Pennsylvania.—Under the act of April 4, 1868, P. L. p. 58, if the place of an accident where a person is injured is, clearly and for general purposes, the "roads, works, depots or premises" of the company, the person injured is a fellow-servant of the employés of the company within the meaning of the act if he is lawfully engaged or employed on or about them, and is not a passenger. *Spisak v. Baltimore & O. R. Co.*, 152 Pa. St. 281, 25 Atl. Rep. 497.

If the accident occurs in a place which is not exclusively, but only within a limited and statutory sense, the premises of the company, and the person injured is engaged in work which it is ordinarily the duty of railroad employés to do, he is a *quasi* employé within the meaning of the act. But if the work has no relation to railroad work as such, and is connected with the railroad only by irrelevant and immaterial circumstances of locality, the case is not within the statute. *Spisak v. Baltimore & O. R. Co.*, 152 Pa. St. 281, 25 Atl. Rep. 497.

Plaintiff was brakeman of a locomotive belonging to a steel company which owned two spur tracks connecting its works with the defendant's lines. After the railroad company had delivered a car, and after the car had been unloaded, plaintiff, at the direction of the yard boss of the steel company, moved the car from the receiving track to the scales, to take its light weight. While doing so he was injured, through the negligence of one of defendant's employés. *Held*, that the intermediate unloading, shifting, and weighing of the car was the work of the steel company on its own land; that the connection of the railroad company with the place of the accident, by reason of its joint use of the tracks for other purposes, was immaterial; and that plaintiff was neither an employé in fact, nor doing work which made him a *quasi* employé under the statute. *Spisak v. Baltimore & O. R. Co.*, 152 Pa. St. 281, 25 Atl. Rep. 497.—REVIEWING *Richter v. Pennsylvania Co.*, 104 Pa. St. 511.—QUOTED IN *Vannatta v. Central R. Co.*, 154 Pa. St. 262.

Plaintiff's employers were owners of a private side track running into their yard from the tracks of the defendant. It was

part of plaintiff's duty to separate the cars of the railroad company so that a path across the track might be used by other employés. While engaged in uncoupling the cars upon the track for the purpose of separating them, plaintiff was injured through an engine belonging to the defendant being backed against the cars. *Held*, that plaintiff could not recover, being within the provisions of the act of April 4, 1868, § 1, which provides that whenever any person shall be injured "while lawfully engaged or employed" on or about the road, cars, or premises of a railroad company of which he is not an employé, the right of action in all such cases against the company shall be such as would exist if such person were an employé. *Stone v. Pennsylvania R. Co.*, 41 Am. & Eng. R. Cas. 522, 132 Pa. St. 206, 19 Atl. Rep. 67.—DISTINGUISHING *Richter v. Pennsylvania Co.*, 104 Pa. St. 511. FOLLOWING *Mulherrin v. Delaware, L. & W. R. Co.*, 81 Pa. St. 366; *Cummings v. Pittsburgh, C. & St. L. R. Co.*, 92 Pa. St. 82; *Baltimore & O. R. Co. v. Colvin*, 118 Pa. St. 230.—DISTINGUISHED IN *Christman v. Philadelphia & R. R. Co.*, 141 Pa. St. 604.

104. Wisconsin.—St. 1875, ch. 173, which makes each railroad company in the state liable for damages sustained by any agent or employé thereof while in the line of his duty as such, caused by the negligence of any other agent or employé of such company in respect to his duty as such, where the negligence of the person so injured does not materially contribute to the result, is valid, although it does not impose a similar liability upon other corporations or persons. *Ditberner v. Chicago, M. & St. P. R. Co.*, 47 Wis. 138, 2 N. W. Rep. 69.—REVIEWING *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.—REVIEWED IN *Lavallee v. St. Paul, M. & M. R. Co.*, 38 Am. & Eng. R. Cas. 115, 40 Minn. 249, 41 N. W. Rep. 974.

A railroad company is liable for injuries suffered in Wisconsin by one of its agents or servants from negligence of any other agent or servant thereof, without contributory negligence on his part (Rev. St. § 1816), and in case of his death from such injury the action may be brought by his personal representative. *Gumz v. Chicago, St. P. & M. R. Co.*, 5 Am. & Eng. R. Cas. 583, 52 Wis. 672, 10 N. W. Rep. 11.

2. In England.

195. Employers' Liability Act of 1880.*—One employed by a railway company as a capstanman, who propels trucks against another employé engaged in similar work, by the application of hydraulic power, is a person in control of a train upon a railway within the meaning of the Employers' Liability Act of 1880, § 1. *Cox v. Great Western R. Co.*, 6 Am. & Eng. R. Cas. 485, L. R. 9 G. B. D. 106.

A railroad workman who was employed to clean, oil, and adjust the points and wires of the company's locking apparatus, but who is subject to the orders of an inspector, is not a person in "charge or control," within the meaning of the Employers' Liability Act of 1880, § 1, which enables a workman to recover from his employer for an injury inflicted upon him "by reason of the negligence of any person in the service of the employer, who has charge or control of any signal, points, locomotive engine, or train upon a railway." *Gibbs v. Great Western R. Co.*, 15 Am. & Eng. R. Cas. 336, L. R. 12 Q. B. D. 208.

VI. WHO ARE AND WHO ARE NOT FELLOW-SERVANTS; WHO ARE AND WHO ARE NOT VICE-PRINCIPALS.

1. In General.

a. Who are Fellow-servants,†

196. Generally.—A fellow-servant is one employed about the same work with the servant injured, and whose negligence caused the injury to the servant complaining. *Krogg v. Atlanta & W. P. R. Co.*, 77 Ga. 202, 4 Am. St. Rep. 79.

Laborers are fellow-servants where they have the same employer, are engaged in the accomplishment of the same general object,

* Fellow-servants. English Employers' Liability Act 1880, see note, 15 AM. & ENG. R. CAS. 339.

† Who are fellow-servants, see notes, 8 AM. & ENG. R. CAS. 167; 2 *Id.* 103; 28 *Id.* 549; 48 *Id.* 293; 36 AM. DEC. 287; 67 *Id.* 588; 53 AM. REP. 45; 1 AM. ST. REP. 31; 4 L. R. A. 795; 7 *Id.* 500; 18 *Id.* 792. See also 33 AM. & ENG. R. CAS. 264, *abstr.*

Who are fellow-servants and who vice-principals, see note, 16 AM. REP. 495.

See monographic note on the criterion of fellow-servants, 25 AM. & ENG. R. CAS. 513.

Test of co-service, see notes, 44 AM. & ENG. R. CAS. 606; 54 *Id.* 364.

are acting in one common service, and derive their compensation from the same source. *Sullivan v. New York, N. H. & H. R. Co.*, 62 Conn. 209, 25 Atl. Rep. 711.

Persons contracting to perform work for another, none of whom are superior or subordinate one to another, are deemed to be fellow-servants. *Louisville C. & L. R. Co. v. Cavens*, 9 Bush (Ky.) 559.

When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as a servant of the man to whom he is lent, although he remains the general servant of the person who lent him; and if the servant receives injuries in such employment from the negligence of a servant of the person to whom he is lent, he cannot recover therefor. *Hasty v. Sears*, 157 Mass. 123, 31 N. E. Rep. 759.—QUOTING *Rourke v. White Moss Colliery Co.*, 2 C. P. D. 205.

If a party injured was lawfully in the building where the injury was received, in the course of his employment, he was a fellow-servant with those whose negligence produced the injury. *Collyer v. Pennsylvania R. Co.*, 49 N. J. L. 59, 6 Atl. Rep. 437.

Under the Alabama law, a car inspector, a brake repairer, and a brakeman are fellow-servants, and one cannot recover against the company for injuries resulting from the negligence of the others. *Nashville, C. & St. L. R. Co. v. Foster*, 11 Am. & Eng. R. Cas. 180, 10 Lea (Tenn.) 351.—QUOTING *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672.

Servants of the same master, to be fellow-servants, must be such as are directly or indirectly operating with each other in a particular line of employment. *Webb v. Den. & R. G. W. R. Co.*, 7 Utah 363, 26 Pac. Rep. 981.

The fellow-servant or the co-employé for whose negligence the company is not liable, is one employed in the same shop or place with, and having no authority over, the one injured, and who is no more charged with the discretionary exercise of powers and duties resting on the company than is the one injured. *Moon v. Richmond & A. R. Co.*, 17 Am. & Eng. R. Cas. 531, 78 Va. 745.

One who is charged with keeping machinery in a safe condition is not a fellow-servant with one who operates it, in the sense which would relieve the company from liability when the latter is injured by the negligent performance of his duties by the former. *Houston & T. C. R. Co. v.*

Marcellos, 12 Am. & Eng. R. Cas. 231, 59 Tax. 334.

Defendant company, which was organized as a common carrier, rented a room to a certain person, in which liquors and cigars were to be sold, charging a stipulated price therefor, and for his board and the privilege of riding to and from the place where he boarded. *Held*, that he was not an employé, so as to exempt the company from liability for injuries received through the negligence of other employés. *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71.

197. Depends upon the circumstances of each case.—Whether a servant is a fellow-servant or not depends upon the facts and circumstances of the particular case. *McBride v. Indianapolis, F. & S. Co.*, 5 Ind. App. 482, 32 N. E. Rep. 579. *Pittsburgh, Ft. W. & C. R. Co. v. Lewis*, 33 Ohio St. 196. *Wellman v. Oregon S. L. & U. N. R. Co.*, 21 Oreg. 530, 28 Pac. Rep. 625.

198. Depends on nature of service, not on rank of servants.—It is not the rank of an employé or his authority over other employés, but the nature of the service he performs which determines whether he is a vice-principal or a fellow-servant. *Lindvall v. Woods*, 39 Am. & Eng. R. Cas. 339, 41 Minn. 212, 4 L. R. A. 793, 42 N. W. Rep. 1020. *Mobile & M. R. Co. v. Smith*, 59 Ala. 245.—FOLLOWED IN *Bull v. Mobile & M. R. Co.*, 67 Ala. 206. *LIMITED IN Georgia Pac. R. Co. v. Davis*, 92 Ala. 300.—*Chicago & A. R. Co. v. May*, 15 Am. & Eng. R. Cas. 320, 108 Ill. 288. *Hofnagle v. New York C. & H. R. R. Co.*, 55 N. Y. 608; *reversing 1 T. & C. 346*. *Krueger v. Louisville, N. A. & C. R. Co.*, 31 Am. & Eng. R. Cas. 329, 111 Ind. 51, 9 West. Rep. 247, 11 N. E. Rep. 957. *Hard v. Vermont & C. R. Co.*, 32 Vt. 473. *Daves v. Southern Pac. Co.*, 98 Cal. 19, 32 Pac. Rep. 708. *East Tenn., V. & G. R. Co. v. Rush*, 15 Lea (Tenn.) 145. *Cincinnati, H. & D. R. Co. v. McMullen*, 38 Am. & Eng. R. Cas. 165, 117 Ind. 439, 20 N. E. Rep. 287. *Justice v. Pennsylvania Co.*, 53 Am. & Eng. R. Cas. 604, 130 Ind. 321, 30 N. E. Rep. 303. *Ell v. Northern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 318, 1 N. Dak. 336.—APPLYING *St. Louis, A. & T. R. Co. v. Welch*, 72 Tex. 298, 10 S. W. Rep. 529; *Elliot v. Chicago, M. & St. P. R. Co.*, 5 Dak. 523, 41 N. W. Rep. 758; *Fagundes v. Central Pac. R. Co.*, 79 Cal. 97, 21 Pac. Rep. 437; *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *Van Wickle* 5 D. R. D.—46.

v. Manhattan R. Co., 32 Fed. Rep. 278; *McMaster v. Illinois C. R. Co.*, 65 Miss. 264, 4 So. Rep. 59; *Naylor v. New York C. & H. R. R. Co.*, 33 Fed. Rep. 801; *Van Avery v. Union Pac. R. Co.*, 35 Fed. Rep. 40; *Connelly v. Minneapolis Eastern R. Co.*, 38 Minn. 80, 35 N. W. Rep. 582; *Howard v. Denver & R. G. R. Co.*, 26 Fed. Rep. 837; *Houston & T. C. R. Co. v. Rider*, 62 Tex. 267; *Gormley v. Ohio & M. R. Co.*, 72 Ind. 31; *Collins v. St. Paul & S. C. R. Co.*, 30 Minn. 31, 14 N. W. Rep. 60; *Clifford v. Old Colony R. Co.*, 141 Mass. 564, 6 N. E. Rep. 751; *Keyes v. Pennsylvania Co.*, (Pa.) 3 Atl. Rep. 15; *Whaalan v. Mad River & L. E. R. Co.*, 8 Ohio St. 249.

If an act done or omitted is in the execution of the proper details of the principal work which has been by the master directed to be done, such execution of proper details is the act of the servant, no matter how high the rank of the subordinate who performs the labor. *Shiner v. Russell*, 6 N. Y. S. R. 78.

The relation of master and servant is not determined by gradation of rank or superiority, but by the nature of the act causing the injury. If this act be one which devolves upon the master, the delegation of it to a servant does not discharge the master from liability for its negligent performance; but if the act be one within the duty of a servant, its negligent performance is the negligence of a fellow-servant, and the master is not liable. *Geoghegan v. Atlas Steamship Co.*, 51 N. Y. S. R. 868, 22 N. Y. Supp. 749.

199. — for servants may be of different grades.—The law recognizes no distinction growing out of grades of employment of the respective servants of the same employer; and a foreman, conductor, or other superior servant, who is not clothed with the authority of vice-principal and in whose favor the principal has not abdicated his authority, is a fellow-servant of an inferior employé, under the law applicable to the liability of a master for the negligence of his servants. *Congrave v. Southern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 337, 88 Cal. 360, 26 Pac. Rep. 175.—CRITICISING *Brown v. Sennett*, 68 Cal. 225, 58 Am. Rep. 8; *McKune v. California Southern R. Co.*, 66 Cal. 302. *DISTINGUISHING Beeson v. Green Mountain Gold Min. Co.*, 57 Cal. 20; *Sanborn v. Madera F. & T. Co.*, 70 Cal. 261.

All those who are subject to the same

general control and are co-operating in the prosecution or accomplishment of the same general end and purpose, are, while engaged in the common pursuit, without regard to their relative rank, co-employees. *Cincinnati, H. & D. R. Co. v. McMullen*, 38 Am. & Eng. R. Cas. 165, 117 Ind. 439, 20 N. E. Rep. 287. *Indiana Car Co. v. Parker*, 100 Ind. 181. — CRITICISING *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 31 Alb. L. J. 8. DISTINGUISHING *Rogers v. Overton*, 87 Ind. 410; *Indiana Mfg. Co. v. Millican*, 87 Ind. 87. RECONCILING *Boyce v. Fitzpatrick*, 80 Ind. 526; *Mitchell v. Robinson*, 80 Ind. 281. REVIEWING *Hard v. Vermont & C. R. Co.*, 32 Vt. 473; *Brown v. Winona & St. P. R. Co.*, 27 Minn. 162, 38 Am. Rep. 285; *Peterson v. Whitebreast C. & M. Co.*, 50 Iowa 673, 32 Am. Rep. 143; *Blake v. Maine C. R. Co.*, 70 Me. 60, 35 Am. Rep. 297; *McAndrews v. Burns*, 39 N. J. L. 117. — *Higgins v. Missouri Pac. R. Co.*, 104 Mo. 413, 16 S. W. Rep. 409. *Kirk v. Atlanta & C. A. L. R. Co.*, 25 Am. & Eng. R. Cas. 507, 94 N. Car. 625, 55 Am. Rep. 621. *East Tenn., V. & G. R. Co. v. Rush*, 15 Lea (Tenn.) 145.

A superior servant is not a vice-principal when he orders a subordinate to perform a service which results in an injury occasioned merely from an ordinary risk of the latter's employment. *Davis v. Detroit & M. R. Co.*, 20 Mich. 105.

200. — contrary rule in Tennessee.—Two servants are not to be considered as fellow-servants when one is subordinate to the other. *Washburn v. Nashville & C. R. Co.*, 3 Head (Tenn.) 638.

One who is a superior servant to another, even though in the same department, is not his fellow-servant. *East Tenn., V. & G. R. Co. v. De Armond*, 86 Tenn. 73, 6 Am. St. Rep. 816, 5 S. W. Rep. 600.

201. Distinguished from vice-principals.—Where a servant occupies the position both of vice-principal and fellow-servant to other servants in the employ of the same master, while performing duty merely as a fellow-servant he must not be considered in any way a vice-principal so as to make the company responsible for his negligence. *Chicago & A. R. Co. v. May*, 15 Am. & Eng. R. Cas. 320, 108 Ill. 288. *Hofnagle v. New York C. & H. R. R. Co.*, 55 N. Y. 608; reversing 1 T. & C. 346. *Fitzgerald v. Honkomp*, 44 Ill. App. 365. *Krueger v. Louisville, N. A. & C.*

R. Co., 31 Am. & Eng. R. Cas. 329, 111 Ind. 51, 9 West. Rep. 247, 11 N. E. Rep. 957. *Ell v. Northern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 318, 1 N. Dak. 336. *Hard v. Vermont & C. R. Co.*, 32 Vt. 473. *Daves v. Southern Pac. Co.*, 98 Cal. 19, 32 Pac. Rep. 708.

If the offending servant is in the discharge of a duty which he owes to the master he is a fellow-servant with others engaged in the same common business. *Justice v. Pennsylvania Co.*, 53 Am. & Eng. R. Cas. 604, 130 Ind. 321, 30 N. E. Rep. 303.

202. In common service of the same company.—Fellow-servants within the rule are persons engaged in the same common service under the same general control. *Gravelle v. Minneapolis & St. L. R. Co.*, 3 McCrary (U. S.) 352, 10 Fed. Rep. 711. *Totten v. Pennsylvania R. Co.*, 11 Fed. Rep. 564. *Chicago & N. W. R. Co. v. Scheuring*, 4 Ill. App. 533. *Kranz v. White*, 8 Ill. App. 583. *Chicago & E. I. R. Co. v. Hagar*, 11 Ill. App. 498. *Chicago, B. & Q. R. Co. v. Stafford*, 16 Ill. App. 84. *Louisville & N. R. Co. v. Collins*, 2 Durv. (Ky.) 114. *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 Miss. 258. — FOLLOWED IN *McMaster v. Illinois C. R. Co.*, 41 Am. & Eng. R. Cas. 486, 65 Miss. 264, 7 Am. St. Rep. 653, 4 So. Rep. 59; *Louisville, N. O. & T. R. Co. v. Petty*, 41 Am. & Eng. R. Cas. 444, 67 Miss. 255, 7 So. Rep. 351; *Lagrone v. Mobile & O. R. Co.*, 67 Miss. 592, 7 So. Rep. 432. — *Louisville, N. O. & T. R. Co. v. Conroy*, 63 Miss. 562. *Foster v. Missouri Pac. R. Co.*, 115 Mo. 165, 21 S. W. Rep. 916. *Coon v. Syracuse & U. R. Co.*, 6 Barb. (N. Y.) 231. *Donnelly v. Brooklyn City R. Co.*, 34 Am. & Eng. R. Cas. 103, 109 N. Y. 16, 15 N. E. Rep. 733, 14 N. Y. S. R. 29, 11 Cent. Rep. 875; reversing 39 Hun 657, mem. *Warner v. Erie R. Co.*, 39 N. Y. 468; reversing 49 Barb. 558. *Loughlin v. State*, 105 N. Y. 159, 11 N. E. Rep. 371. *Dobbin v. Richmond & D. R. Co.*, 81 N. Car. 446. *Ponton v. Wilmington & W. R. Co.*, 6 Jones (N. Car.) 245. *Hardy v. Carolina C. R. Co.*, 76 N. Car. 5, 14 Am. Ry. Rep. 309. *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541. *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201. *Whaalan v. Mad River & L. E. R. Co.*, 8 Ohio St. 249. *Texas & P. R. Co. v. Scott*, 64 Tex. 549. *Waller v. South Eastern R. Co.*, 9 Jur. N. S. 501, 32 L. J. Ex. 205, 11 W. R. 731, 8 L. T. 325, 2 H. & C. 102. — FOLLOWED UNWILLINGLY IN

Morgan v. Vale of Neath R. Co., 33 L. J. Q. B. 260, 12 W. R. 1032.—*Swainson v. North Eastern R. Co.*, 47 L. J. Ex. 372, 38 L. T. 201, 26 W. R. 413, L. R. 3 Ex. D. 341; *reversing* 37 L. T. 102, 25 W. R. 676.

The servants must have been in the same line or department of employment. *Buckley v. Gould & C. Silver Min. Co.*, 8 Sawy. (U. S.) 394, 14 Fed. Rep. 833. *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197. *Indianapolis & St. L. R. Co. v. Johnson*, 102 Ind. 352, 26 N. E. Rep. 200. *Bogard v. Louisville, E. & St. L. R. Co.*, 100 Ind. 491. *Indiana Car Co. v. Parker*, 100 Ind. 181. *Sullivan v. Toledo, W. & W. R. Co.*, 58 Ind. 26. *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174. *Wilson v. Madison, etc.*, R. Co., 18 Ind. 226. *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366. *Madison & I. R. Co. v. Bacon*, 6 Ind. 205. *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49. *Hunn v. Michigan C. R. Co.*, 41 Am. & Eng. R. Cas. 452, 78 Mich. 513, 7 L. R. A. 500, 44 N. W. Rep. 502. *Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 318. *Mensch v. Pennsylvania R. Co.*, 53 Am. & Eng. R. Cas. 198, 150 Pa. St. 598, 25 Atl. Rep. 31, 30 W. N. C. 548. *Dwyer v. American Exp. Co.*, 53 Am. & Eng. R. Cas. 612, 82 Wis. 307, 52 N. W. Rep. 304. *Brabbits v. Chicago & N. W. R. Co.*, 38 Wis. 289. *Moseley v. Chamberlain*, 18 Wis. 700.

The servants, to be fellow-servants, must be engaged in a common work or in the same general undertaking. *Parrish v. Pensacola & A. R. Co.*, 28 Fla. 251, 9 So. Rep. 696.

The two servants must be co-employees directly operating with each other in a particular business, in the same line of employment, or their usual duties must bring them habitually together, so that they may exercise a mutual influence upon each other promotive of proper caution. *Chicago & N. W. R. Co. v. Snyder*, 28 Am. & Eng. R. Cas. 611, 117 Ill. 376, 7 N. E. Rep. 604; *reversing* 18 Ill. App. 640. *Chicago & A. R. Co. v. Hoyt*, 31 Am. & Eng. R. Cas. 309, 123 Ill. 369, 12 N. E. Rep. 225, 9 West. Rep. 785.

Fellow-workmen are in a common employment when each of them is employed in a service or work of such a kind that all the others, in the exercise of ordinary sagacity, ought to be able to foresee, when accepting employment, that it may probably expose them to the risk of injury in case he is negligent. *Lindvall v. Woods*,

44 Fed. Rep. 855. *McAndrews v. Burns*, 39 N. J. L. 117.—REVIEWED IN *Indiana Car Co. v. Parker*, 100 Ind. 181.

They are fellow-servants who, under the direction and management of the master himself, or of some servant placed by the latter over them, are engaged in the prosecution of the same common work without any dependence upon or relation to each other, except as co-laborers without rank. *Moore v. Wabash, St. L. & P. R. Co.*, 21 Am. & Eng. R. Cas. 509, 85 Mo. 588.—DISTINGUISHED IN *Murray v. St. Louis C. & W. R. Co.*, 41 Am. & Eng. R. Cas. 446, 98 Mo. 573. FOLLOWED IN *McDermott v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 528, 87 Mo. 285. QUOTED IN *Sherrin v. St. Joseph & St. L. R. Co.*, 103 Mo. 378.

Plaintiff was employed as a yard hand to do such work as directed by a foreman, and was directed to assist in the removal of the parts of an engine which had been taken to pieces by another employé, called a "stripper," and was injured through the negligence of such stripper in procuring a defective board for use. *Held*, that they were fellow-servants and the company was not liable. *Chicago & N. W. R. Co. v. Scheuring*, 4 Ill. App. 533.

Where one burning a brick kiln by means of crude oil burners allowed a party having a different burner to put in some of his burners for the purpose of testing which of the two sets of burners consumed the least oil to produce the same heat to burn the kiln, the latter will not be a fellow-servant with an employé of the owner of the kiln employed by him in the work. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. Rep. 285.

203. Need not be working together at the time.—It is not necessary, in order to bring a case within the rule that an employer is not responsible to those in his employ for injuries caused by the negligence or misconduct of a fellow-servant, that the servant who causes and the one who suffers the injury should be at the time working together in the same particular work; it is sufficient if they are in the employment of the same master, engaged in the same common enterprise, and both employed to perform duties tending to accomplish the same general purpose. *South Fla. R. Co. v. Weese*, 32 Fla. 212, 13 So. Rep. 436.—APPROVING *Wright v. New York C. R. Co.*, 25 N. Y. 562; *Texas & P. R. Co. v.*

Harrington, 62 Tex. 597; Holden v. Fitchburg R. Co., 129 Mass. 268; Kirk v. Atlanta & C. A. L. R. Co., 94 N. Car. 625; Foster v. Minnesota C. R. Co., 14 Minn. 360; New York, L. E. & W. R. Co. v. Bell, 112 Pa. St. 400; Slattery v. Toledo & W. R. Co., 23 Ind. 81; Gormley v. Ohio & M. R. Co., 72 Ind. 31. REVIEWING Parrish v. Pensacola & A. R. Co., 28 Fla. 251, 9 So. Rep. 696; Chicago & A. R. Co. v. Murphy, 53 Ill. 336; Richmond & D. R. Co. v. Norment, 84 Va. 167.

204. — nor engaged in the same particular work.—To constitute fellow-servants within the rule, employes need not be at the same time engaged in the same particular work, provided they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purpose; and this, though one injured may be inferior in grade and subject to the direction and control of a superior whose act has caused the injury. *Lewis v. Seifert*, 116 Pa. St. 628, 9 Cent. Rep. 751, 11 Atl. Rep. 514, 20 W. N. C. 145.—DISTINGUISHED IN *Spancake v. Philadelphia & R. R. Co.*, 148 Pa. St. 184; *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38. QUOTED IN *Northern Pac. R. Co. v. Charless*, 51 Am. & Eng. R. Cas. 198, 51 Fed. Rep. 562, 7 U. S. App. 359, 2 C. C. A. 380.—*New York, L. E. & W. R. Co. v. Bell*, 28 Am. & Eng. R. Cas. 338, 112 Pa. St. 400, 4 Atl. Rep. 50.—FOLLOWING *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432

205. Habitually consociated.—To constitute servants of the same master "fellow-servants," within the rule *respondent superior*, it is not enough that they are engaged in doing parts of the same work, or in the promotion of the same enterprise carried on by the master, not requiring co-operation or bringing them together, or in such relations as that they may have an influence upon each other, but it is essential that at the time it is claimed such relation exists they shall be directly co-operating with each other in the particular business in hand. *Chicago & N. W. R. Co. v. Moranda*, 17 Am. & Eng. R. Cas. 564, 108 Ill. 576; explaining 93 Ill. 302.—QUOTED IN *Chicago & A. R. Co. v. Kelly*, 127 Ill. 637, 21 N. E. Rep. 203; *Parker v. Hannibal & St. J. R. Co.*, 109 Mo. 362. REVIEWED AND APPLIED IN *Chicago, B. & Q. R. Co. v. Young*, 26 Ill. App. 115.—*Stafford v. Chicago, B. & Q. R. Co.*, 114 Ill. 244, 2 N. E. Rep. 185.—AP-

PROVED IN *United States Rolling Stock Co. v. Wilder*, 25 Am. & Eng. R. Cas. 414, 116 Ill. 100.—*Chicago & A. R. Co. v. Kelly*, 127 Ill. 637, 21 N. E. Rep. 203; affirming 28 Ill. App. 655.—QUOTING *Chicago & N. W. R. Co. v. Moranda*, 108 Ill. 580.—FOLLOWED IN *Lake Erie & W. R. Co. v. Middleton*, 46 Ill. App. 218. REVIEWED IN *Dixon v. Chicago & A. R. Co.*, 109 Mo. 413. *Chicago & A. R. Co. v. O'Bryan*, 15 Ill. App. 134. *Lake Erie & W. R. Co. v. Middleton*, 46 Ill. App. 218. *Bier v. Jeffersonville, M. & I. R. Co.*, 132 Ind. 78, 31 N. E. Rep. 471.

206. — so as to mutually influence each other.—If they are not associated together in the performance of their duties, or their employment does not require co-operation, or bring them together or into such relations that they can exercise an influence upon each other promotive of proper caution, they are not fellow-servants, within the rule which exempts the master from liability for injury to one through the negligence of the other. *Louisville, E. & St. L. Con. R. Co. v. Hawthorn*, 147 Ill. 226, 35 N. E. Rep. 534. *Chicago & A. R. Co. v. Hoyt*, 31 Am. & Eng. R. Cas. 309, 122 Ill. 369, 12 N. E. Rep. 225, 9 West. Rep. 785. *Chicago & N. W. R. Co. v. Snyder*, 28 Am. & Eng. R. Cas. 611, 117 Ill. 376, 7 N. E. Rep. 604; reversing 18 Ill. App. 640. *Chicago & N. W. R. Co. v. Moranda*, 17 Am. & Eng. R. Cas. 564, 108 Ill. 576; explaining 93 Ill. 302. *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57, 29 N. E. Rep. 186.—FOLLOWED IN *Lake Erie & W. R. Co. v. Middleton*, 46 Ill. App. 218. QUOTED IN *Louisville, E. & St. L. Con. R. Co. v. Hawthorn*, 45 Ill. App. 635; *Peoria, D. & E. R. Co. v. Johns*, 43 Ill. App. 83.—*Lake Erie & W. R. Co. v. Middleton*, 46 Ill. App. 218.—FOLLOWING *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57; *Chicago & A. R. Co. v. Kelly*, 127 Ill. 637.—*Relyea v. Kansas City, Ft. S. & G. R. Co.*, 53 Am. & Eng. R. Cas. 578, 112 Mo. 86, 20 S. W. Rep. 480. *Daniels v. Union Pac. R. Co.*, 6 Utah 357, 23 Pac. Rep. 762. *Webb v. Denver & R. G. W. R. Co.*, 7 Utah 363, 26 Pac. Rep. 981.

207. Need not be hired or subject to discharge by same person.—The fact that one employé upon a railroad is hired and discharged by one superior agent, and another by another, does not affect the relation of the employés to each other as fellow-servants. *Slater v. Jewett*, 5 Am. &

Eng. R. Cas. 515, 85 *N. Y.* 61, 39 *Am. Rep.* 627.—*DISTINGUISHING* *Flike v. Boston & A. R. Co.*, 53 *N. Y.* 549; *Fuller v. Jewett*, 80 *N. Y.* 46; *Crispin v. Babbitt*, 81 *N. Y.* 516.

208. Need not receive same wages.—Differences in wages or work do not affect the question of fellow-service if the general business is the same. *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 *Miss.* 258.

209. Volunteers.*—A person who is injured while voluntarily assisting servants of a railway company in their work is a fellow-servant of the company's employés, within the meaning of the rule exempting the master from responsibility. *Degg v. Midland R. Co.*, 1 *H. & N.* 773, 3 *Jur. N. S.* 395, 26 *L. J. Ex.* 171.—*DISTINGUISHED IN* *Wright v. London & N. W. R. Co.*, 33 *L. T.* 830, *L. R.* 1 *Q. B. D.* 252, 45 *L. J. Q. B.* 570.—*Mayton v. Texas & P. R. Co.*, 63 *Tex.* 77. *Eason v. Sabine & E. T. R. Co.*, 65 *Tex.* 577. But compare *Wright v. London & N. W. R. Co.*, 33 *L. T.* 830, *L. R.* 1 *Q. B. D.* 252, 45 *L. J. Q. B. D.* 570; *affirming L. R.* 10 *Q. B.* 298, 44 *L. J. Q. B.* 119, 32 *L. T.* 599.

If the injured person is not a volunteer, but engaged at the request or with the permission of the railroad's agent in a transaction of interest as well to himself or his master as to the railroad company, he is entitled to the same protection against the negligence of the company's servants as if he were at the time attending to his own private affairs. *Eason v. Sabine & E. T. R. Co.*, 65 *Tex.* 577.—*QUOTED IN* *Bonner v. Bryant*, 79 *Tex.* 540.

b. Who are Vice-principals.

210. Depends upon the circumstances of each case.—Whether a servant is a vice-principal or a fellow-servant with another servant depends upon the circumstances of the particular case. *Chicago & A. R. Co. v. May*, 15 *Am. & Eng. R. Cas.* 320, 108 *Ill.* 288. *McBride v. Indianapolis F. & S. Co.*, 5 *Ind. App.* 482, 32 *N. E. Rep.* 579. *Pittsburgh, Ft. W. & C. R. Co. v. Lewis*, 33 *Ohio St.* 196.

211. Depends not upon rank, but upon duties imposed on servant.—The mere fact that one of a number of ser-

vants who are in the habit of working together in the same line of employment for a common master has power to control and direct the actions of the others with respect to such employment will not of itself render the master liable for the negligence of the governing servant, resulting in an injury to one of the others, without regard to other circumstances. *Chicago & A. R. Co. v. May*, 15 *Am. & Eng. R. Cas.* 320, 108 *Ill.* 288.

Whether in a given case one is acting as the representative of the master, or merely as a co-employé with others employed by the same master, depends upon the character of the duties imposed upon him, and which he is performing at the time, and not upon his rank or title. *Nall v. Louisville, N. A. & C. R. Co.*, 48 *Am. & Eng. R. Cas.* 309, 129 *Ind.* 260, 28 *N. E. Rep.* 183, 611. *Flike v. Boston & A. R. Co.*, 53 *N. Y.* 549, 5 *Am. Ry. Rep.* 392. *Knahtla v. Oregon S. L. & U. N. R. Co.*, 21 *Oreg.* 136, 27 *Pac. Rep.* 91. *Nix v. Texas Pac. R. Co.*, 82 *Tex.* 473, 18 *S. W. Rep.* 571. *Core v. Ohio River R. Co.*, 38 *W. Va.* 456, 18 *S. E. Rep.* 596. See also *Chicago & A. R. Co. v. May*, 15 *Am. & Eng. R. Cas.* 320, 108 *Ill.* 288.

He may be a superintendent, a foreman, or a middleman, and yet be a fellow-servant with hands working under him. *Anderson v. Bennett*, 38 *Am. & Eng. R. Cas.* 87, 16 *Oreg.* 515, 8 *Am. St. Rep.* 311, 19 *Pac. Rep.* 765.

Two servants of a common master may occupy a threefold relation toward each other, entirely dependent on the duties imposed upon them by their employment; to wit, that of (1) superior or master; (2) co-ordinate or fellow-servant; (3) inferior or servant. *Core v. Ohio River R. Co.*, 38 *W. Va.* 456, 18 *S. E. Rep.* 596.

212. Servants charged with duty of furnishing proper agencies and providing safe working place.*—The master is chargeable for any act of negligence in so far as the negligent servant is charged with the performance of the master's duty to his servants, such as the selection of competent servants, the furnishing of suitable tools and instrumentalities, the providing of a reasonably safe place in which to work, and the observance of such care as will not expose the servant to haz-

* Liability of company for injuries to persons assisting by request or consent of those in authority, see notes, 22 *L. R. A.* 664; 67 *AM. DEC.* 597.

* Servant performing master's duty to supply safe place to work, see note, 38 *AM. & ENG. R. CAS.* 105.

ards and perils which may be guarded against by proper diligence, etc.; and to the extent of the discharge of these duties which the master owes to his servant by the middleman or vice-principal the latter stands in the place of the master. *Anderson v. Bennett*, 38 *Am. & Eng. R. Cas.* 87, 16 *Oreg.* 515, 19 *Pac. Rep.* 765, 8 *Am. St. Rep.* 311. *Mackey v. Baltimore & P. R. Co.*, 8 *Mackey (D. C.)* 282.

213. Servants standing in the place of or representing the company.*—A servant through whose negligence another servant is injured is a vice-principal, provided he was in the performance of the duty imposed by law upon the company. *Fones v. Phillips*, 39 *Ark.* 17. *Pullman Palace Car Co. v. Laack*, 143 *Ill.* 242, 32 *N. E. Rep.* 285. *Capper v. Louisville, E. & St. L. R. Co.*, 21 *Am. & Eng. R. Cas.* 525, 103 *Ind.* 305, 2 *N. E. Rep.* 749. *Lindvall v. Woods*, 39 *Am. & Eng. R. Cas.* 339, 41 *Minn.* 212, 4 *L. R. A.* 793, 42 *N. W. Rep.* 1020. *Flike v. Boston & A. R. Co.*, 53 *N. Y.* 549, 5 *Am. Ry. Rep.* 392. *Wooden v. Western N. Y. & P. R. Co.*, 43 *N. Y. S. R.* 218, 16 *N. Y. Supp.* 840. *Fuller v. Jewett*, 1 *Am. & Eng. R. Cas.* 109, 80 *N. Y.* 46. *Knahla v. Oregon S. L. & U. N. R. Co.*, 21 *Oreg.* 136, 27 *Pac. Rep.* 91. *Brabbitts v. Chicago & N. W. R. Co.*, 38 *Wis.* 289. *Pike v. Chicago & A. R. Co.*, 41 *Fed. Rep.* 95. *Stockmeyer v. Reed*, 55 *Fed. Rep.* 259. *Madden v. Chesapeake & O. R. Co.*, 28 *W. Va.* 610, 57 *Am. Rep.* 695. *Lewis v. St. Louis & I. M. R. Co.*, 59 *Mo.* 495. *Brickner v. New York C. R. Co.*, 2 *Lans. (N. Y.)* 506; affirmed in 49 *N. Y.* 672, mem.

A servant who can be said to take the place of or represent the company in the performance of its duties to its servants is a vice-principal. *Colorado Midland R. Co. v. Naylor*, 17 *Colo.* 501, 30 *Pac. Rep.* 249. *Elledge v. National City & O. R. Co.*, 100 *Cal.* 282, 34 *Pac. Rep.* 720.—QUOTING *Daves v. Southern Pac. Co.*, 98 *Cal.* 19, 35 *Am. St. Rep.* 133.—*Justice v. Pennsylvania Co.*, 53 *Am. & Eng. R. Cas.* 604, 130 *Ind.* 321, 30 *N. E. Rep.* 303. *Loughlin v. State*, 105 *N. Y.* 159, 11 *N. E. Rep.* 371.

If the particular act done is one that the law implies a contract duty of the employer to perform, so that the person performing

it is a vice-principal as to that act, then he is not a fellow-servant with the other laborers. *Sullivan v. New York, N. H. & H. R. Co.*, 62 *Conn.* 209, 25 *Atl. Rep.* 711.

A co-laborer is not a fellow-servant of those under his charge, when he stands in the relation of a governing servant and performs duties in the exercise of authority conferred upon him by the company. *Chicago & A. R. Co. v. May*, 15 *Am. & Eng. R. Cas.* 320, 108 *Ill.* 288. *Mad River & L. E. R. Co. v. Barber*, 5 *Ohio St.* 541.

214. Servants to whom company delegates performance of its duties, generally.—Where the master delegates to an agent the performance of duties which the law devolves upon him, the agent stands as the representative of the master, and a servant may maintain an action for injuries caused by the negligence of the agent in matters in which he performs the duties of the master and is his representative. *Indiana Car Co. v. Parker*, 100 *Ind.* 181.—REVIEWING *Flike v. Boston & A. R. Co.*, 53 *N. Y.* 549; *McCosker v. Long Island R. Co.*, 84 *N. Y.* 77.—*Justice v. Pennsylvania Co.*, 53 *Am. & Eng. R. Cas.* 604, 130 *Ind.* 321, 30 *N. E. Rep.* 303. *Hannibal & St. J. R. Co. v. Fox*, 15 *Am. & Eng. R. Cas.* 325, 31 *Kan.* 586, 3 *Pac. Rep.* 320.—QUOTING *Kansas Pac. R. Co. v. Salmon*, 14 *Kan.* 524.—QUOTED IN *Criswell v. Pittsburgh, St. L. & C. R. Co.*, 30 *W. Va.* 798.—*Atchison, T. & S. F. R. Co. v. McKee*, 37 *Kan.* 592, 15 *Pac. Rep.* 484. *Daves v. Southern Pac. Co.*, 98 *Cal.* 19, 32 *Pac. Rep.* 708. *Pennsylvania Co. v. Whitcomb*, 31 *Am. & Eng. R. Cas.* 149, 111 *Ind.* 212, 9 *West. Rep.* 823, 12 *N. E. Rep.* 380. *Fisher v. Oregon S. L. & U. N. R. Co.*, 53 *Am. & Eng. R. Cas.* 539, 22 *Oreg.* 533, 16 *L. R. A.* 519, 30 *Pac. Rep.* 425. *Brown v. Minneapolis & St. L. R. Co.*, 31 *Minn.* 553, 18 *N. W. Rep.* 834. *Mobile & M. R. Co. v. Smith*, 59 *Ala.* 245. *Elledge v. National City & O. R. Co.*, 100 *Cal.* 282, 34 *Pac. Rep.* 720. *Mackey v. Baltimore & P. R. Co.*, 8 *Mackey (D. C.)* 282. *Miller v. Southern Pac. Co.*, 48 *Am. & Eng. R. Cas.* 294, 20 *Oreg.* 285, 26 *Pac. Rep.* 70. *Moon v. Richmond & A. R. Co.*, 17 *Am. & Eng. R. Cas.* 531, 78 *Va.* 745. *Baltimore & O. R. Co. v. McKenzie*, 24 *Am. & Eng. R. Cas.* 395, 81 *Va.* 71.—FOLLOWING *Moon v. Richmond & A. R. Co.*, 78 *Va.* 745. QUOTING *Chicago, M. & St. P. R. Co. v. Ross*, 112 *U. S.* 377.—*Madden v. Chesapeake & O. R. Co.*, 28 *W. Va.* 610, 57 *Am. Rep.* 695.—AP-

* Negligence of instructor furnished by employer, see note, 41 *AM. & ENG. R. CAS.* 470.

PLIED IN *Parker v. Hannibal & St. J. R. Co.*, 109 Mo. 362.

It is the law, in the absence of express contract, that establishes the relation of the parties, creating him agent or representative of the master who performs duties which the law itself makes it incumbent on the master to perform, and not the rules or regulations of the company designed for the guidance of its servants, and to secure reasonable safety in the conduct of its business. *Miller v. Southern Pac. Co.*, 48 Am. & Eng. R. Cas. 294, 20 Oreg. 285, 26 Pac. Rep. 70.

The question in such cases is not whether the company reserved to itself any oversight or discretion, but whether it did in fact clothe the middleman with power to perform its duties to the servant injured. *Riley v. West Virginia C. & P. R. Co.*, 27 W. Va. 145.

One who commands an act to be done, and who possesses the authority to command and enforce obedience from all servants employed in a distinct department, by virtue of the power delegated to him by the master, is not a fellow-servant; for in the absence of the master, the command, if entitled to obedience, must be that of the master, conveyed through the medium of the agent. *Taylor v. Evansville & T. H. R. Co.*, 41 Am. & Eng. R. Cas. 437, 121 Ind. 124, 22 N. E. Rep. 876, 6 L. R. A. 584.

215. Delegated duty to provide safe track and roadbed.—An employé engaged in the performance of some duty which the master owes to the servant—such as that of a railroad company to furnish a reasonably safe track and roadbed whereon its trainmen may operate its cars—is a vice-principal as distinguished from a fellow-servant; and his negligence causing injury to such servant will render the master liable. *Fisher v. Oregon S. L. & U. N. R. Co.*, 53 Am. & Eng. R. Cas. 539, 22 Oreg. 533, 30 Pac. Rep. 425, 16 L. R. A. 519.—**DISTINGUISHING** *Carlson v. Oregon S. L. & U. N. R. Co.*, 21 Oreg. 454.

When duties are intrusted by a corporation to an officer which are such as cannot properly be performed by the corporation itself, the negligence of the officer is not that of the corporation, unless it has been negligent in his selection. *So held*, where a fireman on a construction train sought to recover from the company for injuries received through the alleged negligence of the superintendent of the road in sending

him out, whereby he ran into a section of the road which was washed out. *Mobile & M. R. Co. v. Smith*, 59 Ala. 245.

216. Delegated duty to furnish and keep in repair safe machinery, etc.—The duty to provide employés with safe machinery and appliances cannot be so delegated by the master as to relieve him from responsibility. The agent to whom it is intrusted, whatever his rank may be, acts as the master in discharging it. *Pennsylvania Co. v. Whitcomb*, 31 Am. & Eng. R. Cas. 149, 111 Ind. 212, 9 West. Rep. 823, 12 N. E. Rep. 380. *Brown v. Minneapolis & St. L. R. Co.*, 31 Minn. 553, 18 N. W. Rep. 834.

Where a company employs a person to inspect, repair, and provide machinery for others to operate, who are employed by the same company, he stands in the place of master to those who operate such machinery, rather than that of a fellow-servant. *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592, 15 Pac. Rep. 484. *Houston & T. C. R. Co. v. Marcelles*, 12 Am. & Eng. R. Cas. 231, 59 Tex. 334.

217. Servants with power to employ and discharge others.—One servant of a corporation, to whom is delegated the power of hiring and discharging other servants, and in whom the corporation vests the sole control and direction of such other servants in and about the work which they may be ordinarily required to do, is, as to such servants whom he so hires, discharges, and controls, the representative of the master when exercising such power or control, and is not a fellow-servant, nor is he in the same line of employment as the servants he so controls. *Chicago & A. R. Co. v. May*, 15 Am. & Eng. R. Cas. 320, 108 Ill. 288.—**NOT FOLLOWED IN** *O'Brien v. American Dredging Co.*, 53 N. J. L. 291.—*Woods v. Lindvall*, 48 Fed. Rep. 62, 4 U. S. App. 49, 1 C. C. A. 37. *Colorado Midland R. Co. v. O'Brien*, 48 Am. & Eng. R. Cas. 235, 16 Colo. 219, 27 Pac. Rep. 701. *Chicago, B. & Q. R. Co. v. Blank*, 24 Ill. App. 438. *Baldwin v. St. Louis, K. & N. W. R. Co.*, 75 Iowa 297, 39 N. W. Rep. 507. *St. Louis, A. & T. R. Co. v. Lemon*, 83 Tex. 143, 18 S. W. Rep. 331. *Kansas Pac. R. Co. v. Little*, 19 Kan. 267, 17 Am. Ry. Rep. 455. *Erickson v. Milwaukee, L. S. & W. R. Co.*, 93 Mich. 414, 53

* Power to employ and discharge servants as test of co-service, see note, 17 AM. & ENG. R. CAS. 560.

N. W. Rep. 393. *Cook v. Hannibal & St. J. R. Co.*, 63 *Mo.* 397, 20 *Am. Ry. Rep.* 177. *Denver, S. P. & P. R. Co. v. Driscoll*, 38 *Am. & Eng. R. Cas.* 105, 12 *Colo.* 520, 21 *Pac. Rep.* 708. *Russ v. Wabash Western R. Co.*, 112 *Mo.* 45, 20 *S. W. Rep.* 472. *Smith v. Sioux City & P. R. Co.*, 17 *Am. & Eng. R. Cas.* 561, 15 *Neb.* 583, 19 *N. W. Rep.* 638. *Texas Mex. R. Co. v. Whitmore*, 11 *Am. & Eng. R. Cas.* 195, 58 *Tex.* 276. *Missouri Pac. R. Co. v. Williams*, 75 *Tex.* 4, 12 *S. W. Rep.* 835. *Nix v. Texas Pac. R. Co.*, 82 *Tex.* 473, 18 *S. W. Rep.* 571. *International & G. N. R. Co. v. Hinzle*, 82 *Tex.* 623, 18 *S. W. Rep.* 681. *Sweeney v. Gulf, C. & S. F. R. Co.*, 84 *Tex.* 433, 19 *S. W. Rep.* 555. *Missouri Pac. R. Co. v. Sasse*, (*Tex. Civ. App.*) 22 *S. W. Rep.* 187. *Reddon v. Union Pac. R. Co.*, 5 *Utah* 344, 15 *Pac. Rep.* 262. *Criswell v. Pittsburgh, St. L. & C. R. Co.*, 33 *Am. & Eng. R. Cas.* 232, 30 *W. Va.* 798, 6 *S. E. Rep.* 31.

And this, although he works as any other servant, and there is nothing in the nature of the employment to show an authority to charge the common master. *Patton v. Western N. C. R. Co.*, 31 *Am. & Eng. R. Cas.* 298, 96 *N. Car.* 455, 1 *S. E. Rep.* 863.

The mere fact that a person has the authority to hire and discharge hands does not of itself make him a vice-principal so as to render the company liable for his negligence resulting in injury to such hands. *Hamilton v. Iron Mountain Co.*, 4 *Mo. App.* 564. *Slater v. Jewett*, 5 *Am. & Eng. R. Cas.* 515, 85 *N. Y.* 61, 39 *Am. Rep.* 627. *Webb v. Richmond & D. R. Co.*, 97 *N. Car.* 387, 2 *S. E. Rep.* 440.

The question whether or not the servant has power to employ and discharge other servants is important in determining whether or not he is deemed to be a superior servant for whose acts the master is held liable. *Palmer v. Michigan C. R. Co.*, 93 *Mich.* 363, 53 *N. W. Rep.* 397.—QUOTING *Harrison v. Detroit, L. & N. R. Co.*, 79 *Mich.* 409.

218. Servants in full charge or control of others.—One in the employ of a master, but having full control and management of a branch or department of the latter's business, including the servants employed therein, occupies the position of vice-principal, and the master is liable for injuries to a servant caused by the negligence of such vice-principal. *Lantry v. Silverman*, 1 *Colo. App.* 404, 29 *Pac. Rep.*

180. *Gravelle v. Minneapolis & St. L. R. Co.*, 3 *McCrary (U. S.)* 352, 10 *Fed. Rep.* 711. *Northern Pac. R. Co. v. Peterson*, 51 *Fed. Rep.* 182, 4 *U. S. App.* 574, 2 *C. C. A.* 157. *Libby v. Scherman*, 146 *Ill.* 540, 34 *N. E. Rep.* 801. *Hunn v. Michigan C. R. Co.*, 41 *Am. & Eng. R. Cas.* 452, 78 *Mich.* 513, 7 *L. R. A.* 500, 44 *N. W. Rep.* 502.—QUOTING *Quincy Min. Co. v. Kitts*, 42 *Mich.* 39.—*Cook v. St. Paul, M. & M. R. Co.*, 34 *Minn.* 45, 24 *N. W. Rep.* 311.—DISTINGUISHED IN *Cole v. Chicago & N. W. R. Co.*, 33 *Am. & Eng. R. Cas.* 274, 71 *Wis.* 114.—*Chicago, B. & Q. R. Co. v. Sullivan*, 41 *Am. & Eng. R. Cas.* 463, 27 *Neb.* 673, 43 *N. W. Rep.* 415.—FOLLOWING *Chicago, M. & St. P. R. Co. v. Ross*, 112 *U. S.* 377, 5 *Sup. Ct. Rep.* 190; *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 *Neb.* 254; *Sioux City & P. R. Co. v. Smith*, 22 *Neb.* 780; *Burlington & M. R. R. Co. v. Crockett*, 19 *Neb.* 145.—*Dobbin v. Richmond & D. R. Co.*, 81 *N. Car.* 446. *Cleveland, C. & C. R. Co. v. Keary*, 3 *Ohio St.* 201.—DISTINGUISHED IN *Cox v. Keahey*, 36 *Ala.* 340.—*Lewis v. Seifert*, 116 *Pa. St.* 628, 9 *Cent. Rep.* 751, 11 *Atl. Rep.* 514, 23 *W. N. C.* 145. *Hancy v. Pittsburgh, C., C. & St. L. R. Co.*, 38 *W. Va.* 570, 18 *S. E. Rep.* 748.

An employé of a company having the charge and control of a crew or gang of men engaged in a particular service, who are bound to obey his orders, is not a fellow-servant with such persons, in the same line of employment, within the meaning of the rule that prevents a recovery by a servant of his master for the negligence of a fellow-servant; and the commands of such employé, within the scope of his authority, are to be regarded as those of the master. *Wabash, St. L. & P. R. Co. v. Hawk*, 31 *Am. & Eng. R. Cas.* 306, 121 *Ill.* 259, 12 *N. E. Rep.* 253, 10 *West. Rep.* 137. *Kansas City, M. & B. R. Co. v. Burton*, 53 *Am. & Eng. R. Cas.* 115, 97 *Ala.* 240, 12 *So. Rep.* 88. *Chicago & A. R. Co. v. May*, 15 *Am. & Eng. R. Cas.* 320, 108 *Ill.* 288.—RECONCILING *Chicago & N. W. R. Co. v. Moranda*, 93 *Ill.* 302.—REFERRED TO IN *Cleveland, C., C. & St. L. R. Co. v. Brown*, 56 *Fed. Rep.* 804.—*Louisville, C. & L. R. Co. v. Cavens*, 9 *Bush (Ky.)* 559. *McLeod v. Ginther*, 8 *Am. & Eng. R. Cas.* 162, 80 *Ky.* 399. *Moore v. Wabash, St. L. & P. R. Co.*, 21 *Am. & Eng. R. Cas.* 509, 85 *Mo.* 588.—EXPLAINED IN *Hutson v. Missouri Pac. R. Co.*, 50 *Mo. App.* 300. FOLLOWED IN

St. L. R.
Rep. 711.
n. 51 *Fed.*
C. A. 157.
34 N. E.
R. Co., 41
h. 513, 7 *L.*
 QUOTING
ich. 39.—
34 Minn.
 NGUISHED
Co., 33 *Am.*
 —Chicago,
m. & Eng.
Rep. 415.
P. R. Co.
Rep. 190;
v. Lund-
& P. R. Co.
on & M. R.
5.—Dobbin
Car. 446.
ry. 3 *Ohio*
v. Keahey,
116 Pa. St.
Rep. 514, 23
ugh, C., C.
70, 18 S. E.
 having the
 or gang of
 service, who
 is not a fel-
 in the same
 meaning of
 y by a ser-
 gence of a
 nds of such
 s authority,
 the master.
Hawk, 31
259, 12 N
7. Kansas
53 Am. &
12 So. Rep.
ay, 15 *Am.*
 3.—RECON-
v. Moranda,
Cleveland,
n, 56 *Fed.*
R. Co. v.
ood v. Gin-
80 Ky. 399.
R. Co., 21
Mo. 588.—
uri Pac. R.
 LOWED IN

Dowling *v.* Allen, 88 Mo. 293; Hoke *v.* St. Louis, K. & N. R. Co., 88 Mo. 360; Hutson *v.* Missouri Pac. R. Co., 50 Mo. App. 300. REVIEWED IN Smith *v.* Wabash, St. L. & P. R. Co., 31 *Am. & Eng. R. Cas.* 331, 92 Mo. 359.—Stephens *v.* Hannibal & St. J. R. Co., 28 *Am. & Eng. R. Cas.* 538, 86 Mo. 221.—FOLLOWED IN Ischer *v.* St. Louis Bridge Co., 95 Mo. 261.—Ischer *v.* St. Louis Bridge Co., 95 Mo. 261, 8 *S. W. Rep.* 367. Miller *v.* Missouri Pac. R. Co., 53 *Am. & Eng. R. Cas.* 598, 109 Mo. 350, 19 *S. W. Rep.* 58.—DISTINGUISHED IN Parker *v.* Hannibal & St. J. R. Co., 109 Mo. 362.

Where an employé, intrusted with the duty of saving a bridge whose destruction is threatened by a freshet, in pursuance of the authority conferred upon him, calls out the employés from the various departments of the railroad company's service to unite in saving the bridge, chooses the place where they should work, and directs what appliances they should use, he is not a fellow-servant with those under his control. Nall *v.* Louisville, N. A. & C. R. Co., 48 *Am. & Eng. R. Cas.* 309, 129 *Ind.* 260, 28 *N. E. Rep.* 183, 611.—FOLLOWING Taylor *v.* Evansville & T. H. R. Co., 121 *Ind.* 124. QUESTIONING Columbus & I. C. R. Co. *v.* Arnold, 31 *Ind.* 174.

It is immaterial that the servants are engaged in the same common employment, where the negligent servant is superior to or in control of the injured one, if the former is deemed to be acting as a vice-principal. Louisville & N. R. Co. *v.* Moore, 24 *Am. & Eng. R. Cas.* 443, 83 *Ky.* 675.

To constitute a servant of a company the vice-principal, so as to hold the company liable for his negligence toward another servant, it is not sufficient to show that the duties of the former were to direct and control assistant brakemen in the service of the company at a particular yard, and that the latter was one of the assistant brakemen at that yard. Rains *v.* St. Louis, I. M. & S. R. Co., 5 *Am. & Eng. R. Cas.* 610, 71 Mo. 164.—FOLLOWING McGowan *v.* St. Louis & I. M. R. Co., 61 Mo. 528; Marshall *v.* Schricker, 63 Mo. 308.

219. American rule distinguished from the English.—The American rule, as distinguished from the English, is that a servant intrusted with the general management of the master's business, or employé in a particular department, or on detached service in charge of the train or body of

laborers, is not a fellow-servant of those who are employed under him and subject to his orders. Mason *v.* Richmond & D. R. Co., 53 *Am. & Eng. R. Cas.* 183, 111 *N. Car.* 482, 16 *S. E. Rep.* 698.

220. Temporary vice-principal.—One who has charge of the timber yard of a railroad company, and employs and discharges men, is a vice-principal; and one who takes his place when absent is a temporary vice-principal; and for the negligence of such persons, resulting in personal injury to a subordinate employé, the company is liable. Baldwin *v.* St. Louis, K. & N. W. R. Co., 75 *Iowa* 297, 39 *N. W. Rep.* 507.

In such case notice to the temporary vice-principal, when he was acting as such, of the defective piling of timbers which caused the injury, was notice to the company, regardless of the question whether or not he had any duty to perform in the piling of the timbers or in connection with the piles. Baldwin *v.* St. Louis, K. & N. W. R. Co., 75 *Iowa* 297, 39 *N. W. Rep.* 507.

In an action by a laborer for injuries sustained by the negligence of a fellow-servant temporarily put in charge by the foreman of the gang, where the evidence conflicts as to the powers of the regular foreman, the court should clearly charge that to justify a recovery the evidence must show that the temporary foreman had full power to employ and discharge men. St. Louis, A. & T. R. Co. *v.* Lemon, 83 *Tex.* 143, 18 *S. W. Rep.* 331.—FOLLOWING Rogers *v.* Galveston City R. Co., 76 *Tex.* 502; International & G. N. R. Co. *v.* Hester, 72 *Tex.* 40; Gulf, C. & S. F. R. Co. *v.* Brentford, 79 *Tex.* 619.

221. May be both vice-principal and fellow-servant.—A servant may stand in the relation both of vice-principal and fellow-servant; he is vice-principal in so far as he represents the company, and fellow-servant in all other matters. Lindvall *v.* Woods, 39 *Am. & Eng. R. Cas.* 339, 41 *Minn.* 212, 4 *L. R. A.* 793, 42 *N. W. Rep.* 1020. Rowland *v.* Missouri Pac. R. Co., 20 *Mo. App.* 463. Core *v.* Ohio River R. Co., 38 *W. Va.* 456, 18 *S. E. Rep.* 596.

One may be a fellow-servant as to the acts complained of, while he may have other duties which make him the representative of the company. Brick *v.* Rochester, N. Y. & P. R. Co., 21 *Am. & Eng. R. Cas.* 605, 98 *N. Y.* 211; reversing (P) 31 *Hun* 453.—FOLLOWING Crispin *v.* Babbitt, 81 *N. Y.*

516; *McCosker v. Long Island R. Co.*, 84 N. Y. 77.—APPLIED IN *Monaghan v. New York C. & H. R. R. Co.*, 45 Hun 113, 9 N. Y. S. R. 672. NOT FOLLOWED IN *Colorado Midland R. Co. v. O'Brien*, 48 Am. & Eng. R. Cas. 235, 16 Colo. 219.

2. Particular Servants.

a. Car Inspector; Car Repairer.

222. Car inspector, generally.*—

A car inspector in failing to inspect and repair cars represents the company and is a vice principal to that extent. *Johnson v. Chesapeake & O. R. Co.*, 36 W. Va. 73, 14 S. E. Rep. 432. *Condon v. Missouri Pac. R. Co.*, 78 Mo. 567. *King v. Ohio & M. R. Co.*, 8 Am. & Eng. R. Cas. 119, 11 Biss. (U. S.) 362, 14 Fed. Rep. 277. *Little Rock & M. R. Co. v. Moseley*, 56 Fed. Rep. 1009. *Cincinnati, H. & D. R. Co. v. McMullen*, 38 Am. & Eng. R. Cas. 165, 117 Ind. 439, 20 N. E. Rep. 287. *Brann v. Chicago, R. I. & P. R. Co.*, 53 Iowa 595, 21 Am. Ry. Rep. 184, 6 N. W. Rep. 5. *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492. *Daniels v. Union Pac. R. Co.*, 6 Utah 357, 23 Pac. Rep. 762. *Long v. Pacific R. Co.*, 65 Mo. 225. *Missouri Pac. R. Co. v. Dwyer*, 36 Kan. 58, 12 Pac. Rep. 352. *Tierney v. Minneapolis & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 545, 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. Rep. 229. *Dewey v. Detroit, G. H. & M. R. Co.*, 53 Am. & Eng. R. Cas. 550, 16 L. R. A. 342, 52 N. W. Rep. 942; reversed on rehearing in 97 Mich. 329, 56 N. W. Rep. 756. Contra, *Alabama G. S. R. Co. v. Carroll*, 53 Am. & Eng. R. Cas. 556, 97 Ala. 126, 11 So. Rep. 803. *St. Louis, I. M. & S. R. Co. v. Gaines*, 46 Ark. 555. *Seaver v. Boston & M. R. Co.*, 14 Gray (Mass.) 466. *Gibson v. Northern C. R. Co.*, 22 Hun (N. Y.) 289. *Little Miami R. Co. v. Fitzpatrick*, 17 Am. & Eng. R. Cas. 578, 42 Ohio St. 318. *Columbus & X. R. Co. v. Webb*, 12 Ohio St. 475. *Dewey v. Detroit, G. H. & M. R. Co.*, 97 Mich. 329, 56 N. W. Rep. 756; reversing on rehearing, 53 Am. & Eng. R. Cas. 550, 16 L. R. A. 342, 52 N. W. Rep. 942.—APPROVING *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914; *Ford v. Lake Shore & M. S. R. Co.*, 41 Am. & Eng. R. Cas. 369,

117 N. Y. 638; *Byrnes v. New York, L. E. & W. R. Co.*, 113 N. Y. 251; *Toledo, W. & W. R. Co. v. Black*, 88 Ill. 112; *Louisville & N. R. Co. v. Gower*, 85 Tenn. 465; *Northern C. R. Co. v. Husson*, 101 Pa. St. 1. DISTINGUISHING *Smith v. Potter*, 2 Am. & Eng. R. Cas. 140, 46 Mich. 258.—*Smith v. Potter*, 2 Am. & Eng. R. Cas. 140, 46 Mich. 258, 9 N. W. Rep. 273.—DISTINGUISHED IN *Dewey v. Detroit, G. H. & M. R. Co.*, 97 Mich. 329, 56 N. W. Rep. 756.

223. When deemed fellow-servant of brakeman.—

A brakeman and car inspector are fellow-servants, so as to prevent the brakeman from recovering from the company for injuries received through the negligence of the inspector. *St. Louis, I. M. & S. R. Co. v. Gaines*, 46 Ark. 555.—APPLYING *Atchison, T. & S. F. R. Co. v. Wagner*, 33 Kan. 660, 21 Cent. L. J. 53; *Atchison, T. & S. F. R. Co. v. Ledbetter*, 8 Pac. Rep. 411; *Skellenger v. Chicago & N. W. R. Co.*, 61 Iowa 714. DISAPPROVING *Tierney v. Minneapolis & St. L. R. Co.*, 33 Minn. 311, 24 Am. Law Reg. 669; *Cooper v. Pittsburgh, C. & St. L. R. Co.*, 24 W. Va. 37.—NOT FOLLOWED IN *Little Rock & M. R. Co. v. Moseley*, 56 Fed. Rep. 1009.—*Alabama G. S. R. Co. v. Carroll*, 53 Am. & Eng. R. Cas. 556, 97 Ala. 126, 11 So. Rep. 803. *Smith v. Potter*, 2 Am. & Eng. R. Cas. 140, 46 Mich. 258, 9 N. W. Rep. 273.—NOT FOLLOWED IN *Little Rock & M. R. Co. v. Moseley*, 56 Fed. Rep. 1009. REVIEWED IN *Kelly v. Abbot*, 21 Am. & Eng. R. Cas. 633, 63 Wis. 307.—*Columbus & X. R. Co. v. Webb*, 12 Ohio St. 475.—FOLLOWING *Manville v. Cleveland & T. R. Co.*, 11 Ohio St. 417.—DISAPPROVED IN *Long v. Pacific R. Co.*, 65 Mo. 225. FOLLOWED IN *Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 318. NOT FOLLOWED IN *Little Rock & M. R. Co. v. Moseley*, 56 Fed. Rep. 1009.—*Little Miami R. Co. v. Fitzpatrick*, 17 Am. & Eng. R. Cas. 578, 42 Ohio St. 318.—APPROVING *Mackin v. Boston & A. R. Co.*, 135 Mass. 201. FOLLOWING *Columbus & X. R. Co. v. Webb*, 12 Ohio St. 475.—*Nashville, C. & St. L. R. Co. v. Foster*, 10 Lea (Tenn.) 351.

224. When not deemed fellow-servant of brakeman.—An employé charged with the duty of inspecting cars, and a brakeman using such cars, are not co-employés in such sense that the latter cannot recover from the corporation, by the com-

* Negligence of car inspectors and repairers, see note, 38 AM. & ENG. R. CAS. 172.

Car inspectors and repairers not fellow-servants, see 44 AM. & ENG. R. CAS. 609, *abstr.*

Car inspectors and trainmen, see note, 17 AM. & ENG. R. CAS. 589.

York, L.
Toledo,
Ill. 112;
Gower, 85
v. Hus-
ng Smith
s. 140, 46
n. & Eng.
Rep. 273.
Detroit, G.
56 N. W.

-servant
nd car in-
to prevent
from the
rough the
Louis, I.
rk. 555.—
R. Co. v.
53; Atch-
ter, 8 Pac.
& N. W.
ING Tier-
33 Minn.
er v. Pitts-
37.—NOT
R. Co. v.
abama G. S.
R. Cas. 556,
ith v. Pot-
46 Mich.
LOWED IN
ey, 56 Fed.
v. Abbot,
Vis. 307.—
b, 12 Ohio
v. Cleve-
417.—DIS-
R. Co., 65
Miami R.
318. NOT
R. Co. v.
Little Mi-
n. & Eng.
PPROVING
135 Mass.
X. R. Co.
shville, C.
a (Tenn.)

fellow-
employé
ting cars,
are not co-
ter cannot
the com-

mon law, for an injury received through the negligence of the former in failing to properly perform his duties. *Brann v. Chicago, R. I. & P. R. Co.*, 53 Iowa 595, 6 N. W. Rep. 5, 21 Am. Ry. Rep. 184. *Missouri Pac. R. Co. v. Dwyer*, 36 Kan. 38, 12 Pac. Rep. 352. *Long v. Pacific R. Co.*, 65 Mo. 225.—*APPROVING SNOW v. Housatonic R. Co.*, 8, Allen (Mass.) 441; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Flike v. Boston & A. R. Co.*, 53 N. Y. 549. *DISAPPROVING Wonder v. Baltimore & O. R. Co.*, 32 Md. 412; *Columbus & X. R. Co. v. Webb*, 12 Ohio St. 475; *Waller v. South Eastern R. Co.*, 2 H. & C. 102. *FOLLOWING Gibson v. Pacific R. Co.*, 46 Mo. 163; *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495.—*Condon v. Missouri Pac. R. Co.*, 78 Mo. 567.—*DISTINGUISHED IN Murray v. St. Louis C. & W. R. Co.*, 41 Am. & Eng. R. Cas. 446, 98 Mo. 573.

A car inspector is not a fellow-servant of a brakeman injured while coupling cars, owing to the negligence of the inspector in loading a flat car so that the lumber projected over the end. *Dewey v. Detroit, G. H. & M. R. Co.*, 53 Am. & Eng. R. Cas. 550, 16 L. R. A. 342, 52 N. W. Rep. 942.—*OVER-RULING Smith v. Potter*, 2 Am. & Eng. R. Cas. 140, 46 Mich. 258.

225. — as not being in the same line of service.—A car inspector, upon whom is enjoined the duty of inspecting the company's cars, is not a co-employé of a brakeman or of a conductor who is, in the line of his service, discharging the duties of a brakeman, within the meaning of the common law rule which exempts a master from liability for injuries to a servant resulting from the negligence of a fellow-servant. *Cincinnati, H. & D. R. Co. v. McMullen*, 38 Am. & Eng. R. Cas. 165, 117 Ind. 439, 20 N. E. Rep. 287.—*FOLLOWING Northern Pac. R. Co. v. Herbert*, 116 U. S. 642.

A car inspector is not a fellow-servant with a train brakeman, since they are not engaged in the same line of work, or under the control of the same foreman, or do not labor together in such relation that the one can exercise an influence upon the other promotive of a proper caution for their mutual safety. *Daniels v. Union Pac. R. Co.*, 6 Utah 357, 23 Pac. Rep. 762.

226. When deemed vice-principal of brakeman.—A car inspector stands in the relation of a vice-principal to the brakeman in so far as he represents the company

in the inspection and repair of cars. *Cooper v. Pittsburgh, C. & St. L. R. Co.*, 24 W. Va. 37. *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492.—*REVIEWED IN Cooper v. Pittsburgh, C. & St. L. R. Co.*, 24 W. Va. 37.—*King v. Ohio & M. R. Co.*, 8 Am. & Eng. R. Cas. 119, 11 Biss. (U. S.) 362, 14 Fed. Rep. 277. *Ohio & M. R. Co. v. Peary*, 128 Ind. 197, 27 N. E. Rep. 479.

227. Fellow-servant of brake repairer.—A car inspector is a fellow-servant of a brake repairer, in Alabama. *Nashville, C. & St. L. R. Co. v. Foster*, 10 Lea (Tenn.) 351.

228. Fellow-servant of carpenter being carried to work.—A carpenter employed by the day by a railroad corporation to work on the line of its road, and carried on the cars to the place of such work without paying fare, cannot maintain an action against the corporation for injuries occasioned to him while being so carried, by a hidden defect in an axle, the failure to discover which, if discoverable, was occasioned by the negligence of servants of the corporation whose duty it was to examine and keep in repair the cars, engine, and axles. *Seaver v. Boston & M. R. Co.*, 14 Gray (Mass.) 466.—*APPLIED IN Vick v. New York C. & H. R. R. Co.*, 17 Am. & Eng. R. Cas. 609, 95 N. Y. 267. *APPROVED IN Gibson v. Pacific R. Co.*, 46 Mo. 163. *DISTINGUISHED IN Hobson v. New Mexico & A. R. Co.*, (Ariz.) 28 Am. & Eng. R. Cas. 360, 11 Pac. Rep. 545; *State v. Western Md. R. Co.*, 21 Am. & Eng. R. Cas. 503, 63 Md. 433. *REVIEWED IN Ewald v. Chicago & N. W. R. Co.*, 33 Am. & Eng. R. Cas. 326, 70 Wis. 420, 36 N. W. Rep. 12.

229. Not fellow-servant of car coupler.—A railroad car inspector and a car coupler are not fellow-servants. (Mitchell, J., dissenting.) *Tierney v. Minneapolis & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 545, 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. Rep. 229.—*NOT FOLLOWING Columbus & X. R. Co. v. Webb*, 12 Ohio St. 475; *Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 318; *Smoot v. Mobile & M. R. Co.*, 67 Ala. 13; *Smith v. Potter*, 46 Mich. 258; *Mackin v. Boston & A. R. Co.*, 135 Mass. 201.—*DISAPPROVED IN St. Louis, I. M. & S. R. Co. v. Gaines*, 46 Ark. 555. *REVIEWED IN Lindvall v. Woods*, 39 Am. & Eng. R. Cas. 339, 41 Minn. 212, 4 L. R. A. 793, 42 N. W. Rep. 1020.

230. Not fellow-servant of switchman.—A company is liable to a switchman who is injured through the negligence of a car inspector in failing to discover and remedy defects in a coupling-link. *Little Rock & M. R. Co. v. Moseley*, 56 Fed. Rep. 1009.—FOLLOWING *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590; *Hough v. Texas & P. R. Co.*, 100 U. S. 213; *King v. Ohio & M. R. Co.*, 14 Fed. Rep. 277; *Carpenter v. Mexican Nat. R. Co.*, 39 Fed. Rep. 315; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914. NOT FOLLOWING *Mackin v. Boston & A. R. Co.*, 135 Mass. 201; *Keith v. New Haven & N. Co.*, 140 Mass. 175; *Byrnes v. New York, L. E. & W. R. Co.*, 113 N. Y. 251, 21 N. E. Rep. 50; *Philadelphia & R. R. Co. v. Hughes*, 119 Pa. St. 301, 13 Atl. Rep. 286; *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411; *Columbus & X. R. Co. v. Webb*, 12 Ohio St. 475; *St. Louis, I. M. & S. R. Co. v. Gaines*, 46 Ark. 555; *Smith v. Potter*, 46 Mich. 258, 9 N. W. Rep. 273; *Smoot v. Mobile & M. R. Co.*, 67 Ala. 13.

231. Fellow-servant of a yard switchman.—A yard switchman and a car inspector are fellow-servants engaged in a common service, and a railroad company cannot be held liable for neglect of the car inspector to discover that the bumper of a coal car was out of repair. *Gibson v. Northern C. R. Co.*, 22 Hun (N. Y.) 289.—APPLYING *Besel v. New York C. & H. R. Co.*, 70 N. Y. 171.

But yard switchmen and car inspectors are not fellow-servants under the Illinois decisions. *Chicago & E. I. R. Co. v. Kneirim*, 48 Ill. App. 243.—QUOTING *Chicago & A. R. Co. v. Hoyt*, 122 Ill. 369.

232. Fellow-servant of yard master.—The car inspector is a fellow-servant with the assistant yard master. *Kidwell v. Houston & G. N. R. Co.*, 3 Woods (U. S.) 313.

233. Car repairer, when a fellow-servant and when not.*—A brakeman on a train of cars is in the same common employment with the mechanics in the shops to repair and keep in order the machinery, with the inspector of the machinery and rolling stock of the road, and with the superintendent of the movement of trains. *Wonder v. Baltimore & O. R.*

Co., 32 Md. 411.—DISAPPROVED IN *Long v. Pacific R. Co.*, 65 Mo. 225. LIMITED IN *Riley v. West Virginia C. & P. R. Co.*, 27 W. Va. 145.

A car repairer in so far as he represents the company is not a fellow-servant of a brakeman, but his vice-principal. *Northern Pac. R. Co. v. Herbert*, 24 Am. & Eng. R. Cas. 407, 116 U. S. 642, 6 Sup. Ct. Rep. 590.

A car repairer—held, to be a fellow-servant of a yard master who was acting with the former in the same general scope of employment voluntarily. *Kirk v. Atlanta & C. A. L. R. Co.*, 25 Am. & Eng. R. Cas. 507, 94 N. Car. 625, 55 Am. Rep. 621.

A conductor ordered a car repairer to go under a car while the train was in a yard and repair it, and while he was under it it was started and he was killed; but the evidence left it in doubt whether the conductor or the yard master had charge of the train at the time it was started. Held, that the repairer and the yard master were fellow-servants, but not he and the conductor; and the liability of the company would depend upon which the jury determined were in charge. *Ritt v. Louisville & N. R. Co.*, (Ky.) 31 Am. & Eng. R. Cas. 289, 4 S. W. Rep. 796.

b. Conductor.

234. Fellow-servant of baggage master on another train.—A baggage master on one train, killed through the negligence of a conductor on another train in bringing about a collision, is a fellow-servant of such conductor. *Kerlin v. Chicago, P. & St. L. R. Co.*, 53 Am. & Eng. R. Cas. 530, 50 Fed. Rep. 185.—REVIEWING AND LIMITING *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184.—FOLLOWED IN *Becker v. Baltimore & O. R. Co.*, 57 Fed. Rep. 188.

235. Not a fellow-servant of baggageman and expressman on other train.—One who acts as expressman and baggageman on a passenger train is not a fellow-servant with employes on a freight train. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 34 Fed. Rep. 616.—APPLYING *Corcoran v. Holbrook*, 59 N. Y. 517. FOLLOWING *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; *Hough v. Texas & P. R. Co.*, 100 U. S. 213. QUOTING *Flike v. Boston & A. R. Co.*, 53 N. Y. 549; *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201.

* Car repairers and other servants as fellow-servants, see note, 31 AM. & ENG. R. CAS. 297.

236. Fellow-servant of brakeman.

—Conductors and brakemen are fellow-servants whose acts are not independent in such a sense as to separate them from each other in the line of dangers. *Smith v. Potter*, 2 Am. & Eng. R. Cas. 140, 46 Mich. 258, 9 N. W. Rep. 273. *Lawless v. Connecticut River R. Co.*, 18 Am. & Eng. R. Cas. 96, 136 Mass. 1. *Sherman v. Rochester & S. R. Co.*, 17 N. Y. 153; *affirming* 15 Barb. 574.—**FOLLOWING** *Coon v. Syracuse & U. R. Co.*, 5 N. Y. 492; *Keegan v. Western R. Co.*, 8 N. Y. 175.—*Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104. *Pease v. Chicago & N. W. R. Co.*, 17 Am. & Eng. R. Cas. 527, 61 Wis. 163, 20 N. W. Rep. 908.—**FOLLOWING** *Heine v. Chicago & N. W. R. Co.*, 58 Wis. 528.

A dispatch was sent to the conductor and engineer of train No. 3, of which plaintiff's intestate was brakeman, requiring them to "wildcat to N. ahead of train 39 and report." This order was delivered to conductor of train No. 3, at J., before leaving that station. The conductor of train No. 3 testified that it was the usual custom to signal trains approaching from behind at the place where this accident happened, especially on foggy nights, by going back on the track and placing caps on the rails, and that plaintiff's intestate was just about to do this when the collision occurred, but waited a few minutes to fix his fires. In these few minutes the collision took place which killed plaintiff's intestate. *Held*, that the accident was caused either by the failure of the brakeman to put caps on the rails behind No. 3, as a signal to No. 39, or by the failure of fellow-servants, the conductor and engineer, either to side track No. 3, or to give proper signals, and that in either case plaintiff was not entitled to recover. *Hoover v. Beech Creek R. Co.*, 154 Pa. St. 362, 26 Atl. Rep. 315.

237. — of brakeman on another train.—The conductor is a fellow-servant of a brakeman on another train. *Baltimore & O. R. Co. v. Andrews*, 53 Am. & Eng. R. Cas. 523, 50 Fed. Rep. 728, 1 C. C. A. 636. *Becker v. Baltimore & O. R. Co.*, 57 Fed. Rep. 188.—**FOLLOWING** *Kerlin v. Chicago, P. & St. L. R. Co.*, 50 Fed. Rep. 185.—*Pittsburg, Ft. W. & C. R. Co. v. Devinney*, 17 Ohio St. 197.—**APPROVING** *Hutchinson v. York, N. & B. R. Co.*, 5 Ex. 343. **DISAPPROVING** *Chamberlain v. Milwaukee & M. R. Co.*, 11 Wis. 239. **FOLLOWING** *Whaalan*

v. Mad River & L. E. R. Co., 8 Ohio St. 249. **REVIEWING** *Little Miami R. Co. v. Stevens*, 20 Ohio 415.—**APPLIED** *IN* *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484. **QUOTED** *IN* *Baltimore & O. R. Co. v. Andrews*, 53 Am. & Eng. R. Cas. 523, 50 Fed. Rep. 728, 1 C. C. A. 636.

The brakeman of a freight train is the fellow-servant of the conductor, and other employes in charge of and operating a passenger train of the same company, and cannot recover for injuries caused by the negligence of the train hands on the passenger train. *McMaster v. Illinois C. R. Co.*, 41 Am. & Eng. R. Cas. 486, 65 Miss. 264, 7 Am. St. Rep. 653, 4 So. Rep. 59.—**APPROVING** *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478; *Murray v. South Carolina R. Co.*, 1 McMull. (So. Car.) 385, 36 Am. Dec. 268; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377. **FOLLOWING** *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 Miss. 258; *Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977; *Louisville, N. O. & T. R. Co. v. Conroy*, 63 Miss. 562. **QUOTING** *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49.—**APPLIED** *IN* *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336.

238. Not a fellow-servant of brakeman.—The conductor is not a fellow-servant with a brakeman on the same train. *Newport News & M. V. Co. v. Dentzel*, 91 Ky. 42, 14 S. W. Rep. 958. *Lake Shore & M. S. R. Co. v. Spangler*, 28 Am. & Eng. R. Cas. 319, 44 Ohio St. 471, 8 N. E. Rep. 467. *Openshaw v. Utah & N. R. Co.*, 6 Utah 132. *Ayers v. Richmond & D. R. Co.*, 33 Am. & Eng. R. Cas. 269, 84 Va. 679, 5 S. E. Rep. 582.

A brakeman may recover from the company for an injury caused by the negligence of the conductor and engineer on the same train in disobeying the train dispatcher's orders, thereby causing a collision. *Northern Pac. R. Co. v. Cavanaugh*, 51 Fed. Rep. 517, 2 C. C. A. 358.—**FOLLOWING** *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184.

A conductor of a freight train is not a fellow-servant of a brakeman in regard to injuries sustained by the latter while obeying the former's orders to carry goods across the track, through negligence of the former in ordering a portion of the train to be backed down upon such track. *Richmond & D. R. Co. v. Brown*, 89 Va. 749, 17 S. E. Rep. 132. To the same effect see *Richmond*

See D. R. Co. v. Williams, 39 *Am. & Eng. R. Cas.* 326, 86 *Va.* 165, 9 *S. E. Rep.* 990.—APPLIED IN *Parker v. Hannibal & St. J. R. Co.*, 109 *Mo.* 362. FOLLOWED IN *Richmond & D. R. Co. v. Rudd*, 88 *Va.* 648.

A company left the manner of running a train down a mountain grade to the judgment of a conductor, and he decided to run it down by gravity, and in doing so a brakeman was injured. *Held*, that the judgment of the conductor was that of the company, and if the manner of running the train was negligent, the company was liable. *Wooden v. Western N. Y. & P. R. Co.*, 46 *N. Y. S. R.* 77; *see* 43 *N. Y. S. R.* 218.

Where it appeared that a brakeman, a minor, on his first trip, was coupling freight cars by the conductor's order, the latter being so situated that he could not see the opening between the cars, nor the brakeman, so as to give the proper signal to slow up, and thus the brakeman was killed by the cars coming together with great force—*held*, the death was caused by the conductor's negligence, and the defendant company is liable. *Johnson v. Richmond & A. R. Co.*, 84 *Va.* 713, 5 *S. E. Rep.* 707.—APPLIED IN *Parker v. Hannibal & St. J. R. Co.*, 109 *Mo.* 362.

A collision occurred and injured plaintiff, a brakeman on one of the trains. The evidence showed that the conductor on plaintiff's train had been promoted without examination, and tended to show that the collision resulted from his unfamiliarity with the time of running trains and the meaning of dispatches directing the movement of trains. *Held*, that the company was liable, if the jury found that the conductor was incompetent. *Evansville & T. H. R. Co. v. Guyton*, 33 *Am. & Eng. R. Cas.* 311, 115 *Ind.* 450, 14 *West. Rep.* 301, 17 *N. E. Rep.* 101.

230. — of brakeman on another train.—When a conductor in charge of a train, with a right to command and to control its movements, leaves his engine and train standing on the track of the main line, along which a train due and expected by him has a right at that time to pass, and fails to use ordinary care to warn or notify in any way the expected train of such obstruction in its way, whereby a collision takes place, and a brakeman on the coming train is injured, and such negligence of the conductor is the direct and proximate cause of such injury, such brakeman, being with-

out fault or the means of preventing such negligence, or of avoiding its consequences, is not the fellow-servant of the conductor, and the company will be held responsible for the injury to the brakeman, caused by the negligence of the conductor in such manner. *Daniel v. Chesapeake & O. R. Co.*, 53 *Am. & Eng. R. Cas.* 503, 36 *W. Va.* 397, 16 *L. R. A.* 383, 15 *S. E. Rep.* 162.—APPROVED IN *Collins v. St. Paul & S. C. R. Co.*, 30 *Minn.* 31.

A yard master in lawful command and control of a train as a conductor for the occasion, is a conductor within the meaning of the rule. *Daniel v. Chesapeake & O. R. Co.*, 53 *Am. & Eng. R. Cas.* 503, 36 *W. Va.* 397, 16 *L. R. A.* 383, 15 *S. E. Rep.* 162.

The conductor of a freight train cut the train in two while on a grade, and left a part of the train, on which a brakeman was asleep, without seeing that the brakes were set, and it ran down the grade and collided with another train, killing a brakeman thereon. *Held*, that the company was liable for the negligence of the conductor. *An v. New York, L. E. & W. R. Co.*, 29 *Fed. Rep.* 72.—FOLLOWING *Chicago, M. & St. P. R. Co. v. Ross*, 112 *U. S.* 377, 5 *Sup. Ct. Rep.* 184.

240. Vice-principal of brakeman.—The conductor is vice-principal of a brakeman on the same train. *Georgia Pac. R. Co. v. Propst*, 83 *Ala.* 518, 3 *So. Rep.* 764. *Central R. Co. v. DeBray*, 71 *Ga.* 406. *Wooden v. Western N. Y. & P. R. Co.*, 18 *N. Y. Supp.* 768. *Wooden v. Western N. Y. & P. R. Co.*, 25 *N. Y. Supp.* 977, 5 *Misc.* 537. *Cleveland, C. & C. R. Co. v. Keary*, 3 *Ohio St.* 201.—FOLLOWING *Little Miami R. Co. v. Stevens*, 20 *Ohio* 415. *LIMITING* *Hutchinson v. York, N. & B. R. Co.*, 5 *Ex.* 343; *Murray v. South Carolina R. Co.*, 1 *McMull.* (So. Car.) 385; *Farwell v. Boston & W. R. Corp.*, 4 *Metc. (Mass.)* 49; *Hayes v. Western R. Corp.*, 3 *Cush. (Mass.)* 270; *Coon v. Syracuse & U. R. Co.*, 5 *N. Y.* 492.—APPROVED IN *Chicago, M. & St. P. R. Co. v. Ross*, 112 *U. S.* 377; *Louisville & N. R. Co. v. Bowler*, 9 *Heisk. (Tenn.)* 866. *DIS- TINGUISHED* IN *Kroy v. Chicago, R. I. & P. R. Co.*, 32 *Iowa* 357. FOLLOWED IN *Pittsburgh, C. & St. L. R. Co. v. Ranney*, 37 *Ohio St.* 665. QUOTED IN *Parker v. Hannibal & St. J. R. Co.*, 50 *Am. & Eng. R. Cas.* 521, 109 *Mo.* 362, 19 *S. W. Rep.* 1119; *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 34 *Fed. Rep.* 616; *Chicago, St. P., M. & O. R.*

Co. v. Lundstrom, 21 Am. & Eng. R. Cas. 528, 16 Neb. 254; *Dick v. Indianapolis, C. & L. R. Co.*, 8 Am. & Eng. R. Cas. 101, 38 Ohio St. 389; *Anderson v. Bennett*, 38 Am. & Eng. R. Cas. 87, 16 Oreg. 515. REFERRED TO IN *Newport News & M. V. Co. v. Howe*, 52 Fed. Rep. 362, 6 U. S. App. 172, 3 C. C. A. 121.

A company is liable for an injury to a brakeman caused by the wilful or gross neglect of the conductor or engineer in charge of the train. *Louisville & N. R. Co. v. Moore*, 24 Am. & Eng. R. Cas. 443, 83 Ky. 675.—APPLIED IN *Parker v. Hannibal & St. J. R. Co.*, 109 Mo. 362. FOLLOWED IN *Louisville & N. R. Co. v. Sheets*, (Ky.) 41 Am. & Eng. R. Cas. 470, 13 S. W. Rep. 248. NOT FOLLOWED IN *Newport News & M. V. Co. v. Howe*, 52 Fed. Rep. 362, 6 U. S. App. 172, 3 C. C. A. 121.

The conductor of a train, though not authorized to make repairs, bears the relation of vice-principal to the brakeman on his train, and his knowledge of defects in the cars composing his train, and promise to repair them, are binding upon the company. *Louisville & N. R. Co. v. Kenley*, 92 Tenn. 207, 21 S. W. Rep. 326.

241. Fellow-servant of car coupler.—An employé whose duties are various, consisting, among other things, of coupling and uncoupling cars, is, while engaged in uncoupling, a fellow-servant with the conductor and engineer having charge of the train. *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226.—REVIEWING *Gillshannon v. Stony Brook R. Corp.*, 10 Cush. (Mass.) 228; *Whealan v. Mad River & L. E. R. Co.*, 8 Ohio St. 249; *Russell v. Hudson River R. Co.*, 17 N. Y. 134; *Boldt v. New York C. R. Co.*, 18 N. Y. 432.

And the fact that such servant had other duties to perform could neither enlarge nor diminish his rights in the premises. *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226.

242. — and when not.—The conductor is not a fellow-servant of a person employed in coupling cars. *Mason v. Richmond & D. R. Co.*, 53 Am. & Eng. R. Cas. 183, 111 N. Car. 482, 16 S. E. Rep. 698.—APPLYING *Boatwright v. Northeastern R. Co.*, 25 So. Car. 129.

243. Fellow-servant of car inspector.—It was the habit to load freight cars on a wharf and then "kick" them down the track where they were made up into a train. A car inspector, who was familiar

with the method of doing business, notified a conductor that he was going to examine a defective car, and to leave a space between it and the next cars; but a newly loaded car was "kicked" down the track, so as to push the cars upon the inspector, causing his death. *Held*, that the company was not liable, as the accident resulted either from the negligence of the inspector or that of his fellow-servant. *Whitmore v. Boston & M. R. Co.*, 150 Mass. 477, 23 N. E. Rep. 220.

244. Vice-principal construction hands and track repairers.—A conductor of a construction train, with a gang of men engaged to work as day laborers for the company, but under the immediate orders of such conductor, is, as to such men, the vice-principal of the company, and not a fellow-servant. *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 21 Am. & Eng. R. Cas. 528, 16 Neb. 254, 49 Am. Rep. 718, 30 N. W. Rep. 198.—QUOTING *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201.—FOLLOWED IN *Burlington & M. R. Co. v. Crockett*, 24 Am. & Eng. R. Cas. 390, 19 Neb. 138; *Sioux City & P. R. Co. v. Smith*, 22 Neb. 775; *Chicago, B. & Q. R. Co. v. Sullivan*, 27 Neb. 673.

A conductor of a material train, having control of it and its movements, and the foreman over a crew of men engaged in repairing a railroad track, having power to direct them, are vice-principals, and the company is liable for the death of a member of the crew occasioned by their negligence. *Miller v. Missouri Pac. R. Co.*, 53 Am. & Eng. R. Cas. 598, 109 Mo. 350, 19 S. W. Rep. 58.

245. Vice-principal of engineer on same train.—It is now established that a conductor of a train represents the company for the time and is the master of the engineer, who is obliged to obey his orders. *Van Amburg v. Vicksburg, S. & P. R. Co.*, 37 La. Ann. 650, 55 Am. Rep. 517.—APPROVING *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377.

Where the rules of a company make it the duty of conductors to care for and manage switches, it makes the conductor as to such duty a vice-principal, and renders the company liable for the death of an engineer caused by the negligence of a conductor of another train in leaving a switch open. *Mase v. Northern Pac. R. Co.*, 57 Fed. Rep. 283.—FOLLOWING *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep.

184. QUOTING *Garrahy v. Kansas City, St. J. & C. B. R. Co.*, 25 Fed. Rep. 258.

240. — and not his fellow-servant.—A conductor who has full management of a train is not a fellow-servant of the engineer; and if the latter is injured in the discharge of his duties, without negligence on his part, through the negligence of the conductor, the company is liable. *Chicago, M. & St. P. R. Co. v. Ross*, 17 Am. & Eng. R. Cas. 501, 112 U. S. 377, 5 Sup. Ct. Rep. 184.

—APPROVED *Little Miami R. Co. v. Stevens*, 20 Ohio 415; *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201; *Louisville & N. R. Co. v. Collins*, 2 Duv. (Ky.) 114. —APPLIED IN *Borgman v. Omaha & St. L. R. Co.*, 41 Fed. Rep. 667. APPROVED IN *Van Amburg v. Vicksburg, S. & P. R. Co.*, 37 La. Ann. 650; *McMaster v. Illinois C. R. Co.*, 41 Am. & Eng. R. Cas. 486, 65 Miss. 264, 7 Am. St. Rep. 653, 4 So. Rep. 59. DISAPPROVED IN *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336; *Loughlin v. State*, 105 N. Y. 159, 6 N. Y. S. R. 826, 11 N. E. Rep. 371. DISTINGUISHED IN *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368; *Anderson v. Winston*, 31 Fed. Rep. 528; *Pike v. Chicago & A. R. Co.*, 41 Fed. Rep. 95; *Baltimore & O. R. Co. v. Andrews*, 53 Am. & Eng. R. Cas. 523, 50 Fed. Rep. 728, 1 C. C. A. 636; *New York & N. E. R. Co. v. Hyde*, 56 Fed. Rep. 188; *Congrave v. Southern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 337, 88 Cal. 360; *Brodeur v. Valley Falls Co.*, 16 R. I. 448. EXPLAINED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758. FOLLOWED IN *Garrahy v. Kansas City, St. J. & C. B. R. Co.*, 25 Fed. Rep. 258; *Au v. New York, L. E. & W. R. Co.*, 29 Fed. Rep. 72; *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 34 Fed. Rep. 616; *Howard v. Delaware & H. Canal Co.*, 40 Fed. Rep. 195; *Athlison, T. & S. F. R. Co. v. Wilson*, 48 Fed. Rep. 57, 4 U. S. App. 25, 1 C. C. A. 25; *Woods v. Lindvall*, 48 Fed. Rep. 62, 4 U. S. App. 49, 1 C. C. A. 37; *Northern Pac. R. Co. v. Cavanaugh*, 51 Fed. Rep. 517, 2 C. C. A. 358; *Newport News & M. V. Co. v. Howe*, 52 Fed. Rep. 362, 6 U. S. App. 172, 3 C. C. A. 121; *Cleveland, C. & St. L. R. Co. v. Brown*, 56 Fed. Rep. 804; *Mase v. Northern Pac. R. Co.*, 57 Fed. Rep. 283; *Palmer v. Utah & N. R. Co.*, 2 Idaho 290. NOT FOLLOWED IN *Feston v. Houston & T. C. R. Co.*, 32 Fed. Rep. 893; *O'Brien v. American Dredging Co.*, 53 N. J.

L. 291. QUOTED IN *Northern Pac. R. Co. v. Charles*, 51 Am. & Eng. R. Cas. 198, 51 Fed. Rep. 562, 7 U. S. App. 359, 2 C. C. A. 380; *St. Louis, A. & T. R. Co. v. Triplett*, 48 Am. & Eng. R. Cas. 283, 54 Ark. 289; *Darigan v. New York & N. E. R. Co.*, 23 Am. & Eng. R. Cas. 438, 52 Conn. 285, 52 Am. Rep. 590; *Mills v. East Tenn., V. & G. R. Co.*, 87 Ga. 102; *Cincinnati, H. & I. R. Co. v. Carper*, 31 Am. & Eng. R. Cas. 36, 112 Ind. 26, 11 West. Rep. 223, 13 N. E. Rep. 122; *Sherrin v. St. Joseph & St. L. R. Co.*, 103 Mo. 378; *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74; *Mason v. Richmond & D. R. Co.*, 111 N. Car. 482; *Anderson v. Bennett*, 38 Am. & Eng. R. Cas. 87, 16 Oreg. 515; *Baltimore & O. R. Co. v. McKenzie*, 24 Am. & Eng. R. Cas. 395, 81 Va. 71; *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599; *Madden v. Chesapeake & O. R. Co.*, 28 W. Va. 610, 57 Am. Rep. 695. QUOTED AND APPLIED IN *Parker v. Hannibal & St. J. R. Co.*, 109 Mo. 362. REFERRED TO IN *Newport News & M. V. Co. v. Howe*, 52 Fed. Rep. 362, 6 U. S. App. 172, 3 C. C. A. 121. REVIEWED IN *Van Avery v. Union Pac. R. Co.*, 35 Fed. Rep. 40; *Ragsdale v. Northern Pac. R. Co.*, 42 Fed. Rep. 383; *Kerlin v. Chicago, P. & St. L. R. Co.*, 53 Am. & Eng. R. Cas. 530, 50 Fed. Rep. 185; *Northern Pac. R. Co. v. Peterson*, 51 Fed. Rep. 182, 2 C. C. A. 157.

When a railroad company places the engineer under their employ under the control of the conductor, who directs when the cars are to start, stop, etc., the company are liable to the engineer for an injury received, occasioned by the negligence of the conductor, whilst they are both engaged in their respective employments. *Little Miami R. Co. v. Stevens*, 20 Ohio 415.—CRITICISING *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49; *Murray v. South Carolina R. Co.*, 1 McMull. (So. Car.) 385.—APPROVED IN *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377. COMMENTED ON IN *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 Miss. 258. DISTINGUISHED IN *Honner v. Illinois C. R. Co.*, 15 Ill. 550; *Kroy v. Chicago, R. I. & P. R. Co.*, 32 Iowa 357; *Vicksburg & M. R. Co. v. Wilkins*, 47 Miss. 404. EXPLAINED IN *Madison & I. R. Co. v. Bacon*, 6 Ind. 205. FOLLOWED IN *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541; *Whaalan v. Mad River & L. E. R. Co.*, 8 Ohio St. 249; *Pittsburgh,*

- ac. R. Co.
as. 198, 51
2 C. C. A.
Cripplott, 48
289; Dar-
o., 23 Am.
5, 52 Am.
& G. R.
i. R. Co.
as. 36, 112
N. E. Rep.
L. R. Co.,
al & St. J.
Richmond
Anderson v.
7, 16 Oreg.
Kenzie, 24
; Northern
599; Mad-
28 W. Va.
D AND AP-
St. J. R.
O IN New-
re, 52 Fed.
C. A. 121.
Union Pac.
agsdale v.
Rep. 383;
R. Co., 53
Rep. 185;
on, 51 Fed.
- ces the en-
er the con-
s when the
pany are
ry received,
of the con-
engaged in
Little Mi-
115.—CRIT-
7, R. Corp.,
outh Caro-
ar.) 385.—
St. P. R.
COMMENTED
I. R. Co. v.
ISHED IN
5 Ill. 550;
o., 32 Iowa
Wilkins, 47
son & I. R.
LOWED IN
ary, 3 Ohio
Co. v. Bar-
Mad River
Pittsburgh,
- C. & St. L. R. Co. v. Ranney, 37 Ohio St.
665; Jenkins v. Little Miami R. Co., 2 Dis-
ney (Ohio) 49. NOT FOLLOWED IN Sum-
merhays v. Kansas Pac. R. Co., 2 Colo. 484;
Sullivan v. Mississippi & M. R. Co., 11
Iowa 421; Ponton v. Wilmington & W. R.
Co., 6 Jones (N. Car.) 245. QUOTED IN
Parker v. Hannibal & St. J. R. Co., 50 Am.
& Eng. R. Cas. 521, 109 Mo. 362, 19 S. W.
Rep. 1119. REFERRED TO IN Newport
News & M. V. Co. v. Howe, 52 Fed.
Rep. 362, 6 U. S. App. 172, 3 C. C. A.
121. REVIEWED IN Mobile & O. R. Co. v.
Thomas, 42 Ala. 672; Pittsburg, Ft. W. &
C. R. Co. v. Devinney, 17 Ohio St. 197;
Hard v. Vermont & C. R. Co., 32 Vt. 473;
Madden v. Chesapeake & O. R. Co., 28 W.
Va. 610, 57 Am. Rep. 695.
- 247. Not a fellow-servant of en-
gineer on another train.**—A company
is liable to an engineer who is injured
through the negligence of a conductor of
another train, or of a telegraph operator
who is charged with the duty of directing
the conductor how to run his train. *Mad-
den v. Chesapeake & O. R. Co.*, 28 W. Va.
610, 57 Am. Rep. 695.—QUOTING Chicago,
M. & St. P. R. Co. v. Ross, 112 U. S. 377.
REVIEWING Little Miami R. Co. v. Stevens,
20 Ohio 415.
- 248. Fellow-servant of engine-
man on same train.**—In an action for
killing plaintiff's intestate in a collision of
trains alleged to have been caused by mis-
leading orders, where defendant demurred
to evidence—*held*, that on the presented
evidence it was plain that defendant com-
pany was guilty of no negligence connected
remotely or directly with the death of the
plaintiff's intestate, which was due solely to
the joint gross negligence, oversight, and
disobedience of its orders by the conductor
and the deceased who was engineman on
his train. *Harris v. Norfolk & W. R. Co.*,
88 Va. 560, 14 S. E. Rep. 535.—QUOTING
Darracott v. Chesapeake & O. R. Co., 83
Va. 288.
- 249. Fellow-servant of fireman
on same train.**—The conductor is a fel-
low-servant of a fireman upon the same
train. *Slater v. Jewett*, 5 Am. & Eng. R.
Cas. 515, 85 N. Y. 61, 39 Am. Rep. 627.
- 250. — but not of fireman on an-
other train.**—A fireman can recover from
the company for an injury caused by the
negligence of the conductor of another train
by reason of which the trains collide. *Rags-*
- dale v. Northern Pac. R. Co.*, 42 Fed. Rep.
383.
- 251. Fellow-servant of a laborer
hired to remove snow from track.**—
A laborer employed to remove snow and
other obstructions from a railroad track
under the directions of a road master, is a
fellow-servant with a track walker and con-
ductor, and cannot recover for an injury
resulting from the combined negligence of
the two. *Fagundes v. Central Pac. R. Co.*,
79 Cal. 97, 3 L. R. A. 824, 21 Pac. Rep. 437.
—APPLIED IN *Elli v. Northern Pac. R. Co.*,
1 N. Dak. 336. REVIEWED IN *Daves v.*
Southern Pac. Co., 98 Cal. 19.
- Plaintiff, while going as a shoveler of
snow for the defendant company upon a
train engaged in the business of removing
snow from the track, was injured by the
overturning of the car in which he rode, by
reason of an unsuccessful attempt of the
conductor to remove a snowbank from the
track by means of the snowplow alone,
aided by the momentum of the train. *Held*,
upon all the facts set out in the complaint,
that a recovery by plaintiff is precluded by
the facts that such overturning of his car
was one of the perils of the business which
he assumed, and that the conductor and
others, whose negligence is alleged, were
fellow-servants in the same employment.
Howland v. Milwaukee, L. S. & W. R. Co.,
5 Am. & Eng. R. Cas. 578, 54 Wis. 226, 11
N. W. Rep. 529. — REVIEWING *Naylor v.*
Chicago & N. W. R. Co., 53 Wis. 661.—AP-
PROVED IN *Bryant v. Burlington, C. R. &*
N. R. Co., 66 Iowa 305. FOLLOWED IN
Toner v. Chicago, M. & St. P. R. Co., 28
Am. & Eng. R. Cas. 449, 31 Am. & Eng. R.
Cas. 320, 69 Wis. 188, 33 N. W. Rep. 433.
REVIEWED IN *Dwyer v. American Exp. Co.*,
82 Wis. 307.
- 252. Vice-principal of a porter.**—
A conductor having the entire control and
management of a railway train occupies a
very different position from the brakeman,
porters, and other subordinates employed.
He is in fact, and should be treated as, the
vice-principal of the corporation, for whose
negligence it is responsible to subordinate
servants. *Haney v. Pittsburgh, C. C. & St.*
L. R. Co., 38 W. Va. 570, 18 S. E. Rep. 748.
- Plaintiff was employed on a train as a
porter, whose duty it was to set brakes,
fasten bell-cords, etc. *Held*, that he was not
a fellow-servant with the conductor of the
train, and might recover for an injury caused

by the conductor negligently starting the train while he was attempting to fasten a bell-cord. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 38 Fed. Rep. 816.

253. Fellow-servant of road master.—A road master was injured while riding on a train in discharge of his duties, through the negligence of the conductor and engineer. *Held*, that he was a fellow-servant, and could not recover from the company without alleging and proving want of care in their selection. *Gulf, W. T. & P. R. Co. v. Ryan*, 69 Tex. 665, 7 S. W. Rep. 83.

254. Fellow-servant of a section foreman.—A section foreman and a train conductor are co-employees "engaged in the same general business" within the meaning of a statute which exempts the employer from liability for injuries caused by the negligence of such fellow-servants. *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 41 N. W. Rep. 758, 3 L. R. A. 363.—*APPROVING* *Murray v. South Carolina R. Co.*, 1 McMull. (So. Car.) 385; *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49; *Holden v. Fitchburg R. Co.*, 129 Mass. 268; *Clifford v. Old Colony R. Co.*, 141 Mass. 564, 6 N. E. Rep. 751; *Coon v. Syracuse & U. R. Co.*, 5 N. Y. 492; *Boldt v. New York C. R. Co.*, 18 N. Y. 432; *Henry v. Staten Island R. Co.*, 81 N. Y. 373; *Harvey v. New York C. & H. R. Co.*, 88 N. Y. 481; *Valtez v. Ohio & M. R. Co.*, 85 Ill. 500; *Keyes v. Pennsylvania Co.*, (Pa.) 3 Atl. Rep. 15; *Heine v. Chicago & N. W. R. Co.*, 58 Wis. 525, 17 N. W. Rep. 420; *Brown v. Minneapolis & St. L. R. Co.*, 31 Minn. 553, 18 N. W. Rep. 834; *Gormley v. Ohio & M. R. Co.*, 72 Ind. 31; *Capper v. Louisville, E. & St. L. R. Co.*, 103 Ind. 305, 2 N. E. Rep. 749; *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322. *DISTINGUISHING* *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642. *EXPLAINING* *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184. *QUOTING* *Garrahy v. Kansas City, St. J. & C. B. R. Co.*, 25 Fed. Rep. 258; *Easton v. Houston & T. C. R. Co.*, 32 Fed. Rep. 893; *Naylor v. New York C. & H. R. R. Co.*, 33 Fed. Rep. 801.—*APPLIED* *IN* *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336.

255. — and when not.—A section foreman on a branch line was directed to take his men and assist in repairing the main line, and was injured through the neg-

ligence of a conductor on a repair train on the main line while going to the place of repairs. *Held*, that they were not fellow-servants, and he might recover from the company. *Union Pac. R. Co. v. Callaghan*, 56 Fed. Rep. 988.

256. Fellow-servant of a section hand riding on train.—A section hand riding on a work train from one place of his work to another, under the charge of the road master, is fellow-servant of the conductor and engineer of such train. *Knahtla v. Oregon S. L. & U. N. R. Co.*, 21 Oreg. 136, 27 Pac. Rep. 91.

257. Fellow-servant of shovelers.—A shoveler on a construction train is a fellow-servant with the conductor and engineer of the train, and cannot recover from the company for injuries received through the negligence of such conductor and engineer, or either of them. *Chicago & A. R. Co. v. McDonald*, 21 Ill. App. 409. *Heine v. Chicago & N. W. R. Co.*, 58 Wis. 525, 17 N. W. Rep. 420.—*QUOTING* *Brabbitts v. Chicago & N. W. R. Co.*, 38 Wis. 289; *Hoht v. Peters*, 55 Wis. 405. *REVIEWING* *Chamberlain v. Milwaukee & M. R. Co.*, 7 Wis. 425, 11 Wis. 238; *Moseley v. Chamberlain*, 18 Wis. 700; *Cooper v. Milwaukee & P. du C. R. Co.*, 23 Wis. 668.—*APPROVED* *IN* *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758. *FOLLOWED* *IN* *Pease v. Chicago & N. W. R. Co.*, 17 Am. & Eng. R. Cas. 527, 61 Wis. 163; *Toner v. Chicago, M. & St. P. R. Co.*, 28 Am. & Eng. R. Cas. 449, 31 Am. & Eng. R. Cas. 320, 69 Wis. 188, 33 N. W. Rep. 433.

258. Vice-principal of a sub-boss.—A conductor is a vice-principal of a sub-boss who is under his control and directions. *Burlington & M. R. R. Co. v. Crockett*, 24 Am. & Eng. R. Cas. 390, 19 Neb. 138, 26 N. W. Rep. 921.

259. Fellow-servant of surveyor.—A surveyor in the employ of a company, while being transported on a train free of charge, is a fellow-servant with the conductor of the train, and cannot recover from the company for an injury caused by the conductor's negligence, in the absence of evidence that he was incompetent, or that the company had been negligent in employing him. *Ross v. New York C. & H. R. R. Co.*, 5 Hun (N. Y.) 488; *affirmed in* 74 N. Y. 617, *mem.*—*QUOTING* *Gilman v. Eastern R. Corp.*, 10 Allen (Mass.) 238. *REVIEWING*

air train on
the place of
not fellow-
er from the
Callaghan,

a section
section hand
e place of his
charge of the
of the con-
in. *Knahlla*
21 *Oreg.* 136,

shovelers.
on train is a
tor and engi-
reover from
ived through
tor and engi-
ago & A. R.
99. *Heine v.*
Wis. 525, 17
abbitts *v. Chi-*
289; *Hoth v.*
NG Chamber-
7 *Wis.* 425, 11
plain, 18 *Wis.*
P. du C. R.
IN *Elliot v.*
8 *Am. & Eng.*
A. 363, 41 *N.*
Pease *v. Chi-*
& *Eng. R. Cas.*
icago, M. & St.
t. *Cas.* 449, 31
Wis. 188, 33 *N.*

a sub-boss.
cipal of a sub-
and directions.
v. Crockett, 24
Neb. 138, 26 *N.*

of surveyor.
of a company,
a train free of
with the conduc-
reover from
caused by the
the absence of
petent, or that
gent in employ-
C. & H. R. R.
med in 74 *N. Y.*
n *v. Eastern R.*
8. REVIEWING

Laning v. New York C. R. Co., 49 *N. Y.* 521;
Flike v. Boston & A. R. Co., 53 *N. Y.* 549;
Wright v. New York C. R. Co., 25 *N. Y.* 564;
Chapman v. Erie R. Co., 1 *T. & C. (N. Y.)*
526.—DISTINGUISHED IN *Vick v. New York*
C. & H. R. R. Co., 17 *Am. & Eng. R. Cas.*
609, 95 *N. Y.* 267.

260. Vice-principal of trainmen on same train.—The conductor of a train is the representative of the company, and not a fellow-servant with other employes operating the same train, under his orders. *Boatwright v. Northeastern R. Co.*, 25 *So. Car.* 128.—APPLYING *Couch v. Charlotte, C. & A. R. Co.*, 22 *So. Car.* 557; *Calvo v. Charlotte, C. & A. R. Co.*, 23 *So. Car.* 526.—APPLIED IN *Parker v. Hannibal & St. J. R. Co.*, 109 *Mo.* 362; *Mason v. Richmond & D. R. Co.*, 111 *N. Car.* 482.

The conductor of a material train, even in the matter of readjusting a switch, is not a fellow-servant with a laborer on his train, but is a representative of the master. *Coleman v. Wilmington, C. & A. R. Co.*, 25 *So. Car.* 446.

Where it is the province of the conductor to control the placing and assigning to duty of trainmen, and the coupling and make-up of the train, and the train is not made up in the usual and proper manner, the conductor is not a fellow-servant, but the superior of the trainmen, where an accident results whereby one of said trainmen is injured. *Moon v. Richmond & A. R. Co.*, 17 *Am. & Eng. R. Cas.* 531, 78 *Va.* 745.—APPLIED IN *Parker v. Hannibal & St. J. R. Co.*, 109 *Mo.* 362. DISTINGUISHED IN *Miller v. Southern Pac. Co.*, 20 *Oreg.* 285; *Brodeur v. Valley Falls Co.*, 16 *R. I.* 448. FOLLOWED IN *Baltimore & O. R. Co. v. McKenzie*, 24 *Am. & Eng. R. Cas.* 395, 81 *Va.* 71; *Richmond & D. R. Co. v. Norment*, 84 *Va.* 167, 4 *S. E. Rep.* 211. QUOTED IN *Calvo v. Charlotte, C. & A. R. Co.*, 28 *Am. & Eng. R. Cas.* 327, 23 *So. Car.* 526, 55 *Am. Rep.* 28.

261. Fellow-servant of trainmen on a construction train.*—One employed on a construction train in repairing the track is a fellow-servant with the conductor and engineer of the train. *St. Louis, I. M. & S. R. Co. v. Shackelford*, 42 *Ark.* 417. *Ryan v. Cumberland Valley R. Co.*, 33

Pa. St. 384.—QUOTED IN *Mullen v. Philadelphia & S. M. Steamship Co.*, 9 *Phila. (Pa.)* 16. REVIEWED IN *Waterbury v. New York C. & H. R. R. Co.*, 21 *Blatchf. (U. S.)* 314, 17 *Fed. Rep.* 671; *Ewald v. Chicago & N. W. R. Co.*, 33 *Am. & Eng. R. Cas.* 326, 70 *Wis.* 420, 36 *N. W. Rep.* 12.

And this, although at the time of the accident the train was moving from one point to another, and he had no active duty to perform. *Prather v. Richmond & D. R. Co.*, 80 *Ga.* 427, 9 *S. E. Rep.* 530.—DISTINGUISHING AND DOUBTING *Atlanta & R. A. L. R. Co. v. Ayers*, 53 *Ga.* 12.

Prima facie all employes on a train of cars, including conductors, are fellow-servants. *McGowan v. St. Louis & I. M. R. Co.*, 61 *Mo.* 528.—QUOTED IN *Blessing v. St. Louis, K. C. & N. R. Co.*, 15 *Am. & Eng. R. Cas.* 298, 77 *Mo.* 410.

A person in charge of a railroad construction train ordered the plaintiff's intestate, an employe, to jump upon a car from a station platform, while the train was in motion. The intestate caught hold of a stake in a platform car, the stake not being at the time properly secured by the dog or pawl which serves to keep the stake in a firm and upright position, and thereby fell under the wheels of the cars and was injured. *Held*, that the conductor who gave the order, and the employe who neglected to put the pawl in place, were fellow-servants with the employe who was injured, in a common and associated service, and that the injured employe could not maintain an action against the railroad company for the injury. *Cassidy v. Maine C. R. Co.*, 17 *Am. & Eng. R. Cas.* 519, 76 *Me.* 488.

262. — and when not.*—Where a laborer on a gravel train was injured by a collision with a wild train which failed to obey orders to flag the gravel train, and could not be readily stopped owing to a defect in its engine—*held*, that the conductor and engineer of the wild train were not fellow-servants of the workman on the gravel train, or engaged in the same common employment. *Northern Pac. R. Co. v. O'Brien*, 1 *Wash.* 599, 21 *Pac. Rep.* 32.—QUOTING *Chicago, M. & St. P. R. Co. v. Ross*, 112 *U. S.* 377.—APPLIED IN *Parker v. Hannibal & St. J. R. Co.*, 109 *Mo.* 362. FOLLOWED

* Conductor as fellow-servant of other train hands, see notes, 48 *AM. & ENG. R. CAS.* 344; 17 *Id.* 536.

* Cases where conductor and trainmen held not to be fellow-servants, see note, 49 *AM. REP.* 406.

IN *Pike v. Chicago & A. R. Co.*, 41 Fed. Rep. 95. REVIEWED IN *Dixon v. Chicago & A. R. Co.*, 109 Mo. 413.

263. Vice-principal of trainmen on gravel or material train.—A gravel-train conductor with a gang of men under his immediate control in the employ of the company is, as to such men, the vice-principal of the company, and not their fellow-servant. *Burlington & M. R. R. Co. v. Crockett*, 24 Am. & Eng. R. Cas. 390, 19 Neb. 138, 26 N. W. Rep. 921.—FOLLOWING *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb. 254.—FOLLOWED IN *Chicago, B. & Q. R. Co. v. Sullivan*, 27 Neb. 673.

The conductor of a material train, having control of it and its movements, is a vice-principal as to the men under him. *Miller v. Missouri Pac. R. Co.*, 53 Am. & Eng. R. Cas. 598, 109 Mo. 350, 19 S. W. Rep. 58.

264. Not a fellow-servant of a watchman.—A watchman at a railroad bridge is not a fellow-servant with the conductor and engineer of a train. *Pike v. Chicago & A. R. Co.*, 41 Fed. Rep. 95.—DISTINGUISHING *Randall v. Baltimore & O. R. Co.*, 109 U. S. 482, 3 Sup. Ct. Rep. 322; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184. FOLLOWING *Sullivan v. Missouri Pac. R. Co.*, 97 Mo. 114, 10 S. W. Rep. 852; *Murray v. St. Louis C. & W. R. Co.*, 98 Mo. 573, 12 S. W. Rep. 252; *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 303; *Garrahy v. Kansas City, St. J. & C. B. R. Co.*, 25 Fed. Rep. 258; *Howard v. Delaware & H. Canal Co.*, 40 Fed. Rep. 195; *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599, 21 Pac. Rep. 32.—REVIEWED IN *Dixon v. Chicago & A. R. Co.*, 109 Mo. 413.

265. Not a fellow-servant of a woman hired to clean cars.—A conductor is not a fellow-servant, so as to exempt the company from liability, of a woman whose employment was to take care of and clean the cars at a station. *Devine v. Boston & A. R. Co.*, 159 Mass. 348, 34 N. E. Rep. 539.

c. Engineer.

266. Generally.*—A workman engaged on a steam shovel is a fellow-servant with the engineer in charge of the shovel, and cannot recover from the company for

an injury received through the negligence of such engineer. *Thompson v. Chicago, M. & St. P. R. Co.*, 5 McCrary (U. S.) 542, 18 Fed. Rep. 239.

The engineer and fireman of a locomotive, and a common laborer, who are all employed by a mill owner in the work of moving lumber cars, are fellow-servants, and for injuries received by the laborer on account of the engineer's negligence the master is not liable. *Watts v. Hart*, 7 Wash. 178, 34 Pac. Rep. 423, 771.

A married woman cooking on a work train, occupying a car, boarding work hands in employ of a railway company, the company paying the board to the husband and deducting the same from their wages, is not a fellow-servant with the engineer running the train. *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. Rep. 288.

267. Fellow-servant of a blacksmith riding to work.—An engineer, acting also as conductor on a train which carried an injured person, who was a head blacksmith, with a number of other employes, on a wrecking train to the locality of a wreck, was a fellow-servant of such blacksmith, being engaged in a common service under a common master. *Abend v. Terre Haute & I. R. Co.*, 17 Am. & Eng. R. Cas. 614, 111 Ill. 202.

268. Fellow-servant of brakeman.—An engineer is a fellow-servant of a brakeman. *Newport News & M. V. Co. v. Howe*, 52 Fed. Rep. 362, 6 U. S. App. 172, 3 C. C. A. 121. *Wallis v. Morgan's L. & T. R. & S. Co.*, 38 La. Ann. 156. *Miller v. Chicago & G. T. R. Co.*, 90 Mich. 230, 51 N. W. Rep. 370. *Hobbs v. Atlantic & N. C. R. Co.*, 44 Am. & Eng. R. Cas. 592, 107 N. Car. 1, 12 S. E. Rep. 124. *East Tenn. & W. N. C. R. Co. v. Collins*, 85 Tenn. 227, 1 S. W. Rep. 883. *Louisville & N. R. Co. v. Kenley*, 92 Tenn. 207, 21 S. W. Rep. 326.

An engineer is a fellow-servant of a brakeman, both running upon the same train. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 31 Fed. Rep. 527. *Illinois C. R. Co. v. Keen*, 72 Ill. 512.—FOLLOWING *Illinois C. R. Co. v. Houck*, 72 Ill. 285.—*Louisville, N. O. & T. R. Co. v. Petty*, 41 Am. & Eng. R. Cas. 444, 67 Miss. 255, 7 So. Rep. 351. *Moran v. New York C. & H. R. R. Co.*, 67 Barb. (N. Y.) 96, 3 T. & C. 770.—APPLYING *Warner v. Erie R. Co.*, 39 N. Y. 468.—*Pittsburgh, C. & St. L. R. Co. v. Ranney*, 5 Am. & Eng. R. Cas. 533, 37 Ohio St. 665. *Nashville, C.*

* Locomotive engineer as fellow-servant of other employes, see notes, 44 Am. & Eng. R. Cas. 595; 53 *Id.* 576.

negligence
Chicago, M.
S.) 542, 18

locomotive,
employed
moving lum-
for injuries
bunt of the
ster is not
sh. 178, 34

on a work
work hands
y, the com-
usband and
vages, is not
er running
71 Tex. 470.

a black-
n engineer,
train which
was a head
other em-
the locality
ant of such
a common
r. Abend v.
m. & Eng.

brakeman.
t of a brake-
Co. v. Howe,
172, 3 C. C.
& T. R. &
Chicago &
N. W. Rep.
C. R. Co., 44
N. Car. 1, 12
W. N. C. R.
S. W. Rep.
r. Kenley, 92

t of a brake-
same train.
P. R. Co.,
Co. v. Keen,
is C. R. Co.
le, N. O. &
Eng. R. Cas.
Moran v.
7 Barb. (N.
ING Warner
Pittsburgh, C.
Am. & Eng.
Nashville, C.

& St. L. R. Co. v. *Wholes*, 15 Am. & Eng. R. Cas. 315, 10 Lea (Tenn.) 741, 43 Am. Rep. 317.—DISTINGUISHED IN *East Tenn. & W. N. C. R. Co. v. Collins*, 85 Tenn. 227, 1 S. W. Rep. 883. QUOTED IN *Nashville, C. & St. L. R. Co. v. Handman*, 13 Lea 423. REVIEWED IN *Bradley v. Nashville, C. & St. L. R. Co.*, 14 Lea 374; *East Tenn., V. & G. R. Co. v. Rush*, 15 Lea 145.—*Texas & N. O. R. Co. v. Berry*, 31 Am. & Eng. R. Cas. 147, 67 Tex. 238, 5 S. W. Rep. 817.

A brakeman in a switch gang is a fellow-servant with the engineer in charge of the switch engine. *Warmington v. Atchison, T. & S. F. R. Co.*, 46 Mo. App. 159.

An engineer is fellow-servant, not the superior, of a brakeman on his train, where, being deprived of their conductor, both pursue, independently of each other, the duties prescribed by the rules of the company in such emergency—the engineer not, in fact, assuming any control over the brakeman, though having the right to do so. *Louisville & N. R. Co. v. Martin*, 87 Tenn. 398, 3 L. R. A. 282, 10 S. W. Rep. 772.

Under the rules of a company, where a train parted and the conductor was on the rear portion, the engineer became the conductor of the forward portion; and after a train had parted the conductor sent a brakeman from the rear portion to signal the forward portion. *Held*, that he was a fellow-servant with the engineer while acting as conductor, and could not recover from the company for the engineer's negligence. *Newport News & M. V. Co. v. Howe*, 52 Fed. Rep. 362, 6 U. S. App. 172, 3 C. C. A. 121.—FOLLOWING *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *Baltimore & O. R. Co. v. Andrews*, 50 Fed. Rep. 728, 1 C. C. A. 636. REFERRING TO *Little Miami R. Co. v. Stevens*, 20 Ohio 415; *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184.

There was no proof that a brakeman was subordinate to an engineer on the same train, except a rule of the company requiring the engineer to give certain signals as a notice to apply or loosen the brakes, and requiring the brakeman to manage the brakes "according to circumstances, and the signals of the engineer," and placing the brakeman while on the train in subordination to the conductor. *Held*, not sufficient to show the relation of superior and sub-

ordinate servant, and that they were fellow-servants. *Pittsburgh, Ft. W. & C. R. Co. v. Lewis*, 33 Ohio St. 196.

269. Fellow-servant of brakeman on another train.—An engineer on one train of a corporation is a fellow-servant of a brakeman working the switch for another train of the same company on an adjacent track. *Randall v. Baltimore & O. R. Co.*, 15 Am. & Eng. R. Cas. 243, 109 U. S. 478, 3 Sup. Ct. Rep. 322.

The conductor and engineer of one train, whose negligence causes a collision resulting in the death of a brakeman on another train, are fellow-servants of such brakeman. *Baltimore & O. R. Co. v. Andrews*, 53 Am. & Eng. R. Cas. 523, 50 Fed. Rep. 728, 1 C. C. A. 636.—DISTINGUISHING *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 599; *Hough v. Texas & P. R. Co.*, 100 U. S. 217; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493; *Quebec Steamship Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. Rep. 397; *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. Rep. 1000. FOLLOWING *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322. QUOTING *Pittsburgh, Ft. W. & C. R. Co. v. Devinney*, 17 Ohio St. 198.—DISTINGUISHED IN *Cincinnati, N. O. & T. P. R. Co. v. Clark*, 57 Fed. Rep. 125. FOLLOWED IN *Newport News & M. V. Co. v. Howe*, 52 Fed. Rep. 362, 6 U. S. App. 172, 3 C. C. A. 121.

Engineers and brakemen are held to be in the same class or line of service; and the fact that the engineer served on a passenger and the brakeman on a freight train does not affect the reason and policy of implying, as between themselves, such association, knowledge, and trust as to have induced an undertaking mutually to risk all the contingencies which the ordinary skill and care of each other in his line of service could not avert. *Louisville & N. R. Co. v. Robinson*, 4 Bush (Ky.) 507.

An engineer on a moving passenger train, and a brakeman on a freight train of the same company, at a depot, who is ordered by the conductor of his train to go along the line of the road to display danger signals to the passenger train, are fellow-servants for the purpose of bringing the train safely into the depot. *East Tenn., V. & G. R. Co. v. Rush*, 15 Lea (Tenn.) 145.—

REVIEWING Nashville, C. & St. L. R. Co. v. Wheelless, 10 Lea 741; East Tenn. V. & G. R. Co. v. Gurley, 12 Lea 46.

270. Vice-principal of brakeman.

—The engineer is not a fellow-servant of a brakeman upon the same train. *Louisville & N. R. Co. v. Brooks*, 83 Ky. 129.

An engineer in charge of a train is not the fellow-servant of a brakeman on the same train, who is subject to his orders. *East Tenn. & W. N. C. R. Co. v. Collins*, 85 Tenn. 227, 1 S. W. Rep. 883.—DISTINGUISHING Nashville, C. & St. L. R. Co. v. Wheelless, 10 Lea (Tenn.) 741.

An engineer who puts a fireman in charge of an engine is a vice-principal of, and not a fellow-servant of, a brakeman coupling the engine to another engine. *Brown v. Southern Pac. R. Co.*, 7 Utah 288, 26 Pac. Rep. 579.

Notice to an engineer of defects in wheels which throw the train from the track and kill a brakeman is not notice to the brakeman; and the doctrine of fellow-service does not apply where the accident was not due to the negligence of the former in running the train. *Illinois C. R. Co. v. Pirtle*, 47 Ill. App. 498.

271. Fellow-servant of car coupler.*—The engineer and the coupler of a freight train are fellow-servants, and for injury to the one caused by the other's negligence the master is not liable. *Boutwell v. Northeastern R. Co.*, 25 So. Car. 128.

In the absence of any evidence tending to show that a railroad engineer was negligent in allowing the fireman to operate the engine at the time the plaintiff was injured while attempting to couple cars, and which alleged negligence is the gist of plaintiff's action, a verdict should be directed for the defendant. *Thompson v. Lake Shore & M. S. R. Co.*, 84 Mich. 281, 47 N. W. Rep. 584.

272. Not fellow-servant of car inspector.—An engineer and a car inspector are not fellow-servants, and a railroad company is liable for an injury to the latter caused by the negligence of the former. *Chicago & A. R. Co. v. Hoyt*, 31 Am. & Eng. R. Cas. 309, 122 Ill. 369, 12 N. E. Rep. 225, 9 West. Rep. 785.—QUOTED IN Louisville, E. & St. L. Con. R. Co. v. Hawthorn, 45 Ill. App. 635.

273. Fellow-servant of car repairer.—The driver of a switch engine is

a fellow-servant of an employé at work repairing cars. *Vallee v. Ohio & M. R. Co.*, 85 Ill. 500. *Chicago & A. R. Co. v. Murphy*, 53 Ill. 336.—REVIEWED IN *Howd v. Mississippi C. R. Co.*, 50 Miss. 178.—*Unfried v. Baltimore & O. R. Co.*, 34 W. Va. 260, 12 S. E. Rep. 512.

274. — and when not.—A car repairer assisting in making a coupling is not, as a matter of law, a fellow-servant of an engineer in charge of a switch engine. *Webb v. Denver & R. G. W. R. Co.*, 7 Utah 363, 26 Pac. Rep. 981.—QUOTING *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590.

275. Fellow-servant of carpenter of bridge gang.—A carpenter employed in a bridge gang, after his day's work was done was sitting in a car writing a letter. He slept in this car. While so engaged a collision occurred with a switch engine, through the negligence of an employé in charge of it. In the collision the carpenter was injured. *Held*, that the injury was from the negligence of a fellow-servant. *International & G. N. R. Co. v. Ryan*, 82 Tex. 565, 18 S. W. Rep. 219.

276. Fellow-servant of carpenter riding to work.—A carpenter employed by the day by a company to work on its road, and carried to the working place on the cars free of charge, cannot maintain an action for injuries received while so carried by the negligence of the engineer running the engine. *Seaver v. Boston & M. R. Co.*, 14 Gray (Mass.) 466.

277. Fellow-servant of conductor on same train.—An engineer is a fellow-servant with the conductor of the same train and running the train subject to the order of the latter. *St. Louis, I. M. & S. R. Co. v. Morgart*, 45 Ark. 318. *Ragsdale v. Memphis & C. R. Co.*, 3 Baxt. (Tenn.) 426.

An engineer is a fellow-servant of an employé on the same train whose duties were to act as conductor and brakeman. *Long v. Coronado R. Co.*, 96 Cal. 269, 31 Pac. Rep. 170.

An engineer is a fellow-servant with the conductor on the same freight train. *Enright v. Toledo, A. A. & N. M. R. Co.*, 93 Mich. 409, 53 N. W. Rep. 536.

Engineer, whether a fellow-servant of a conductor, see *Ragsdale v. Memphis & C. R. Co.*, 3 Baxt. (Tenn.) 426.

278. Fellow-servant of construction hands and gravel-train hands.—An engineer and a laborer upon a con-

* Fellow-servants. Engineer and car-coupler, see note, 17 AM. & ENG. R. CAS. 538.

struction train are fellow-servants. *Miller v. Ohio & M. R. Co.*, 24 Ill. App. 326.

An engineer and laborer on a railroad construction train are fellow-servants where they work under the same conductor, derive their authority and compensation from the same common source, and are engaged in the same general business, though in a different grade of the common service. *Higgins v. Missouri Pac. R. Co.*, 104 Mo. 413, 16 S. W. Rep. 409.

An engineer is a fellow-servant with employes on the same gravel train. *Henry v. Staten Island R. Co.*, 2 Am. & Eng. R. Cas. 60, 81 N. Y. 373. *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366.—DISTINGUISHING *Fitzpatrick v. New Albany & S. R. Co.*, 7 Ind. 436.—DISTINGUISHED IN *Dobbin v. Richmond & D. R. Co.*, 81 N. Car. 446.

A laborer on a gravel train who, by arrangement, is entitled to be carried to and from his work free of charge, except that he may be required to apply the brakes if necessary, is a fellow-servant with the engineer of the train while so riding. *Russell v. Hudson River R. Co.*, 17 N. Y. 134; *reversing 5 Lur* 39.—DISTINGUISHED IN *Vick v. New York C. & H. R. R. Co.*, 17 Am. & Eng. R. Cas. 609, 95 N. Y. 267. FOLLOWED IN *Boldt v. New York C. R. Co.*, 18 N. Y. 432. REVIEWED IN *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226; *Ewald v. Chicago & N. W. R. Co.*, 33 Am. & Eng. R. Cas. 326, 70 Wis. 420, 36 N. W. Rep. 12.

279. Not a fellow-servant of an express messenger.—An engineer is not deemed to be a fellow-servant of an express messenger employed by the superintendent of a road to act as a brakeman for one trip. *Chamberlain v. Milwaukee & M. R. Co.*, 11 Wis. 238.

280. — mixed question of law and fact.—Where a railroad company does its own express business, but as a separate department, the question whether an express messenger and the engineer of a train are fellow-servants is a mixed question of law and fact, and it is error for the court to instruct the jury as a matter of law that they are fellow-servants. *Baltimore & O. R. Co. v. McKenzie*, 24 Am. & Eng. R. Cas. 395, 81 Va. 71.—QUOTING *McAndrews v. Burns*, 39 N. J. L. 117; *Morgan v. Vale of Neath R. Co.*, 5 B. & S. 570.

281. Fellow-servant of fireman.—A fireman and engineer are fellow-servants,

and a recovery cannot be had against the company for the death of a fireman through the negligence of the engineer. *Illinois C. R. Co. v. Hostler*, 45 Ill. App. 205. *Bull v. Mobile & M. R. Co.*, 67 Ala. 206. *Hobbs v. Atlantic & N. C. R. Co.*, 107 N. Car. 1, 12 S. E. Rep. 124.

The engineer is a fellow-servant of a fireman running upon the same locomotive. *Baltimore & O. R. Co. v. Baugh*, 54 Am. & Eng. R. Cas. 328, 149 U. S. 368, 13 Sup. Ct. Rep. 914. *Henry v. Lake Shore & M. S. R. Co.*, 8 Am. & Eng. R. Cas. 110, 49 Mich. 495, 13 N. W. Rep. 832. *Nashville, C. & St. L. R. Co. v. Handman*, 13 Lea (Tenn.) 423.—FOLLOWING *Jones v. Yeager*, 2 Dill. (U. S.) 64; *Caldwell v. Brown*, 53 Pa. St. 453.—*Gulf, C. & S. F. R. Co. v. Blohn*, 73 Tex. 637, 4 L. R. A. 764, 11 S. W. Rep. 867.

A fireman on a passenger train, and an engineer in charge of an engine not connected with such train, but belonging to the same railroad company, are fellow-servants, and where the fireman is killed by a collision between the engine and the train, caused by the negligence of the engineer, the company will not be liable. *Howard v. Denver & G. R. Co.*, 24 Am. & Eng. R. Cas. 448, 26 Fed. Rep. 837.—APPLIED IN *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336. FOLLOWED IN *Mealman v. Union Pac. R. Co.*, 37 Fed. Rep. 189, 2 L. R. A. 192.

Whether the engineer and fireman of a locomotive engine running along on a railroad, and without any train attached, are fellow-servants, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former, is not a question of local law, to be settled by the decisions of the highest court of the state in which a cause of action arises, but is one of general law, to be determined by a reference to all the authorities, and a consideration of the principles underlying the relations of master and servant. *Baltimore & O. R. Co. v. Baugh*, 54 Am. & Eng. R. Cas. 328, 149 U. S. 368, 13 Sup. Ct. Rep. 914.—DISTINGUISHING *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377.

282. — under California statute.—A fireman and oiler and an engineer are engaged in the same general business and are fellow-servants within the meaning of the civil code, § 1970; and this is so though it appear that the engineer has authority to employ and discharge firemen. *Stevens v.*

San Francisco & N. P. R. Co., 100 Cal. 554, 35 Pac. Rep. 165.

283. — under Florida statute.—The engineer, fireman, and brakeman of the same freight train are fellow-servants; and prior to the passage of chapter 3744, laws approved June 7, 1887, the employer company was not liable in damages to one of such fellow-servants for injuries sustained in the line of his employment in consequence of the negligence of the engineer in putting his unskilled or careless fireman in the performance of his duty in temporarily handling the engine. *South Fla. R. Co. v. Price*, 32 Fla. 46, 13 So. Rep. 638.—FOLLOWING *Parrish v. Pensacola & A. R. Co.*, 28 Fla. 251, 9 So. Rep. 696; *South Fla. R. Co. v. Weese*, 32 Fla. 212, 13 So. Rep. 436.

284. Vice-principal of fireman.—A fireman upon a locomotive, while in the discharge of his duties as such, may properly be found to have been acting under the immediate control of the engineer. *Cooper v. Central R. Co.*, 44 Iowa 134.

An engineer whose duties are to inspect engines upon which he runs, and perform other duties, by law imposed upon the company, stands in relation of vice-principal to a fireman on his engine. *Sabine & E. T. R. Co. v. Ewing*, 1 Tex. Civ. App. 531, 21 S. W. Rep. 700.

285. Fellow-servant of a flagman.—A locomotive engineer is a fellow-servant with a flagman, and the company is not liable for the death of the latter through the negligence of the engineer in running his engine without a headlight, instead of sending it to the shop for a new headlight, as the rules of the company required. *McDonald v. New York C. & H. R. R. Co.*, 45 N. Y. S. R. 711, 63 Hun 587; affirmed in 138 N. Y. 663, mem., 34 N. E. Rep. 514, mem., 53 N. Y. S. R. 932, mem.—QUOTING *Miller v. Southern Pac. Co.*, 20 Oreg. 285, 26 Pac. Rep. 70, 43 Alb. L. J. 354.

286. Fellow-servant of founder in a blast furnace.—A founder in a blast furnace for the manufacture of pig iron, who has a separate department—the inside work of the furnace—and who has nothing to do with the other departments, except when acting through the general management or the foreman or boss of such departments, is a fellow-servant of an engineer whose business it is to move the cars on the furnace track as desired in the business, and he assumes the risk that said cars might

be handled negligently by said engineer. *Adams v. Iron Cliffs Co.*, 41 Am. & Eng. R. Cas. 414, 78 Mich. 271, 44 N. W. Rep. 270.

287. Not a fellow-servant of an "overhauler of cars."—Plaintiff, who was overhauling a car on a side track, was injured through the negligence of an engineer in running a train against the car, while engaged in shifting cars. Held, that plaintiff and the negligent engineer were not fellow-servants. *Richmond & D. R. Co. v. Norment*, 84 Va. 167, 4 S. E. Rep. 211.—FOLLOWING *Moon v. Richmond & A. R. Co.*, 78 Va. 745.

288. Fellow-servant of road master.—A locomotive engineer and a road master are fellow-servants, and in order to entitle the latter to recover from the company for an injury, the result of the negligence of the former, the evidence must show that the negligence of the engineer was the proximate cause of the injury, and that the engineer was incompetent, and the company had been negligent either in employing him or retaining him. *Holland v. Southern Pac. Co.*, 100 Cal. 240, 34 Pac. Rep. 666.

289. Not fellow-servant of section foreman.—The fact that a section foreman engaged in the repair of a railway bridge has the right to flag a freight train approaching such bridge, and it is the duty of the engineer to obey the signal, in no way tends to establish the relation of fellow-servant between them. *Proria, D. & E. R. Co. v. Rice*, 144 Ill. 227, 33 N. E. Rep. 951.

290. Fellow-servant of section hand.—An engineer in charge of a train which ran into a hand-car and injured a section hand is a fellow-servant with the latter, inasmuch as they were in the same common employment and were respectively charged with the ordinary risks of each other's negligence. *Easton v. Houston & T. C. R. Co.*, 32 Fed. Rep. 893. *Clifford v. Old Colony R. Co.*, 141 Mass. 564, 6 N. E. Rep. 751. *Connolly v. Minneapolis Eastern R. Co.*, 38 Minn. 80, 35 N. W. Rep. 582.—APPLIED IN *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336.—*Texas & P. R. Co. v. Wagner*, 2 Tex. App. (Civ. Cas.) 291.

A section hand and an engineer operating a construction train are fellow-servants. *Trinity & S. R. Co. v. Mitchell*, 72 Tex. 609, 10 S. W. Rep. 698.

A section hand cannot recover from his company for injuries received by a col-

lision between a hand-car on which he is at work and the engine of a train, where the negligence of the section boss and the engineer of the train produced the collision. *Clifford v. Old Colony R. Co.*, 141 Mass. 564, 6 N. E. Rep. 751.—APPLIED IN *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336. APPROVED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758. REVIEWED IN *Criswell v. Pittsburgh, St. L. & C. R. Co.*, 30 W. Va. 798.

291. Fellow-servant of shoveler.—The engineer is a fellow-servant of the fireman and brakemen and shovelers on a gravel train engaged in loading, hauling, and unloading gravel in repair of the road-bed. *Parrish v. Pensacola & A. R. Co.*, 28 Fla. 251, 9 So. Rep. 696.

And a shoveler who is injured through the negligence of the engineer cannot recover from their common employer for such injury. *St. Louis & S. E. R. Co. v. Britz*, 72 Ill. 256.

292. Fellow-servant of superintendent of track repairs.—The engineer of a train and a person employed by the owners of a private railroad to superintend repairs and put the track in good condition are fellow-servants, and the latter cannot recover for injuries received while traveling on a material train through the negligence of the former. *White v. Kennon*, 39 Am. & Eng. R. Cas. 330, 83 Ga. 343, 9 S. E. Rep. 1082.

293. Fellow-servant of a switchman.*—A switchman and a locomotive engineer are fellow-servants. *Chicago, R. I. & P. R. Co. v. Touhy*, 26 Ill. App. 99. *Toms v. Buffalo Creek R. Co.*, 70 Hun 84, 53 N. Y. S. R. 640, 23 N. Y. Supp. 1112.

An engineer running a switch engine, and a switch tender, are engaged in the same common employment to such an extent as to be considered co-employees. *Chicago, R. I. & P. R. Co. v. Henry*, 7 Ill. App. 322.

An engineer is the fellow-servant of a switchman who was ordered to ride upon the engine. *Smith v. Memphis & L. R. R. Co.*, 18 Fed. Rep. 304.

294. Not fellow-servant of teamster hauling ties.—An engine driver is not a fellow-servant with a teamster whose business is the hauling of railroad ties for

the construction of a road. *Hobson v. New Mexico & A. R. Co.*, (Ariz.) 28 Am. & Eng. R. Cas. 360, 11 Pac. Rep. 545.

295. Fellow-servant of trackman.—An engineer running a train backward on a track is a fellow-servant of an employé at work on the track. *Rohback v. Pacific R. Co.*, 43 Mo. 187.

296. — and when not.—Where a servant of a railway employed on a track was injured by the engine through the carelessness of the engineer of the company—held, that the servant injured was not engaged in the same line of employment as the engineer, and he might recover of the company for the injury the same as any other person not in its service, if he acted with prudence on his part. *Pittsburg, Ft. W. & C. R. Co. v. Powers*, 74 Ill. 341.

297. Fellow-servant of track repairer.—A track repairer and an engineer and others engaged in running a train are in the same general undertaking, and are therefore fellow-servants. *Gormley v. Ohio & M. R. Co.*, 5 Am. & Eng. R. Cas. 581, 72 Ind. 31.—APPLIED IN *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336. APPROVED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758.

An engineer on an elevated railroad train is a fellow-servant with the track repairer on a structure of such road. *Van Winkle v. Manhattan R. Co.*, 23 Blatchf. (U. S.) 422, 32 Fed. Rep. 278.

298. — and when not.—A track repairer and a locomotive engineer, both employed by the same company, are not engaged in a common employment, and are therefore not fellow-servants. *Chicago & N. W. R. Co. v. Bliss*, 6 Ill. App. 411. *Schlereth v. Missouri Pac. R. Co.*, 115 Mo. 87, 21 S. W. Rep. 1110.

299. Not a fellow-servant of trainmen of his train.—An engineer, with respect to the movements of a train which is wholly under his own control, is not a fellow-servant with the other train employees, but their vice-principal. *Ragsdale v. Northern Pac. R. Co.*, 42 Fed. Rep. 383.

300. Fellow-servant of a tunnel repairer.—One whose business it is to construct and repair tunnels is a fellow-servant with a locomotive engineer and other train employees while being carried from one place of work to another. *Capper v. Louisville, E. & St. L. R. Co.*, 21 Am. & Eng. R.

* Fellow-servants. Engineer and switchman, see note, 41 AM. & ENG. R. CAS. 472.

Cas. 525, 103 *Ind.* 305, 2 *N. E. Rep.* 749.—
APPROVED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 *Am. & Eng. R. Cas.* 62, 5 *Dak.* 523, 3 *L. R. A.* 363, 41 *N. W. Rep.* 758.

301. Fellow-servant of yard and car clerk.—An engineer and train hands are fellow-servants of a yard or car clerk whose duties are to make a record of the seals of the cars of each train entering the yard. *New York & N. E. R. Co. v. Hyde*, 56 *Fed. Rep.* 188.

302. Not fellow-servant of yard switchman.—A locomotive engineer is not the fellow-servant of a yard switchman, and the employer is responsible for injuries caused to the latter by the negligence of the former. *Louisville & N. R. Co. v. Sheets*, (Ky.) 41 *Am. & Eng. R. Cas.* 470, 13 *S. W. Rep.* 248.—FOLLOWING *Louisville & N. R. Co. v. Collins*, 2 *Duv. (Ky.)* 114; *Louisville & N. R. Co. v. Robinson*, 4 *Bush (Ky.)* 507; *Louisville & N. R. Co. v. Filbern*, 6 *Bush* 574; *Louisville & N. R. Co. v. Moore*, 24 *Am. & Eng. R. Cas.* 443, 83 *Ky.* 675.

303. Not fellow-servant of man hired to erect fences along track.—Plaintiff was employed under a foreman in erecting a fence along the company's track, and was injured while going on a train to unload posts, by the engineer suddenly starting the train. *Held*, that the plaintiff and the engineer were not fellow-servants. *Louisville, E. & St. L. Con. R. Co. v. Hawthorn*, 45 *Ill. App.* 635.—QUOTING *North Chicago Rolling Mill Co. v. Johnson*, 114 *Ill.* 57. REVIEWING AND QUOTING *Chicago & A. R. Co. v. Hoyt*, 122 *Ill.* 369.

304. Fellow-servant of men hired to load and unload cars.—An engineer of a locomotive engine used in drawing a train of flat cars, and a laborer employed unloading the cars of the stone and materials placed upon them to be distributed along the track, are fellow-servants. *Lake Shore & M. S. R. Co. v. Stupak*, 41 *Am. & Eng. R. Cas.* 382, 123 *Ind.* 210, 23 *N. E. Rep.* 246. *Kumler v. Junction R. Co.*, 33 *Ohio St.* 150.

305. — and when not.—A locomotive engineer and a laborer unloading rails are not fellow-servants. *Peoria, D. & E. R. Co. v. Johns*, 43 *Ill. App.* 83.—QUOTING *North Chicago Rolling Mill Co. v. Johnson*, 114 *Ill.* 57.

One employed by an independent contractor to assist in loading coal into the tenders of locomotives from coal pockets alongside the track, and to notify engineers

where to place their engines to receive the coal—the engineers rendering no assistance in the loading—is not a fellow-servant with an engineer for whose use he is supplying coal at the time of receiving an injury caused by the negligence of the engineer. *Union Pac. R. Co. v. Billeter*, 41 *Am. & Eng. R. Cas.* 434, 28 *Neb.* 422, 44 *N. W. Rep.* 483.

306. Fellow-servant of other engineers of same company.—One locomotive engineer is the fellow-servant of another working for the same company. *Van Avery v. Union Pac. R. Co.*, 35 *Fed. Rep.* 40. *Ohio & M. R. Co. v. Robb*, 36 *Ill. App.* 627.—FOLLOWING *Chicago & N. W. R. Co. v. Moranda*, 93 *Ill.* 302.—*Norfolk & W. R. Co. v. Donnelly*, 53 *Am. & Eng. R. Cas.* 571, 88 *Va.* 853, 14 *S. E. Rep.* 692.

An engineer is a fellow-servant of another engineer running trains for the same company on the same track. *Chicago, St. L. & N. O. R. Co. v. Doyle*, 8 *Am. & Eng. R. Cas.* 171, 60 *Miss.* 977.

Though the engineer backing an engine had lost the use of one eye, which was bandaged, the relation of fellow-servants existed between him and another engineer standing on the track, and the company was not liable. *Keyes v. Pennsylvania Co. (Pa.)* 3 *Atl. Rep.* 15.

307. — but not of engineers of other companies.—It appeared that the plaintiff was an engineer in the service of another railway company which jointly used a certain track of the defendant company; that all trains when on such joint track were under orders of the defendant's train dispatcher; that plaintiff was operating his employer's train on such joint track under directions of such dispatcher to meet one of defendant's trains at a designated point; that the engineer of defendant's train, in violation of his orders, ran by the meeting point, and plaintiff was injured in a collision that ensued. *Held*, that plaintiff and the engineer of defendant's train were not fellow-servants. *Texas & P. R. Co. v. Easton*, 2 *Tex. Civ. App.* 378, 21 *S. W. Rep.* 575.—DISTINGUISHING *Gulf, C. & S. F. R. Co. v. Dorsey*, 66 *Tex.* 148; *Missouri Pac. R. Co. v. Jones*, 75 *Tex.* 151.

d. Foreman.

308. When deemed a fellow-servant, generally.*—A foreman of men

* Foreman as fellow-servant of laborers under him, see note, 17 *AM. & ENG. R. CAS.* 561. See

employed by a railroad company to make an excavation is a fellow-servant with the men under him. *Chicago & T. R. Co. v. Simmons*, 11 Ill. App. 147.

A foreman under contractors, who has charge of men engaged in excavating a tunnel, is a fellow-servant with such men. *Anderson v. Winston*, 31 Fed. Rep. 528.—DISTINGUISHING *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184.

A foreman, standing in no respect in the place of the company, is not a vice-principal of those engaged under him. *Copper v. Louisville, E. & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 525, 103 Ind. 305, 2 N. E. Rep. 749. *Foley v. Chicago, R. I. & P. R. Co.*, 64 Iowa 644, 21 N. W. Rep. 124. *Baldwin v. St. Louis, K. & N. R. Co.*, 68 Iowa 37, 25 N. W. Rep. 918. *Dube v. Lewiston*, 83 Me. 211, 22 Atl. Rep. 112.

300. — illustrations.—A foreman whose duty it was to close a switch, in failing to do so was not a vice-principal, but acting as a fellow-servant with the other servants employed in the same general business within the meaning of section 1970 of Cal. Civ. Code. *Daves v. Southern Pac. Co.*, 98 Cal. 19, 32 Pac. Rep. 708.

The foreman of a gang is not a vice-principal, but acts merely as a fellow-servant, in failing to block a pile which was shoved against plaintiff, who was working under him. *Ell. v. Northern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 318, 1 N. Dak. 336.

A railroad laborer, injured by the breaking of a chain which the foreman of the gang required them to use when he knew it was defective, cannot recover therefor from the company, the negligence being that of the foreman, the fellow-servant of plaintiff. *Kinney v. Corbin*, 132 Pa. St. 341, 19 Atl. Rep. 141.—QUOTING *Johnson v. Boston Tow Boat Co.*, 135 Mass. 209.

Plaintiff, an employé of defendants, was sent by the foreman of the works to excavate earth from a bank below, while others were loosening it from above. While so engaged a quantity of earth fell down upon him, and broke his leg. *Held*, that defendants were not liable, and a nonsuit was ordered. *O'Sullivan v. Victoria R. Co.*, 44 U. C. Q. B. 128.—APPLYING *Deverill v. Grand Trunk R. Co.*, 25 U. C. Q. B. 517.

also 53 AM. & ENG. R. CAS. 608, *abstr.*; 48 *Id.* 320, *abstr.*

The defendants, the proprietors of extensive mills, constructed a tramway to carry lumber from one end of their yard to the other, the cars used being drawn by a steam engine. There was no passenger car, but the employés were permitted to be carried on the road. The track was laid on ties placed on wet ground, very little ballasting was done, and none where the accident happened, and there was other evidence of faulty construction. The plaintiff was going to his work on one of the cars, when it was thrown off the track by reason of a misplaced rail, caused by the defective construction. The defendants employed a competent foreman, who delegated the duty of keeping the track in repair to one B., a fellow-servant of the plaintiff, and it was shown that B. neglected to replace the rail, though he was aware of its being displaced. *Held*, that the accident having been caused by the negligence of a fellow-servant, the defendants were not liable. *McFarlane v. Gilmour*, 5 Ont. 302.—REVIEWING *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291; *Waller v. South Eastern R. Co.*, 2 H. & C. 102; *Lovegrove v. London, B. & S. C. R. Co.*, 16 C. B. N. S. 669.

310. Performing duties of servant merely.—A foreman though ordinarily a vice-principal may be deemed to be a fellow-servant while in the discharge of his ordinary duties in the course of his employment, and not the duties delegated to him which are imposed by law upon the company. *Olson v. St. Paul, M. & M. R. Co.*, 33 Am. & Eng. R. Cas. 386, 38 Minn. 117, 35 N. W. Rep. 866. *Fitzgerald v. Henkomp*, 44 Ill. App. 365. *Copper v. Louisville, E. & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 525, 103 Ind. 305, 2 N. E. Rep. 749. *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. Rep. 157. *Gulf, C. & S. F. R. Co. v. Schwabbe*, 1 Tex. Civ. App. 573, 21 S. W. Rep. 706.

He is a vice-principal only when he is performing duties imposed by law upon the company itself. *Stockmeyer v. Reed*, 55 Fed. Rep. 259.

311. Where company retains supervision of the work.—A foreman is not a vice-principal of those working under him where the master or his vice-principal retains the direction and supervision of the work. *O'Brien v. American Dredging Co.*, 53 N. J. L. 291, 21 Atl. Rep. 324.—NOT FOLLOWING *Berea Stone Co. v. Kraft*, 31 Ohio St. 287; *Chicago & A. R. Co. v. May*, 108

ceive the assistance of a fellow-servant with the company, who supplied the engine, and caused the accident. *Union Eng. R. Co. v. R. Co.*, 483. *Other*—*One* loco-servant of the company. *35 Fed. Rep. 36 Ill. & N. W. Norfolk & Eng. R. Co. v. R. Co.*, 692. *of another* same com-
pany. *St. L. & Eng. R. Cas.*

an engine which was
employed by the company
to excavate the earth from
the bank below, while others
were loosening it from above.

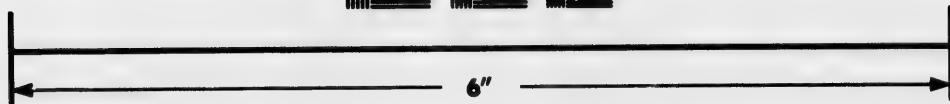
engineers of the company
employed that the service
of the company was jointly
used by the company;
the track were
the train dis-
operating his
track under
to meet one
at the point;
the train, in
the meeting
in a collision
with the
plaintiff and the
were not fel-
low-servants.
Co. v. Easton,
112 U. S. 377, 5
Sup. Ct. Rep. 184.
F. R. Co. v.
Pac. R. Co.

fellow-ser-
vant of men

laborers under
the company. *See*



Resolution test chart showing patterns of vertical and horizontal lines with numerical values ranging from 1.0 to 2.5.



Photographic Sciences Corporation

**23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503**

18 20 22 25
16 19 21 24
14 17 23 26
12 15 27 28

10 01
11 11
12 12
13 13
14 14
15 15
16 16
17 17
18 18
19 19
20 20
21 21
22 22
23 23
24 24
25 25
26 26
27 27
28 28

Ill. 288; *Cook v. Hannibal & St. J. R. Co.*, 63 Mo. 397; *Louisville & N. R. Co. v. Bowler*, 9 Heisk. (Tenn.) 866; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377.—*Malone v. Hathaway*, 64 N. Y. 5.

A foreman who directs the work of the other servants is as much a servant as those whose work he superintends; and if the common master has a general supervision of the work, he is not liable for the foreman's negligence, although the injured servant is obliged to obey the foreman's orders. *Kirk v. Atlanta & C. A. L. R. Co.*, 25 Am. & Eng. R. Cas. 507, 94 N. Car. 625, 55 Ala. Rep. 621.—REVIEWING *Feltham v. Engla.* L. R. 2 Q. B. 33; *Chicago & A. R. Co. v. Murphy*, 53 Ill. 336.—QUOTED IN *Hobbs v. Atlantic & N. C. R. Co.*, 107 N. Car. 1.

312. When deemed a vice-principal, generally.*—A foreman of a crew or gang of men engaged in a particular service—held, to be not a fellow-servant, but a vice-principal of the members of his crew. *Wabash, St. L. & P. R. Co. v. Hawk*, 31 Am. & Eng. R. Cas. 306, 121 Ill. 259, 12 N. E. Rep. 253, 10 West. Rep. 137. *Lindvall v. Woods*, 44 Fed. Rep. 855.

A foreman is not a fellow-servant of a man under his orders in respect to his performance of the master's duty of directing the work in his charge. *Schroeder v. Chicago & A. R. Co.*, 53 Am. & Eng. R. Cas. 436, 108 Mo. 322, 18 S. W. Rep. 1094.

A foreman intrusted with exclusive control of work, and of providing a safe place for employes to work, acts in the discharge of such duty for the master, and is not a fellow-servant of one injured through his negligence in failing to provide a safe place for him to work, and the railroad company is liable. *Louisville, N. A. & C. R. Co. v. Graham*, 124 Ind. 89, 24 N. E. Rep. 668. *Ischer v. St. Louis Bridge Co.*, 95 Mo. 261, 8 S. W. Rep. 367.—FOLLOWING *McDermott v. Hannibal & St. J. R. Co.*, 87 Mo. 298; *Stephens v. Hannibal & St. J. R. Co.*, 86 Mo. 228; *Dowling v. Allen*, 88 Mo. 293; *Hoke v. St. Louis, K. & N. R. Co.*, 88 Mo. 360.—*Dube v. Lewiston*, 83 Me. 211, 22 Atl. Rep. 112. *Foster v. Missouri Pac. R. Co.*, 115 Mo. 165, 21 S. W. Rep. 916. *Rowland v. Missouri Pac. R. Co.*, 20 Mo. App. 463.

A foreman in charge of machinery is a

vice-principal of an infant employe under him with reference to orders given by the former within the scope of his duties concerning dangerous machinery, etc. *Fort v. Union Pac. R. Co.*, 2 Dill. (U. S.) 259; affirmed in 17 Wall. (U. S.) 553.

It is a duty which devolves upon a company to see that its bridges are in safe condition; and when this duty is intrusted to a foreman, his negligence is the negligence of the company, so far as relates to injuries to the men under him. *Bowen v. Chicago, B. & K. C. R. Co.*, 95 Mo. 268, 14 West. Rep. 744, 8 S. W. Rep. 230.

313. Foreman representing the company.—A foreman under whom plaintiff was employed is not a fellow-servant of the latter in so far as he represents the company in the performance of duties imposed upon it by law. *Russ v. Wabash Western R. Co.*, 112 Mo. 45, 20 S. W. Rep. 472. *Stephens v. Hannibal & St. J. R. Co.*, 38 Am. & Eng. R. Cas. 110, 96 Mo. 207, 9 S. W. Rep. 589.

A foreman is the vice-principal of those working under him in so far as he represents the master in furnishing them with a safe place in which to work. *Bunnell v. St. Paul, M. & M. R. Co.*, 29 Minn. 305, 13 N. W. Rep. 129.

When a foreman of a gang is vested with the entire management, control, and supervision of a particular work to be done, so as to say not only what shall be done, but how it shall be done, and he has full power and authority to command the men under him in the work, and the work is under his practical direction and control, save and except as he may receive directions from time to time from his employer, and ordinarily there is no one else present and authorized to superintend and direct the work of the men, then he represents the employer. *Lindvall v. Woods*, 44 Fed. Rep. 855. *Dobbin v. Richmond & D. R. Co.*, 81 N. Car. 446.

It is not the duty of an employer, after having provided materials ample in quantity and quality for the work his employes are engaged in, to supervise the selection of every piece of material for every purpose; and if his foreman should make the selection he does not represent the master therein as a vice-principal. *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. Rep. 157.

314. — and performing duties by law imposed upon company.—Where a company puts a superintendent, foreman,

* Foreman as vice-principal, see note, 15 AM. & ENG. R. CAS. 325.

or other employé in its place to discharge some duty which it owes to its employés, as to such duty such foreman or other employé is not a co-servant, but the representative of the company, and as to such duty the company is bound by the acts or commissions of such middleman the same as though the acts had been done or omitted by the company itself. *Riley v. West Virginia C. & P. R. Co.*, 27 W. Va. 145. — **LIMITING** *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411; *Hard v. Vermont & C. R. Co.*, 32 Vt. 473; *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49. — *Fones v. Phillips*, 39 Ark. 17. *Schroeder v. Chicago & A. R. Co.*, 53 Am. & Eng. R. Cas. 436, 108 Mo. 322, 18 S. W. Rep. 1094. *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. Rep. 157.

A foreman exercising exclusive control of a department of work, and performing the duty of the company in providing a safe place for the employés to work, is their vice-principal. *Louisville, N. A. & C. R. Co. v. Graham*, 124 Ind. 89, 24 N. E. Rep. 668.

315. Foreman with power to hire and discharge those under him.*—A foreman of railroad laborers who has power to hire and discharge the men, and who directs and controls their work and keeps their time, is not a fellow-servant, but the representative of the company. *Cleveland, C., C. & St. L. R. Co. v. Brown*, 56 Fed. Rep. 804. *Miller v. Union Pac. R. Co.*, 5 McCrary (U. S.) 300, 17 Fed. Rep. 67. *Colorado Midland R. Co. v. O'Brien*, 48 Am. & Eng. R. Cas. 235, 16 Colo. 219, 27 Pac. Rep. 701. — **NOT FOLLOWING** *Brick v. Rochester, N. Y. & P. R. Co.*, 98 N. Y. 211. — *Erickson v. Milwaukee, L. S. & W. R. Co.*, 93 Mich. 414, 53 N. W. Rep. 393. — **FOLLOWING** *Harrison v. Detroit, L. & N. R. Co.*, 79 Mich. 409. — *Smith v. Sioux City & P. R. Co.*, 17 Am. & Eng. R. Cas. 561, 15 Neb. 583, 19 N. W. Rep. 638. *Douglas v. Texas Mex. R. Co.*, 63 Tex. 564. *Missouri Pac. R. Co. v. Williams*, 75 Tex. 4, 12 S. W. Rep. 835. — **FOLLOWED IN** *Sweeney v. Gulf, C. & S. F. R. Co.*, 84 Tex. 433. — *Criswell v. Pittsburgh, St. L. & C. R. Co.*, 33 Am. & Eng. R. Cas. 232, 30 W. Va. 798, 6 S. E. Rep. 31. *Schultz v. Chicago, M. & St. P. R. Co.*, 48 Wis. 375, 4 N. W. Rep. 399.

This character attaches to all his acts affecting those under him. He represents

the company in the performance of any act, service, or duty for the company in the line of his employment. No distinction should be drawn between his acts in the performance of the higher duties intrusted to him specially, and those of an ordinary character which both he and the subordinate employés may be in the habit of indiscriminately performing. *Sweeney v. Gulf, C. & S. F. R. Co.*, 84 Tex. 433, 19 S. W. Rep. 555.

316. Foreman as a fellow-servant of a brakeman.—A foreman and a brakeman working under the direction and supervision of the same yard master are fellow-servants. *Harley v. Louisville & N. R. Co.*, 57 Fed. Rep. 144.

317. — of a carpenter.—A foreman is not a vice-principal of a carpenter under his control, where the latter is injured while performing work not as a railroad employé, but in his own personal or individual capacity. *Louisville & N. R. Co. v. Lahr*, 86 Tenn. 335, 6 S. W. Rep. 663.

Plaintiff, a carpenter, was working under a foreman who had no general authority to employ or discharge the men under him, but was subordinate to a master carpenter, who had control of the different gangs of men and gave instructions to the foreman as to what they were to do. *Held*, that plaintiff and such foreman were fellow-servants engaged in a common employment. *Peschel v. Chicago, M. & St. P. R. Co.*, 17 Am. & Eng. R. Cas. 545, 62 Wis. 338, 21 N. W. Rep. 269. — **FOLLOWED IN** *Toner v. Chicago, M. & St. P. R. Co.*, 28 Am. & Eng. R. Cas. 449, 31 Am. & Eng. R. Cas. 320, 69 Wis. 188, 33 N. W. Rep. 433.

318. — of a derrick man.—A company is liable to a laborer working at a derrick of the company, assisting in hoisting stone and giving signals, for injuries caused by the negligence of the foreman, whose duty it was to direct repairs and keep the derrick in safe condition. *Union Pac. R. Co. v. Fray*, 43 Kan. 750, 23 Pac. Rep. 1039.

319. — of other foreman.—Two foremen of gangs of section men working independent of each other, but under the same road master of the railroad, are fellow-servants; and where a collision between their hand-cars is caused by the negligence of one, and occasions an injury to the other, the company is not liable. *Sherrin v. St. Joseph & St. L. R. Co.*, 103 Mo. 378, 15 S. W. Rep. 442. — **QUOTING** *Moore v. Wabash, St. L. & P. R. Co.*, 85 Mo. 588; *Chicago,*

*Foreman having power to employ and discharge hands, see note, 17 AM. & ENG. R. CAS. 563. See also 41 AM. & ENG. R. CAS. 443, *abstr.*

M. & St. P. R. Co. v. Ross, 112 U. S. 390. QUOTING AND DISTINGUISHING *McDermott v. Hannibal & St. J. R. Co.*, 87 Mo. 285.

320. — of a night watchman.—A company placed a night crew, who had the making up of trains, in charge of a foreman, and then appointed a watcher to note and report upon the conduct of the foreman. From the nature of the business the watcher and foreman were constantly in association, so that one could observe the movements of the other. *Held*, that they were fellow-servants. *Chicago & E. I. R. Co. v. Geary*, 17 Am. & Eng. R. Cas. 606, 110 Ill. 383.— FOLLOWED IN *Joliet Steel Co. v. Shields*, 32 Ill. App. 598.

321. — of a switchman.—A foreman is not a fellow-servant of a switchman. *Hall v. Missouri Pac. R. Co.*, 8 Am. & Eng. R. Cas. 106, 74 Mo. 298.

A foreman in charge of a train is not a fellow-servant with a switchman who is about to couple it. *Louisville & N. R. Co. v. Wallingford, (Ky.)* 22 S. W. Rep. 439.

For an example where the foreman was held to be a fellow-servant with a switchman, see *Chicago, R. I. & P. R. Co. v. Touhy*, 26 Ill. App. 99.

322. — of trackmen.—A foreman in charge of laborers engaged in raising a track, who are subject to his orders, is not their fellow-servant, but a representative of the company, so as to make it liable for his negligence. *Stephens v. Hannibal & St. J. R. Co.*, 38 Am. & Eng. R. Cas. 110, 96 Mo. 207, 9 S. W. Rep. 589.

323. Foreman in charge of gravel train.—A foreman having full charge of a gravel train, with power to hire and discharge men working thereon, to whom alone they can make complaint, is a vice-principal. *Erickson v. Milwaukee, L. S. & W. R. Co.*, 93 Mich. 414, 53 N. W. Rep. 393.

324. Foreman of a blasting crew.—The mere fact that a foreman has the oversight of a certain business, such as handling dynamite cartridges used in blasting, and that he received a higher compensation than the rest of the gang, does not make him the less their fellow-servant. *Sullivan v. New York, N. H. & H. R. Co.*, 63 Conn. 209, 25 Atl. Rep. 711.

And the mere fact that he is authorized to hire and discharge the men does not of itself give him the character of agent or vice-principal, so as to make the company

liable for his negligence. *Hamilton v. Iron Mountain Co.*, 4 Mo. App. 564.

325. Foreman of bridge or shed building crew.—The foreman of bridge builders is a fellow-servant with workmen under him where he in no sense represents the company as a vice-principal. *Lindvall v. Woods*, 39 Am. & Eng. R. Cas. 339, 41 Minn. 212, 4 L. R. A. 793, 42 N. W. Rep. 1020, *Yager v. Receivers*, 4 Hughes (U. S.) 192.

A foreman of a construction gang engaged in constructing a shed, having no authority to throw away an old scaffolding and get a new one, is a fellow-servant of the members of the gang to such an extent as to exempt the company from liability for an injury to one of them occasioned by a defect in a board of the scaffolding. *Willis v. Oregon R. & N. Co.*, 17 Am. & Eng. R. Cas. 539, 11 Oreg. 257, 4 Pac. Rep. 121.

326. Foreman of a construction crew.—Where railroad contractors employ a foreman of a gang of laborers and confer upon him the authority to supervise, direct, and control the construction, and require the laborers to obey his orders and directions, he stands in the place of the contractors, and he and the men under him are not fellow-servants, though he sometimes assists with the work. *Woods v. Lindvall*, 48 Fed. Rep. 62, 4 U. S. App. 49, 1 C. C. A. 37; *affirming on another point* 47 Fed. Rep. 195.— FOLLOWING *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590; *Borgman v. Omaha & St. L. R. Co.*, 41 Fed. Rep. 667; *Atchison, T. & S. F. R. Co. v. Wilson*, 48 Fed. Rep. 57.— FOLLOWED IN *Northern Pac. R. Co. v. Peterson*, 51 Fed. Rep. 182, 4 U. S. App. 574, 2 C. C. A. 157.

327. Foreman of laborers moving building.—A foreman in charge of laborers engaged in the removal of a railroad company's building is the vice-principal of the company. *Sullivan v. Hannibal & St. J. R. Co.*, 107 Mo. 66, 17 S. W. Rep. 748.— DISTINGUISHING *Armour v. Hahn*, 111 U. S. 315.

Where such foreman directs a laborer to use a defective staging, and injury results therefrom, the company will be liable. *Sullivan v. Hannibal & St. J. R. Co.*, 107 Mo. 66, 17 S. W. Rep. 748.

Though the employé so injured knew of the defect in the staging on which he was

working, yet where he did not know the danger to which it subjected him, but the foreman did know it or could have known it had he done his duty, defendant is liable for injuries received by reason of the fall of the staging. *Sullivan v. Hannibal & St. J. R. Co.*, 107 Mo. 66, 17 S. W. Rep. 748.

328. Foreman of a mine.—The foreman or superintendent of a mine who has general and entire charge of the work, who employs and discharges workmen and directs their duties and employments, is not a fellow-servant with a common laborer in the mine, whose duty it is to obey the orders of the superintendent. *Reddon v. Union Pac. R. Co.*, 5 Utah 344, 15 Pac. Rep. 262. *Cunningham v. Union Pac. R. Co.*, 4 Utah 206, 7 Pac. Rep. 795.—REVIEWING *Bowers v. Union Pac. R. Co.*, 4 Utah 215.—Compare *What Cheer Coal Co. v. Johnson*, 56 Fed. Rep. 810.—FOLLOWING *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914.

329. Foreman of paint shop.—A foreman in a paint shop is a vice-principal of those working under him therein. *International & G. N. R. Co. v. Hinzle*, 82 Tex. 623, 18 S. W. Rep. 681.

330. Foreman of a pile-driving crew.—A foreman who has charge of men engaged in driving piles for different trestles of a railroad is a vice-principal, making the company liable for an injury to one of his men caused by his negligence. *Bloyd v. St. Louis & S. F. R. Co.*, 58 Ark. 66, 22 S. W. Rep. 1089. *Schultz v. Chicago, M. & St. P. R. Co.*, 48 Wis. 375, 4 N. W. Rep. 399.

331. Foreman of repairmen.*—A foreman to whom is delegated the duty of directing and overseeing the whole work of making repairs and keeping machinery in a safe condition, for that purpose is a vice-principal. *Union Pac. R. Co. v. Fray*, 43 Kan. 750, 23 Pac. Rep. 1039.

A foreman of a gang of repair hands cannot be considered a fellow-servant with the latter. *Luebke v. Chicago, M. & St. P. R. Co.*, 15 Am. & Eng. R. Cas. 183, 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. Rep. 870.

332. Foreman of bridge repairers.—A foreman charged with the duty of keeping a bridge in repair performs the duty imposed by law upon the company, and to that extent is a vice-principal. *Bowen v.*

Chicago, B. & K. C. R. Co., 95 Mo. 268, 14 West. Rep. 744, 8 S. W. Rep. 230.

A company of men under the control of a foreman engaged in the business of repairing bridges, water tanks, and telegraph lines along a line of railway, in going to and from their labor on a hand-car on such railway are under the control of such foreman, and his principal is liable for his negligence occurring in the course of his employment. *Sioux City & P. R. Co. v. Smith*, 22 Neb. 775, 36 N. W. Rep. 285.—FOLLOWING *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb. 254; *Burlington & M. R. R. Co. v. Crockett*, 19 Neb. 138.—FOLLOWED IN *Chicago, B. & Q. R. Co. v. Sullivan*, 7 Neb. 673.

333. Foreman of car repairers.—A foreman of men engaged in repairing cars, who has no authority over the men except to direct them about their work, is a fellow-servant, and not a vice-principal. *Foley v. Chicago, R. I. & P. R. Co.*, 64 Iowa 644, 21 N. W. Rep. 124. *Peterson v. Chicago & N. W. R. Co.*, 31 Am. & Eng. R. Cas. 292, 67 Mich. 102, 34 N. W. Rep. 260, 10 West. Rep. 870.

A foreman of car repairers is their vice-principal so far as he has authority to order them to go under cars to make repairs, and fails to prevent the cars from being started. *Hannibal & St. J. R. Co. v. Fox*, 15 Am. & Eng. R. Cas. 325, 31 Kan. 586, 3 Pac. Rep. 320. *Missouri Pac. R. Co. v. Williams*, 75 Tex. 4, 12 S. W. Rep. 835.

A foreman in charge of car repairers, representing the company in the performance of duties imposed upon it by law, is none the less a vice-principal because he assists the car repairers in doing their work. *Lake Shore & M. S. R. Co. v. Lavalley*, 5 Am. & Eng. R. Cas. 549, 36 Ohio St. 221.—APPLIED IN *Carr v. North River Constr. Co.*, 17 N. Y. S. R. 945. APPROVED IN *McDermott v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 528, 87 Mo. 285. FOLLOWED IN *Pittsburg, C. & St. L. R. Co. v. Ranney*, 37 Ohio St. 665. QUOTED IN *Criswell v. Pittsburgh, St. L. & C. R. Co.*, 30 W. Va. 798. REVIEWED IN *Dick v. Indianapolis, C. & L. R. Co.*, 8 Am. & Eng. R. Cas. 101, 38 Ohio St. 389.

334. Foreman of track repairers.—A foreman who has the supervision of repairs on a section of a railroad, and who is authorized to hire men and to direct their labor, is a vice-principal, and not a fellow-

*Foreman and servant under him making repairs, see note, 15 AM. & ENG. R. CAS. 330.

servant. *Northern Pac. R. Co. v. Peterson*, 51 Fed. Rep. 182, 4 U. S. App. 574, 2 C. C. A. 157.—FOLLOWING *Woods v. Lindvall*, 48 Fed. Rep. 62, 4 U. S. App. 49. REVIEWING *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184.—*Davis v. New York, N. H. & H. R. Co.*, 159 Mass. 532, 34 N. E. Rep. 1070. *Miller v. Missouri Pac. R. Co.*, 53 Am. & Eng. R. Cas. 598, 109 Mo. 350, 19 S. W. Rep. 58.

A track foreman controlling half a dozen or more men, engaged in the repair of the track, is not a vice-principal as to the men under his direction, and for alleged negligence on his part there can be no recovery against the employer. *Spancake v. Philadelphia & R. R. Co.*, 148 Pa. St. 184, 23 Atl. Rep. 1006.—DISTINGUISHING *Lewis v. Seifert*, 116 Pa. St. 628.

The company is not liable for the death of one of a gang of track repairers, who was killed by the negligence of the one in charge of the gang in failing to give notice of an approaching train. *Shea v. Pennsylvania R. Co.*, (Pa.) 13 Atl. Rep. 193.

335. Foreman of a round house.—The foreman at a round house of a railroad is a fellow-servant of an employé working under him. *Gonsior v. Minneapolis & St. L. R. Co.*, 36 Minn. 385, 31 N. W. Rep. 515.—FOLLOWING *Brown v. Winona & St. P. R. Co.*, 27 Minn. 162, 6 N. W. Rep. 484.—REVIEWED IN *Lindvall v. Woods*, 39 Am. & Eng. R. Cas. 339, 41 Minn. 212, 4 L. R. A. 793, 42 N. W. Rep. 1020.

The foreman of a round house charged with the safe condition of engines is a vice-principal of the engineers who operate them, and others working under him. *Hough v. Texas & P. R. Co.*, 100 U. S. 213, 21 Am. Ry. Rep. 451. *Dayharsh v. Hannibal & St. J. R. Co.*, 103 Mo. 570, 15 S. W. Rep. 554. *Missouri Pac. R. Co. v. Sasse*, (Tex. Civ. App.) 22 S. W. Rep. 187.

The foreman of a round house is a vice-principal of one who voluntarily assists a brakeman by direction of the yard master, without pay. *So held*, where such volunteer was injured by a defective brake which had existed several months in a defective condition to the knowledge of the foreman, and unknown to the plaintiff. *Central Trust Co. v. Texas & St. L. R. Co.*, 32 Fed. Rep. 448.

336. Foreman of switching crew.—A foreman of a switching crew is a vice-principal of the "helpers" under his orders.

Armstrong v. Oregon S. L. & U. N. R. Co., 8 Utah 420, 32 Pac. Rep. 693.

The foreman of a crew employed in switching cars in the yards of a railway company, who received general orders from the yard master before commencing work, and afterwards directed his crew in their execution, is not a fellow-servant of a member of another crew switching in the same yards under the direction of another foreman, nor a fellow-servant of his own immediate foreman. *Armstrong v. Oregon S. L. & U. N. R. Co.*, 8 Utah 420, 32 Pac. Rep. 693.

337. Foreman of men unloading car.—The foreman of a gang engaged in unloading a large stone from a flat car, who was not working with the men, but was present giving orders to the men in relation to the moving of the stone, is the representative or vice-principal of the defendant. *Higgins v. Missouri Pac. R. Co.*, 43 Mo. App. 547.

338. Foreman of wrecking crew.*—The foreman of a wrecking crew is not a fellow-servant with a workman in his crew, but his vice-principal. *Wabash, St. L. & P. R. Co. v. Hawk*, 31 Am. & Eng. R. Cas. 306, 121 Ill. 259, 12 N. E. Rep. 253, 10 West. Rep. 137.—REFERRED TO IN *Cleveland, C., C. & St. L. R. Co. v. Brown*, 56 Fed. Rep. 804.

A wrecking train was sent out in charge of one who superintended this part of the company's business, under orders from those in charge of the company's shops. *Held*, that such superintendent was a fellow-servant with the men under him. *Beilfus v. New York, L. E. & W. R. Co.*, 29 Hun (N. Y.) 556.—DISTINGUISHING *Flike v. Boston & A. R. Co.*, 53 N. Y. 549.—DISTINGUISHED IN *Wooden v. Western N. Y. & P. R. Co.*, 43 N. Y. S. R. 218.

339. Foreman of a yard.—Plaintiff, with others, was employed to assist in handling and removing cars in the company's yard, including the removal of damaged or disabled cars to the place of repair. They worked under a foreman who was subject to the orders of a yard master and a division superintendent. *Held*, that plaintiff and such foreman were fellow-servants. *Fraker v. St. Paul, M. & M. R. Co.*, 15 Am. & Eng. R. Cas. 256, 32 Minn. 54, 19 N. W. Rep.

* Foreman in charge of wrecking train not fellow-servant with members of a crew, see note, 9 AM. ST. REP. 342.

349.—QUOTED IN *Anderson v. Bennett*, 38 Am. & Eng. R. Cas. 87, 16 Oreg. 515. REVIEWED IN *Lindvall v. Woods*, 39 Am. & Eng. R. Cas. 339, 41 Minn. 212, 4 L. R. A. 793, 42 N. W. Rep. 1020.

340. Foreman of gravel-pit hands.

—The foreman of the defendant, in full charge of a gang of laborers engaged in taking gravel from a gravel pit, and using cars and moving tracks for that purpose, is not a fellow-servant with the laborers so engaged. *Anderson v. Ogden Union R. & D. Co.*, 8 Utah 128, 30 Pac. Rep. 305.

341. Temporary foreman.—A member of a gang of men who labor in building and repairing bridges, who is acting temporarily as foreman, but also assists in the labor, is a fellow-servant of the other members of the gang. *Texas & P. R. Co. v. Rogers*, 57 Fed. Rep. 378.—FOLLOWING *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914; *Dallas v. Guitt*, C. & S. F. R. Co., 61 Tex. 196; *Houston & T. C. R. Co. v. Rider*, 62 Tex. 267; *Texas & P. R. Co. v. Harrington*, 62 Tex. 597; *Missouri Pac. R. Co. v. Watts*, 63 Tex. 549; *St. Louis, A. & T. R. Co. v. Welch*, 72 Tex. 298, 10 S. W. Rep. 529.

A foreman, subject to the direction and superintendence of a superior servant during his presence, but who has absolute control during the absence of such superior, is, during such absence, the vice-principal and not the fellow-servant of the employés under him. *Colorado Midland R. Co. v. Naylor*, 17 Colo. 501, 30 Pac. Rep. 249.

a. Section Master; Section Foreman.

342. Generally.—A section master is a vice-principal with reference to the performance of duties imposed by law upon the company for the safety of its other employés. *Babcock v. Old Colony R. Co.*, 150 Mass. 467, 23 N. E. Rep. 325.

The negligence of a section foreman is imputable to the company. *Hall v. Missouri Pac. R. Co.*, 8 Am. & Eng. R. Cas. 106, 74 Mo. 298.

343. Fellow-servant of hands under him.—A section boss or foreman is a fellow-servant of a section hand under him. *Clifford v. Old Colony R. Co.*, 141 Mass. 564, 6 N. E. Rep. 751. *Shepard v. Boston & M. R. Co.*, 158 Mass. 174, 33 N. E. Rep. 508. *Olson v. St. Paul, M. & M. R. Co.*, 33 Am. & Eng. R. Cas. 386, 38 Minn. 117, 35 N. W. 5 D. R. D.—48.

Rep. 866.—APPROVED IN *EMI v. Northern Pac. R. Co.*, 1 N. Dak. 336. REVIEWED IN *Lindvall v. Woods*, 39 Am. & Eng. R. Cas. 339, 41 Minn. 212, 4 L. R. A. 793, 42 N. W. Rep. 1020.—*Weger v. Pennsylvania R. Co.*, 55 Pa. St. 460.

A track foreman is not a vice-principal as to the men under his directions. *Spancake v. Philadelphia & R. R. Co.*, 148 Pa. St. 184, 23 Atl. Rep. 1006. *Kinney v. Corbin*, 132 Pa. St. 341, 19 Atl. Rep. 141. *Coyne v. Union Pac. R. Co.*, 133 U. S. 370, 10 Sup. Ct. Rep. 382.

A section master is not a vice-principal of a section hand while they are both engaged together in performance of a common work, notwithstanding the fact that the former has authority to employ, discharge, and direct the latter in his work. *Lagrone v. Mobile & O. R. Co.*, 67 Miss. 592, 7 So. Rep. 432.—APPROVING *Murray v. South Carolina R. Co.*, 1 McMull. (So. Car.) 385. FOLLOWING *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 Miss. 258; *Louisville, N. O. & T. R. Co. v. Petty*, 67 Miss. 255.

344. — under California Civil Code, section 1970.—Whether the negligent act of a section foreman, by which an accident is caused to a section hand, is a personal duty which the company owes to the section hand as its employé, or whether the accident is "in consequence of the negligence of another person employed by the same employer in the same general business" within the meaning of section 1970 of the civil code, must be determined, not from the grade or rank of the section foreman, but from the character of the act causing the injury. If the act is one which it is the duty of the company to perform towards the section hand, the section foreman, in the performance of such duty, acts as the agent of the company, for which the employer is responsible; but if it is not one of the duties of the company, the foreman and section hand are fellow-servants, and the foreman is alone responsible for an accident to the section hand resulting therefrom. *Daves v. Southern Pac. Co.*, 98 Cal. 19, 32 Pac. Rep. 708.

345. — illustrations.—A section boss is a fellow-servant of a section hand. *So held*, where the latter was injured by a defect in a hand-car, known to the former, but not by him reported to the company. *Barringer v. Delaware & H. Canal Co.*, 19 Hun (N. Y.) 216.

Plaintiff alleged the following: A section master, having authority to employ and discharge section laborers and to direct their work, in track repairing discovered a bent and defective fish-bar, and, instead of applying for a new one, as was his duty, directed plaintiff, one of the laborers employed by him, who was inexperienced and not aware of any danger, to hold the same in a certain position while he attempted to straighten it by blows with a heavy hammer. By reason of his negligence and want of skill in striking the fish-bar the hand of the plaintiff was severely injured. *Held*, on demurrer, that the company was not liable. *Lagrone v. Mobile & O. R. Co.*, 67 Miss. 592, 7 So. Rep. 432.

346. Vice-principal of hands under him, generally.—A section foreman who is intrusted by the railroad company with power to superintend, direct, and control the workmen under his charge is not a fellow-servant of such workmen. *McDermott v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 528, 87 Mo. 285.—APPROVING *Lake Shore & M. S. R. Co. v. Lavalley*, 36 Ohio St. 221. FOLLOWING *Moore v. Wabash, St. L. & P. R. Co.*, 85 Mo. 588.—FOLLOWED IN *Dowling v. Allen*, 88 Mo. 293; *Ircher v. St. Louis Bridge Co.*, 95 Mo. 261; *Hutson v. Missouri Pac. R. Co.*, 50 Mo. App. 300. QUOTED AND DISTINGUISHED IN *Sherrin v. St. Joseph & St. L. R. Co.*, 103 Mo. 378.—*Rowland v. Missouri Pac. R. Co.*, 20 Mo. App. 463. *Hutson v. Missouri Pac. R. Co.*, 50 Mo. App. 300.—FOLLOWING *Moore v. Wabash, St. L. & P. R. Co.*, 85 Mo. 588; *McDermott v. Hannibal & St. J. R. Co.*, 87 Mo. 285.

In the employment and control of his subordinates a "section boss" acts as the agent of the common superior. When, by reason of his wrongful act or negligence, his subordinate is injured, the rule *respondet superior* applies and the corporation is liable for damages. *Louisville & N. R. Co. v. Bowler*, 9 Heisk. (Tenn.) 866, 20 Am. Ry. Rep. 65.—APPROVING *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201. DISAPPROVING *Gillshannon v. Stony Brook R. Corp.*, 10 Cush. (Mass.) 231. FOLLOWING *Nashville & C. R. Co. v. Carroll*, 6 Heisk. 347. QUOTING *Haynes v. East Tenn. & G. R. Co.*, 3 Coldw. (Tenn.) 222. REVIEWING *Hayes v. Western R. Corp.*, 3 Cush. 272.—NOT FOLLOWED IN *O'Brien v. American Dredging Co.*, 53 N. J. L. 291. REVIEWED IN *East*

Tenn. V. & G. R. Co. v. Duffield, 18 Am. & Eng. R. Cas. 35, 12 Lea (Tenn.) 63.

The offices of "section boss" and his subordinates create the relation of master and servant. The latter have no authority to control or resist the former in his allotted sphere of service. Education, skill, and experience are essential to the discharge of his duties, whereas they are merely required to have sufficient capacity to understand an order and physical strength to execute it. It would be absurd to hold that, as a rule, they understand the management of such work, its proper mode of execution, and the dangers attending it equally with him who assumes to oversee, direct, and plan it. *Louisville & N. R. Co. v. Bowler*, 9 Heisk. (Tenn.) 866, 20 Am. Ry. Rep. 65.

347. — Illustrations.—A section foreman—*held*, not a fellow-servant with men in charge of a freight train running over the track. *Peoria, D. & E. R. Co. v. Rice*, 144 Ill. 227, 33 N. E. Rep. 951.

A foreman of a section gang—*held*, a vice-principal with reference to his negligence in respect to the condition of the handle of a hand-car. *Banks v. Wabash Western R. Co.*, 40 Mo. App. 458.

Three or four section men, including the plaintiff and his foreman, were endeavoring to pull a tie from under the rails. The foreman's pick slipped out and he made a quick "overhand" stroke at the tie, and in so doing he injured plaintiff. Plaintiff was working as ordered at the time. *Held*, that the stroke was negligence, and the section foreman was not the fellow-servant of plaintiff, but was a vice-principal. *Hutson v. Missouri Pac. R. Co.*, 50 Mo. App. 300.—EXPLAINING *Moore v. Wabash, St. L. & P. R. Co.*, 85 Mo. 588. FOLLOWING *Dayharsh v. Hannibal & St. J. R. Co.*, 103 Mo. 570.

348. Representing the company.—A section foreman may be both a vice-principal and a fellow-servant. He is a vice-principal when representing the company, but a fellow-servant when performing the ordinary duties of a servant in the course of his employment. *Justice v. Pennsylvania Co.*, 53 Am. & Eng. R. Cas. 604, 130 Ind. 321, 30 N. E. Rep. 303. *Rowland v. Missouri Pac. R. Co.*, 20 Mo. App. 463. *Couch v. Charlotte, C. & A. R. Co.*, 28 Am. & Eng. R. Cas. 331, 22 So. Car. 557.—REVIEWING *Gilmore v. Northern Pac. R. Co.*, 15 Am. & Eng. R. Cas. 304, 18 Fed. Rep.

866.—APPLIED IN *Boatwright v. Northeastern R. Co.*, 25 So. Car. 128.

349. — having power to hire and discharge hands.—Where a section foreman has the immediate and almost exclusive control of the laborers under him, and has the power to hire, control, and discharge such laborers, he is to be regarded as a vice-principal, and not a fellow-servant. *Clowers v. Wabash, St. L. & P. R. Co.*, 21 Mo. App. 213. *Russ v. Wabash Western R. Co.*, 112 Mo. 45, 20 S. W. Rep. 472. *Gulf, C. & S. F. R. Co. v. Wells, (Tex.)* 16 S. W. Rep. 1025. *Sweeney v. Gulf, C. & S. F. R. Co.*, 84 Tex. 433, 19 S. W. Rep. 555.—FOLLOWING *Missouri Pac. R. Co. v. Williams*, 75 Tex. 4.

A section foreman, with power to employ and discharge section hands, is a vice-principal when employing and discharging servants; but he is a fellow-servant in his control of the men after their employment, and for an injury to a member of his gang, occasioned by such foreman's negligence, the company is not liable. *Justice v. Pennsylvania Co.*, 53 Am. & Eng. R. Cas. 604, 130 Ind. 321, 30 N. E. Rep. 303.

While there may be nothing in the nature of the employment of a section master to charge the company with responsibility for his acts towards his co-laborers, yet if the company gives him authority to command, discharge, and employ the laborers, it is liable for his misfeasance towards his fellow-laborers in the exercise of the authority so conferred. *Patton v. Western N. C. R. Co.*, 31 Am. & Eng. R. Cas. 298, 96 N. Car. 455, 1 S. E. Rep. 863.

350. Fellow-servant of other section foreman.—Two section foremen of separate gangs of section men working independently of each other, but under the same road master, are fellow-servants. *Sherrin v. St. Joseph & St. L. R. Co.*, 103 Mo. 378, 15 S. W. Rep. 442.

351. Not fellow-servant of brakeman.—The negligence of a section foreman in failing to keep the track in repair is the negligence of the company, and renders it liable to a brakeman who is injured by such negligence. *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495, 8 Am. Ry. Rep. 450.—APPROVING *Holmes v. Clarke*, 6 H. & N. 349.—DISTINGUISHED IN *Corbett v. St. Louis, I. M. & S. R. Co.*, 26 Mo. App. 621. FOLLOWED IN *Hall v. Missouri Pac. R. Co.*, 8 Am. & Eng. R. Cas. 106, 74 Mo. 298;

Long v. Pacific R. Co., 65 Mo. 225. REVIEWED IN *Baltimore & O. R. Co. v. McKenzie*, 24 Am. & Eng. R. Cas. 395, 81 Va. 71; *Calvo v. Charlotte, C. & A. R. Co.*, 28 Am. & Eng. R. Cas. 327, 23 So. Car. 526, 55 Am. Rep. 28.

A company is liable to a brakeman who is injured by reason of its section boss negligently allowing obstructions on the track. *Hulehan v. Green Bay, W. & St. P. R. Co.*, 31 Am. & Eng. R. Cas. 322, 68 Wis. 520, 32 N. W. Rep. 529.—QUOTED IN *Pidcock v. Union Pac. R. Co.*, 5 Utah 612, 1 L. R. A. 131, 19 Pac. Rep. 191.

352. Not fellow-servant of engineer.—A section foreman or section boss is not a fellow-servant with an engineer having charge of a locomotive drawing a train. *St. Louis & S. F. R. Co. v. Weaver*, 28 Am. & Eng. R. Cas. 341, 35 Kan. 412, 11 Pac. Rep. 408. *Calvo v. Charlotte, C. & A. R. Co.*, 28 Am. & Eng. R. Cas. 327, 23 So. Car. 526, 55 Am. Rep. 28.—QUOTING *Davis v. Central Vt. R. Co.*, 55 Vt. 84, 45 Am. Rep. 590; *Moon v. Richmond & A. R. Co.*, 78 Va. 745, 49 Am. Rep. 401. REVIEWING *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495, 21 Am. Rep. 385.—APPLIED IN *Boatwright v. Northeastern R. Co.*, 25 So. Car. 128. DISTINGUISHED IN *Miller v. Southern Pac. Co.*, 20 Oreg. 285.

353. Not fellow-servant of switchman.—A section foreman, whose duty is to keep the track in repair and free from obstructions, in this particular represents the company, and is not a fellow-servant with the switchman. *Hall v. Missouri Pac. R. Co.*, 8 Am. & Eng. R. Cas. 106, 74 Mo. 298.—FOLLOWING *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495.—QUOTED IN *Murray v. St. Louis C. & W. R. Co.*, 41 Am. & Eng. R. Cas. 446, 98 Mo. 573.

354. Not fellow-servant of train hand.*—A section master is not a fellow-servant with a train hand on a construction train, injured by reason of a washout. *Mobile & M. R. Co. v. Smith*, 59 Ala. 245.

f. Superintendent.

355. Vice-principal of those under him, generally.—A superintendent is a vice-principal of employés under him. *Galveston, H. & S. A. R. Co. v. Arispe*, 48 Am.

* Fellow-servants. Section foreman and train hands, see note, 17 AM. & ENG. R. CAS. 568.

& Eng. R. Cas. 350, 81 Tex. 517, 17 S. W. Rep. 47.

The superintendent is a vice-principal, not a fellow-servant, when he has entire charge of a branch of the business and absolute control of those working under him. *Dobbin v. Richmond & D. R. Co.*, 81 N. Car. 446. *Denver, S. P. & P. R. Co. v. Driscoll*, 38 Am. & Eng. R. Cas. 105, 12 Colo. 520, 21 Pac. Rep. 708.

A superintendent is a vice-principal as to those subordinate to him only when he is performing duties imposed by law upon the company itself. *Stockmeyer v. Reed*, 55 Fed. Rep. 259.

356. — illustrations.—The superintendent of a railroad—held, not a fellow-servant, but a vice-principal, of a section hand. *Galveston, H. & S. A. R. Co. v. Smith*, 44 Am. & Eng. R. Cas. 598, 76 Tex. 611, 13 S. W. Rep. 562.

A teamster employed by a subcontractor to haul rock for the construction of a railroad was told by the company's superintendent to drive on a certain place. The teamster expressed some apprehension of the safety of the ground, but the superintendent assured him that there was no danger; but the earth gave way, precipitating the team into a river. Held, that the driver was not the fellow-servant of the superintendent so as to prevent the subcontractor from recovering against the company. *Cook v. Hannibal & St. J. R. Co.*, 63 Mo. 397, 20 Am. Ry. Rep. 177.—NOT FOLLOWED IN *O'Brien v. American Dredging Co.*, 53 N. J. L. 291.

357. Having power to hire and discharge men.—A superintendent empowered to select, employ, and discharge servants under him is a vice-principal. *Douglas v. Texas Mex. R. Co.*, 63 Tex. 564. *Wall v. Texas & P. R. Co.*, 2 Tex. Unrep. Cas. 432.

The superintendent who employs and discharges those under him at pleasure, and who controls the cars, tools, and machinery with which they work, is a vice-principal. *Denver, S. P. & P. R. Co. v. Driscoll*, 38 Am. & Eng. R. Cas. 105, 12 Colo. 520, 21 Pac. Rep. 708. *Kansas Pac. R. Co. v. Little*, 19 Kan. 267, 17 Am. Ry. Rep. 455.

358. Superintendent of repairs and repair shop.—The administratrix of a fireman may recover from the company for his death caused by the explosion of a boiler through the negligence of the super-

intendent of the repair shop. *Stevenson v. Jewett*, 16 Hun (N. Y.) 210.—APPLYING *Booth v. Boston & A. R. Co.*, 73 N. Y. 38.

A superintendent charged with the management of making repairs represents the company, and any negligence on his part is the negligence of the company. *Stevenson v. Jewett*, 16 Hun (N. Y.) 210.

The superintendent of the hands in a railroad shop is a vice-principal of one employed as a helper to do whatever work is assigned him. *Missouri Pac. R. Co. v. Hill*, 3 Tex. App. (Civ. Cas.) 454.

359. Superintendent of bridge building.—A superintendent in charge of the erection of a railroad bridge, who has exclusive management and control of the men engaged in the work, is not a fellow-servant with a carpenter working under him, but acts as a vice-principal. *Galveston, H. & S. A. R. Co. v. Sullivan*, 2 Tex. Unrep. Cas. 315.

360. Superintendent of construction.—The superintendent of the track laying of a railroad, who has charge of a number of men, who employs and discharges them at his pleasure, and who has control of the cars, tools, and machinery employed in the work, is not the fellow-servant of a workman employed under him, but is the vice-principal of the company, and the latter is responsible for his negligence. *Denver, S. P. & P. R. Co. v. Driscoll*, 38 Am. & Eng. R. Cas. 105, 12 Colo. 520, 21 Pac. Rep. 708.

B., a general agent, was in charge of the track laying, a distinct department of the railroad construction. He had under him five different gangs of men, employed in different branches of the track-laying department, each gang having its particular foreman. B. had authority to hire and discharge both the foremen and the workmen; he controlled the trains, cars, tools, and other implements used in track laying; he was subject to the superintending direction of N. when present, but during N.'s absence he had supreme control over his department. The injury complained of by plaintiff was caused by obedience to B.'s direction concerning the manner in which certain work should be done; N. was absent at the time. Held, that B. was a vice-principal, and not a fellow-servant. *Colorado Midland R. Co. v. Naylor*, 17 Colo. 501, 30 Pac. Rep. 249.

Plaintiff was injured by falling from a

derrick while engaged as a laborer in building a culvert. He was under a superintendent, who had power to hire and discharge men, and to inspect machinery and appliances used, and reject anything found defective. The materials had been furnished by others, which the superintendent knew to be defective, but nevertheless continued their use. *Held*, that plaintiff and the superintendent were not fellow-servants. *Kansas Pac. R. Co. v. Little*, 19 Kan. 267, 17 Am. Ry. Rep. 455. — DISTINGUISHED IN *Kansas City, Ft. S. & G. R. Co. v. Kier*, 41 Kan. 671; *Peschel v. Chicago, M. & St. P. R. Co.*, 17 Am. & Eng. R. Cas. 545, 62 Wis. 338.

361. Superintendent of extension of road.—A superintendent of the work of extending a line of railroad, who has foremen and workmen under him, whom he employs and discharges at pleasure, and who has entire control of the cars, tools, machinery, and men employed, is not a fellow-servant with the workmen so as to preclude the latter from recovering damages against the railroad company for injuries resulting from the negligence of such superintendent. *Denver, S. P. & P. R. Co. v. Driscoll*, 38 Am. & Eng. R. Cas. 105, 12 Colo. 520, 21 Pac. Rep. 708.

362. Superintendent of grain elevator.—A superintendent of a grain elevator operated in connection with a railroad is not a fellow-servant of those over whom he has complete control. *McGovern v. Central Vt. R. Co.*, 123 N. Y. 280, 25 N. E. Rep. 373, 33 N. Y. S. R. 416; *reversing* 53 Hun 635, 24 N. Y. S. R. 946, 6 N. Y. Supp. 838. — DISTINGUISHED IN *Cullen v. Norton*, 126 N. Y. 1.

Such superintendent is a vice-principal in so far as he represents the company with respect to those employed under him. *McGovern v. Central Vt. R. Co.*, 123 N. Y. 280, 25 N. E. Rep. 373, 33 N. Y. S. R. 416; *reversing* 53 Hun 635, 24 N. Y. S. R. 946, 6 N. Y. Supp. 838.

363. Superintendent of gravel train.—Plaintiff was employed as a trainman, and was injured while engaged in digging gravel under the direction of one who was engineer, superintendent, conductor, and master of the company's gravel train, and whose business it was to employ and discharge hands, and who had entire charge of this part of the company's business. *Held*, that plaintiff and such superintendent

were not fellow-servants. *Dobbin v. Richmond & D. R. Co.*, 81 N. Car. 446. — DISAPPROVING *Sherman v. Rochester & S. R. Co.*, 17 N. Y. 153. DISTINGUISHING *Davis v. Detroit & M. R. Co.*, 20 Mich. 105; *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366. REVIEWING *Brickner v. New York C. R. Co.*, 2 Lans. (N. Y.) 506. — QUOTED IN *East Tenn., V. & G. R. Co. v. De Armond*, 86 Tenn. 73, 6 Am. St. Rep. 816, 5 S. W. Rep. 600.

364. Superintendent of tunnel work.—Where one employed by a company to work in a tunnel was ordered by the superintendent of the work, under threat of dismissal, to get on a freight train for transportation to another tunnel, and in doing so he was violently cast on the ground and injured by the negligence of the engineer in starting the train, the company is not liable. *Capper v. Louisville, E. & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 525, 103 Ind. 305, 2 N. E. Rep. 749.

365. Assistant superintendent.—As between the conductor and the company, the assistant superintendent, to whose orders all trains are subject, is the representative of the corporation, and his orders to the conductor of a train are essentially the orders of the company. *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 109, 16 Am. Ry. Rep. 425. — APPLIED IN *Smith v. Wabash, St. L. & P. R. Co.*, 31 Am. & Eng. R. Cas. 331, 92 Mo. 359. FOLLOWED IN *Chicago, B. & Q. R. Co. v. Young*, 26 Ill. App. 115.

An assistant superintendent is not a fellow-servant with an employé whom he orders to dig down a telegraph pole. *East St. Louis Connecting R. Co. v. Enright*, 47 Ill. App. 494.

g. Various Other Servants.

366. Assistant road master.—An assistant road master, having general charge of one division and absolute control of the servants under him so far as their employment and discharge are concerned, represents the company and is a vice-principal. *Harri-son v. Detroit, L. & N. R. Co.*, 41 Am. & Eng. R. Cas. 398, 79 Mich. 409, 44 N. W. Rep. 1034. — QUOTING *Flike v. Boston & A. R. Co.*, 53 N. Y. 553; *Quincy Min. Co. v. Kitts*, 42 Mich. 39; *Ryan v. Bagaley*, 50 Mich. 179. — FOLLOWED IN *Erickson v. Milwaukee, L. S. & W. R. Co.*, 93 Mich. 414. QUOTED IN

Palmer v. Michigan C. R. Co., 93 Mich. 363.—See also *Galveston, H. & S. A. R. Co. v. Delahanty*, 4 Am. & Eng. R. Cas. 628, 53 Tex. 206.

367. Baggage master.—When a fellow-servant of the conductor, see *Colorado C. R. Co. v. Martin*, 17 Am. & Eng. R. Cas. 592, 7 Colo. 592, 4 Pac. Rep. 1118.

When not a fellow-servant under *consociation rule* of Illinois, see *Indianapolis & St. L. R. Co. v. Morgenstern*, 12 Am. & Eng. R. Cas. 228, 106 Ill. 216.

368. Blacksmith's helper.—Where a blacksmith in the employ of a railroad company is injured by a careless blow of a helper, he cannot recover from the company if the helper was skilful and only careless, unless he was habitually careless, which was known to the company and not known to the blacksmith. *Melville v. Missouri River Ft. S. & G. R. Co.*, 48 Fed. Rep. 820.

369. Blaster.—One who is engaged in hauling rock by means of a team, and those who are engaged in blasting such rock, all employed by a common master, are fellow-servants; and such facts being shown by a complaint to recover for an injury to the teamster, an averment that the injured servant "had no connection whatever with any of the employés of the defendant who were engaged in blasting rock" is a mere conclusion, and the facts will control. *Bogard v. Louisville, E. & St. L. R. Co.*, 100 Ind. 491.

370. Boiler manufacturer.—A boiler manufacturer in the employ of a company furnished a defective boiler, which exploded and killed a fireman. *Held*, that the manufacturer and fireman, being in different departments, were not fellow-servants. *Nashville & D. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27, 19 Am. Ry. Rep. 261.—FOLLOWED IN East Tenn., V. & G. R. Co. v. Smith, 15 Am. & Eng. R. Cas. 224, 9 Lea (Tenn.) 685.—See also *Pennsylvania & N. Y. C. & R. Co. v. Mason*, 109 Pa. St. 296, 58 Am. Rep. 722. *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575. *Murphy v. Boston & A. R. Co.*, 8 Am. & Eng. R. Cas. 510, 88 N. Y. 146.

371. Boss.—The boss of railroad shops is a vice-principal or a boy employed as a helper. *Union Pac. R. Co. v. Fort*, 17 Wall. (U. S.) 553.

The boss in charge of railroad employés engaged in loading cars, who has control over them, is their vice-principal. *Proctor*

v. Missouri, K. & T. R. Co., 42 Mo. App. 124.

The boss in charge of track-laying gangs is a vice-principal and not a fellow-servant of the members of the various gangs of workmen. *Colorado Midland R. Co. v. Naylor*, 17 Colo. 501, 30 Pac. Rep. 249.

Where several employés of a railroad company are traveling on a hand-car, under the charge of a conductor or "boss," employed as such by the company, such employés are not chargeable with the negligence of such "boss" in the management of the car. *Hoben v. Burlington & M. R. R. Co.*, 20 Iowa 562.

372. Brake repairer.—A brake repairer is a fellow-servant of a brakeman and of a car inspector. *Nashville, C. & St. L. R. Co. v. Foster*, 10 Lea (Tenn.) 351.

373. Brakeman, generally.*—A brakeman is in the same common employment with one who has the superintendence of the movements of his train. *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411.—DISAPPROVED IN *Long v. Pacific R. Co.*, 65 Mo. 225.

Brakemen are fellow-servants with employés on the same gravel train. *Henry v. Staten Island R. Co.*, 2 Am. & Eng. R. Cas. 60, 81 N. Y. 373.

Appellee was in the employ of one B., who had a contract with appellants to furnish wood. While engaged in loading appellants' car with wood appellee was requested by a brakeman to assist him in pushing two loaded cars to the caboose, and was directed by the brakeman to get between the two cars, which were coupled together, in order to move them easily. He did so, and while pushing the cars, which were slowly moving, the brakeman mounted one of them, upon which was a set brake, and, without warning or notice to appellee, unfixed the brake, whereby the cars were caused to move suddenly forward, and caught appellee's foot and crushed his leg. Under the facts appellee was not a fellow-servant of the brakeman and thereby precluded from recovery. *Bonner v. Bryant*, 1 Tex. Civ. App. 269, 21 S. W. Rep. 549.

* A brakeman and an employé intrusted with shifting cars on the track are fellow-servants; see 48 AM. & ENG. R. CAS. 346, *abstr.*

Brakeman and engineer, see note, 15 AM. & ENG. R. CAS. 319.

374. — fellow-servant of car inspectors and repairers.—A brakeman on a train is in the same common employment with mechanics in the repair shop. *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411. *Campbell v. Pennsylvania R. Co.*, (Pa.) 24 Am. & Eng. R. Cas. 427, 2 Atl. Rep. 489. *Resel v. New York C. & H. R. R. Co.*, 70 N. Y. 171; reversing 9 Hun 457.—APPLIED IN *Gibson v. Northern C. R. Co.*, 22 Hun 289. DISTINGUISHED IN *Wooden v. Western N. Y. & P. R. Co.*, 43 N. Y. S. R. 218.

A brakeman and one whose duty it is to repair cars are not fellow-servants. *Northern Pac. R. Co. v. Herbert*, 24 Am. & Eng. R. Cas. 407, 116 U. S. 642, 6 Sup. Ct. Rep. 590.

375. — fellow-servant of conductor.—The head brakeman is a fellow-servant with the conductor on a freight train. *Brown v. Central Pac. R. Co.*, 72 Cal. 523, 14 Pac. Rep. 138; reversing on rehearing 12 Pac. Rep. 512.

376. — fellow-servant of fireman.—A fireman and brakeman on the same train are fellow-servants, and the company is not liable where one is injured through the negligence of the other, unless it appears that the company had not used proper care in selecting the negligent employé. *Galveston, H. & S. A. R. Co. v. Faber*, 63 Tex. 344.

A brakeman of one freight train is the fellow-servant of the fireman of another freight train where they are engaged in the same department of service and are operating the trains over the same section of the road. *Relyea v. Kansas City, Ft. S. & G. R. Co.*, 53 Am. & Eng. R. Cas. 578, 112 Mo. 86, 20 S. W. Rep. 480.

377. — fellow-servant of switchman.—A brakeman on a train and one whose duty and business is to attend a switch are engaged in the same general undertaking, and the company is not liable to one for an injury caused by the negligence of the other. *Slattery v. Toledo & W. R. Co.*, 23 Ind. 81.—DOUBTING *Gillenwater v. Madison & I. R. Co.*, 5 Ind. 339; *Fitzpatrick v. New Albany & S. R. Co.*, 7 Ind. 436.

378. — fellow-servant of trackmen and shovelers.—A brakeman of a train is a fellow-servant of section hands or trackmen. *Connelly v. Minneapolis Eastern R. Co.*, 38 Minn. 80, 35 N. W. Rep. 582.

* Brakeman and car inspector as fellow-servants, see note, 21 AM. & ENG. R. CAS. 564. See also 53 AM. & ENG. R. CAS. 587, *abstr.*

Brakeman and shoveler on a construction train are fellow-servants. *St. Louis & S. E. R. Co. v. Britz*, 72 Ill. 256.

379. — fellow-servant of other brakemen.—A railroad company will not be responsible for injuries to a brakeman caused by the negligence of a fellow-brakeman operating a switch. *Chicago & A. R. Co. v. Rush*, 84 Ill. 570.

Laborers that work on a railroad in transporting dirt on small trucks a short distance, alternately acting as brakemen, are in the same grade of employment, and no recovery can be had against the company for an injury to one by the negligence of the other, although the one charged with negligently causing the injury was at the time acting as brakeman. *Casey v. Louisville & N. R. Co.*, 84 Ky. 79.—DISTINGUISHING *Louisville & N. R. Co. v. Collins*, 2 Duv. (Ky.) 114.

The proprietors of a railroad are not responsible to a brakeman in their employment for an injury sustained by him in consequence of the neglect or fault of another brakeman engaged in the same service, even though the latter is at the same time the acting conductor of a train of freight cars. *Hayes v. Western R. Corp.*, 3 Cush. (Mass.) 270.—FOLLOWING *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49.—FOLLOWED IN *Coon v. Syracuse & U. R. Co.*, 5 N. Y. 492. LIMITED IN *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201. REVIEWED IN *Louisville & N. R. Co. v. Bowler*, 9 Heisk. (Tenn.) 866.

If a brakeman employed on a train of cars by the proprietors of a railroad sustains an injury in consequence of the carelessness of another brakeman employed in the same service, and the injury would not have happened if the latter had performed his duty, it is immaterial, as respects the liability of the proprietors of the road, whether the train was short of hands or not. *Hayes v. Western R. Corp.*, 3 Cush. (Mass.) 270.

380. Bridge builder.—A bridge builder in constructing a bridge was negligent to such an extent that a fireman was injured thereby. *Held*, that the negligence was attributable to the railroad company, and the fireman was entitled to recover damages. *Davis v. Central Vt. R. Co.*, 11 Am. & Eng. R. Cas. 173, 55 Vt. 84.

381. Bridge repairers.—Members of a bridge gang employed to make repairs upon railroad bridges are fellow-servants with one of the members of such gang to

whom has been assigned the duty of pulling down an elevated water tank. *Easton v. Houston & T. C. R. Co.*, 39 *Fed. Rep.* 65.

A crew of men, of which plaintiff was one, was engaged in repairing a bridge on defendant's road, and in performing the work it was necessary to leave the draw partly open. Through the negligence of one of the crew the draw was left unfastened, and was blown shut by the wind, and injured the plaintiff while at work between the stationary part of the bridge and the draw. *Held*, that defendant was not liable. *Johnson v. St. Paul & D. R. Co.*, 43 *Minn.* 222, 45 *N. W. Rep.* 156.

382. Coal heaver.—Coal heavers are fellow-servants of a track walker. *Schultz v. Chicago & N. W. R. Co.*, 67 *Wis.* 616, 58 *Am. Rep.* 881, 31 *N. W. Rep.* 321.

383. Derrick hand.—A company is not liable for injuries to a brakeman through the negligence of workmen setting up a derrick too near the track. *Holden v. Fitchburg R. Co.*, 2 *Am. & Eng. R. Cas.* 94, 129 *Mass.* 268.

384. Engine builder.—Engine builders are not fellow-servants of a locomotive engineer. *Toledo, W. & W. R. Co. v. Moore*, 77 *Ill.* 217.

385. Engine repairer—"Wiper."—Engine repairers are not fellow-servants of locomotive engineer and fireman, although under the same general superintendent. *Pennsylvania & N. Y. C. & R. Co. v. Mason*, 109 *Pa. St.* 296. *Toledo, W. & W. R. Co. v. Moore*, 77 *Ill.* 217.

A "wiper" who has temporary charge of an engine is a temporary vice-principal so long as he takes the place of the regular engineer. *Whalen v. Chicago, R. I. & P. R. Co.*, 38 *Am. & Eng. R. Cas.* 141, 75 *Iowa* 563, 39 *N. W. Rep.* 894.

By the rules of the company's repair shop, known to all the employes, when a locomotive was sent in for repairs, aside from repairing defects reported, a thorough examination was required to discover and repair other defects, if any. The ordinary course was to put the locomotive into the hands of the boiler makers for examination and repairs, and then into the hands of machinists, and then in the hands of mechanics to set the safety valves. This last work was intrusted to plaintiff's intestate, and while he was setting the safety valve of a locomotive the boiler exploded and killed him. The explosion was caused by defects

in the boiler, which would have been discovered had the boiler makers performed their duty. All employed in the shop were competent and skillful. *Held*, that the death was caused by the negligence of co-servants, and a nonsuit was properly allowed. *Murphy v. Boston & A. R. Co.*, 8 *Am. & Eng. R. Cas.* 510, 88 *N. Y.* 146; *affirming* 24 *Hun* 142, 59 *How. Pr.* 197, 8 *Abb. N. Cas.* 41.—DISTINGUISHING *Fuller v. Jewett*, 80 *N. Y.* 46.—DISTINGUISHED IN *Kranz v. Long Island R. Co.*, 123 *N. Y.* 1, 33 *N. Y. S. R.* 46; *Carlson v. Oregon S. L. & U. N. R. Co.*, 21 *Oreg.* 450.

386. Fireman, generally.—A fireman in charge of an engine is a fellow-servant of a baggageman and car coupler, or a switch tender. *Hudson v. Charleston, C. & C. R. Co.*, 55 *Fed. Rep.* 248.

A fireman temporarily in charge of an engine while coupling a switch train, under the custom of the company, represents the engineer and is a temporary vice-principal. *Louisville & N. R. Co. v. Moore*, 24 *Am. & Eng. R. Cas.* 443, 83 *Ky.* 675.

A fireman is a fellow-servant with employes on the same gravel train. *Henry v. Staten Island R. Co.*, 2 *Am. & Eng. R. Cas.* 60, 81 *N. Y.* 373.

A fireman is not a fellow-servant of a section hand working upon the track. *Chicago & N. W. R. Co. v. Moranda*, 93 *Ill.* 302.

Where a party engaged in the repair of a railroad track was injured by being struck in the face by a stick of firewood thrown from a passing engine by its fireman—*held*, in an action by the track hand for damages, that they were fellow servants and no recovery could be had. *Whaalan v. Mad River & L. E. R. Co.*, 8 *Ohio St.* 249.—DISTINGUISHING *Gillenwater v. Madison & I. R. Co.*, 5 *Ind.* 339; *Fitzpatrick v. New Albany & S. R. Co.*, 7 *Ind.* 436. FOLLOWING *Coon v. Syracuse & U. R. Co.*, 5 *N. Y.* 492. REVIEWING *Farwell v. Boston & W. R. Corp.*, 4 *Metc. (Mass.)* 49.—REVIEWED IN *Wilson v. Madison, etc., R. Co.*, 18 *Ind.* 226; *Rohback v. Pacific R. Co.*, 43 *Mo.* 187; *Manville v. Cleveland & T. R. Co.*, 11 *Ohio St.* 417.

387. — fellow-servant of brakeman.—A fireman and brakeman on the same train are fellow-servants. *Kersey v. Kansas City, St. J. & C. B. R. Co.*, 17 *Am. & Eng. R. Cas.* 638, 79 *Mo.* 362.

A boy seventeen years old was employed as a brakeman on an ore train; but he was

been dis-
performed
shop were
that the
ence of co-
properly al-
I. R. Co., 8
Y. 146; af-
197, 8 Abb.
Fuller v.
ISHED IN
23 N. Y. 1,
regon S. L.

y.—A fire-
s a fellow-
ar coupler,
Charleston,

arge of an
rain, under
resents the
e-principal.
24 Am. &

t with em-
Henry v.
Eng. R. Cas.

ervant of a
track. Chi-
93 Ill. 302.
repair of a
being struck
pod thrown
eman—held,
or damages,
and no re-
an v. Mad
249.—Dis-
adison & I.
v. New Al-
FOLLOWING
5 N. Y. 492.
& W. R.
VIEWED IN
Co., 18 Ind.
Co., 43 Mo.
R. Co., 11

of brake-
man on the
Kersey v.
Co., 17 Am.

s employed
but he was

capable and experienced, and was injured through the alleged negligence of a fireman in backing the train without warning. *Held*, that the brakeman and fireman were fellow-servants and the company was not liable. *Greenwald v. Marquette, H. & O. R. Co.*, 8 Am. & Eng. R. Cas. 133, 49 Mich. 197, 13 N. W. Rep. 513.

Where it is the custom of a railroad company to permit the fireman upon its trains to act as engineer in coupling and switching the trains, he is, when so acting, to all intents and purposes the engineer of the train, and not the common equal fellow-servant of the brakeman; and the rule of *respondet superior* applies where a brakeman is injured by his negligence. *Louisville & N. R. Co. v. Moore*, 24 Am. & Eng. R. Cas. 443, 83 Ky. 675.

388. — fellow-servant of track walker.—Firemen who load coal upon tenders are the fellow-servants of a track walker, and for an injury to the latter caused by their negligence in such work the railroad company is not liable. *Schultz v. Chicago & N. W. R. Co.*, 28 Am. & Eng. R. Cas. 404, 67 Wis. 616, 31 N. W. Rep. 321, 58 Am. Rep. 881.

389. Flagman.—A railroad company is not liable for an injury to a brakeman, caused by other employes taking up the rails of a track while making repairs, and not flagging or giving notice to the approaching train, on mere proof of the injury, without showing that the company was negligent in employing the trackmen, or that they were unfit. *Cooper v. Milwaukee & P. du C. R. Co.*, 23 Wis. 668.

Plaintiff, a carpenter employed by defendant company, was injured while being carried on a train through the alleged negligence or incompetency of a flagman. The evidence tended to show that the flagman was an habitual drunkard. *Held*, that if these facts were known to the company, or by the use of due care might have been known, and if the accident resulted from such habits of intoxication, the company was liable. *Gilman v. Eastern R. Co.*, 13 Allen (Mass.) 433.

390. Gang boss.—A track repairer or construction hand is a fellow-servant with his gang boss, and cannot recover against the railroad for an injury received through the latter's negligence. *Coyne v. Union Pac. R. Co.*, 133 U. S. 370, 10 Sup. Ct. Rep. 382.—DISTINGUISHED IN *Northern Pac. R. Co. v. Behling*, 57 Fed Rep. 1037.

Plaintiff had been ordered by a "gang boss" to assist in lowering an engine in the defendant's shops. The engine was hoisted above the track, and was resting on timbers, which in turn were resting on the rails and above a pit two or three feet deep. In removing the last timber but three men were employed, plaintiff being on the right-hand side, and J. and E. on the left. By order of the "boss" J. left the work, and the end of the timber held by E. dropped into the pit, causing the other end to fly up and hit plaintiff, inflicting the injuries complained of. The jury found that the "gang boss" had immediate control of the work, but that he was under the general control of the master mechanic; that the latter was not in the shops at the time, but that the foreman, who superintended the work in the shops under the general directions of the master mechanic, was present. *Held*, that the defendant could not be held liable for the negligence of the "gang boss" as a vice-principal in exclusive control of a department. *McBride v. Union Pac. R. Co.*, 3 Wyo. 247, 21 Pac. Rep. 687.

391. General manager.—A railroad manager is a vice-principal of employes under him. *Galveston, H. & S. A. R. Co. v. Arispe*, 48 Am. & Eng. R. Cas. 350, 81 Tex. 517, 17 S. W. Rep. 47.

General manager, train dispatcher, and brakeman—held, not co-servants. *Phillips v. Chicago, M. & St. P. R. Co.*, 23 Am. & Eng. R. Cas. 453, 64 Wis. 475, 25 N. W. Rep. 544.

392. General traffic manager.—The general traffic manager of a railway company is a fellow-servant of a milesman, and the latter is not entitled to recover for injuries caused by the negligence of the former. *Conway v. Belfast & N. C. R. Co.*, 11 Ir. R., C. L. 345; affirming 9 Ir. R., C. L. 498.

A train guard is a fellow-servant of plate layers, and no recovery can be had for his death caused by the neglect of the gauger of the plate layers to renew decayed metals, whereby the train was derailed. *Waller v. South-eastern R. Co.*, 9 Jur. N. S. 501, 32 L. J. Ex. 205, 11 W. R. 731, 8 L. T. 325, 2 H. & C. 102.—FOLLOWED UNWILLINGLY IN *Morgan v. Vale of Neath R. Co.*, 33 L. J. Q. B. 260, 12 W. R. 1032.

393. Guard.—A servant while being carried from his work on one of the company's trains in the course of his contract of service is a fellow-servant of the guard

of such train, whose negligence causes a collision, and the master is not liable for injury to such servant. *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291, 12 Jur. N. S. 691.

394. Inspector and repairer of machinery.—One who is charged with no other duty than to inspect machinery and keep it in order is not to be regarded as a co-employé of a person operating the machinery. *Theleman v. Moeller*, 73 Iowa 108, 34 N. W. Rep. 765. *Houston & T. C. R. Co. v. Marcelles*, 12 Am. & Eng. R. Cas. 231, 59 Tex. 334.

One who, besides being charged with the inspection and care of machinery, is also charged with the duty of operating the engine which propels the machinery, is to be regarded as a co-employé of one who operates the machinery. And where the evidence tended to show that the injury was caused by the negligence of such a co-employé—held, that it was error for the court not to submit to the jury the question of the relationship of plaintiff and the employé whose negligence occasioned the injury. *Theleman v. Moeller*, 73 Iowa 108, 34 N. W. Rep. 765.

395. Mail catcher, one who erects.—A fireman on a locomotive and one employed to erect "mail catchers" along the line are not fellow-servants so as to prevent a recovery by the former against the company for an injury caused by a "catcher" being too near the track. *Chicago, B. & Q. R. Co. v. Gregory*, 58 Ill. 272, 11 Am. Ry. Rep. 75.

396. Manager.—Managers and foremen are not fellow-servants of the employés under their orders in respect to the exercise by the former of their directing authority. *Foster v. Missouri Pac. R. Co.*, 115 Mo. 165, 21 S. W. Rep. 916.

397. Master mechanic, generally.—A master mechanic invested with full authority over those in a shop under his control stands in the place of the company, and is a vice-principal. *Taylor v. Evansville & T. H. R. Co.*, 41 Am. & Eng. R. Cas. 437, 121 Ind. 124, 22 N. E. Rep. 876, 6 L. R. A. 584.

A master mechanic is a vice-principal with respect to a brakeman in so far as he represents the master in inspecting and repairing cars. *Cooper v. Pittsburgh, C. & St. L. R. Co.*, 24 W. Va. 37.

A railroad company is not liable for an injury to one of its employés, resulting from

the negligence of a car inspector, upon proof of notice to the company's master mechanic of the habitual negligence and general bad habits of the inspector, unless it appears also that the master mechanic had the power to employ and discharge men. *Kidwell v. Houston & G. N. R. Co.*, 3 Woods (U. S.) 313.

It does not follow, because the master of the machinery acted in a distinct and special employment in making the selection of an engine, that therefore he was not a fellow-servant with those operating it, in his ordinary employment as master of machinery. *Cumberland & P. R. Co. v. State*, 44 Md. 283, 45 Md. 229.

398. — fellow-servant of assistant yard master.—The master mechanic is a fellow-servant with the assistant yard master. *Kidwell v. Houston & G. N. R. Co.*, 3 Woods (U. S.) 313.

399. — fellow-servant of engine wiper.—An engine wiper, making a coupling with a road engine operated temporarily by a foreman machinist who had power to employ and discharge engine wipers, is a fellow-servant of the machinist while performing duties as fellow-servant, assumes the risk of making the coupling with an incompetent engineer, and cannot recover for injuries received while making the coupling. *Gulf, C. & S. F. R. Co. v. Schwabbe*, 1 Tex. Civ. App. 573, 21 S. W. Rep. 706.

400. — fellow-servant of a fireman.—A master machinist who has the immediate charge, control, and direction of the engines and other machinery of a railroad company, and the repairs thereof, and the control and direction of the engineers and firemen on the trains, is the fellow-servant of such a fireman. *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174.—APPLIED IN *Summerhays v. Kansas Pac. R. Co.*, 2 Col. 484.

401. — not fellow-servant of a brakeman.—A brakeman on a freight train, and a car inspector or a master mechanic, charged with the duty of keeping machinery, cars, and appliances in repair, are not fellow-servants. *Cooper v. Pittsburgh, C. & St. L. R. Co.*, 24 W. Va. 37.—DISAPPROVED IN *St. Louis, I. M. & S. R. Co. v. Gaines*, 46 Ark. 555. DISTINGUISHED IN *Williamson v. Newport News & M. V. Co.*, 34 W. Va. 657.

402. — not fellow-servant of engineer.—An engineer is not a fellow-servant with a master mechanic and fore-

man of a railroad round house, who are charged with the safe condition of engines, so as to prevent a recovery for the death of the engineer through a defect in his engine. *Hough v. Texas & P. R. Co.*, 100 U. S. 213, 21 Am. Ry. Rep. 451.—DISTINGUISHED IN *Hobson v. New Mexico & A. R. Co.*, (Ariz.) 28 Am. & Eng. R. Cas. 360, 11 Pac. Rep. 545; *Baltimore & O. R. Co. v. Andrews*, 53 Am. & Eng. R. Cas. 523, 50 Fed. Rep. 728, 1 C. C. A. 636; *Yager v. Receivers*, 4 Hughes (U. S.) 192; *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478. FOLLOWED IN *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 34 Fed. Rep. 616; *Palmer v. Utah & N. R. Co.*, 2 Idaho 290. QUOTED IN *Criswell v. Pittsburgh, St. L. & C. R. Co.*, 30 W. Va. 798.

403. — not fellow-servant of a machinist.—A master mechanic who is invested with full authority over those employed in a shop under his control is not fellow-servant of a machinist who is engaged under his direction in disconnecting the equalizer of a locomotive, and who is injured in consequence of the equalizer being negligently pulled out of its place by the master mechanic. *Taylor v. Evansville & T. H. R. Co.*, 41 Am. & Eng. R. Cas. 437, 121 Ind. 124, 22 N. E. Rep. 876, 6 L. R. A. 584.—FOLLOWED IN *Nall v. Louisville, N. A. & C. R. Co.*, 48 Am. & Eng. R. Cas. 309, 129 Ind. 260.

404. — not a fellow-servant of plumber.—A master mechanic is a vice-principal standing in the relation of the master to a plumber who was employed in a railroad company's shop and was subject to the orders of such master mechanic. *Douglas v. Texas Mex. R. Co.*, 63 Tex. 564.

405. — not a fellow-servant of watchman.—The master mechanic of a company's shops, to whom is committed the supervision of repairs and determining necessary repairs, and how the work shall be done, is the agent or representative of the company, making it liable for his negligence resulting in an injury to a watchman. *St. Louis, I. M. & S. R. Co. v. Harper*, 44 Ark. 524.

406. — not a fellow-servant of bridge carpenter.—A master mechanic and wreck master—*h. id.* not to be a fellow-servant with a bridge carpenter. *Tabler v. Hannibal & St. J. R. Co.*, 31 Am. & Eng. R. Cas. 185, 93 Mo. 79, 11 West. Rep. 458, 5 S. W. Rep. 810.

407. Porter.—A carpenter on a scaffolding injured through the negligence of porters carelessly shifting an engine, so that it strikes a ladder supporting the scaffold, is a fellow-servant of such porters, and cannot recover for the injury. *Morgan v. Vale of Neath R. Co.*, 5 B. & S. 736, L. R. 1 Q. B. 149, 35 L. J. Q. B. 23, 13 L. T. 564, 34 L. J. Q. B. 23, 14 W. R. 144; *affirming* 5 B. & S. 570, 10 Jur. N. S. 1074, 33 L. J. Q. B. 260, 13 W. R. 1031.—FOLLOWED IN *Warburton v. Great Western R. Co.*, L. R. 2 Ex. 30, 36 L. J. Ex. 9, 15 L. T. 361, 15 W. R. 108, 4 H. & C. 695.

408. Purchasing agent.—The servants or agents of a carrier, intrusted with the duty of furnishing proper engines and machinery for the use of other servants, are not fellow-servants of those using such engines and machinery. *Lawless v. Connecticut River R. Co.*, 18 Am. & Eng. R. Cas. 96, 136 Mass. 1. *Cumberland & P. R. Co. v. State*, 44 Md. 283, 45 Md. 229.

409. Road master.—A road master having complete superintendence of a job represents the company and is a vice-principal of an employé under his control. *Harrison v. Detroit, L. & N. R. Co.*, 41 Am. & Eng. R. Cas. 398, 79 Mich. 409, 44 N. W. Rep. 1034. *Atchison, T. & S. F. R. Co. v. Moore*, 15 Am. & Eng. R. Cas. 312, 31 Kan. 197, 1 Pac. Rep. 644. *Hoke v. St. Louis, K. & N. R. Co.*, 25 Am. & Eng. R. Cas. 463, 88 Mo. 360.

A road master, upon whom is imposed the duty of directing the repairs of the road and keeping the road in safe condition, is, in the line of his duty, the representative of the company. *Atchison, T. & S. F. R. Co. v. Moore*, 15 Am. & Eng. R. Cas. 312, 31 Kan. 197, 1 Pac. Rep. 644. *Hoke v. St. Louis, K. & N. R. Co.*, 25 Am. & Eng. R. Cas. 463, 88 Mo. 360.

A road master is not necessarily a vice-principal of a section hand merely because he has the power to employ and discharge section hands working on his train. *Galveston, H. & S. A. R. Co. v. Smith*, 44 Am. & Eng. R. Cas. 598, 76 Tex. 611, 13 S. W. Rep. 562.

410. — illustrations.—A road master negligently misplaced a switch, causing an engine to be overturned, which injured the engineer and fireman. *Held*, that they were fellow-servants with the road master, and could not recover against the company. *Walker v. Boston & M. R. Co.*, 1 Am. &

Eng. R. Cas. 141, 128 *Mass.* 8.—APPROVED IN *Toner v. Chicago, M. & St. P. R. Co.*, 28 *Am. & Eng. R. Cas.* 449, 31 *Am. & Eng. R. Cas.* 320, 69 *Wis.* 188, 33 *N. W. Rep.* 433.

A road master—*held*, not a fellow-servant with a laborer engaged under him in removing a wrecked car, and the company is liable for his negligence by which such laborer was, while so employed, injured. *Hoke v. St. Louis, K. & N. R. Co.*, 25 *Am. & Eng. R. Cas.* 463, 88 *Mo.* 360.—FOLLOWING *Moore v. Wabash, St. L. & P. R. Co.*, 85 *Mo.* 588.—FOLLOWED IN *Ischer v. St. Louis Bridge Co.*, 95 *Mo.* 261.

Plaintiff was assisting in getting a car on the track, and was injured by the breaking of an old and worn rope which was furnished for his use by the company's road master, who was superintending the work. *Held*, that the company was liable. *Galveston, H. & S. A. R. Co. v. Delahunty*, 4 *Am. & Eng. R. Cas.* 628, 53 *Tex.* 206.

A road master in charge of a working train and a working party moved the train so negligently that he brought it into collision with a special train, and a section hand riding upon the working train, but not employed under the immediate eye of the road master, was injured. *Held*, that although the road master had the power to employ and discharge the men on his train, yet in bringing about the collision he acted as a fellow-servant of the section hand, and his negligence should not be considered as the negligence of the company. *Galveston, H. & S. A. R. Co. v. Smith*, 44 *Am. & Eng. R. Cas.* 598, 76 *Tex.* 611, 13 *S. W. Rep.* 562.

411. Section man.—A section hand is a fellow-servant with the other section hands. *Rose v. Gulf, C. & S. F. R. Co.*, (Tex.) 17 *S. W. Rep.* 789.

A section master who is in sole command of a hand-car and of the other employes cannot recover from the company for injuries received, by a co-employé who was turning the crank, catching it in his clothes, which threw him against the section master. *Kenney v. Central R. Co.*, 61 *Ga.* 590.—FOLLOWING *Central R. & B. Co. v. Kenney*, 58 *Ga.* 485.

A yard switchman is a fellow-servant of section men whose duty it is to keep the track and adjoining ground clear, and cannot recover from the company for injuries received in falling over lumps of coal while making a coupling, which the section men have negligently left on the track. *Cincin-*

nati, N. O. & T. P. R. Co. v. Mealer, 50 *Fed. Rep.* 725, 6 *U. S. App.* 86, 1 *C. C. A.* 633.

A member of one "section gang" is the fellow-servant of the boss of another "section gang" employed by the same railroad company, they being engaged in the same general service and in the same line of duty, and he cannot recover for an injury occasioned by the negligent running of the hand-car, in charge of said boss, into the hand-car on which the plaintiff was riding. *Clarke v. Pennsylvania Co.*, 132 *Ind.* 199, 31 *N. E. Rep.* 808.—DISTINGUISHING *Pittsburgh, C. & St. L. R. Co. v. Kirk*, 102 *Ind.* 399.

Where it is a part of the duty of section men to help unload iron rails from cars, one cannot recover from the company for an injury sustained by another jostling him, causing him to drop a rail on his foot, where there is no charge of negligence in the manner of unloading, nor of the employment of incompetent servants. *International & G. N. R. Co. v. Tarver*, 72 *Tex.* 308, 11 *S. W. Rep.* 1043.

Section hands who are engaged in ballasting the track are not fellow-servants with the trainmen. *Parker v. Hannibal & St. J. R. Co.*, 109 *Mo.* 362, 19 *S. W. Rep.* 1119.

Section hands while digging around a switch negligently left the hole open, and a brakeman stepped into it while uncoupling cars and was injured. *Held*, that the brakeman and section hands were not fellow-servants. *Vautrain v. St. Louis, I. M. & S. R. Co.*, 8 *Mo. App.* 538; *affirmed on other grounds* in 78 *Mo.* 44.—DISTINGUISHED IN *Corbett v. St. Louis, I. M. & S. R. Co.*, 26 *Mo. App.* 621.

412. Shopman.—The question whether the negligence of the superintendent of repair shops is the negligence of the company is a mixed question of law and fact, to be determined by the jury under proper instructions. *Potter v. Chicago, R. I. & P. R. Co.*, 46 *Iowa* 399. Compare *Hanrathy v. Northern C. R. Co.*, 46 *Md.* 280, 18 *Am. Ry. Rep.* 188.

Where the works of a railroad are carried on in different "shops," with foremen for each, and the laborers are divided into "gangs," with foremen, a laborer in one gang is a fellow-servant of a laborer in another, so as to prevent a recovery by one against the company for the negligence of the other. *New York, L. E. & W. R. Co.*

v. Bell, 28 Am. & Eng. R. Cas. 338, 112 Pa. St. 400, 4 Atl. Rep. 50.—DISTINGUISHING *Pennsylvania & N. Y. C. & R. Co. v. Leslie*, 16 W. N. C. 321.

413. Station agent, generally.—Where it is made the duty of a station agent to inspect loaded cars, his negligence in permitting an improperly loaded car to go out, which caused an injury to a brakeman, is not the negligence of the company, but that of a fellow-servant. *Byrnes v. New York, L. E. & W. R. Co.*, 113 N. Y. 251, 21 N. E. Rep. 50, 22 N. Y. S. R. 936, 4 L. R. A. 151; *reversing* 14 N. Y. S. R. 554.—APPLIED IN *Ford v. Lake Shore & M. S. R. Co.*, 117 N. Y. 638. DISTINGUISHED IN *LaCroy v. New York, L. E. & W. R. Co.*, 132 N. Y. 570, 4 Silv. App. 123; *Dougherty v. Rome, W. & O. R. Co.*, 45 N. Y. S. R. 154. NOT FOLLOWED IN *Little Rock & M. R. Co. v. Moseley*, 56 Fed. Rep. 1009. REVIEWED IN *Dewey v. Detroit, G. H. & M. R. Co.*, 97 Mich. 329.

414. — fellow-servant of brakeman.—A station agent and a brakeman employed by the same railroad company are fellow-servants. *Gaffney v. New York & N. E. R. Co.*, 31 Am. & Eng. R. Cas. 265, 15 R. I. 456, 4 N. Eng. Rep. 33, 7 Atl. Rep. 284.

A station agent having general supervision over the tracks and switches at his station, and a brakeman in the employ of the same company, are fellow-servants, and the company is not liable for an injury to the latter caused by the negligence of the former. *Toner v. Chicago, M. & St. P. R. Co.*, 28 Am. & Eng. R. Cas. 449, 31 Am. & Eng. R. Cas. 320, 69 Wis. 188, 31 N. W. Rep. 104, 33 N. W. Rep. 433.

The brakeman of a freight train is the fellow-servant of a station agent who has control over the company's station, including the freight business, with power to employ and discharge hands on duty at the station, but without any power to employ or discharge the servants operating trains upon the road. *Galveston, H. & S. A. R. Co. v. Farmer*, 38 Am. & Eng. R. Cas. 75, 73 Tex. 85, 11 S. W. Rep. 156.—REVIEWING *St. Louis, A. & T. R. Co. v. Welch*, 72 Tex. 298.—QUOTED IN *Galveston, H. & S. A. R. Co. v. Smith*, 44 Am. & Eng. R. Cas. 598, 76 Tex. 611, 13 S. W. Rep. 562.

A station agent who, by the rules of a railroad company, is held responsible for the safety of switches, and whose express

duty it is to see that the main track is kept clear and unobstructed for the passage of trains, and to be out at the station, and know that everything is right when trains are passing, is a fellow-servant of a brakeman in the employ of the same company, who has been injured by a collision near such agent's station; and if the agent is not shown to have been incompetent, the railroad company is not liable to the brakeman for an accident happening through the negligence of such agent. *Toner v. Chicago, M. & St. P. R. Co.*, 28 Am. & Eng. R. Cas. 449, 31 Am. & Eng. R. Cas. 320, 69 Wis. 188, 31 N. W. Rep. 104, 33 N. W. Rep. 433.—APPROVING *Walker v. Boston & M. R. Co.*, 128 Mass. 8; *Henry v. Lake Shore & M. S. R. Co.*, 49 Mich. 495; *Collins v. St. Paul & S. C. R. Co.*, 30 Minn. 31; *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478. FOLLOWING *Cooper v. Milwaukee & P. du C. R. Co.*, 23 Wis. 668; *Anderson v. Milwaukee & St. P. R. Co.*, 37 Wis. 322; *Howland v. Milwaukee, L. S. & W. R. Co.*, 54 Wis. 230; *Heine v. Chicago & N. W. R. Co.*, 58 Wis. 529; *Peschel v. Chicago, M. & St. P. R. Co.*, 62 Wis. 349.

415. — fellow-servant of engineer.—In the absence of evidence to the contrary, an ordinary station agent is presumed to have general charge of the tracks in and about his station, and as respects such charge he is the fellow-servant of a locomotive engineer. *Brown v. Minneapolis & St. L. R. Co.*, 31 Minn. 553, 18 N. W. Rep. 834.—DISTINGUISHING *Drymala v. Thompson*, 26 Minn. 40.—APPROVED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758. REVIEWED IN *Lindvall v. Woods*, 39 Am. & Eng. R. Cas. 339, 41 Minn. 212, 4 L. R. A. 793, 42 N. W. Rep. 1020.

A station master who is charged with delivering telegrams to engineers of passing trains, notifying them of the condition of the track, etc., is a fellow-servant with such engineers, and the company is not liable for the death of an engineer caused by the station master failing to deliver a telegram notifying him of an open switch. *Dealey v. Philadelphia & R. R. Co.*, (Pa.) 4 Atl. Rep. 170.

416. — fellow-servant of fireman.—A fireman of a locomotive and a station agent who is also a telegraph operator are fellow-servants within the rule that

an employer is not liable to an employé for an injury caused by the negligence of a fellow-servant. *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 25 Atl. Rep. 175.—DISTINGUISHING *Lewis v. Seifert*, 116 Pa. St. 628.

417. Station hand.—Persons who make up trains under the direction of a station master are fellow-servants with a brakeman upon such trains. *Hodgkins v. Eastern R. Co.*, 119 Mass. 419, 9 Am. Ry. Rep. 271.

418. Switch engineer.—A switch engineer is a fellow-servant of a yard repair hand, where both are in the employ of the same company and their occupations are such that the carelessness of the engineer endangered the safety of deceased fellow-servant. *Chicago & A. R. Co. v. Murphy*, 53 Ill. 336.

419. Switchman, generally.*—A switchman is a fellow-servant of persons employed to run passenger cars over the road. *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49.

The co-operation of the switchman is necessary to the successful management of the trains, and employés upon the trains in the common service assume the risk of the negligent discharge of his duty. *Miller v. Southern Pac. Co.*, 48 Am. & Eng. R. Cas. 294, 20 Oreg. 285, 26 Pac. Rep. 70.—DISTINGUISHING *Ford v. Fitchburg R. Co.*, 110 Mass. 260, 14 Am. Rep. 598; *Davis v. Central Vt. R. Co.*, 55 Vt. 84, 45 Am. Rep. 590; *Calvo v. Charlotte, C. & A. R. Co.*, 23 So. Car. 526, 55 Am. Rep. 28; *Moon v. Richmond & A. R. Co.*, 78 Va. 745, 49 Am. Rep. 401; *Brothers v. Cartter*, 52 Mo. 372, 14 Am. Rep. 424; *Flike v. Boston & A. R. Co.*, 53 N. Y. 549, 13 Am. Rep. 545; *Corcoran v. Holbrook*, 59 N. Y. 517, 17 Am. Rep. 369; *Mullan v. Philadelphia & S. M. Steamship Co.*, 78 Pa. St. 25, 21 Am. Rep. 2; *Ryan v. Chicago & N. W. R. Co.*, 60 Ill. 171, 14 Am. Rep. 32; *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239, 98 Am. Dec. 336; *Nashville & C. R. Co. v. Carroll*, 6 Heisk. (Tenn.) 347; *Atchison, T. & S. F. R. Co. v. Holt*, 29 Kan. 149; *Slater v. Jewett*, 85 N. Y. 61.

A switchman signaling to an engine to come on towards a car upon which men are working, whose safety will be endangered by the place in which they are working

being rendered unsafe, is not a fellow-servant with the men repairing the car. *Pool v. Southern Pac. R. Co.*, 7 Utah 303, 26 Pac. Rep. 654.

Plaintiff's ordinary duties were those of a track repairer, and he was injured through the negligence of one whose ordinary duties were those of a switchman; but both were liable to be called on to do other things, and plaintiff was injured while both were engaged in working a derrick in clearing away a wreck. *Held*, that they were fellow-servants while so employed. *Slatterly v. New York, L. E. & W. R. Co.*, 21 N. Y. S. R. 552, 51 Hun 638, 4 N. Y. Supp. 910.

420. — fellow-servant of baggage master.—A baggage master on a passenger train and a switch tender are fellow-servants. *Roberts v. Chicago, St. P., M. & O. R. Co.*, 33 Minn. 218, 22 N. W. Rep. 389.

421. — fellow-servant of carpenter.—A carpenter in the employ of a company while being transported to his place of work free of charge is a fellow-servant of a switchman, and cannot recover from the company for an injury caused by the latter's negligence, if the company has exercised proper care in employing the switchman. *Gilman v. Eastern R. Corp.*, 10 Allen (Mass.) 233.—DISTINGUISHED IN *Hobson v. New Mexico & A. R. Co.*, (Ariz.) 28 Am. & Eng. R. Cas. 360, 11 Pac. Rep. 545. QUOTED IN *Harper v. Indianapolis & St. L. R. Co.*, 47 Mo. 567; *Brickner v. New York C. R. Co.*, 2 Lans. (N. Y.) 506. REVIEWED IN *Ewald v. Chicago & N. W. R. Co.*, 33 Am. & Eng. R. Cas. 326, 70 Wis. 420, 36 N. W. Rep. 12.

422. — fellow-servant of an engineer.—A locomotive engineer and a switchman are fellow-servants. *Naylor v. New York C. & H. R. R. Co.*, 33 Fed. Rep. 801.—FOLLOWING *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *Quinn v. New Jersey Lighterage Co.*, 23 Blatchf. (U. S.) 209, 23 Fed. Rep. 363.—APPLIED IN *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336. QUOTED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758.

An engineer and a switchman employed to attend to a semaphore regulating arrival of freight trains are fellow-servants. *Dev-erill v. Grand Trunk R. Co.*, 25 U. C. Q. B. 517.

* Switchman and trainman, see note, 17 AM. & ENG. R. CAS. 577.

423. — fellow-servant of a flagman.—A switch tender is a fellow-servant of a flagman who was killed by a passing train, caused by a misplacing of the switch. *Sammon v. New York & H. R. Co.*, 62 N. Y. 251, 12 Am. Ry. Rep. 150.—DISTINGUISHED IN *Elmer v. Locke*, 15 Am. & Eng. R. Cas. 300, 135 Mass. 575.

424. Telegraph operator.—A station telegraph operator is a co-employé of a locomotive engineer. *Dana v. New York C. & H. R. R. Co.*, 23 Hun (N. Y.) 473.

A telegraph operator who is charged with the duty of displaying signals to regulate the movement of trains is a fellow-servant with a locomotive engineer, preventing the latter from recovering for an injury received through the negligence of the other, when no charge of incompetency is made. *Monaghan v. New York C. & H. R. R. Co.*, 45 Hun 113, 9 N. Y. S. R. 672.—APPLYING *Brick v. Rochester*, N. Y. & P. R. Co., 98 N. Y. 211; *Hofnagle v. New York C. & H. R. R. Co.*, 55 N. Y. 608; *McCosker v. Long Island R. Co.*, 84 N. Y. 77; *Loughlin v. State*, 105 N. Y. 159, 11 N. E. Rep. 371, 7 Cent. Rep. 70.

A telegraph operator who is intrusted with the receiving and delivering messages from the company's train dispatcher to the persons operating trains is a fellow-servant with a fireman on a train. *McKaig v. Northern Pac. R. Co.*, 42 Fed. Rep. 288.—EXPLAINING *Ross v. Chicago, M. & St. P. R. Co.*, 8 Fed. Rep. 544. QUOTING *McAndrews v. Burns*, 39 N. J. L. 117. REVIEWING *Garrahy v. Kansas City, St. J. & C. B. R. Co.*, 25 Fed. Rep. 258.—APPROVED IN *Cincinnati, N. O. & T. P. R. Co. v. Clark*, 57 Fed. Rep. 125.

A telegraph operator whose duty it is to display signals to regulate the movement of trains is a fellow-servant with a fireman on a locomotive engine. *Cincinnati, N. O. & T. P. R. Co. v. Clark*, 57 Fed. Rep. 125.—APPROVING *McKaig v. Northern Pac. R. Co.*, 42 Fed. Rep. 288. DISTINGUISHING *Northern Pac. R. Co. v. Charles*, 2 C. C. A. 380, 51 Fed. Rep. 567.

A telegraph operator, who is also the station agent, is a fellow-servant of a fireman on a locomotive. *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 25 All. Rep. 175.

A telegraph operator is not a fellow-servant of a fireman. *Illinois C. R. Co. v. Hunter*, 70 Miss. 471, 12 So. Rep. 482.

A telegraph operator is not a fellow-

servant of a fireman on a wildcat train. *Sheehan v. New York C. & H. R. R. Co.*, 12 Am. & Eng. R. Cas. 235, 91 N. Y. 332; reversing 25 Hun 310.

A telegraph operator is not the fellow-servant of a brakeman. *Hall v. Galveston, H. & S. A. R. Co.*, 39 Fed. Rep. 18.

425. Track repairer.—A track repairer is a fellow-servant with a trainman whose duty is to couple cars. *Filbert v. Delaware & H. Canal Co.*, 121 N. Y. 207, 23 N. E. Rep. 1104, 30 N. Y. S. R. 494; reversing 24 J. & S. 170, 18 N. Y. S. R. 964, 2 N. Y. Supp. 623.

An employé charged with the duty of keeping in repair a railway track is not a fellow-servant with the employés operating the trains, who sustain injuries through the negligence of such track repairer in the performance of his duty. *Missouri Pac. R. Co. v. Bond*, 2 Tex. Civ. App. 104, 20 S. W. Rep. 930.—FOLLOWING *Houston & T. C. R. Co. v. Dunham*, 49 Tex. 181.

The plaintiff, an engineer, was injured by the overturning of his engine. It was shown that a rail where the accident occurred was somewhat worn, and that the track inspector and his gang went over the track at that place a short time before the accident. *Held*, that it was proper to nonsuit the plaintiff. *Burrell v. Gowen*, 44 Am. & Eng. R. Cas. 610, 134 Pa. St. 527, 19 Atl. Rep. 678.

Where it appeared, in an action for the negligent killing of the plaintiff's intestate while employed as brakeman on a material train, that the immediate cause of his death was the rapid running of the train, suddenly accelerated by additional steam, over a track left in an uneven and weakened condition by other employés of the company, who were employed to repair the said track, and who failed to give warning of the condition of the road—*held*, that defendant company is liable for the negligence of its employés, whose duty it was to repair the road and give notice of its condition, and those employés were not fellow-servants of plaintiff's intestate. *Torian v. Richmond & A. R. Co.*, 84 Va. 192, 4 S. E. Rep. 339.

426. Trackman.*—A laborer engaged in ballasting is a fellow-servant of an em-

* Track hands injured through negligence of train hands, see note, 41 AM. & ENG. R. CAS. 477; 38 Id. 86.

Members of crew of a construction company, see 39 AM. & ENG. R. CAS. 346, *abstr.*

ployé laying tram-plates, and cannot recover for injuries received through such employé's negligence. *Lovegrove v. London, B. & S. C. R. Co.*, 16 C. B. N. S. 669, 10 Jur. N. S. 879, 33 L. J. C. P. 329, 12 W. R. 988, 10 L. T. 718.

The relation of fellow-servant does not exist between a brakeman and those who are charged with keeping the track free from obstructions, so as to prevent the brakeman recovering from his company for an injury received in falling over a timber left at the side of the track, while going rapidly on a dark morning to close a switch. *Southern Pac. R. Co. v. Markey*, (Tex.) 19 S. W. Rep. 392.

Railroad employes negligently left a pit between the tracks uncovered while making repairs, and plaintiff fell in it and was injured while coupling cars. Held, that he was a fellow-servant with the laborers and could not recover from the company. *Filbert v. Delaware & H. Canal Co.*, 121 N. Y. 207, 23 N. E. Rep. 1104, 30 N. Y. S. R. 494; reversing 24 J. & S. 170, 18 N. Y. S. R. 964, 2 N. Y. Supp. 623.—NOT FOLLOWED IN *Southerland v. Northern Pac. R. Co.*, 43 Fed. Rep. 646.

427. Train dispatcher, generally.*

—A train dispatcher is a fellow-servant of those engaged in the operation of trains under his orders. *Slater v. Jewett*, 5 Am. & Eng. R. Cas. 515, 85 N. Y. 61, 39 Am. Rep. 627.

A brakeman and a train dispatcher are servants in the accomplishment of the same general object, and are therefore fellow-servants, though situate many miles apart, and with distinct duties. *Robertson v. Terre Haute & I. R. Co.*, 8 Am. & Eng. R. Cas. 175, 78 Ind. 77, 41 Am. Rep. 552.—DISAPPROVED IN *Lewis v. Seifert*, 116 Pa. St. 628, 9 Cent. Rep. 755, 11 Atl. Rep. 514, 20 W. N. C. 145.

A train dispatcher is not, by virtue of his position, a representative of the company, but a fellow-servant, unless from the extent of discretion committed to him, or by the rules prescribed for his government, it should appear otherwise. *Hankins v. New York, L. E. & W. R. Co.*, 55 Hun 51, 28 N. Y. S. R. 59, 8 N. Y. Supp. 272.—QUOTING *Monaghan v. New York C. & H. R. R. Co.*, 45 Hun 116; *Rose v. Boston & A. R.*

Co., 58 N. Y. 217; *Sheehan v. New York C. & H. R. R. Co.*, 91 N. Y. 332; *Sutherland v. Troy & B. R. Co.*, 11 N. Y. S. R. 841; *Shiner v. Russell*, 6 N. Y. S. R. 78; *Ford v. Lake Shore & M. S. R. Co.*, 17 N. Y. S. R. 393. REVIEWING *Abel v. Delaware & H. Canal Co.*, 103 N. Y. 581.

A train dispatcher wielding the power and authority of a railroad company in the moving of trains, in the changing of schedules, or the making of new ones, as exigencies require, is not a fellow-servant with a train employé; and for his negligence, which is the proximate cause of an injury to such employé, the company is liable in damages. *Lewis v. Seifert*, 116 Pa. St. 628, 9 Cent. Rep. 755, 11 Atl. Rep. 514, 20 W. N. C. 145.—DISAPPROVING *Robertson v. Terre Haute & I. R. Co.*, 8 Am. & Eng. R. Cas. 175, 78 Ind. 77; *Blessing v. St. Louis, K. C. & N. R. Co.*, 15 Am. & Eng. R. Cas. 298, 77 Mo. 410. QUOTING *Slater v. Jewett*, 85 N. Y. 61.—*McKune v. California Southern R. Co.*, 17 Am. & Eng. R. Cas. 589, 66 Cal. 302. *Hunn v. Michigan C. R. Co.*, 41 Am. & Eng. R. Cas. 452, 78 Mich. 513, 7 L. R. A. 500, 44 N. W. Rep. 502. *McChesney v. Panama R. Co.*, 66 Hun 627, 49 N. Y. S. R. 148, 21 N. Y. Supp. 207.

The train dispatcher habitually performing the duties of a superintendent of the road represents the company in the same manner as it was represented by the superintendent, and must be deemed a vice-principal, although subject to his orders. *Lasky v. Canadian Pac. R. Co.*, 83 Me. 461, 22 Atl. Rep. 367.

The train dispatcher having determined that, under existing circumstances, a written order could not be given, and having given a verbal one, his act was that of the company, and binding on it. *Smith v. Wabash, St. L. & P. R. Co.*, 31 Am. & Eng. R. Cas. 331, 92 Mo. 359, 4 S. W. Rep. 129.

A printed rule of the company, under the head of "movement of trains by special orders," provided that all orders should be given by a superintendent, or by a dispatcher appointed for that purpose, under direction of a superintendent; and another that division superintendents were supreme in their respective divisions, and were responsible only to the management for such orders as they might give. Held, that the whole power of the company as to the movement of these trains being delegated

* Fellow-servants. Position of train dispatcher, see note, 15 AM. & ENG. R. CAS. 300.

New York
Sutherland
S. R. 841;
t. 78; Ford
17 N. Y. S.
Delaware &

the power
pany in the
g of sched-
nes, as exi-
servant with
negligence,
of an injury
is liable in
Pa. St. 628,
4, 20 W. N.
son v. Terre
ng. R. Cas.
Louis, K. C.
Cas. 298, 77
ewett, 85 N.
Southern R.
66 Cal. 302.
Am. & Eng.
R. A. 500, 44
Panama R.
C. 148, 21 N.

ly perform-
ident of the
in the same
y the super-
ned a vice-
his orders.
3 Me. 461, 22

determined
nces, a writ-
and having
that of the
Smith v.
31 Am. &
S. W. Rep.

y, under the
by special
s should be
by a dis-
pose, under
and another
ere supreme
nd were rec-
ent for such
eld, that the
as to the
g delegated

to the train dispatcher, he was to be regarded as representing the company. *Darrigan v. New York & N. E. R. Co.*, 23 Am. & Eng. R. Cas. 438, 52 Conn. 285, 52 Am. Rep. 590.—CRITICISING *Feltham v. England*, L. R. 2 Q. B. 33; *Wilson v. Merry*, L. R. 1 H. L. Cas., Sc. 326. EXPLAINING *Wilson v. Williamantic Linen Co.*, 50 Conn. 433. QUOTING *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377; *Sheehan v. New York C. & H. R. R. Co.*, 91 N. Y. 332. QUOTING AND CRITICISING *Holden v. Fitchburg R. Co.*, 129 Mass. 268.

428. — not fellow-servant of a brakeman.—A train dispatcher is not a fellow-servant with the brakeman. *Phillips v. Chicago, M. & St. P. R. Co.*, 23 Am. & Eng. R. Cas. 453, 64 Wis. 475, 25 N. W. Rep. 544.

429. — not fellow-servant of an engineer.—A train dispatcher is not the fellow-servant of a locomotive engineer. (Granger, J., dissenting.) *Darrigan v. New York & N. E. R. Co.*, 23 Am. & Eng. R. Cas. 438, 52 Conn. 285, 52 Am. Rep. 590.—QUOTED IN *Hunn v. Michigan C. R. Co.*, 78 Mich. 513.

A train dispatcher of a railroad, who has the control of the movement of its trains, and to whose orders the conductors and engineers are subject, is the representative of the company, and is not a fellow-servant with those engaged in operating and moving the trains. *Smith v. Wabash, St. L. & P. R. Co.*, 31 Am. & Eng. R. Cas. 331, 92 Mo. 359, 4 S. W. Rep. 129.—APPLYING *Sheehan v. New York C. & H. R. R. Co.*, 91 N. Y. 332; *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 109; *Booth v. Boston & A. R. Co.*, 73 N. Y. 38; *Pittsburgh, C. & St. L. R. Co. v. Henderson*, 37 Ohio St. 552; *Washburn v. Nashville & C. R. Co.*, 3 Head (Tenn.) 638; *Darrigan v. New York & N. E. R. Co.*, 52 Conn. 285, 24 Am. Law Reg. (N. S.) 453.—*Chicago, B. & Q. R. Co. v. Young*, 26 Ill. App. 115.—FOLLOWING *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 109. REVIEWING AND APPLYING *Chicago & N. W. R. Co. v. Moranda*, 108 Ill. 576.

A train dispatcher and a locomotive engineer are *prima facie* fellow-servants, and to entitle plaintiff to a recovery for the death of the engineer, through the train dispatcher's negligence, he must prove that they were not fellow-servants. *Blessing v. St. Louis, K. C. & N. R. Co.*, 15 Am. & Eng. R. Cas. 298, 77 Mo. 410; *affirming* 7 Mo.

5 D. R. D.—49.

App. 594.—QUOTING *McGowan v. St. Louis & I. M. R. Co.*, 61 Mo. 528.—DISAPPROVED IN *Lewis v. Seifert*, 116 Pa. St. 628, 9 Cent. Rep. 755, 11 Atl. Rep. 514, 20 W. N. C. 45.

430. — not fellow-servant of fireman.—Train dispatchers and train masters are not the fellow-servants of locomotive firemen. *Crew v. St. Louis, K. & N. W. R. Co.*, 20 Fed. Rep. 87. Contra, *Slater v. Jewett*, 5 Am. & Eng. R. Cas. 515, 85 N. Y. 61, 39 Am. Rep. 627. *Millsaps v. Louisville, N. O. & T. R. Co.*, 69 Miss. 423, 13 So. Rep. 696.

The company is liable for an accident occurring through the negligence of the train dispatcher in ordering the movement of its engines, whereby a fireman on one of the latter is killed. Nor does it make any difference, as regards the liability of the company, that the engine was on the road when the collision occurred, under verbal orders of the train dispatcher, instead of written orders, as required by the company's rules. *Smith v. Wabash, St. L. & P. R. Co.*, 31 Am. & Eng. R. Cas. 331, 92 Mo. 359, 4 S. W. Rep. 129.—REVIEWING *Moore v. Wabash, St. L. & P. R. Co.*, 85 Mo. 588.—DISTINGUISHED IN *Jackson v. Missouri Pac. R. Co.*, 104 Mo. 448.

431. — not fellow-servant of a track laborer.*—A train dispatcher and material agent having authority to employ and discharge men, and direct movements of trains, is not a fellow-employee with an ordinary track laborer. *McKune v. California Southern R. Co.*, 17 Am. & Eng. R. Cas. 589, 66 Cal. 302, 5 Pac. Rep. 482.—CRITICISED IN *Congrave v. Southern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 337, 88 Cal. 360.

432. Train master.—A train master is a vice-principal of a locomotive fireman. *Crew v. St. Louis, K. & N. W. R. Co.*, 20 Fed. Rep. 87.

433. Train hand, generally.†—A train hand killed in a collision is a fellow-servant of the employees on the two colliding trains, and no recovery can be had for his death caused by their negligence. *Hutchinson v. York, N. & B. R. Co.*, 5 Ex. 343, 6 Railw. Cas. 580, 19 L. J. Ex. 296, 14 Jur. 837.

* Train dispatcher and track laborer, see note, 17 AM. & ENG. R. CAS. 591.

† Workman going to work on train as fellow-servant of engineer and train hands, see note, 17 AM. & ENG. R. CAS. 620.

—QUESTIONED IN *Morgan v. Vale of Neath R. Co.*, 33 L. J. Q. B. 260, 12 W. R. 1032.

A servant whose duties bring him into contact with the traffic of the line accepts the risk of injury from the carelessness of those managing such traffic. *Morgan v. Vale of Neath R. Co.*, 5 B. & S. 736, L. R. 1 Q. B. 149, 35 L. J. Q. B. 23, 13 L. T. 564, 34 L. J. Q. B. 23, 14 W. R. 144; *affirming* 5 B. & S. 570, 10 Jur. N. S. 1074, 33 L. J. Q. B. 260, 13 W. R. 1031.—FOLLOWED IN *Warburton v. Great Western R. Co.*, L. R. 2 Ex. 30, 36 L. J. Ex. 9, 15 L. T. 361, 15 W. R. 108, 4 H. & C. 695.

A freight hand and a switch tender are not fellow-servants. *Chicago, R. I. & P. R. Co. v. Henry*, 7 Ill. App. 322.

Train hands operating a train are in a different department from a mechanic who is working for the company and is merely being carried to and from his place of work. *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239.

434. — fellow-servant of brakeman.—Trainmen on a logging train are fellow-servants with the brakeman on the same. *Conger v. Flint & P. M. R. Co.*, 86 Mich. 76, 48 N. W. Rep. 695.

A brakeman assumes the risk of injury caused by the negligence of the company's trainmen in leaving a freight car on a side track so as to injure the brakeman while riding on a passing train. *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74, 16 S. W. Rep. 924.—QUOTING *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377.—DISTINGUISHED IN *Henry v. Wabash Western R. Co.*, 109 Mo. 488. QUOTED IN *Relyea v. Kansas City, Ft. S. & G. R. Co.*, 112 Mo. 86.

435. — fellow-servant of bridge builder.*—Employés engaged in operating a train are fellow-servants of the foreman of a bridge gang in the sense that it precludes the latter from a recovery of the company for injuries inflicted by reason of their negligence. *St. Louis, A. & T. R. Co. v. Welch*, 38 Am. & Eng. R. Cas. 81, 72 Tex. 298, 2 L. R. A. 839, 10 S. W. Rep. 529.—APPLYING *Dallas v. Gulf, C. & S. F. R. Co.*, 61 Tex. 196. QUOTING *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49.—APPLIED IN *Elli v. Northern Pac. R. Co.*, 1 N. Dak. 336. FOLLOWED IN *Texas & P. R. Co. v.*

Rogers, 57 Fed. Rep. 378. REVIEWED IN *Galveston, H. & S. A. R. Co. v. Farmer*, 38 Am. & Eng. R. Cas. 75, 73 Tex. 85, 11 S. W. Rep. 156.

436. — fellow-servant of conductor.—Where a conductor of a train is killed by a collision of two trains at the intersection of two railroads, in consequence of the negligence of the station agent in giving signals when the several trains might pass with safety, no recovery can be had by his personal representative, if his co-employés in charge of the train under him were guilty of negligence which contributed to his death. *Chicago & N. W. R. Co. v. Snyder*, 28 Am. & Eng. R. Cas. 611, 117 Ill. 376, 7 N. E. Rep. 604; *reversing* 18 Ill. App. 640.

437. — fellow-servant of engine wiper.—A wiper in a round house while going to his work along a path across the track was injured by the jamming together of freight cars which had been left open to allow employés to pass. *Held*, that the wiper and those in charge of the train were fellow-servants, and he could not recover against the company for their negligence. *Ewald v. Chicago & N. W. R. Co.*, 33 Am. & Eng. R. Cas. 326, 70 Wis. 420, 36 N. W. Rep. 12, 591.—QUOTING *Gillshannon v. Stony Brook R. Corp.*, 10 Cush. (Mass.) 228. REVIEWING *Gilman v. Eastern R. Corp.*, 10 Allen (Mass.) 233; *Seaver v. Boston & M. R. Co.*, 14 Gray (Mass.) 466; *Ryan v. Cumberland Valley R. Co.*, 23 Pa. St. 384; *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291; *Higgins v. Hannibal & St. J. R. Co.*, 36 Mo. 418; *Kansas Pac. R. Co. v. Salmon*, 11 Kan. 83; *Russell v. Hudson River R. Co.*, 17 N. Y. 134; *McQueen v. Central Branch U. P. R. Co.*, 30 Kan. 689; *Vick v. New York C. & H. R. R. Co.*, 95 N. Y. 267.

438. — fellow-servant of employe loading or unloading car.—A laborer on a gravel train is the fellow-servant of persons employed to run another train on the same road. *Sullivan v. Toledo, W. & W. R. Co.*, 58 Ind. 26.

Whether a section hand engaged in loading and unloading cars, who is killed by a construction train, is a fellow-servant of those in charge of the train is a question of fact, and not one of law, and a finding by the appellate court as to such fact is conclusive. *Chicago & A. R. Co. v. Kelly*, 127 Ill. 637, 21 N. E. Rep. 203; *affirming* 28 Ill. App. 655.—APPLIED IN *Lake Erie & W. R.*

* Train hands and member of bridge gang as fellow-servants, see 53 AM. & ENG. R. CAS. 587, *abstr.*

Co. v. Middleton, 46 Ill. App. 218. FOLLOWED IN *Joliet Steel Co. v. Shields*, 32 Ill. App. 598.

439. — fellow-servant of trackman.—Persons in charge of and operating trains are not fellow-servants of trackmen, and the latter are entitled to recover for injuries sustained through the negligence of the former. *Howard v. Delaware & H. Canal Co.*, 41 Am. & Eng. R. Cas. 473, 40 Fed. Rep. 195.—DISTINGUISHING *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322. FOLLOWING *Davis v. Central Vt. R. Co.*, 55 Vt. 84; *Hard v. Vermont & C. R. Co.*, 32 Vt. 473; *Boyce v. Tabb*, 18 Wall. (U. S.) 546; *Chicago v. Robbins*, 2 Black (U. S.) 418; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184.—FOLLOWED IN *Pike v. Chicago & A. R. Co.*, 41 Fed. Rep. 95. QUOTED IN *Parker v. Hannibal & St. J. R. Co.*, 109 Mo. 362. REVIEWED IN *Dixon v. Chicago & A. R. Co.*, 109 Mo. 413.

A common laborer on a railroad, while riding on a gravel train to his place of labor, was injured by a collision caused by the negligence of the company's servants in charge of the train. *Held*, that no action would lie against the company therefor, although both servants were not in a common employment. *Gillshannon v. Stony Brook R. Corp.*, 10 Cush. (Mass.) 228.—DISAPPROVED IN *Louisville & N. R. Co. v. Bowler*, 9 Heisk. (Tenn.) 866. DISTINGUISHED IN *State v. Western Md. R. Co.*, 21 Am. & Eng. R. Cas. 503, 63 Md. 433; *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239. FOLLOWED IN *Boldt v. New York C. R. Co.*, 18 N. Y. 432; *Vick v. New York C. & H. R. R. Co.*, 17 Am. & Eng. R. Cas. 609, 95 N. Y. 267. QUOTED IN *Ewald v. Chicago & N. W. R. Co.*, 33 Am. & Eng. R. Cas. 326, 70 Wis. 420, 36 N. W. Rep. 12. REVIEWED IN *Waterbury v. New York C. & H. R. R. Co.*, 21 Blatchf. (U. S.) 314, 17 Fed. Rep. 671; *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226; *Morris v. Brown*, 19 N. Y. S. R. 355.

A section hand engaged in ballasting a railroad track is the fellow-servant of the trainmen on a construction train which hauls the ballast, and there can be no recovery for his death caused by the negligence of such trainmen in backing the train without warning, so as to run over and kill him. *Parker v. Hannibal & St. J. R. Co.*, 50 Am. & Eng. R. Cas. 521, 109 Mo. 362,

19 S. W. Rep. 1119.—QUOTING *Little Miami R. Co. v. Stevens*, 20 Ohio 415; *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201. REVIEWING *Rohback v. Pacific R. Co.*, 43 Mo. 187; *Whealan v. Mad River & L. E. R. Co.*, 8 Ohio St. 249; *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49; *Randall v. Baltimore & O. R. Co.*, 15 Am. & Eng. R. Cas. 243, 109 U. S. 484; *Murray v. St. Louis C. & W. R. Co.*, 98 Mo. 573.

The plaintiff was employed as a trackman to follow passenger trains, in a hand-car, over a certain part of the defendants' road track to keep it in order and report defects, and while engaged in this duty, in the evening, was run over, and was severely and permanently injured, by a train of defendants' cars, without lights, not usually passing at that hour, and through the negligence, as was claimed, of its managers. *Held*, that the defendants were not liable to the plaintiff for the negligence of the managers of the train. *Coon v. Syracuse & U. R. Co.*, 5 N. Y. 492; affirming 6 Barb. 231.—FOLLOWED IN *Sherman v. Rochester & S. R. Co.*, 17 N. Y. 153; *Whealan v. Mad River & L. E. R. Co.*, 8 Ohio St. 249. LIMITED IN *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201.

Plaintiff, a laborer on a gravel train on an unfinished track which paralleled an old one, was injured by a passenger train running on the new track by reason of the old one being obstructed, being the first regular train that had been on the new track. *Held*, that he could not recover against the company for injuries received from the negligence of those running the train. *Boldt v. New York C. R. Co.*, 18 N. Y. 432.—FOLLOWING *Sherman v. Rochester & S. R. Co.*, 17 N. Y. 153; *Russell v. Hudson River R. Co.*, 17 N. Y. 134; *Gillshannon v. Stony Brook R. Corp.*, 10 Cush. (Mass.) 228.—APPROVED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758. FOLLOWED IN *Mele v. Delaware & H. Canal Co.*, 27 J. & S. (N. Y.) 367. REVIEWED IN *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226.

440. — fellow-servant of track repairer.—A section man engaged in repairing the track of a railroad, and those engaged in running trains on it, are fellow-servants engaged in the same general business. *Foster v. Minnesota C. R. Co.*, 14 Minn. 360 (Gil. 277).

A track repairer was run over after night-fall by a locomotive furnished with a proper headlight, which, however, was not lighted. *Held*, that while the failure to provide a headlight would have made the company liable, it was not liable to the person injured for the failure to light the one provided, the neglect being that of his fellow-servant. *Collins v. St. Paul & S. C. R. Co.*, 8 Am. & Eng. R. Cas. 150, 30 Minn. 31, 14 N.W. Rep. 60.—APPLIED IN *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336. APPROVED IN *Toner v. Chicago, M. & St. P. R. Co.*, 28 Am. & Eng. R. Cas. 449, 31 Am. & Eng. R. Cas. 320, 69 Wis. 188, 33 N.W. Rep. 433; *Daniel v. Chesapeake & O. R. Co.*, 36 W. Va. 397.—*Pennsylvania R. Co. v. Wachter*, 15 Am. & Eng. R. Cas. 187, 60 Md. 395.

441. — not fellow-servant of track walker.—A track walker over a section of a railroad is not fellow-servant with those in charge of a train by which he is struck and killed. *Sullivan v. Missouri Pac. R. Co.*, 97 Mo. 113, 10 S.W. Rep. 852.—REVIEWING *Proctor v. Hannibal & St. J. R. Co.*, 64 Mo. 112.—FOLLOWED IN *Pike v. Chicago & A. R. Co.*, 41 Fed. Rep. 95. REVIEWED IN *Murray v. St. Louis C. & W. R. Co.*, 41 Am. & Eng. R. Cas. 446, 98 Mo. 573; *Dixon v. Chicago & A. R. Co.*, 109 Mo. 413.

442. Tunnel hand.—A laborer whose duty it is to deliver on the surface at the shafts, or there use or keep in repair, the instrumentalities provided for the safe conduct of the laborers to and from a tunnel, is a fellow-servant of one whose place of labor is in the tunnel. *McAndrews v. Burns*, 39 N. J. L. 117.

443. Turntable hand.—Where several employes are operating a turntable, they are all fellow-servants, and one who may be injured while so engaged cannot recover against the company for the injury, where the accident was a pure casualty. *Honner v. Illinois C. R. Co.*, 15 Ill. 550.—DISTINGUISHING *Little Miami R. Co. v. Stevens*, 20 Ohio 415.—DISTINGUISHED IN *Lalor v. Chicago, B. & Q. R. Co.*, 52 Ill. 401; *Chicago & N. W. R. Co. v. Taylor*, 69 Ill. 461. FOLLOWED IN *Chicago & A. R. Co. v. Keefe*, 47 Ill. 108.

444. Watchman.—A person employed by a cable railway company to guard a crossing, to prevent injuries to persons crossing the tracks, and to signal approaching cars to stop and start so that they

should not pass each other upon a curve, is a fellow-servant of the gripman of a car. *Murray v. St. Louis C. & W. R. Co.*, 41 Am. & Eng. R. Cas. 446, 98 Mo. 573, 12 S.W. Rep. 252, 5 L. R. A. 735.—DISTINGUISHING *Moore v. Wabash, St. L. & P. R. Co.*, 85 Mo. 588. MODIFYING *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49. QUOTING *Hall v. Missouri Pac. R. Co.*, 74 Mo. 301; *Condon v. Missouri Pac. R. Co.*, 78 Mo. 567. REVIEWING *Sullivan v. Missouri Pac. R. Co.*, 97 Mo. 114.—FOLLOWED IN *Pike v. Chicago & A. R. Co.*, 41 Fed. Rep. 95. REVIEWED AND RECONCILED IN *Parker v. Hannibal & St. J. R. Co.*, 50 Am. & Eng. R. Cas. 521, 109 Mo. 362, 19 S.W. Rep. 1119.

Where a company has provided watchmen to guard an employe from danger while at work under a car, it is not liable to him for an injury resulting from their failure to warn him of an approaching train, which caused the car to be pushed over him. *Luebke v. Chicago, M. & St. P. R. Co.*, 63 Wis. 91, 23 N.W. Rep. 136, 53 Am. Rep. 266.

445. Wreck master.—The foreman of repair shops, who is known as the wreck master, and who has charge of wrecking trains, with a crew of workmen made up of men both from the shops and the section hands, is a vice-principal when in charge of a wreck, making the company liable for his negligence resulting in injury to an employe under him. *Borgman v. Omaha & St. L. R. Co.*, 41 Fed. Rep. 667.—APPLYING *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184. FOLLOWED IN *Woods v. Lindvall*, 48 Fed. Rep. 62, 4 U. S. App. 49, 1 C. C. A. 37.

446. Yard hand.—Where a yard inspector and yard foreman are employed at the same yard by the same company, but their separate services have an immediate and common object—the moving of trains—and neither works under the order of the other, but both are subject to the control of the same yard master, they are fellow-servants, and the company is not liable to either for the negligence of the other in the performance of his service. *St. Louis, I. M. & S. R. Co. v. Rice*, 51 Ark. 467, 4 L. R. A. 173, 11 S.W. Rep. 699. *Fraker v. St. Paul, M. & M. R. Co.*, 15 Am. & Eng. R. Cas. 256, 32 Minn. 54, 19 N.W. Rep. 349.

A servant in charge of a locomotive in a yard and another servant engaged in cleaning it are fellow-servants. *Spencer v. Ohio*

M. R. Co., 130 *Ind.* 181, 29 *N. E. Rep.* 915.

A yard man placed a car on a siding on a grade, but negligently failed to set the brakes or to block its wheels, and in some way it was put in motion, and collided with an incoming train, causing injury to the conductor. *Held*, that the yard man and conductor were fellow-servants. *Harvey v. New York C. & H. R. R. Co.*, 32 *N. Y. S. R.* 817, 57 *Hun* 589, 10 *N. Y. Supp.* 645. —DISTINGUISHING *Lilly v. New York C. & H. R. R. Co.*, 107 *N. Y.* 566, 12 *N. Y. S. R.* 468.

447. Yard master.—The superintendence of the yard master of a road involves the movement of cars, and as a consequence, the control and direction of men and appliances necessary to place the cars in safe and proper positions. *Kansas City, M. & B. R. Co. v. Burton*, 53 *Am. & Eng. R. Cas.* 115, 97 *Ala.* 240, 12 *So. Rep.* 88.

A yard master who has full charge of the yards of a railroad company, and hires and discharges the men employed therein, and assigns them to their labor, is the agent or vice-principal of the company in this respect, as well as in furnishing proper, suitable, and safe appliances and places for their labor; and notice to him of defects in the appliances so furnished is notice to the company, which is chargeable with his negligence, and responsible for his promise to remedy such defects, and to see that an incompetent fireman shall not handle an engine while switching is being done, upon which promise the switchman complaining of such defects and incompetency has a right to rely for a reasonable time and to a reasonable extent. *Lyttle v. Chicago & W. M. R. Co.*, 84 *Mich.* 289, 47 *N. W. Rep.* 571.

A yard master is a vice-principal of those working under him in so far as he performs duties owing by the company to the servants. *McCosker v. Long Island R. Co.*, 5 *Am. & Eng. R. Cas.* 564, 84 *N. Y.* 77; *reversing* 21 *Hun* 500, 59 *How. Pr.* 258. *St. Louis, A. & T. R. Co. v. Triplett*, 48 *Am. & Eng. R. Cas.* 283, 54 *Ark.* 289, 15 *S. W. Rep.* 831, 16 *S. W. Rep.* 266. *Taylor v. Missouri Pac. R. Co.*, (Mo.) 16 *S. W. Rep.* 206.

A yard master is a fellow-servant with those engaged in work with him, in all respects, except as to those acts which are done in performance of some duty which

the company owed to the servants. *McCosker v. Long Island R. Co.*, 5 *Am. & Eng. R. Cas.* 564, 84 *N. Y.* 77; *reversing* 21 *Hun* 500, 59 *How. Pr.* 258.

A yard master is a fellow-servant with a foreman of car repairers. *Ritt v. Louisville & N. R. Co.*, (Ky.) 31 *Am. & Eng. R. Cas.* 289, 4 *S. W. Rep.* 796.

Plaintiff's intestate, a lad of sixteen, had been engaged to perform the duties of a call-boy in defendant's yards; but a yard master mounted a switch engine, and while acting as engineer directed the boy to uncouple certain cars, in attempting to do which he was run over and killed. *Held*, that it was proper to refuse to instruct the jury that while the yard master was acting as engineer he was a fellow-servant of the boy, exempting the company from liability. He was none the less a yard master and the representative of the company because he was acting at the time as engineer. *Hardy v. Minneapolis & St. L. R. Co.*, 36 *Fed. Rep.* 657.

448. Yard engineer.—A yard engineer or "hostler," whose duty it is to supply an engine with fuel and water, sand, etc., before it starts on its trip, is a fellow-servant with a brakeman on the train it draws. *Louisville, N. O. & T. R. Co. v. Petty*, 41 *Am. & Eng. R. Cas.* 444, 67 *Miss.* 255, 7 *So. Rep.* 351.

VII. PROCEDURE.

1. Pleading.

440. Complaint, generally.*—Where an employé sues his company for a personal injury, the complaint is demurrable if it shows that the injury complained of was the act of co-employés. *Whitwam v. Wisconsin & M. R. Co.*, 12 *Am. & Eng. R. Cas.* 214, 58 *Wis.* 408, 17 *N. W. Rep.* 124. —REVIEWED IN *Peschel v. Chicago, M. & St. P. R. Co.*, 17 *Am. & Eng. R. Cas.* 545, 62 *Wis.* 338.

A complaint alleging negligence in failing to furnish a proper caboose is demurrable where the negligence which caused the injury was not due to such failure, but to the negligence of fellow-servants in operating the train which collided with the train upon which the servant was at the time he was killed. *Lutz v. Atlantic & P. R. Co.*, (N. Mex.) 53 *Am. & Eng. R. Cas.* 478, 30 *Pac. Rep.* 912.

* See also EMPLOYEES, INJURIES TO, 530-541.

An averment in a complaint that the injured servant "had no connection whatever with any of the employes of the defendant who are engaged in blasting rock" is a mere conclusion, and facts appearing to the contrary will control. *Bogard v. Louisville, E. & St. L. R. Co.*, 100 Ind. 491.

A complaint for injury to plaintiff while engaged in coupling cars showed that the injury was the result of negligence in the loading of cars, and it was alleged that defendant suffered, permitted, and directed the cars to be loaded in an improper manner described. *Held*, that the complaint showed that the injury was caused by plaintiff's fellow-servants, and therefore did not state a cause of action. *Indianapolis & St. L. R. Co. v. Johnson*, 102 Ind. 352, 26 N. E. Rep. 200.

450. Interpretation.—In an action against an express company for injuries received while in its employment, an allegation that such injuries were caused by the negligence of one who was the "agent and manager of the said company's office" in the city where the plaintiff was employed, does not, in absence of further allegations showing what the duties and powers of such agents were, create the presumption that he was a vice-principal, for whose negligent acts, resulting in injury to its employes, the express company would be liable. *Dwyer v. American Exp. Co.*, 8 Am. & Eng. R. Cas. 159, 55 Wis. 453, 13 N. W. Rep. 471.

And especially does not such presumption arise where the complaint further shows that the acts from which the injury resulted were done by such agent while engaged as driver of the team drawing goods between the company's office and the depots, and while plaintiff was riding to and fro assisting in loading and unloading such goods. *Dwyer v. American Exp. Co.*, 8 Am. & Eng. R. Cas. 159, 55 Wis. 453, 13 N. W. Rep. 471.

Whether, if the complaint had alleged facts showing that such agent was in fact the vice-principal of the company, and empowered to do all acts at a certain city which the company was authorized to do, the company would be liable for his negligence while engaged in the same work with the plaintiff is not here determined. *Dwyer v. American Exp. Co.*, 8 Am. & Eng. R. Cas. 159, 55 Wis. 453, 13 N. W. Rep. 471.

451. Several counts—More than one cause of action in one count.—An action for the negligence of a fellow-servant should not be blended in the same count with one for the negligence of a vice-principal. *McDermott v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 528, 87 Mo. 285.

A complaint which avers that the negligence causing the injury was that of an employe of defendant who had control of a car, and to whom was intrusted superintendence of moving and placing the car, alleges the same and not different causes of action. *Kansas City, M. & B. R. Co. v. Burton*, 53 Am. & Eng. R. Cas. 115, 97 Ala. 240, 12 So. Rep. 88.—**DISTINGUISHING** *Highland Ave. & B. R. Co. v. Dusenberry*, 94 Ala. 413.

A count in a complaint averring that the injuries to an employe were caused by the negligence of defendant's foreman in placing a car in too close proximity to the track, and to the negligence of defendant's engineer in running the train, is not objectionable. *Kansas City, M. & B. R. Co. v. Burton*, 53 Am. & Eng. R. Cas. 115, 97 Ala. 240, 12 So. Rep. 88.—**QUOTING** *Louisville & N. R. Co. v. Hall*, 87 Ala. 708.

452. Negating contributory negligence.—Where one servant sues the master for injuries received through the negligence of a fellow-servant, it is not necessary that the complaint should negative contributory negligence on the part of plaintiff. *Columbus & W. R. Co. v. Bradford*, 38 Am. & Eng. R. Cas. 214, 86 Ala. 574, 6 So. Rep. 90.—**LIMITED IN** *Louisville & N. R. Co. v. Hawkins*, 92 Ala. 241. **QUOTED IN** *Mobile & O. R. Co. v. George*, 94 Ala. 199.

In an action for injury occasioned through the negligence of a fellow-servant the complaint must set up that the plaintiff was free from contributory negligence. *Evansville & C. R. Co. v. Dexter*, 24 Ind. 411. *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75, 10 N. E. Rep. 631.

In such case an averment is necessary that the injured party did not know, or have the same means of knowing as the defendant, of the alleged negligence or unskillfulness of the engineer. *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75, 10 N. E. Rep. 631.—**FOLLOWED IN** *Louisville, N. A. & C. R. Co. v. Sandford*, 117 Ind. 265, 19 N. E. Rep. 770.

More than
ne count.—
e of a fellow-
in the same
ence of a vice-
mnibal & St.
Cas. 528, 87

that the negli-
s that of an
ad control of
sted superin-
encing the car,
rent causes of
B. R. Co. v.
Cas. 115, 97
TINGUISHING
v. Dusenberry,

rrring that the
caused by the
man in placing
the track, and
ant's engineer
objectionable.
v. Burton, 53
7 Ala. 240, 12
ville & N. R.

butory neg-
vant sues the
through the
ant, it is not
should nega-
on the part of
Co. v. Brad-
t, 214, 86 Ala.
IN Louisville
92 Ala. 241.
Co. v. George,

ioned through
vant the com-
plaintiff was
ence. Evans-
24 Ind. 411.
Bailey, 110 Ind.

is necessary
not know, or
owing as the
ligence or un-
Indiana, B. &
75, 10 N. E.
uisville, N. A.
Ind. 265, 19 N.

The claim of the plaintiff being that the defendant had negligently employed an incompetent fellow-servant, an allegation in the declaration, that the plaintiff was at the time of the injury "in the prudent and careful discharge of the duties of his employment," is, upon general demurrer, a good allegation that the plaintiff was, without fault, at work with the fellow-servant, and hence sufficiently negates the idea, if such negation be necessary, that he had knowledge of the incompetency. *Henry v. Fitchburg R. Co.*, 65 Vt. 436, 26 Atl. Rep. 485.

453. Negating plaintiff's knowledge of servant's incompetency.—A complaint by a servant against a master to recover for an injury caused by the negligence of a fellow-servant, to be good on demurrer for want of facts, must not only allege that the master knew that the fellow-servant was negligent, but it must also show that plaintiff had no knowledge of that fact when he entered the service; and the failure to make the latter allegation is not cured by an averment that plaintiff was "wholly unacquainted" with the fellow-servant when he took the employment. *Lake Shore & M. S. R. Co. v. Stupak*, 28 Am. & Eng. R. Cas. 323, 108 Ind. 1, 8 N. E. Rep. 630.—FOLLOWED IN *Louisville, N. A. & C. R. Co. v. Sandford*, 117 Ind. 265, 19 N. E. Rep. 770; *Becker v. Baumgartner*, 5 Ind. App. 576. QUOTED IN *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75.—*Spencer v. Ohio & M. R. Co.*, 130 Ind. 181, 29 N. E. Rep. 915.

Where a servant remains in the master's service after he knows, or from circumstances ought to have known, of the negligent habits of a fellow-servant, it is necessary, in a complaint by him against the master to recover for an injury caused by the negligence of the fellow-servant, to show a reasonable excuse for remaining in the service after such knowledge. *Lake Shore & M. S. R. Co. v. Stupak*, 28 Am. & Eng. R. Cas. 323, 108 Ind. 1, 8 N. E. Rep. 630.

It is unnecessary for the plaintiff to aver that she had no knowledge of the unfitness of the fellow servant by reason of whose want of skill she was injured. The plaintiff is not required to anticipate and negative a charge of contributory negligence on her part, when the facts stated in the petition do not suggest that she may have been

guilty of it. *Galveston R. & T. Co. v. Burkett*, 2 Tex. Civ. App. 308, 21 S. W. Rep. 958.

454. Alleging negligence in selection of servants.—The negligence of the company in selecting or retaining in its service an incompetent employé must be averred in the complaint. *Bogard v. Louisville, E. & St. L. R. Co.*, 100 Ind. 491. *Dow v. Kansas Pac. R. Co.*, 8 Kan. 642, 5 Am. Ry. Rep. 401.—FOLLOWED IN *Union Pac. R. Co. v. Milliken*, 8 Kan. 647.—*Blake v. Maine C. R. Co.*, 70 Me. 60.

And the declaration should allege that the injury resulted from such negligence. *Lawler v. Androscoggin R. Co.*, 62 Me. 463.

455. Alleging company's knowledge of servant's incompetency.—A complaint which alleges that plaintiff was an employé of the defendant company, and was injured by the negligence of the engineer in charge of the locomotive, without any allegation that the engineer was incompetent, and that the company, with knowledge of that fact, retained him in service, does not set out a cause of action, and the action will be dismissed. *Hagins v. Cape Fear & Y. V. R. Co.*, 106 N. Car. 537, 11 S. E. Rep. 590. *Hobbs v. Atlantic & N. C. R. Co.*, 44 Am. & Eng. R. Cas. 592, 107 N. Car. 1, 12 S. E. Rep. 124.—QUOTING *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478.

In a suit for damages resulting from the employment by the master of an incompetent servant, it is unnecessary for the petition to allege that the company knew, or by the use of ordinary care could have known, of the incompetency of the servant. *Galveston R. & T. Co. v. Burkett*, 2 Tex. Civ. App. 308, 21 S. W. Rep. 958.—FOLLOWING *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 293. QUOTING *San Antonio & A. P. R. Co. v. Bennett*, 76 Tex. 151. REVIEWING *Texas & N. O. R. Co. v. Crowder*, 63 Tex. 502; *Murray v. Gulf, C. & S. F. R. Co.*, 73 Tex. 2.

456. Alleging negligence of vice-principal.—A count which alleges that plaintiff's injuries were caused by the negligence of the foreman who had superintendence and control of the engines, machinery, etc., and who knowingly allowed the engine which plaintiff was oiling and cleaning to be and remain in a defective condition, is sufficient under the second subdivision of the Ala. statute. *Seaboard Mfg. Co. v. Woodson*, 94 Ala. 143, 10 So. Rep. 87.

A complaint alleging that the injuries

were received in consequence of the negligence of the master mechanic having sole control of the switch yard where the accident took place, but without stating the size of the yard, the amount of responsibility or vastness of the business intrusted to him, or the extent of his control, is not sufficient to show that he was such a representative of the company as to make his negligence that of the company, instead of that of a fellow-servant. *Mealman v. Union Pac. R. Co.*, 37 Fed. Rep. 189, 2 L. R. A. 192.—DISAPPROVING *Ross v. Chicago, M. & St. P. R. Co.*, 8 Fed. Rep. 544. FOLLOWING *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *Howard v. Denver & R. G. R. Co.*, 26 Fed. Rep. 837.

457. Evidence admissible under pleadings—Variance.—In an action by an employé against his employer for injuries caused by the negligence of a fellow-servant, an allegation that the employer knew of the latter's incompetency is not supported by proof simply of an employment without reasonable inquiry as to fitness. Employment without reasonable inquiry is a different issue from continuance in service after knowledge of incompetency, though they may be equal in their results so far as fixing the liability of the employer. *Union Pac. R. Co. v. Young*, 8 Kan. 658, 5 Am. Ry. Rep. 419.

Where a brakeman sues for injuries which he avers were sustained by reason of the negligence of the engineer acting as his superior, there can be no recovery for want of pleading, upon proof of injuries inflicted upon the plaintiff by the engineer as his negligent fellow-servant. *East Tenn. & W. N. C. R. Co. v. Collins*, 85 Tenn. 227, 1 S. W. Rep. 883.

An employé suing his company for a personal injury charged that the injury was the result of a defective engine, and by reason of its "improper and unskilful management by incompetent servants." Held, that under such allegation it was competent to prove the intemperate habits of the locomotive engineer. *Lyons v. New York C. & H. R. R. Co.*, 39 Hun (N. Y.) 385.—REVIEWING *Cone v. Delaware, L. & W. R. Co.*, 15 Hun 172.

458. Answer.—The company cannot make the defense that the injury resulted from the negligence of a co-employé, unless the fact is set up in its answer; and a mere averment that the injury was caused by

plaintiff's own negligence is not sufficient. *Conlin v. San Francisco & S. J. R. Co.*, 36 Cal. 404.

Complaint by a widow to recover damages for the loss of her husband, who was killed, as the complaint alleged, while traveling as a passenger in one of the defendant's cars. Answer, that the husband was not a passenger, but a servant of the company, and that the accident by which he lost his life happened through the negligence of his fellow-servants acting with him in the management of the train. Held, that the answer was sufficient. *Madison & I. R. Co. v. Bacon*, 6 Ind. 205.

Where, in an action brought in Ohio against a master by a servant, for an injury sustained in another state through the negligence of a superior servant while engaged in the same service, the answer merely stated that, by the law of that state, the servant has no action against the master for the negligence of his fellow-servant—held, that the answer fails to meet the case in not stating what the law of that state was, when the negligence complained of is that of a superior servant, and that the demurrer to the answer may, for that reason, be sustained. *Pittsburgh, Ft. W. & C. R. Co. v. Lewis*, 33 Ohio St. 196.

2. Defenses; Contributory Negligence.

459. In general.—The fact that a subordinate may elect to disobey his superior, and if discharged for so doing apply to the common superior, and, if right in his disobedience, be restored to his position, can have no weight with the courts in a suit for injuries sustained by him. *Louisville & N. R. Co. v. Bowler*, 9 Heisk. (Tenn.) 866, 20 Am. Ry. Rep. 65.

460. Stipulations against liability.—It is not competent for a company to stipulate in its contract of employment with the servants, such as a brakeman, that the company will not be liable for the negligence of other servants standing in the relation of vice-principals to such servants, as such a contract is void as against public policy. *Lake Shore & M. S. R. Co. v. Spangler*, 28 Am. & Eng. R. Cas. 319, 44 Ohio St. 471, 8 N. E. Rep. 467.

Prior to the act of the twenty-second legislature, approved March 10, 1891 (Tex. Gen. Laws 1891, p. 25), the rule was that the negligence of a servant of one grade is as much one of the risks of the business as the

negligence of another; and it seems impossible, therefore, to hold that the servant contracts to run the risks of the negligent acts or omissions on the part of one class of servants and not those of another. *International & G. N. R. Co. v. Ryan*, 82 Tex. 565, 18 S. W. Rep. 219.

461. Negligence of a third person.

—Where the company's concurrent negligence was the proximate cause, the fact that a third person was guilty of some negligence is no defense. *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493.

462. Plaintiff's contributory negligence, generally.*—Though in case of an injury to an employé caused by the negligence of a fellow-servant the company or its agents may be guilty of negligence, yet if the injured party could have avoided the consequences to himself of that negligence by the exercise of ordinary diligence, he is not entitled to recover. *Atlanta & R. A. L. R. Co. v. Ayers*, 53 Ga. 12.—FOLLOWING *Macon & W. R. Co. v. Johnson*, 38 Ga. 409.—DISTINGUISHED AND DOUBTED IN *Prather v. Richmond & D. R. Co.*, 80 Ga. 427, 9 S. E. Rep. 530.—*Alabama & F. R. Co. v. Waller*, 48 Ala. 459. *Fitzpatrick v. New Albany & S. R. Co.*, 7 Ind. 436. *Gillenwater v. Madison & I. R. Co.*, 5 Ind. 339. *Hoben v. Burlington & M. R. Co.*, 20 Iowa 562. *Baltimore & O. R. Co. v. State*, 33 Md. 542. *Franklin v. Winona & St. P. R. Co.*, 31 Am. & Eng. R. Cas. 211, 37 Minn. 409, 34 N. W. Rep. 898, 5 Am. St. Rep. 856.

Where the plaintiff has himself been guilty of contributory negligence he cannot recover for an injury occasioned by the concurring negligence of the company and a fellow-servant. *Stetler v. Chicago & N. W. R. Co.*, 46 Wis. 497, 21 Am. Ry. Rep. 402.

The injured servant, to recover against the company for the negligent act of the vice-principal, must have been without contributory fault on his own part. *Gilmore v. Northern Pac. R. Co.*, 15 Am. & Eng. R. Cas. 304, 9 Sawy. (U. S.) 558, 18 Fed. Rep. 866. *Union Pac. R. Co. v. Fray*, 43 Kan. 750, 23 Pac. Rep. 1039.

463. Degree of care demanded of plaintiff.—It is the duty of a person engaged to work in a dangerous place to ex-

ercise a high degree of care, in view of the dangers to which he may be exposed; but the law does not require that he shall exercise the highest degree of care and caution to entitle him to recover for an injury received from the negligence of other servants and agents of his employer. *Lake Shore & M. S. R. Co. v. O'Conner*, 115 Ill. 254, 3 N. E. Rep. 501.

The plaintiff is held only to the exercise of ordinary care to entitle him to recover—such care as men of ordinary judgment, intelligence, and prudence would exercise under like circumstances; and an instruction that any negligence, or slight negligence, on the part of the plaintiff would prevent a recovery would imply and hold the plaintiff to a higher degree of care than is by the law required of him, and was properly refused. *Missouri Pac. R. Co. v. Mackey*, 22 Am. & Eng. R. Cas. 306, 33 Kan. 298, 6 Pac. Rep. 291.

464. What acts constitute contributory negligence.—Under the Iowa statute a trainman recklessly putting himself in a dangerous position upon a train moving with unusual speed cannot recover for injuries on the ground of his fellow-servants' negligence in running the train too fast. *Brown v. Chicago, R. I. & P. R. Co.*, 69 Iowa 161, 28 N. W. Rep. 487.

Where a servant employed in operating a derrick is charged with others with the duty of keeping a rope about the derrick wet, and his duty is not attended to, in consequence of which the rope breaks, injuring the plaintiff, he cannot recover damages from the company. *Union Pac. R. Co. v. Fray*, 15 Am. & Eng. R. Cas. 158, 31 Kan. 739, 3 Pac. Rep. 550.

Plaintiff, a brakeman, was injured by the negligence of the engineer, his own negligence contributing thereto, both being employed on the same train. The evidence showed that but for the primary negligence of plaintiff he would not have been injured, although the engineer was negligent in starting the train without a proper signal. *Held*, that they were fellow-servants, and the company was not liable. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 31 Fed. Rep. 527.—FOLLOWING *Hough v. Texas & P. R. Co.*, 100 U. S. 213.

Where a flat car, pushed along a track in the company's yard by several employes, was about to collide with another car, the end of which was supported on "jacks," and

*Contributory negligence of servants as a defense, see note, 36 AM. DEC. 286.

one of the men engaged in pushing the car put his hand in the bracket under the car and by pulling backward endeavored to stop it, and at the same time one of the men on the other car sprang upon the flat car and applied the brakes, thereby crushing the hand of the man under the car, there can be no recovery for the injury, notwithstanding the fact that had the brake been better constructed his hand would not have been crushed. *Richmond & D. R. Co. v. Dickey*, 90 Ga. 491, 16 S. E. Rep. 212.

465. — and what do not.—If an employé has a duty to perform in front of a train, which requires his presence on the track, and he takes the usual and ordinary precautions for his own protection before going upon the track, it cannot be said that he is necessarily guilty of such contributory negligence as will prevent his recovering for an injury inflicted by the carelessness of his co-employés, though he may have been informed that there is danger in so doing. *Bucklew v. Central Iowa R. Co.*, 64 Iowa 603, 21 N. W. Rep. 103.

The evidence tending to show that the employé was told by the engineer that the engine would not start for fifteen minutes, but it actually struck him within seven minutes, such employé is not guilty of negligence in failing to keep a vigilant watch at the time of the accident, having a right to repose confidence in what had been told him. *Hawley v. Chicago, B. & Q. R. Co.*, 71 Iowa 717, 29 N. W. Rep. 787.

466. Doctrine in Kentucky.—Under the rule in Kentucky allowing a servant to recover of the master for injuries received through the gross or extraordinary negligence of a fellow-servant, if the injured party was himself negligent he cannot recover unless the fellow-servant could have avoided the accident by the observance of ordinary care, notwithstanding the negligence of the injured servant. *Louisville & N. R. Co. v. Robinson*, 4 Bush (Ky.) 507.

467. Effect to mitigate damages.—Where a telegraph operator at a way station negligently delivers to a conductor a dispatch that was intended for another train, whereby the conductor moved his train out when it should have been held, thereby causing a collision which injured him, it was contributory negligence in the conductor to accept and act upon a dispatch that was meaningless when applied to him or his train; but where the proximate cause

of the injury was the negligence of the operator, the contributory negligence of the conductor should only go in mitigation of damages under the rule in Tennessee. *East Tenn., V. & G. R. Co. v. De Armond*, 86 Tenn. 73, 6 Am. St. Rep. 816, 5 S. W. Rep. 600.

468. Imputed negligence.—The negligence of a locomotive engineer resulting in a collision with another train cannot be imputed to the fireman running with such engineer as contributory negligence. *Cincinnati, N. O. & T. P. R. Co. v. Clark*, 57 Fed. Rep. 125.—**DISTINGUISHING** *Baltimore & O. R. Co. v. Andrews*, 1 C. C. A. 636, 50 Fed. Rep. 728; *Newport News & M. V. Co. v. Howe*, 3 C. C. A. 121, 52 Fed. Rep. 362.

3. Evidence.

a. In General.

469. Evidence admissible.—Where an employé sues his company for an injury received through the negligence of other employés, and it becomes a question of fact whether the relation of fellow-servants existed, all evidence tending to show the association of the injured servant with the others is admissible. *Chicago, B. & Q. R. Co. v. Fitzgerald*, 40 Ill. App. 476.—**QUOTING AND FOLLOWING** *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 315.

In an action brought against the owner of a railroad to recover for an injury sustained by reason of the insufficiency of a brake on a locomotive engine, whereby the engine ran from a turntable upon the plaintiff, who was in the employ of the defendant, evidence is admissible in favor of the latter to show that the person who had charge for him of all his engines had given instructions before the accident to the engineers to have the wheels of their engines "choked" while turning on the turntable, and that the accident occurred by failure of some servant of the defendant to obey such instructions; notwithstanding the plaintiff did not know that they had been given. *Durgin v. Munson*, 9 Allen (Mass.) 396.

470. — inadmissible.—Where an employé sues his employer to recover for personal injuries, evidence of a failure to put out a certain signal light, as was customary, is not admissible, inasmuch as such failure only tended to show negligence on the part of fellow-servants, for which the company was not liable. *Moran v.*

New York C. & H. R. R. Co., 67 *Barb.* (N. Y.) 96, 3 *T. & C.* 770. — APPLYING *Warner v. Erie R. Co.*, 39 N. Y. 468.

The injury involved in the case having been received by the subordinate while acting under orders from his superior, his habit to act hastily and needlessly upon other occasions was not sufficiently relevant to be admissible in evidence. *Central R. & B. Co. v. Ryles*, 84 *Ga.* 420, 11 *S. E. Rep.* 499.

471. Evidence improperly rejected.—Defendant company was sued for the death of a fireman, and a recovery sought on the ground that the death was caused through the act of a switchman who was known by the company to be incompetent. *Held*, that it was error to reject evidence tending to show that the misplaced switch which caused the accident had been changed by some other person in the absence of the switchman. *Baulec v. New York & H. R. Co.*, 12 *Abb. Pr. N. S.* (N. Y.) 310, 62 *Barb.* 623, 5 *Lans.* 436.

In such case plaintiff introduced evidence showing that the switchman on a former occasion had misplaced a switch which caused an accident. *Held*, that it was error to refuse evidence offered by the company that it had investigated the former act, through its road master, who reported that the switchman was free from negligence. *Baulec v. New York & H. R. Co.*, 12 *Abb. Pr. N. S.* (N. Y.) 310, 62 *Barb.* 623, 5 *Lans.* 436.—QUOTING *Ryan v. Fowler*, 24 N. Y. 410.

472. Competency of negligent fellow-servant.—In a suit by an employé against his master for damages alleged to have resulted from the negligence of a co-employé, the latter is competent to prove that he was not at fault, under proper questions for that purpose. *Augusta & S. R. Co. v. Dorsey*, 68 *Ga.* 228.

473. Presumptive evidence.—In a suit against a company by one of its servants for injuries sustained by alleged negligence of others of its servants in the performance of an act with which the plaintiff was connected at the time of the injury, the presumption of negligence is not against the company before the plaintiff has proved that he was without fault. *Western & A. R. Co. v. Vandiver*, 85 *Ga.* 470, 11 *S. E. Rep.* 781.—QUOTING *Central R. & B. Co. v. Kelly*, 58 *Ga.* 113; *Central R. & B. Co. v. Sears*, 59 *Ga.* 436.

Where an employé is so grossly and notoriously unfit that not to know of his unfitness is negligence, the law presumes notice to the employer. *Chicago, R. I. & P. R. Co. v. Doyle*, 18 *Kan.* 58, 15 *Am. Ry. Rep.* 187.

474. Judicial notice.—In an action by a conductor of a street-car to recover damages for injuries received from a collision with a truck, it appeared that the conductor, by means of signals to the driver, stopped the car to let off and take on passengers, but the record did not otherwise show that the driver was subject to the orders of the conductor or in any way under his control. The court charged that negligence on the part of the driver could not be imputed to the plaintiff. *Held*, no error; that this court will not take judicial notice of the relations between conductor and driver for the purpose of reversing a judgment. *Seaman v. Koehler*, 122 N. Y. 646, 25 *N. E. Rep.* 353, 33 *N. Y. S. R.* 729.

475. Sufficiency of the proof.—Where a brakeman sues his company for injuries received through the negligence of an engineer, he makes a case by proving the injury, and that the company had retained the engineer in its service after repeated acts of recklessness and unfitness, which had been reported to the company. *Northern Pac. R. Co. v. Mares*, 123 *U. S.* 710, 8 *Sup. Ct. Rep.* 321.

Evidence that clinker men had for years assisted in moving tanks, where it does not appear that there was any one else whose duty it was to do this particular work, coupled with the fact that they had done it with the knowledge of, as well as under the direction of, other employés of the defendant, is sufficient to show that it was in the line of their employment. *Butler v. Chicago, B. & Q. R. Co.*, 87 *Iowa* 206, 54 *N. W. Rep.* 208.

In an action for injuries caused by the negligence of a fellow-servant, an allegation that the employer knew of his unfitness and recklessness is sustained by proof showing that such incompetency ought to have been known by the defendant. *Chicago, R. I. & P. R. Co. v. Doyle*, 18 *Kan.* 58, 15 *Am. Ry. Rep.* 187.

Where the testimony introduced under the pleadings tends to prove that the plaintiff was injured through the negligence of the engineer; that said engineer was an incompetent and unfit person to be a locomotive engineer; that the company was guilty

of negligence in employing him and retaining him in its employ after his unfitness had become known, or when, by the exercise of ordinary care, it would have been known—and thereon the jury find a verdict for the plaintiff against the railway company, and the trial court approves the same, and sufficient evidence is offered to sustain the verdict, an appellate court will not disturb the judgment on the claim of the railway company that the preponderance of the evidence proves the injury to the plaintiff was due solely to his own fault or misfortune, growing out of his own errors of judgment. *Union Pac. R. Co. v. Young*, 19 Kan. 488.

Previous negligence on the part of a railroad engineer, if established, is not important, unless he is also shown to have been negligent at the time of the injury for which suit is brought. *Thompson v. Lake Shore & M. S. R. Co.*, 84 Mich. 281, 47 N. W. Rep. 584.

In the absence of any testimony tending to show that the engineer when hired was not a completely instructed engineer who understood his business, or of any evidence of negligence in hiring him, or any evidence tending to show that the defendant knew, or might with reasonable diligence have known, that the engineer was incompetent or careless, and retained the engineer after they knew, or might with proper diligence have known, that he was not a proper man to trust with an engine—the plaintiff cannot recover, and it was error to submit the cause to the jury. *Cook v. St. Louis, I. M. & S. R. Co.*, 8 Mo. App. 573.

Plaintiff sues for injuries received by being struck with the crank of a windlass used in connection with a ditching machine. The negligence charged consisted in a co-employee releasing the brake without warning to plaintiff. It is apparent that if he had been so warned he would not have been injured. There was evidence tending to show due care on plaintiff's part and negligence on the part of the co-employee, so that a verdict for plaintiff cannot be set aside in this court. *Nelson v. Chicago, M. & St. P. R. Co.*, 77 Iowa 405, 42 N. W. Rep. 335.

For facts tending to show that the negligence of the engineer was the proximate cause of injury to the switchman, see *Chicago, R. I. & P. R. Co. v. Touhy*, 26 Ill. App. 99.

476. Burden of proof.—The burden is on the plaintiff to show that the com-

pany's negligence concurring with that of the fellow-servant was the proximate cause of the injury. *Union Pac. R. Co. v. Callaghan*, 56 Fed. Rep. 988.

The burden of proof is on him who seeks to show that employes stand in the relation of fellow-servants, to prove such fact. *McGowan v. St. Louis & I. M. R. Co.*, 61 Mo. 528.

The burden of proof is on the plaintiff to show that a co-employé of a common master is a superior and not a fellow-servant, unless the nature of the employment shows the extent of the co-employé's powers. *Patton v. Western N. C. R. Co.*, 31 Am. & Eng. R. Cas. 298, 96 N. Car. 455, 1 S. E. Rep. 863.

The burden of proving affirmatively that an accident did not result from the negligence of the company, or some person representing it, for whose conduct it was responsible, rests upon the company. *Moon v. Richmond & A. R. Co.*, 17 Am. & Eng. R. Cas. 531, 78 Va. 745.

b. As to the Incompetency of Negligent Servant.

477. Admissibility, generally.—As bearing upon the question of negligence, the master may show the competency and character of workmen employed by owners of similar works and businesses, as bearing upon the question of whether any special skill or experience is necessary to constitute reasonable competency. *Holland v. Tennessee C., I. & R. Co.*, 91 Ala. 444, 8 So. Rep. 524.

The complaint alleged negligence in the employment of plaintiff's co-laborers. Held, that evidence of the quality of such co-laborers was admissible as a link in the chain of evidence, and as such could not be objected to at the time when offered, even though it afterwards appeared that the injury had not resulted from any unfitness on the part of such co-laborers. *Altee v. South Carolina R. Co.*, 21 So. Car. 550, 53 Am. Rep. 699, n.

478. Prior specific acts of carelessness.—For the purpose of showing that the officers of a railroad corporation did not exercise due care, prudence, and caution in the employment of, or in retaining in service, careful, prudent, and skilful persons to manage and operate its road, and for the purpose of charging such corporation with notice of the incompetency of its employes, specific acts of negligence or unskilfulness

of such employés may be proved, and it may be proved that such acts were known to such officers prior to the employment of such persons, or that such employés were retained in service after notice of such acts. *Pittsburgh, Ft. W. & C. R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Ry. Rep. 199. — DISAPPROVING *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104. DISTINGUISHING *Pittsburgh, Ft. W. & C. R. Co. v. Evans*, 53 Pa. St. 250; *Robinson v. Fitchburg & W. R. Co.*, 7 Gray (Mass.) 92; *Mitchell v. Pennsylvania R. Co.*, 1 Am. Law Reg. 717; *Barton v. State*, 18 Ohio 221; *McDermott v. State*, 13 Ohio St. 332; *Ellis v. Short*, 21 Pick. (Mass.) 142; *True v. Sanborn*, 27 N. H. 383. — APPROVED IN *Baulec v. New York & H. R. Co.*, 59 N. Y. 356. QUOTED IN *Ohio & M. R. Co. v. Collarn*, 5 Am. & Eng. R. Cas. 554, 73 Ind. 261, 38 Am. Rep. 134. REVIEWED IN *Texas & P. R. Co. v. Kirk*, 62 Tex. 227.

479. General reputation of servant.—General reputation of a servant for competency and care at the time and place of employment, of such character as to imply information to the employer, is admissible as tending to disprove alleged negligence in employing such servant. *Illinois C. R. Co. v. Morrissey*, 45 Ill. App. 127.

It is the duty of a railroad company to use reasonable care in selecting fit and competent persons to discharge the duties assigned to them. To show a want of such care, either in employing servants or in retaining them in its service, it is competent, in actions for the wrongful death of employés resulting from the negligence of co-employés, to put in evidence the general reputation of the latter for unfitness for the duties assigned to them, and also specific acts of negligence or of incompetency, with evidence of knowledge thereof on the part of the master. *Grube v. Missouri Pac. R. Co.*, 41 Am. & Eng. R. Cas. 357, 98 Mo. 330, 11 S. W. Rep. 736, 4 L. R. A. 776.

If the question be whether the master exercised due care to inform himself as to the competency of a servant, evidence showing what inquiry was made, and what knowledge he had or obtained through inquiry, should be considered; and it would seem, if it is contended that a master knowingly employed an incompetent servant, that it could be established by evidence tending to show that the master had been in a position to know that the servant was in-

competent, or to know his general reputation for incompetency. *East Line & R. R. Co. v. Scott*, 71 Tex. 703, 10 S. W. Rep. 99, 298.

In an action for injuries to a fireman resulting from a collision of trains caused through the incompetency of a drunken engineer, it was permissible for a witness to testify as to the daily amount of the whiskey drunk by the engineer at and about the time of the collision, though the witness did not know the engineer's general reputation for temperance or intemperance, and though it did not appear that the facts so testified to by the witness were communicated or known to the defendant company. *Texas C. R. Co. v. Rowland*, 3 Tex. Civ. App. 158, 22 S. W. Rep. 134.

480. Declarations of vice-principal.—Where it is sought to hold a company liable for injuries to an employé resulting from the incompetency of his foreman, it is competent to prove knowledge of such incompetency by the company's general agent, who employed the foreman, by proving declarations of the agent to the injured employé. *Laning v. New York C. R. Co.*, 49 N. Y. 521.

481. Opinion evidence.—A locomotive engineer's opinion that if he had obeyed the order of the yard master to place his engine on the main track when a coming train was past due, he would have gotten into trouble—held, inadmissible to show that the company was negligent in keeping the yard master in its employment, unless the case had been brought to the knowledge of its officers. *Michigan C. R. Co. v. Gilbert*, 2 Am. & Eng. R. Cas. 230, 46 Mich. 176, 9 N. W. Rep. 243.

482. Weight and sufficiency of evidence to show incompetency, generally.—In an action for personal injuries alleged to have been caused by the negligence of the employer in retaining the services of a fellow-servant who was careless, and whose carelessness caused the injury, a witness testified that he considered the fellow-servant slow and lazy and not fit for the service, he was so slow, and witness had so informed the agent of the employer; and in answer to a question, if the fellow-servant was competent and careful in the performance of his duties, witness testified: "Yes, he was always careful about his work." Held, that this evidence was not sufficient to establish the negligence of the

employer. *Corson v. Maine C. R. Co.*, 17 *Am. & Eng. R. Cas.* 634, 76 *Me.* 244.

The jury are not authorized to decide that a person is unfit to be employed as a brakeman on a railroad on account of what they saw or supposed they saw, or could read in his face and manner while testifying before them as a witness, and determine from that alone that the railroad company was negligent in employing such a person. *Corson v. Maine C. R. Co.*, 17 *Am. & Eng. R. Cas.* 634, 76 *Me.* 244.

A company was charged with negligence in retaining in its employ a drunken section foreman through whose incompetency plaintiff, a track laborer under a foreman, was injured. The evidence showed that the foreman was fit for his position, unless rendered otherwise by intoxication, and there was no proof that he was intoxicated at the time of the injury. *Held*, that proof of intoxication on other occasions would not render the company liable, unless it caused or contributed to the injury. *Harrington v. New York C. & H. R. R. Co.*, 19 *N. Y. S. R.* 20, 50 *Hun* 602, 4 *N. Y. Supp.* 640.

A brakeman sued for an injury alleged to be the result of the negligence of a fireman who was handling an engine. Two witnesses testified that in their opinion the fireman was not competent to take charge of an engine. Another witness testified that he was not competent to do so some five or six years before, when they were working together in the capacity of brakemen. *Held*, that the evidence was not sufficient to show that the fireman was incompetent. *East Tenn., V. & G. R. Co. v. McKeney*, (Tenn.) 1 *S. W. Rep.* 500.

483. Single or specific acts of carelessness.—A single act of casual neglect, in one who has previously shown himself to be competent, careful, and trustworthy, and who has acquired a reputation therefor, does not, *per se*, tend to prove him careless, imprudent, or unfitted for a position requiring care and prudence, or render the corporation liable for retaining him in such position. *Baulec v. New York & H. R. Co.*, 59 *N. Y.* 356, 48 *How. Pr.* 399, 7 *Am. Ry. Rep.* 114; *affirming* 62 *Barb.* 623.—*FOLLOWING* *Murphy v. Pollock*, 15 *Ir. C. L.* 224.—*APPLIED IN* *Sullivan v. New York, N. H. & H. R. Co.*, 62 *Conn.* 209. *APPLIED AND QUOTED IN* *Powers v. New York C. & H. R. R. Co.*, 60 *Hun* 19, 14 *N. Y. Supp.* 408. *QUOTED IN* *Dwight v. Germania Life Ins.*

Co., 3 *N. Y. S. R.* 115.—*Buckley v. Gould & C. Silver Min. Co.*, 8 *Savvy. (U. S.)* 394, 14 *Fed. Rep.* 833. *Holland v. Southern Pac. Co.*, 100 *Cal.* 240, 34 *Pac. Rep.* 666.—*QUOTING* *Baltimore Elevator Co. v. Neal*, 65 *Md.* 438.—*Sullivan v. New York, N. H. & H. R. Co.*, 62 *Conn.* 209, 25 *Atl. Rep.* 711.—*APPLYING* *Baulec v. New York & H. R. Co.*, 59 *N. Y.* 356.—*Cook v. St. Louis, I. M. & S. R. Co.*, 8 *Mo. App.* 573. *Hansen v. New York & B. Bridge*, 9 *N. Y. S. R.* 726, 45 *Hun* 590.—*REVIEWING* *Neubauer v. New York, L. E. & W. R. Co.*, 101 *N. Y.* 607.—*Dallas City R. Co. v. Beeman*, 74 *Tex.* 291, 11 *S. W. Rep.* 1102.—*FOLLOWING* *Houston & T. C. R. Co. v. Myers*, 55 *Tex.* 115.

Whether one act of negligence is sufficient to establish incompetency in a servant depends upon the character of the act. *McDermott v. Hannibal & St. J. R. Co.*, 28 *Am. & Eng. R. Cas.* 528, 87 *Mo.* 285.

When it is sought to charge an employer by reason of his having knowingly employed an incompetent servant, such incompetency must be shown by general reputation, and not by specific acts. *East Line & R. R. Co. v. Scott*, 68 *Tex.* 694, 5 *S. W. Rep.* 501.

The bringing of two railroad trains into collision is such a negligent act that evidence of that act alone will suffice to show the incompetency of the conductor who caused it. *Evansville & T. H. R. Co. v. Guyton*, 33 *Am. & Eng. R. Cas.* 311, 115 *Ind.* 450, 14 *West. Rep.* 301, 17 *N. E. Rep.* 101.

484. Youth of servant.—A jury cannot infer negligence because a railroad company employs a telegraph operator who is but seventeen years of age, where he had a year's experience and for three months had discharged his duties intelligently, and was a "first-class operator." *Sutherland v. Troy & B. R. Co.*, 35 *N. Y. S. R.* 853, 125 *N. Y.* 737, 4 *Silv. App.* 596; *reversing* 54 *Hun* 639, 28 *N. Y. S. R.* 201, 8 *N. Y. Supp.* 83.

485. Habits and character of servant.—The habitual intemperance of the conductor, under circumstances bringing knowledge thereof to his employers, is sufficient to render them liable for injury resulting therefrom. *Chicago & A. R. Co. v. Sullivan*, 63 *Ill.* 293.

Evidence that a railroad employé was hasty, passionate, and excitable does not of itself necessarily show that he is unfit for

ey v. Gould
(U. S.) 394.
v. Southern
Rep. 666.—
Co. v. Neal,
York, N. H.
tl. Rep. 711.
rk & H. R.
Louis, I. M.
Hansen v.
S. R. 726, 45
uer v. New
N. Y. 607.—
74 Tex. 291,
NG Houston
x. 115.

force is suffi-
in a servant
of the act.
f. R. Co., 28
p. 285.

an employer
such incom-
petent reputa-
East Line &
94, 5 S. W.

trains into
fact that evi-
dence to show
ductor who
H. R. Co. v.
Cas. 311, 115
N. E. Rep.

A jury can-
railroad com-
rator who is
ere he had a
months had
tly, and was
utherland v.
R. 853, 125
reversing 54
N. Y. Supp.

ter of ser-
vance of the
ces bringing
employers, is
le for injury
& A. R. Co.

employé was
e does not of
e is unfit for

the post of yard master; nor does the mere fact that he had sent an engine upon the track when a coming train was overdue conclusively show that the company was negligent in keeping him in its service, since he might have had information showing that the train would not arrive for some time. *Michigan C. R. Co. v. Gilbert*, 2 Am. & Eng. R. Cas. 230, 46 Mich. 176, 9 N. W. Rep. 243.

486. Time of service, experience, etc.—In an action by an engineer for an injury caused by the negligence of a freight conductor, evidence that he was put on the list of conductors some eight months before the accident, after having been employed as brakeman for a somewhat longer period, and that he had once by mistake carried a passenger by his stopping place, and had for that reason spoken disparagingly of himself to his employer, where it appears that he had nevertheless maintained a good standing, and that no fault had been found with him except by himself for this single blunder, does not make out a case of incompetence. *Michigan C. R. Co. v. Dolan*, 32 Mich. 510.

The fact that a company promoted an employé to the position of conductor after he had served seven years as car coupler and shover is not of itself sufficient to show negligence, where it does not appear that he had ever shown himself incompetent or unfaithful prior to the injury sued for. *Haskin v. New York C. & H. R. R. Co.*, 65 Barb. (N. Y.) 129; affirmed in 56 N. Y. 608, mem.

In an action for injuries resulting from the negligence of a switchman in raising a semaphore which regulated the arrival of freight trains, where the evidence on both sides showed that he was an intelligent man and that his duties could be learned in a period estimated at from one day to one week, that he had performed this work regularly for two weeks without a complaint until the accident, a verdict for the plaintiff will be set aside, there being no evidence to go to the jury that defendant company negligently employed an incompetent person. *Deverill v. Grand Trunk R. Co.*, 25 U. C. Q. B. 517.—QUOTING *Toomey v. London, B. & S. C. R. Co.*, 3 C. B. N. S. 150; *Lovegrove v. London, B. & S. C. R. Co.*, 16 C. B. N. S. 691.—APPLIED IN *O'Sullivan v. Victoria R. Co.*, 44 U. C. Q. B. 128.

Plaintiff, a yard switchman, sought to recover for an injury received through the alleged incompetency of a car inspector. The evidence showed that the latter was a native of Ireland and had been a common laborer there, except that he had worked for a few months in putting brass into freight cars. He worked in defendant's shops from one to two years doing general carpenter work on cars, when he was promoted to car inspector. He was about thirty-five years old, and seemed to be sober and intelligent. Held, not sufficient to show that he was incompetent. *Gibson v. Northern C. R. Co.*, 22 Hun (N. Y.) 289.

An engine was thrown from the track by a misplaced switch and killed plaintiff's intestate, a fireman. It was claimed that the switchman was inexperienced and incompetent. It appeared that he had been in the company's service for seven years as a baggage man, until three months before the accident, occasionally acting as switchman; and that for the last three months he had performed the duties of switchman, so far as appeared, without fault or neglect, and was a man of ordinary intelligence. Held, sufficient to show that he was competent to perform his duties. *Harvey v. New York C. & H. R. R. Co.*, 8 Am. & Eng. R. Cas. 515, 88 N. Y. 481; reversing 25 Hun 62.—APPROVED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758.—QUOTED IN *Burke v. Syracuse, B. & N. Y. R. Co.*, 52 N. Y. S. R. 813, 23 N. Y. Supp. 458.

487. Sufficiency of evidence to show that company negligently employed incompetent servant.—The mere fact of the incompetency of a servant for the work upon which he was employed is not enough to warrant a jury in finding the master guilty of negligence in employing him. *Murphy v. St. Louis & I. M. R. Co.*, 2 Am. & Eng. R. Cas. 83, 71 Mo. 202.

In the absence of any evidence as to the exercise of care in his selection, proof that a servant who has been in the service but two or three weeks was incompetent when employed need not be supplemented by proof of the master's knowledge of his incompetency. *Lee v. Michigan C. R. Co.*, 48 Am. & Eng. R. Cas. 356, 87 Mich. 574, 49 N. W. Rep. 909.

A switchman went out from his station to signal an approaching passenger train,

and was suddenly impressed with the mistaken belief that a switch was set wrong, and hurriedly rushed to it and threw the switch, which diverted the train from the main track to a side track, causing it to collide with a freight train lying on the side track, which killed an engineer on the freight train. The switchman was but seventeen years old, but the evidence showed that he had been fully instructed as to his duties, and understood them. If he had left the switch alone no accident would have happened. *Held*, insufficient to show that the company was negligent in employing him, and a nonsuit was properly granted. *Burke v. Syracuse, B. & N. Y. R. Co.*, 23 N. Y. Supp. 458, 69 Hun 21, 52 N. Y. S. R. 813.—DISTINGUISHING *Mann v. Delaware & H. Canal Co.*, 91 N. Y. 500. QUOTING *Harvey v. New York C. & H. R. R. Co.*, 88 N. Y. 486; *Sutherland v. Troy & B. R. Co.*, 125 N. Y. 739, 26 N. E. Rep. 609; *Forey v. Syracuse, B. & N. Y. R. Co.*, 12 N. Y. S. R. 201.

A brakeman sued for injuries received while coupling cars, through the alleged negligence of the engineer, and at the trial introduced evidence that the engineer had declared that he would "as soon run over him as not." *Held*, that the evidence was admissible, but the jury should have been charged only to consider it for the purpose of determining whether the company had selected an unsuitable engineer; that if the injury resulted from the malice of the engineer there could be no recovery. *Houston & T. C. R. Co. v. Willie*, 5 Am. & Eng. R. Cas. 541, 53 Tex. 318, 37 Am. Rep. 756.—FOLLOWED IN *International & G. N. R. Co. v. Telephone & T. Co.*, 69 Tex. 277.

488. Presumption that company exercised due care in employment of servant.—Where one employé seeks to recover from the master for an injury occasioned by the negligence of a co-employé, the law presumes that the master exercised due care in the appointment of the co-employé, and that he was competent for the work assigned him, which must be met by proper averments and evidence to the contrary. *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484, 20 Am. Ry. Rep. 359. *McDermott v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 528, 87 Mo. 285. *Davis v. Detroit & M. R. Co.*, 20 Mich. 105.

489. — and sufficiency of evidence to rebut the presumption.—Evidence that a brakeman did not answer a

signal to remove a pin from a coupling, and that for the two days he worked with plaintiff he bore a very poor reputation as a railroad man among the train hands, is wholly insufficient to overthrow the presumption that the company exercised reasonable care and diligence in employing him. *Van Dusen v. Lake Shore & M. S. R. Co.*, 12 N. Y. S. R. 351, 46 Hun 678, mem.; affirmed in 122 N. Y. 666, mem., 26 N. E. Rep. 754, mem., 34 N. Y. S. R. 1015.

490. Presumption of competency of servant, and its continuance.—The law presumes that railroad companies employ persons of reasonable competency and fitness for duty, and this presumption exists until the company is notified of their incompetency or unfitness. *Gravelle v. Minneapolis & St. L. R. Co.*, 3 McCrary (U. S.) 352, 10 Fed. Rep. 711.

Proper qualifications, once possessed, may be presumed to continue, and the master may rely on that presumption until notice of a change. *Blake v. Maine C. R. Co.*, 70 Me. 60.

Where an employer has shown due care in the choice of his servants, no presumption of the latter's unfitness arises afterwards; but if it appears that a servant has been repeatedly guilty of carelessness or incompetency, it is for the jury to determine whether the master knew of it, or would have known if he had exercised ordinary care. *Michigan C. R. Co. v. Gilbert*, 2 Am. & Eng. R. Cas. 230, 46 Mich. 176, 9 N. W. Rep. 243.

491. Burden on plaintiff to show negligence in employment of servant.—The mere fact that a fellow-servant is incompetent does not tend even *prima facie* to establish negligence on the part of the master; but the burden is upon the servant seeking to recover to establish the fact that the injury resulted to him because the master did not exercise reasonable and proper care in selecting such servant. This must be affirmatively established as a fact in the case, and cannot result as the inference from the circumstance that the servant causing the injury was in fact incompetent. Negligence is not to be presumed, but must be proved. *Van Dusen v. Lake Shore & M. S. R. Co.*, 12 N. Y. S. R. 351, 46 Hun 678, mem.; affirmed in 122 N. Y. 666, mem., 26 N. E. Rep. 754, mem., 34 N. Y. S. R. 1015. *Chicago & E. I. R. Co. v. Geary*, 110 Ill. 383. *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411. *McDermott v. Hannibal*

St. J. R. Co., 28 Am. & Eng. R. Cas. 528, 87 Mo. 285. *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484, 20 Am. Ry. Rep. 359.

492. — to show servant's incompetency and the company's knowledge thereof.—Where the gravamen of the complaint is negligence on the part of the employer in employing incompetent servants, the burden is on plaintiff to show not only incompetency of the servants, but that the employer knew, or had reason to believe, them to be incompetent. *Murphy v. St. Louis & I. M. R. Co.*, 4 Mo. App. 565; reversed on other grounds in 71 Mo. 202.

General reputation of unfitness is admissible, and may be sufficient to charge the company with knowledge, as ignorance amounts to negligence when proper inquiry would have brought the necessary information, and where it is the duty of the company to make inquiry; but the burden of proving unfitness and knowledge thereof by the company is upon the plaintiff. *Davis v. Detroit & M. R. Co.*, 20 Mich. 105.—FOLLOWED IN Michigan *C. R. Co. v. Dolan*, 32 Mich. 510; Michigan *C. R. Co. v. Gilbert*, 2 Am. & Eng. R. Cas. 230, 46 Mich. 176.

493. — to show negligence in retaining incompetent servant.—In a suit by a servant against his employer to recover damages for a personal injury from negligence of a fellow-servant, if it is claimed that the master was guilty of negligence in retaining incompetent servants, the burden is on the plaintiff to prove it. *Stafford v. Chicago, B. & Q. R. Co.*, 114 Ill. 244, 2 N. E. Rep. 185. *St. Louis, A. & T. H. R. Co. v. Corgan*, 49 Ill. App. 229.

494. Burden on company to disprove prima facie case.—Where a servant seeks to charge his master for negligence in employing an unfit fellow-servant, through whose unfitness the former is injured, the proper rule of proof is that when the unfitness is shown to have existed at the time of employment a *prima facie* case of negligence is made out against the master, and the burden is upon him to disprove negligence. *Crandall v. McClrath*, 24 Minn. 127.

4. Instructions.

495. Generally.—An instruction which directed in effect that laborers who are under the control of a superior, trust more or less to his care, was held not vulnerable to the objection that it simply enunciates a

proposition of fact. *Deppe v. Chicago, R. I. & P. R. Co.*, 38 Iowa 592.

It is the better rule for the court to state to the jury the particular ground of negligence set out in the petition, and say to them, in clear and explicit terms, that to entitle plaintiff to recover he must establish the particular negligence thus stated. *Bucklew v. Central Iowa R. Co.*, 64 Iowa 603, 21 N. W. Rep. 103.

496. Proper, generally.—Whether the relation of fellow-servant exists or not is a question of fact to be determined by the jury from the evidence in the case, under the instruction of the court; and an instruction so stating is not open to the objection that the jury might conclude that they were the arbitrary and final judges of that question. *Lake Erie & W. R. Co. v. Middleton*, 46 Ill. App. 218.

Where a petition claimed to recover for a personal injury caused by the negligent acts of the co-employees, which acts were set out, it was erroneous to refuse to instruct the jury that negligence must be proved in the manner alleged to authorize a recovery. *Manuel v. Chicago, R. I. & P. R. Co.*, 5 Am. & Eng. R. Cas. 588, 56 Iowa 655, 10 N. W. Rep. 237.—FOLLOWED IN *Fisk v. Chicago, M. & St. P. R. Co.*, 74 Iowa 424.

Under the evidence which tends to show that the injury was due to a latent defect in the lever of a hand-car, which defect was unknown to the plaintiff, but was known to the foreman under whose immediate and almost exclusive control the plaintiff and the hand-car were, the foreman having the power to hire, control, and discharge the plaintiff, it is proper to instruct the jury on the theory that the defect was known to the defendant and unknown to the plaintiff. *Clowers v. Wabash, St. L. & P. R. Co.*, 21 Mo. App. 213.

In an action for the death of a yard repair hand, caused by the negligence of a switch-engine driver, the following instruction—held, correct: "If the jury believe, from the evidence, that both the deceased and the engine driver, at the time deceased was injured, were in the employment of the railroad company, and that their ordinary occupations in such service bore such relations to each other that the careless or negligent conduct of the engine driver endangered the safety of the deceased, then such danger was incident to the employment of the deceased, and the plaintiff cannot recover in this

case." *Chicago & A. R. Co. v. Murphy*, 53 Ill. 336.—EXPLAINING *Chicago & A. R. Co. v. Keefe*, 47 Ill. 108.—DISTINGUISHED IN *Chicago & N. W. R. Co. v. Taylor*, 69 Ill. 461. REVIEWED IN *Kirk v. Atlanta & C. A. L. R. Co.*, 25 Am. & Eng. R. Cas. 507, 94 N. Car. 625, 55 Am. Rep. 621.

497. Given with other instructions or modifications.—An error in the charge as to who are fellow-servants is not fatal, where the entire charge is based on the assumption that the deceased engineer and the yard master, whose negligence was the cause of damage, were fellow-servants. *East Tenn., V. & G. R. Co. v. Gurrey*, 17 Am. & Eng. R. Cas. 568, 12 Lea (Tenn.) 46.—REVIEWED IN *East Tenn., V. & G. R. Co. v. Rush*, 15 Lea 145.

In an action to recover for the death of a conductor, caused by the negligence of another servant in charge of a semaphore, the defendant asked, and the court gave, an instruction embodying the rule as to the liability of a master to one servant for an injury caused by the negligence of a fellow-servant, which was numbered 1. The defendant asked the court to submit this question: "At the time of the accident causing S.'s death did the usual duties of S. and T., the semaphore attendant, bring them habitually together so that they could exercise a mutual influence upon each other promotive of proper caution?" The court submitted the same with this addition: "So as to make them co-employees in the same line of employment, as explained in defendant's instruction No. 1." Held, no error in the modification of the question, as it did not require the jury to pass upon the law. *Chicago & N. W. R. Co. v. Snyder*, 38 Am. & Eng. R. Cas. 188, 128 Ill. 655, 21 N. E. Rep. 520; former appeal 117 Ill. 376, 7 N. E. Rep. 604.

498. Improper, generally.—It is error for the court to give to the jury the unqualified instruction that "the defendant is not liable to the plaintiff for the negligence of its other servants and employees." *Baldwin v. St. Louis, K. & N. W. R. Co.*, 15 Am. & Eng. R. Cas. 166, 63 Iowa 210, 18 N. W. Rep. 884.

A court properly refused to instruct that "if the jury find that the conductor or any person in charge of the cars at the time directed the coupling of an engine to a car, the draw-bars of which were of an unequal height, whereby the injury was caused, the

plaintiff cannot recover," the injury being the result of the carelessness of a fellow-servant. *Lawless v. Connecticut River R. Co.*, 18 Am. & Eng. R. Cas. 96, 136 Mass. 1.

Instructions are properly refused when asked by the defendant to the effect that the negligence of a fellow-servant of the plaintiff concurring with that of the defendant, a company whose road crossed that of the company in whose employ the servants were, would be a defense. *Fl. Worth & D. C. R. Co. v. Mackney*, 83 Tex. 410, 18 S. W. Rep. 949.

499. Assuming facts not proved.—It is error for the court to submit a case to the jury on the theory that the relation of vice-principal existed between the defendant company and the servant whose negligence produced a personal injury to the plaintiff, when there is no testimony tending to show that such relation existed, or that the negligent servant was at the time performing any duties devolving upon the principal. *South Fla. R. Co. v. Weese*, 32 Fla. 212, 13 So. Rep. 436.

Where an employé sues his company for a personal injury, it is improper to instruct the jury as to the liability of the company for injuries to one employé by another, where there is no evidence that any employé in any manner caused or contributed to the injury. *Gulf, C. & S. F. R. Co. v. Blohn*, 73 Tex. 637, 4 L. R. A. 764, 11 S. W. Rep. 867.—FOLLOWING *Robinson v. Houston & T. C. R. Co.*, 46 Tex. 541.

Where an employé without experience is engaged in dangerous work under a foreman who is experienced, it cannot be said that the danger is as open to the observation of the employé as to the superintendent, and a court is justifiable in refusing to so charge. *Texas & P. R. Co. v. French*, (Tex. Civ. App.) 22 S. W. Rep. 866.

500. Assuming facts not pleaded.—It is error to instruct the jury that the company is liable if plaintiff "was hurt through the negligence of its employes while they were performing services within the scope of their employment." The right of recovery should be confined to the specific negligences and causes of action alleged in the declaration. *Chicago & A. R. Co. v. Lammert*, 12 Ill. App. 408.

501. Ignoring material issues.—Plaintiff, a "car-catcher," was injured while attempting to reach the top of a freight car. The evidence showed that the car in

question was furnished with ladders at the ends, whilst other cars usually had ladders on the sides. The cars collided with the rear car of a number that had been switched onto the next track, but had not been drawn far enough from the switch-stand to clear the car on which plaintiff was. The night on which the accident took place was very dark. *Held*, that an instruction which attributed plaintiff's injuries to the position of the ladder which he was climbing, and to the darkness, was properly refused, when it ignored the fact that if plaintiff acted with proper care on his part, and the accident was due to the negligence of another employé which caused the car of plaintiff to be thrown onto a track which was not clear, the defendant would be liable. *Chase v. Burlington, C. R. & N. R. Co.*, 38 *Am. & Eng. R. Cas.* 148, 76 *Iowa* 675, 39 *N. W. Rep.* 196.

In an action by the widow and children of an engineer killed in the service, by the alleged negligence of the receivers in charge of a railway, the court having charged fully upon the duties of employer and employé, and upon negligence and due care, the defendants asked the charge: "If the defendants had proper rules and gave proper instructions to employé, and the accident happened by reason of the violation of said rules or instructions by Whitcomb's fellow-servants, defendants are not liable." The instruction was refused, and properly, because it does not fully announce the rule without the qualification "that if the fellow-servant or servants who violated such rules and instructions of the master were unfit and incompetent within the knowledge of the master, and as a consequence the injury occurred," there being testimony as to the unfitness, etc., of the conductor of the colliding train. *Bonner v. Whitcomb*, 80 *Tex.* 178, 15 *S. W. Rep.* 899.

502. Ignoring the issue of contributory negligence.—Where there is some evidence of negligence on the part of an employé injured by the fault of fellow-servants which should be considered as lessening the amount of damages, it is error in the trial judge to say in the hearing of the jury that the doctrine of contributory negligence does not apply to this case. *Atlanta & R. A. L. R. Co. v. Ayers*, 53 *Ga.* 12.

An instruction which in effect makes the defendant company responsible for any neg-

ligence or mismanagement on the part of any agent or employé, while it permits the plaintiff, another employé, to recover against the company, although he may have been guilty of slight negligence, is erroneous. *Chicago, K. & N. R. Co. v. Brown*, 44 *Kan.* 384, 24 *Pac. Rep.* 497.

The objection, in an action against the master for the wrongful death of an employé resulting from the negligence of a co-employé, that an instruction ignores the question of contributory negligence of the deceased and the latter's knowledge of the incompetency of his co-employé, cannot be sustained, where such instruction requires the jury to find that deceased was injured "without negligence on his part directly contributing" to it, and other instructions declare that plaintiff cannot recover if deceased was guilty of negligence, or if he knew, or by the exercise of reasonable care might have known, that his co-employé was negligent or incompetent, and that deceased thereafter remained in defendant's employ. *Grube v. Missouri Pac. R. Co.*, 41 *Am. & Eng. R. Cas.* 357, 98 *Mo.* 330, 11 *S. W. Rep.* 736, 4 *L. R. A.* 776.

503. Incorrectly stating the law.—Where a fireman is killed through the negligence of an engineer and it is sought to avoid the rule of fellow-service and make the company liable, an instruction to the effect that though the engineer was competent and skilful in other respects, yet the company would be liable if he was rendered incompetent by reason of intoxication, is properly refused unless it appear that the company knew of such intoxication. *Stevens v. San Francisco & N. P. R. Co.*, 100 *Cal.* 554, 35 *Pac. Rep.* 165.

The injury sued for having been caused by the falling of a piece of timber upon the foot of plaintiff in the shop of a company, where he was employed, by the alleged negligence of a co-employé, it was not error to refuse the charge, "If the injury to the plaintiff would not have resulted except by the negligence of a fellow-servant, and such negligence of the fellow-servant caused the injury, he cannot recover." *Georgia R. & B. Co. v. Brown*, 48 *Am. & Eng. R. Cas.* 368, 86 *Ga.* 320, 12 *S. E. Rep.* 812.—ADHERING TO *Georgia R. Co. v. Ivey*, 73 *Ga.* 499; *Thompson v. Central R. & B. Co.*, 54 *Ga.* 509.—FOLLOWED IN *Georgia R. & B. Co. v. Miller*, 90 *Ga.* 571.

A switchman suing for an injury charged

the company with negligence both in employing fellow-servants and in failing to properly block its guard rails. *Held*, that it was error to instruct the jury so as to make the company liable for the negligence of a fellow-servant regardless of his general competency or fitness, and of the negligence of the company in employing him, and that the law makes the company absolutely liable for the condition of its track, regardless of the fact that the switchman had knowledge of how it was constructed, and continued to work without complaint, and without promise or expectation of change. *Illinois C. R. Co. v. Morrissey*, 45 Ill. App. 127.

While it may be conceded that a mere foreman, as the word "foreman" is generally understood—that is, as a laborer with power to superintend the labor of those working with him—is a co-employé so far as his own mere labor is concerned, for whose negligence in that capacity, resulting in injury to a co-employé, the master is not liable, yet an instruction asked, to the effect that the master would not be liable for any negligence of the foreman, unless it was in the employment of incompetent men, or in the use of unfit machinery or appliances, was properly refused. *Baldwin v. St. Louis, K. & N. R. Co.*, 68 Iowa 37, 25 N. W. Rep. 918.

The court having defined the relations of fellow-servants, added the following: "Provided there is a natural or necessary connection between the different classes of service, such as necessarily brings the servants in contact with each other in the prosecution of their work, however dissimilar their occupations may be." This qualification was error, and its correction having been refused is ground for reversal. *International & G. N. R. Co. v. Ryan*, 82 Tex. 565, 18 S. W. Rep. 219.

504. Misleading instructions.—In a case where it is clear that a conductor was in charge of the train, and the engineer and brakeman therefore fellow-servants, it is misleading and erroneous for the court, in his charge, to state imaginary cases in which the engineer might become the superior of the brakeman. *East Tenn., V. & G. R. Co. v. Smith*, 89 Tenn. 114, 14 S. W. Rep. 1077.

Where the plaintiff voluntarily placed himself in a position of danger, and was injured by the alleged negligence of a sin-

gle co-employé, and the court instructed the jury that "If he [the plaintiff] did all that a prudent and careful man could or should do in the situation in which he was placed, and his calamity was brought upon him by the negligence of other employés, he is entitled to recover"—*held*, that such instruction is inexact and erroneous; and where the court immediately afterwards, and in the same connection, instructed the jury that their verdict should be their conscientious judgment on the facts of the case, "applying the law as here given"—*held*, that these two instructions may have misled the jury. *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 472, 8 Pac. Rep. 780.

505. Directing verdict.—Where it is doubtful whether a train, which caused an injury to a servant, was in charge of the regular conductor or of the yard master, it is error for the court to order a verdict for the company on the ground that the train was in charge of the yard master, who was a fellow-servant of the injured employé. *Ritt v. Louisville & N. R. Co.*, (Ky.) 31 Am. & Eng. R. Cas. 289, 4 S. W. Rep. 796.

Where the engineer upon a passenger train seeks to recover for injuries received in a collision of his train with a freight train, and there is evidence tending to show that the injury was caused by the wilful neglect of not only the engineer but the conductor of the freight train, who had the power to direct its movements, the court did not err in refusing a peremptory instruction. *Kentucky C. R. Co. v. Ackley*, 87 Ky. 278, 12 Am. St. Rep. 480, 8 S. W. Rep. 691, 10 Ky. L. Rep. 170.

5. Questions of Law and Fact.

506. Plaintiff's contributory negligence.—The question of contributory negligence on the part of an injured employé is one of fact for the determination of the jury. *McGovern v. Central Vt. R. Co.*, 123 N. Y. 280, 25 N. E. Rep. 373, 33 N. Y. S. R. 416; *reversing* 53 Hun 635, 24 N. Y. S. R. 946, 6 N. Y. Supp. 838. *Tuten v. Central R. & B. Co.*, 88 Ga. 228, 14 S. E. Rep. 185.

Whether the master of the machinery was unskilful or otherwise incompetent for his position, or whether the injury sued for was in any manner the result of his unskilfulness or other incompetency, and not of the want of care on the part of the deceased, were questions for the jury to deter-

instructed the
did all that a
or should do
as placed, and
n him by the
he is entitled
instruction is
here the court
in the same
tentious judg-
"applying the
these two in-
e jury. *Kan-*
4 *Kan.* 472, 8

ct.—Where it
which caused
charge of the
yard master, it
r a verdict for
that the train
master, who was
ared employé.
(*Ky.*) 31 *Am.*
Rep. 796.

a passenger
injuries received
with a freight
ending to show
by the wilful
ineer but the
, who had the
, the court did
tory instruc-
Ackley, 87 *Ky.*
W. Rep. 691,

nd Fact.

utory neg-
contributory
in injured em-
determination
Central Vt. R.
Rep. 373, 33 *N.*
Hun 635, 24 *N.*
338. *Tuten v.*
228, 14 *S. E.*

he machinery
competent for
injury sued for
of his unskil-
y, and not of
rt of the de-
jury to deter-

mine upon the facts of the case. *Cumber-*
land & P. R. Co. v. State, 44 *Md.* 283, 45
Md. 229.

507. Company's negligence, generally.—Whether or not the company pre-
scribes the proper rules and conditions
under which its servants should be required
or permitted to enter bins of an elevator at
the bottom is a question for the considera-
tion of the jury. *McGovern v. Central Vt.*
R. Co., 123 *N. Y.* 280, 25 *N. E. Rep.* 373, 33
N. Y. S. R. 416; *reversing* 53 *Hun* 635, 24
N. Y. S. R. 946, 6 *N. Y. Supp.* 838.

Plaintiff, a switchman in the employ of
defendant, was directed by the foreman of
the switching crew to assist him in coup-
ling an engine to a flat car. According to
some of the evidence the draw-head of the
car sank flush with the end of the car
when the engine struck the car, and plain-
tiff was caught between the car and engine,
and injured. The evidence showed that
the play of a draw-bar was from 1 to 4
inches, and that this draw-bar was 10 to 12
inches long. *Held*, sufficient evidence of
defendant's negligence to require the sub-
mission of that question to a jury. *Bennett*
v. Northern Pac. R. Co., 3 *N. Dak.* 91, 54
N. W. Rep. 314.

Plaintiff, who was an employé, claimed
that the accident was caused either by a
defective guard rail, or by the excessive
speed of the train around a curve. The
plaintiff did not describe the position of the
rail on the day of the accident, but as it
was "a few days," or "several days," or "a
couple of days" before that time; while
the testimony of defendant's witnesses was
positive and uncontradicted that a new rail
had been put in proper position on the day
before the accident. *Held*, that the evi-
dence as to the defect in the rail was insuf-
ficient, and that if the accident was caused
by excessive speed it was due to the negli-
gence of a fellow-servant, and that on
neither of the grounds alleged was it
proper to submit the case to the jury. *Mil-*
ler v. Cornwall R. Co., 154 *Pa. St.* 473, 26
Atl. Rep. 779.

**508. Negligence in selecting in-
competent servants.**—A brakeman from
a standing freight train was sent forward
on a dark night to signal an approaching
train, but he failed to give the proper signal,
and there was a collision, which killed the
engineer of the standing train. The brake-
man had only been employed a few days,

and had only made two or three trips, and
had only signaled one train at night before,
and then the conductor found fault with
the manner of doing it. The usual way to
signal trains was by the use of a red light,
and on dark nights to also use torpedoes,
but the brakeman did not know this, and
only took the lantern. *Held*, sufficient to
justify a submission to the jury of the ques-
tion whether the company had exercised
due care in the selection of the brakeman.
Mann v. Delaware & H. Canal Co., 12
Am. & Eng. R. Cas. 199, 91 *N. Y.* 495.—
DISTINGUISHING *Laning v. New York C.*
R. Co., 49 *N. Y.* 521, 10 *Am. Rep.* 417.
REVIEWING *Flike v. Boston & A. R. Co.*,
53 *N. Y.* 549, 13 *Am. Rep.* 545; *Booth v.*
Boston & A. R. Co., 73 *N. Y.* 38, 29 *Am. Rep.*
97; *Fuller v. Jewett*, 80 *N. Y.* 46, 36 *Am.*
Rep. 575.—DISTINGUISHED IN *Burke v.*
Syracuse, B. & N. Y. R. Co., 52 *N. Y. S. R.*
813, 23 *N. Y. Supp.* 458. QUOTED IN *Newell*
v. Ryan, 40 *Hun* (N. Y.) 286.

A yard master directed the plaintiff to go
under a car on a track to repair it, and
assured him that he would be notified if
any other cars were seen approaching; but
no notice was given, and a car with a broken
brake was run down the track against the
one under which the plaintiff was working.
The evidence showed previous similar acts
of negligence on the part of the yard master,
which had been reported to the superintend-
ent, and that he had promised to discharge
him. *Held*, that the question of the com-
pany's negligence in not employing a com-
petent yard master was properly submitted
to the jury. *Sutton v. New York, L. E. &*
W. R. Co., 50 *N. Y. S. R.* 514, 66 *Hun* 632,
21 *N. Y. Supp.* 312.—APPLYING *Baulec v.*
New York & H. R. Co., 59 *N. Y.* 356;
Coppins v. New York C. & H. R. R. Co.,
122 *N. Y.* 557, 34 *N. Y. S. R.* 214.

509. Servant's incompetency.—The
yard master himself may, if competent, act
as brakeman on a car being moved; but if
he has only one arm, and the evidence
shows that he failed to control and check
the speed of the moving car, though no
defect in the brake was discovered before
or after the accident, it is a question for the
jury whether he was a competent brakeman.
Louisville & N. R. Co. v. Davis, 91 *Ala.* 487,
8 *So. Rep.* 552.

Where an employé sues for injuries alleged
to have resulted from the negligence of a
co-employé, and evidence is introduced on

the trial tending to show the habitual negligence of such co-employé, and that the plaintiff had knowledge thereof, and the defendant attempted, by asking the court to give certain instructions, to submit the question of the co-employé's incompetency and habitual negligence and the plaintiff's knowledge thereof to the jury, but the court refused—*held*, error. *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 472, 8 Pac. Rep. 780.

It appeared that a train dispatcher telegraphed to a local operator to flag and hold a certain train. He flagged it and stopped it for another train to pass, but instead of holding it, allowed it to proceed, and it collided with another train and killed plaintiff's intestate, an engineer. It was sought to hold the company liable on the ground that the operator was inexperienced and incompetent. The evidence showed that he was seventeen years old, intelligent, and had performed his duties for three or four months in a satisfactory manner. *Held*, that the question of his competency was for the jury. *Sutherland v. Troy & B. R. Co.*, 8 N. Y. Supp. 83.

Plaintiff, a fireman, was injured in a collision at night with a partially disabled engine which was running "wild" to repair shops in charge of an engineer of but little experience. *Held*, that it was a question for the jury whether the engineer was competent to run such an engine at night. *O'Laughlin v. New York C. & H. R. Co.*, 9 N. Y. S. R. 384, 45 Hun 588; *affirmed in* 113 N. Y. 623, *mem.*, 20 N. E. Rep. 876, 22 N. Y. S. R. 992.

Plaintiff, a brakeman on a passenger train, was injured by a collision with a freight train at a station. It was the duty of the company's flagman to signal the freight train to stop to allow the passenger train to take a siding, but at the time of the collision he gave a signal which was understood by the men on both trains to move on. *Held*, that the case should have been submitted to the jury on the question of the company's negligence in employing a negligent or incompetent flagman. (Martin, J., dissenting.) *Bossout v. Rome, W. & O. R. Co.*, 10 N. Y. Supp. 602, 32 N. Y. S. R. 884; *affirmed in* 126 N. Y. 646, 27 N. E. Rep. 853. —REVIEWING *Purdy v. Rome, W. & O. R. Co.*, 5 N. Y. Supp. 217.

510. Company's knowledge of incompetency.—Plaintiff's intestate was killed while shoveling snow from the track

on a city street, on a stormy morning, by a backing engine. Plaintiff's evidence showed that the engineer in charge had previously and frequently run engines through the yard and across the streets without giving notice, which had been brought to the knowledge of the company's superintendent and train dispatcher. *Held*, sufficient to warrant a submission to the jury whether the company knew, or ought to have known, of the negligent habits of the engineer. *Wall v. Delaware, L. & W. R. Co.*, 7 N. Y. Supp. 709.

511. Who are fellow-servants—Question of fact.—The definition of fellow-servants may be a question of law, but it is always a question of fact, to be determined from the evidence, whether a given case falls within the definition. *Chicago, B. & Q. R. Co. v. Bell*, 112 Ill. 360.—FOLLOWING *Indianapolis & St. L. R. Co. v. Morgenstern*, 106 Ill. 216.—*Chicago & A. R. Co. v. Kelly*, 127 Ill. 637, 21 N. E. Rep. 203; *affirming* 28 Ill. App. 655. *Lake Erie & W. R. Co. v. Middleton*, 142 Ill. 550, 32 N. E. Rep. 453. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. Rep. 285.—APPLYING *Indianapolis & St. L. R. Co. v. Morgenstern*, 106 Ill. 216; *Chicago & N. W. R. Co. v. Moranda*, 108 Ill. 576.—*Louisville, E. & St. L. Con. R. Co. v. Hawthorn*, 147 Ill. 226, 35 N. E. Rep. 534.—FOLLOWING *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302.—*Wabash, St. L. & P. R. Co. v. Deardorff*, 14 Ill. App. 401. *Chicago & A. R. Co. v. Hoyt*, 16 Ill. App. 237. *Wabash, St. L. & P. R. Co. v. Mahaffee*, 16 Ill. App. 290.—QUOTING *Chicago & N. W. R. Co. v. Moranda*, 108 Ill. 576.—*Chicago & A. R. Co. v. Kelly*, 25 Ill. App. 17. *Joliet Steel Co. v. Shields*, 32 Ill. App. 598.—FOLLOWING *Chicago & N. W. R. Co. v. Moranda*, 108 Ill. 576; *Chicago & A. R. Co. v. Kelly*, 127 Ill. 637, 21 N. E. Rep. 203; *Chicago & E. I. R. Co. v. Geary*, 110 Ill. 383.—*Hobbold v. Chicago Sugar Refining Co.*, 44 Ill. App. 418.—QUOTING *Chicago & A. R. Co. v. May*, 108 Ill. 288; *Abend v. Terre Haute & I. R. Co.*, 111 Ill. 202; *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302; *Indianapolis & St. L. R. Co. v. Morgenstern*, 106 Ill. 216.—*Chicago & N. W. R. Co. v. Tuite*, 44 Ill. App. 535. *Theleman v. Moeller*, 73 Iowa 108, 34 N. W. Rep. 765. *McGowan v. St. Louis & I. M. R. Co.*, 61 Mo. 528. *Baltimore & O. R. Co. v. McKenzie*, 24 Am. & Eng. R. Cas. 395, 81 Va. 71.

As to whether negligence in fact is shown,

morning, by a
dances showed
ad previously
ough the yard
giving notice,
ne knowledge
ent and train
to warrant a
the company
n, of the neg-
Wall v. Dela-
Supp. 709.
-servants—
inition of fel-
on of law, but
e, to be deter-
ether a given
Chicago, B.
4, 360.—FOL-
L. R. Co. v.
Chicago & A.
N. E. Rep.
Lake Erie
42 Ill. 550, 32
ace Car Co. v.
ep. 285.—AP-
L. R. Co. v.
cago & N. W.
—Louisville,
thorn, 147 Ill.
LOWING Chi-
la, 93 Ill. 302.
v. Deardorff,
A. R. Co. v.
sh, St. L. &
App. 290.—
Co. v. Mo-
A. R. Co. v.
Steel Co. v.
LOWING Chi-
nda, 108 Ill.
Kelly, 127 Ill.
go & E. I. R.
Chubb v. Chi-
App. 418.—
v. May, 108
& I. R. Co.,
R. Co. v. Mo-
& St. L. R.
16.—Chicago
Ill. App. 535.
08, 34 N. W.
uis & I. M.
& O. R. Co.
Cas. 395, 81
fact is shown,

and whether the party killed thereby was a fellow-servant and received the injury from another servant of the same master in the same line of duty, bringing them often together, co-operating in the same work, this court is precluded from determining. *Indianapolis & St. L. R. Co. v. Morgenstern*, 12 Am. & Eng. R. Cas. 228, 106 Ill. 216.—APPLIED IN *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *Lake Erie & W. R. Co. v. Middleton*, 46 Ill. App. 218. FOLLOWED IN *Chicago, B. & Q. R. Co. v. Bell*, 112 Ill. 360. FOLLOWED AND QUOTED IN *Lake Erie & W. R. Co. v. Middleton*, 142 Ill. 550. QUOTED IN *Hobbold v. Chicago Sugar Refining Co.*, 44 Ill. App. 418.

In a suit to recover for negligence resulting in the death of a section foreman having charge and oversight of repairs upon a certain part of the road track, it is error to instruct the jury that such foreman is not engaged in the same line of duty with an engineer and fireman running with the defendant's locomotive engines, and therefore not within the rule which exempts the common employer from liability to one of its employés for damages resulting from the fault, etc., of a fellow-servant. Whether such persons were so operating and associating is a question of fact for the jury, and not of law. *Chicago & N. W. R. Co. v. Moranda*, 17 Am. & Eng. R. Cas. 564, 108 Ill. 576.—APPLIED IN *Pullman Palace Car Co. v. Laack*, 143 Ill. 242. FOLLOWED IN *Joliet Steel Co. v. Shields*, 32 Ill. App. 598. QUOTED IN *Wabash, St. L. & P. R. Co. v. Mahaffee*, 16 Ill. App. 290.

The employment of one as a member of a fence gang does not, as a matter of law, bring him into co-operation with a locomotive engineer, or into such association or personal relation with the latter as that the former can exercise an influence over him promotive of proper caution in respect to their mutual safety. *Louisville, E. & St. L. Con. R. Co. v. Hawthorn*, 147 Ill. 226, 35 N. E. Rep. 534.

Where a person employed to unload fence posts from a freight car attached to a locomotive is injured by the engineer starting the train suddenly and without notice or warning, the servant so injured and the engineer cannot be held, as a matter of law, to be fellow-servants, or as co-operating in a particular business. *Louisville, E. & St. L. Con. R. Co. v. Hawthorn*, 147 Ill. 226, 35 N. E. Rep. 534.—DISTINGUISHING *Abend v. Terre Haute & I. R. Co.*, 111 Ill. 202.

512. Who are fellow-servants, a question of law.—Whether or not an employé occupies the position of a fellow-servant to another employé depends upon whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master. What he is employed to do is a question of fact; in what capacity an employé acts is an inference of law. Where the facts are not disputed the question is one of pure law. *Dube v. Lewiston*, 83 Me. 211, 22 Atl. Rep. 112.

Where the facts are undisputed as to the duties of fellow-servants it is for the court to say whether they come within the rule which exempts the master from liability for injuries suffered by one from the negligence of the other servant. *Dealey v. Philadelphia & R. R. Co.*, 16 Phila. (Pa.) 122.—QUOTING *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 438. REVIEWING *Mullan v. Philadelphia & S. M. Steamship Co.*, 78 Pa. St. 25; *Haas v. Philadelphia & S. M. Steamship Co.*, 88 Pa. St. 269.

513. — mixed question of law and fact.—Whether two servants of the same master, in any given case, are fellow-servants is a mixed question of law and of fact, and in the trial court it should be considered in both aspects. It is for the court, by proper instruction, to explain and define the relation of fellow-servants, so far as it is capable of legal definition, and for the jury, in considering the evidence, to determine whether the relation thus defined in fact existed. *Lake Erie & W. R. Co. v. Middleton*, 142 Ill. 550, 32 N. E. Rep. 453.—FOLLOWING AND QUOTING *Indianapolis & St. L. R. Co. v. Morgenstern*, 106 Ill. 216.—*Chicago, B. & Q. R. Co. v. Fitzgerald*, 40 Ill. App. 476. *Lake Erie & W. R. Co. v. Middleton*, 46 Ill. App. 218.—APPLYING *Indianapolis & St. L. R. Co. v. Morgenstern*, 106 Ill. 216; *Chicago & A. R. Co. v. Kelly*, 127 Ill. 637.

514. Who is a vice-principal.—A brakeman on a freight train, while getting on an engine from a freight yard, was injured by striking ties that had been piled about a foot and a half from the track. The evidence showed that the section master, who was charged, with others, with the supervision of the place, had received printed instructions from the company's general manager to see that nothing was piled within six feet of the track; notwithstanding he had been on the ground and knew how the ties were piled. *Held*, that

the question whether the section master was so far intrusted with the supervision of the tracks as to make the company liable was a question for the jury. *Babcock v. Old Colony R. Co.*, 150 Mass. 467, 23 N. E. Rep. 325.

515. Whether injury was caused by negligence of company or of fellow-servant.—The injury in this case having been received in the state of Illinois, the court erred in taking from the jury the question whether the injury was caused by negligence of the defendant company or by that of plaintiff's co-employé, the conductor of the train, there being evidence for the jury on that question. *Stetler v. Chicago & N. W. R. Co.*, 46 Wis. 497, 21 Am. Ry. Rep. 402.

516. Whether a vice-principal's negligence was cause of injury.—A section foreman in charge of men on a hand-car knew that a train was approaching from behind, but directed the men to go on until he told them to stop. He did not give the order to stop in sufficient time to allow the car to be removed from the track without great haste, and in the excitement and hurry of getting it off the track, one of the men was injured. *Held*, that the question as to whether the injury was due to the negligence of the foreman was properly left to the jury, and it was not error to refuse to direct a verdict for the company. *Northern Pac. R. Co. v. Behling*, 57 Fed. Rep. 1037.—**DISTINGUISHING** *Coyne v. Union Pac. R. Co.*, 133 U. S. 370, 10 Sup. Ct. Rep. 382.

A section hand was struck and injured by a train while working on the track near a curve on a city street, where he could see but a short distance, though he might have known that it was about train time. The train was racing with another, and therefore running at unusual speed without bell or whistle. *Held*, that it was error to grant a nonsuit on the ground that the injury was caused by the negligence of the engineer, who was a fellow-servant. The case should have been left to the jury, as there was evidence from which the jury might have found that the manner of running was authorized by the conductor, which would render the company liable. *Dick v. Indianapolis, C. & L. R. Co.*, 8 Am. & Eng. R. Cas. 101, 38 Ohio St. 389.—**QUOTING** *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201. **REVIEWING** *Pittsburgh, C. & St. L. R. Co. v. Henderson*, 37 Ohio St. 552; *Lake Shore & M. S. R. Co. v. Lavalley*, 36 Ohio St. 221.

FEMALES.

Arrest of, see **ARREST**, 2.

Duty of carrier to protect female passengers from assaults by employees, see **CARRIAGE OF PASSENGERS**, 308.

FENCES.

Alleging company's failure to build, see **ANIMALS, INJURIES TO**, 349-353.

Along embankments, duty to build, see **STREET RAILWAYS**, 131.

Assumption of risk as to patent defects in, see **EMPLOYEES, INJURIES TO**, 210.

At parks and public places, ordinance requiring, see **STREETS AND HIGHWAYS**, 312.

Burden of proof to show duty to construct, see **ANIMALS, INJURIES TO**, 518-521, 523.

— — — — — **failure to build or keep in repair**, see **ANIMALS, INJURIES TO**, 505-509.

— — — — — **sufficiency of**, see **ANIMALS, INJURIES TO**, 517.

Conditions in municipal grants of right of way respecting, see **STREETS AND HIGHWAYS**, 93.

Constitutionality of fence laws, see **ANIMALS, INJURIES TO**, 1-11; **STATUTES**, 26.

Contributory negligence of employe struck by, see **EMPLOYEES, INJURIES TO**, 358.

Cost of, as an element of land damages, see **EMINENT DOMAIN**, 691-697.

Covenant to maintain, when runs with the land, see **COVENANTS**, 4, 9.

Duty to build, as affecting liability for killing stock, see **ANIMALS, INJURIES TO**, 85-212.

— — — — — **at crossings**, see **ANIMALS, INJURIES TO**, 190.

— — — — — **farm crossings**, see **ANIMALS, INJURIES TO**, 172.

— — — — — **construct as against children**, see **CHILDREN, INJURIES TO**, 10.

— — — — — **fence as a protection to employes**, see **EMPLOYEES, INJURIES TO**, 77-79.

— — — — — **track as towards passengers**, see **CARRIAGE OF PASSENGERS**, 179.

— — — — — **guard excavations by fences**, see **EXCAVATIONS**, 2.

— — — — — **keep in repair**, see **ANIMALS, INJURIES TO**, 140-151.

Effect of breach of agreement to build see **EMINENT DOMAIN**, 216.

— — — — — **notice of defects in, or absence of**, see **EMPLOYEES, INJURIES TO**, 233, 234.

Evidence of cost of, on assessment of land damages, see **EMINENT DOMAIN**, 616.

Inconvenience from absence of, as an element of land damages, see EMINENT DOMAIN, 690.

Instructions relating to duty to build, see ANIMALS, INJURIES TO, 564.

Interpretation of statutes requiring, see ANIMALS, INJURIES TO, 87; STATUTES, 62.

Liability for killing stock, irrespective of duty to build, see ANIMALS, INJURIES TO, 29-84.

— of lessee road for defects in, see LEASES, ETC., 65.

Measure of damages for failure to build, see DAMAGES, 59.

— — — to, by fire, see FIRES, 342.

Necessity of building, to perfect title by adverse possession, see ADVERSE POSSESSION, 6.

Presumption of performance of duty to build, see ANIMALS, INJURIES TO, 476.

Prosecution for destruction of, see CRIMINAL LAW, 15.

— — failure to erect, see CRIMINAL LAW, 18.

Sufficiency of, see ANIMALS, INJURIES TO, 109-113.

— — evidence to show duty to build, see ANIMALS, INJURIES TO, 458.

Whether possible to build, a question of fact, see ANIMALS, INJURIES TO, 553.

I. FENCE LAWS. 793

1. *Constitutionality*..... 793

2. *Interpretation and Effect*..... 795

II. DUTY TO BUILD AND MAINTAIN.. 797

1. *Generally*..... 797

2. *By Statute*..... 799

3. *By Contract*..... 804

4. *Building by Adjoining Owner, where Company Fails to Build*..... 807

5. *Time within Which to Fence*.. 808

6. *Where Fences must be Built*. 810

7. *Against Whom must Fence*... 820

8. *Sufficiency of Fences*..... 822

9. *Against What must Fence*.. 825

10. *Duty to Repair and Rebuild*.. 825

III. LIABILITY FOR FAILURE TO BUILD

AND MAINTAIN..... 829

1. *Generally*..... 829

2. *For Injury to Crops, Pasturage, etc*..... 832

I. FENCE LAWS.

1. *Constitutionality*.*

1. Power of the legislature to enact fence laws, generally.—In what

* Constitutionality of fence laws, see notes, 22 AM. & ENG. R. CAS. 564; 34 AM. REP. 115. See also 45 AM. & ENG. R. CAS. 460, *abstr.*; ANIMALS, INJURIES TO, 1-11.

manner and to what extent railway corporations shall be required by law to inclose their tracks, and where it shall be done, would seem to be ordinarily within legislative discretion. *Chicago, M. & St. P. R. Co. v. Dumser*, 19 Am. & Eng. R. Cas. 545, 109 Ill. 402.

The power of the legislature to require railways to fence their track has been universally upheld, and has been expressly affirmed by this court. *Gulf, C. & S. F. R. Co. v. Rowland*, 35 Am. & Eng. R. Cas. 286, 70 Tex. 298, 7 S. W. Rep. 718.

The Missouri statute requiring companies to fence their tracks is not unconstitutional on the ground that the legislature has no power to subject one person to expense for the sole benefit of another, as the supposed protection of the property of adjoining landowners is but an incidental object of the statute, its leading object being the protection of the public. *Trice v. Hannibal & St. J. R. Co.*, 49 Mo. 438, 2 Am. Ky. Rep. 445.—QUOTED IN *Barnett v. Atlantic & P. R. Co.*, 68 Mo. 56; *Kaes v. Missouri Pac. R. Co.*, 6 Mo. App. 397.

2. Such laws a valid exercise of the police power of the state.—

Under the police power the state has the undoubted right to require all railway corporations to inclose their roads with a suitable and sufficient fence, as a matter of public safety. Such regulations tend to the safety of persons and property, and are for that reason lawful. *Chicago, M. & St. P. R. Co. v. Dumser*, 19 Am. & Eng. R. Cas. 545, 109 Ill. 402. *Peoria, D. & E. R. Co. v. Duggan*, 20 Am. & Eng. R. Cas. 489, 109 Ill. 537, 50 Am. Rep. 619. *Chicago & N. W. R. Co. v. Chicago*, 50 Am. & Eng. R. Cas. 150, 140 Ill. 309, 29 N. E. Rep. 1109. *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573, 9 Am. Ry. Rep. 400. *Emmons v. Minneapolis & St. L. R. Co.*, 35 Minn. 503, 29 N. W. Rep. 202. *Gorman v. Pacific R. Co.*, 26 Mo. 441.—APPROVING *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 141.—DISTINGUISHED IN *Wallace v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 594. FOLLOWED IN *Apitz v. Missouri Pac. R. Co.*, 17 Mo. App. 419. QUOTED IN *Stanley v. Missouri Pac. R. Co.*, 84 Mo. 625; *Kaes v. Missouri Pac. R. Co.*, 6 Mo. App. 397. REFERRED TO IN *Hannibal & St. J. R. Co. v. Kenney*, 41 Mo. 271.—*Pennsylvania R. Co. v. Ribbet*, 66 Pa. St. 164.

The legislature cannot delegate to the citizen the police power of the state. Therefore while the legislature may, as a police

regulation, require a railroad company to fence all or a part of its track for the protection of the public, it cannot leave to the owner of the adjoining land the determination of the question as to the necessity for a fence, and thus require the company to fence its track at the mere will of the landowner. *Owensboro & N. R. Co. v. Todd*, 91 Ky. 175, 15 S. W. Rep. 56.

The statute requiring a railway company within a certain time to fence its track is a police regulation of the state, and it is not within the jurisdiction of any court, either state or federal, to arrest its operation. *Ohio & M. R. Co. v. Russell*, 23 Am. & Eng. R. Cas. 149, 115 Ill. 52, 3 N. E. Rep. 561.

3. Effect of provisions in, or silence of charter.—An act of the legislature requiring a railroad company, its charter being silent on the subject, to construct fences along its line, is within the police power of the legislature and valid. *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 515 (Gil. 392). Compare *New Albany & S. R. Co. v. McNamara*, 11 Ind. 543.

A clause in a railroad charter providing what fences and other structures required for protection of life and property the company shall maintain, and when it shall provide them, is not sufficient to conclude the state from a future exercise of the police power which it has in such cases. *Gillam v. Sioux City & St. P. R. Co.*, 26 Minn. 268, 3 N. W. Rep. 353.

The Ind. Act of 1853, p. 113, regulating the fencing of railroads, is not so much a measure of protection to the owners of animals as it is a regulation for the safety of passengers; and it is competent for the legislature to enact such a law after a road has been constructed, even where the company's charter is not amendable, without interfering with vested rights, or violating the obligation of a contract. *New Albany & S. R. Co. v. Tilton*, 12 Ind. 3.—FOLLOWED IN *New Albany & S. R. Co. v. Mead*, 13 Ind. 258.—*Blair v. Milwaukee & P. du C. R. Co.*, 20 Wis. 254. *Chicago & N. W. R. Co. v. Chicago*, 50 Am. & Eng. R. Cas. 150, 140 Ill. 309, 29 N. E. Rep. 1109.

4. What statutes are valid.—Ill. Act of February 14, 1855, requiring completed railroads to be fenced within six months, and making the companies liable for damages resulting to stock by a failure to do so, is not unconstitutional as being an *ex post*

facto law, or as impairing the obligation of contracts. *Ohio & M. R. Co. v. McClelland*, 25 Ill. 140.—DISTINGUISHED IN *Bielenberg v. Montana Union R. Co.*, 38 Am. & Eng. R. Cas. 275, 8 Mont. 271. FOLLOWED IN *Galena & C. U. R. Co. v. Crawford*, 25 Ill. 529. REVIEWED IN *Rodemacher v. Milwaukee & St. P. R. Co.*, 41 Iowa 297.

The amendment of 1879, § 25, of the Ill. Act of 1874, in relation to fencing and operating railroads, was passed in accordance with the constitution, and is a valid law. *Illinois C. R. Co. v. People*, 143 Ill. 434, 33 N. E. Rep. 173.

The fifth section of the Ind. Act of April 13, 1885, which provides for the fencing of rights of way by railroad companies, the construction of cattle-guards, etc., is valid and constitutional, being sufficiently connected with the subject as expressed in the title. *Hunt v. Lake Shore & M. S. R. Co.*, 35 Am. & Eng. R. Cas. 176, 112 Ind. 69, 11 West. Rep. 107, 13 N. E. Rep. 263.

Chapter 154 of the Kan. Laws of 1885, "An act to compel railroad companies to fence their roads by and through lands inclosed with a lawful fence," is constitutional and valid. *Missouri Pac. R. Co. v. Harrelson*, 45 Am. & Eng. R. Cas. 457, 44 Kan. 253, 24 Pac. Rep. 465.

Minn. General Laws of 1876, ch. 24, as amended in 1877, ch. 73, regulating the fencing of railroads, is not in conflict with that provision of the constitution of the United States which guarantees equal protection of the law. *Minneapolis & St. L. R. Co. v. Emmons*, 149 U. S. 364, 13 Sup. Ct. Rep. 870.—FOLLOWED IN *Minneapolis & St. L. R. Co. v. Nelson*, 149 U. S. 368.

A law requiring a railroad company to fence lands adjoining the track is not invalid because it imposes a duty not required by contract, common law, or its charter. The states are not limited by the road's charter in creating new duties. *Minneapolis & St. L. R. Co. v. Emmons*, 149 U. S. 364, 13 Sup. Ct. Rep. 870.

Wis. Rev. St. § 1810, as amended in 1881, ch. 193, making railroad companies absolutely liable for all damages occasioned by the failure to erect fences along their roads, and excluding the defense of contributory negligence, is not unconstitutional. *Quackebush v. Wisconsin & M. R. Co.*, 71 Wis. 472, 37 N. W. Rep. 834.

5. What statutes are invalid.—While the Kansas legislature, by enacting

obligation of
McClelland,
Bielenberg
Am. & Eng.
ALLOWED IN
ford, 25 Ill.
ther v. Mil-
a 297.

5, of the Ill.
fencing and
used in ac-
n, and is a
People, 143

Act of April
e fencing of
panies, the
etc., is valid
ciently con-
pressed in the
M. S. R. Co.,
2 Ind. 69, 11
263.

aws of 1885,
companies to
gh lands in-
stitutional
Co. v. Harrel-
457, 44 Kan.

6, ch. 24, as
ing the fenc-
dict with that
of the United
protection of
L. R. Co. v.
Cl. Rep. 870.
& St. L. R.

company to
is not invalid
t required by
charter. The
oad's charter
eapolis & St.
S. 364, 13 Sup.

ended in 1881,
panies abso-
occasioned by
g their roads,
contributory
onal. Quack-
Co., 71 Wis.

invalid,—
by enacting

certain fence laws and laws regulating the running at large of stock, have impliedly declared that reasonable care and diligence with regard to real estate shall be to fence it with a lawful fence, and that no action shall lie for injuries done to real estate by roaming cattle, unless such lawful fence is made, yet they have nowhere attempted to enact any law giving to any person any rights upon another's land, whether it is fenced or not. An act of that kind would tend to disturb vested rights and be unconstitutional and void. *Union Pac. R. Co. v. Rollins*, 5 Kan. 167.

A statute (Gen. St. Ky. ch. 55, art. 1, § 12) requiring railroad companies, to which a right of way has been donated, to fence their tracks after notice from the adjoining landowner that the fence must be built, is unconstitutional, since it amounts to a delegation by the state of its police power to the citizen, and also because it constitutes an unwarranted discrimination in favor of the landowner. *Owensboro & N. R. Co. v. Todd*, 45 Am. & Eng. R. Cas. 461, 91 Ky. 175, 15 S. W. Rep. 56.

6. Validity of double damage laws.

—It is competent for the legislature to make railroads liable to owners of stock killed by reason of the company's failure to fence, in damages double the value of the stock. *Missouri Pac. R. Co. v. Humes*, 22 Am. & Eng. R. Cas. 557, 115 U. S. 512, 6 Sup. Ct. Rep. 110. *Minneapolis & St. L. R. Co. v. Beckwith*, 38 Am. & Eng. R. Cas. 267, 129 U. S. 26, 9 Sup. Ct. Rep. 207. *Cairo & St. L. R. Co. v. Warrington*, 92 Ill. 157.

Such a statute does not deprive the company of its property without due process of law, nor deny it the usual protection of the law within the meaning of the fourteenth amendment of the United States constitution. *Missouri Pac. R. Co. v. Humes*, 22 Am. & Eng. R. Cas. 557, 115 U. S. 512, 6 Sup. Ct. Rep. 110. *Cairo & St. L. R. Co. v. Peoples*, 92 Ill. 97.—DISTINGUISHING *Atchison & N. R. Co. v. Baty*, 6 Neb. 37.—*Minneapolis & St. L. R. Co. v. Beckwith*, 38 Am. & Eng. R. Cas. 267, 129 U. S. 26, 9 Sup. Ct. Rep. 207.—APPROVED IN *Schoolcraft v. Louisville & N. R. Co.*, 92 Ky. 233.

2. Interpretation and Effect.

7. How construed, generally.*—

The act of April 8 (Ind. Acts 1885, p. 148)

* Laws requiring company to maintain fences and gates, see note, 11 L. R. A. 427.

making a railroad company liable for injury to stock, does not apply in cases where land separated by its right of way is not owned by the same person. *Louisville, N. A. & C. R. Co. v. Consolidated Tank Line Co.*, 4 Ind. App. 40, 30 N. E. Rep. 159.

The Michigan statutory regulations concerning the fencing of railways apply north of the Saginaw river, except that the statutory penalty for neglecting to build them is not in force (act 98 of 1875). *Marcott v. Marquette, H. & O. R. Co.*, 4 Am. & Eng. R. Cas. 548, 47 Mich. 1, 10 N. W. Rep. 53.

Nevada statute of 1864-65, providing that companies shall maintain a good and sufficient fence on either or both sides of their property, requires companies to fence their roads where they may run through or alongside of the land of private individuals, on either or both sides, as occasion may demand. *Walsh v. Virginia & T. R. Co.*, 8 Nev. 110.

The New York Act of 1854, ch. 282, § 8, requiring companies to erect and maintain fences on either side of their tracks, only enjoins a new duty upon the company; but the right which corresponds to that duty is left to be enforced by old remedies. *Graham v. Delaware & H. Canal Co.*, 46 Hun 386, 12 N. Y. S. R. 390.

Under the provision of the above statute to the effect that so long as the road shall not be fenced or a fence not in good repair "such railroad corporation and its agents shall be liable for damages which shall be done by the agents or engines of such corporation to any cattle or horses thereon," the liability of the company is not limited to the damages done by its agents or engines. *Graham v. Delaware & H. Canal Co.*, 46 Hun 386, 12 N. Y. S. R. 390.—DISTINGUISHING *Knight v. New York, L. E. & W. R. Co.*, 99 N. Y. 25.

An act induced by public considerations, the purpose of which is to protect the traveling public and the owners of domestic animals along the line of a railroad, should receive a liberal construction to effectuate the benign purpose of its framers. *Tracy v. Troy & B. R. Co.*, 38 N. Y. 433; affirming 55 Barb. 529.

Ohio Rev. St. § 3324, requiring companies to fence their tracks, and providing that they shall be liable for damages sustained by reason of the want or insufficiency of such fences, is to be reasonably construed; and where such damage results from defects occurring without the fault or neglect of

such companies, in an otherwise sufficient fence, there is no liability. *Baltimore & O. R. Co. v. Schultz*, 22 Am. & Eng. R. Cas. 579, 23 Am. & Eng. R. Cas. 211, 43 Ohio St. 270, 54 Am. Rep. 805, 1 N. E. Rep. 324.—RECONCILING *Pittsburgh, C. & St. L. R. Co. v. Smith*, 38 Ohio St. 410.

The Railways Clauses Act of 1845, § 68, imposes upon railway companies the same liability to fence as that which is imposed on an adjoining owner at common law. *Wiseman v. Booker*, L. R. 3 C. P. D. 184, 38 L. T. 292, 26 W. R. 634.

8. Object of the statutes.*—The Illinois statute is only intended for the protection of the owners of live stock, and does not create a new right in favor of railroad employees. *Wabash R. Co. v. Brown*, 5 Ill. App. 590.

Nor is it intended to protect adjoining landowners from damage that might be done by stock getting on the right of way and thence to the adjacent crops. The object of the statute was to prevent stock from coming on the railroad and being injured, and to prevent accidents which would likely occur if stock were not fenced away from the track, thereby promoting the safety of passengers and employés on the trains. *Peoria, D. & E. R. Co. v. Schiller*, 12 Ill. App. 443.—QUOTED IN *Cannon v. Louisville, E. & St. L. Con. R. Co.*, 34 Ill. App. 640.

The plain object of the statute is to prevent stock from getting on the track; and for a failure to comply with it, a special liability is provided in respect to one particular thing—viz., the damages which may be done by the agents, engines, or cars of the corporation to such stock so getting on the road, and providing that when this requirement is complied with, liability in respect to such damages shall be dependent upon negligent or wilful conduct. The manifest purpose of the law is to enforce this special duty by attaching this special liability; and had there been a purpose to create a liability beyond that specified, very different terms would have been employed. *Peoria, D. & E. R. Co. v. Schiller*, 12 Ill. App. 443.—DISTINGUISHED IN *Ohio & M. R. Co. v. McGehee*, 47 Ill. App. 348.

The Indiana statute is not intended to change the common law rule as to the duty

of the owners of cattle, nor merely to give them compensation for animals killed or injured on the track where the road is not fenced, but chiefly as a police regulation, for the benefit of the public, to secure safety and freedom from obstructions to the passage of carriages along the track. *Toledo & W. R. Co. v. Fowler*, 22 Ind. 316.

9. To what companies applicable.

—The liability imposed by the statute upon railroad companies for injuries to animals, without proof of negligence, where the roads are not fenced, is in the nature of a police regulation, for the safety of passengers, and applies as well to companies organized under special charters, as to those organized under the general law. *Indianapolis, P. & C. R. Co. v. Marshall*, 27 Ind. 300.

The Maine Act of 1853, ch. 41, requiring companies to fence their tracks, and providing a forfeiture of \$100 per month for a failure to do so, is a remedial statute, designed for the protection of property, and applies to corporations existing before its passage. *Norris v. Androscoggin R. Co.*, 39 Me. 273.—QUOTED IN *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573. REVIEWED IN *Gorman v. Pacific R. Co.*, 26 Mo. 441.—*Wilder v. Maine C. R. Co.*, 65 Me. 332, 9 Am. Ry. Rep. 289. *S. P., Shurley v. New York, L. E. & W. R. Co.*, 121 Pa. St. 511, 15 Atl. Rep. 567.

Mass. St. of 1846, ch. 271, requiring companies to fence their tracks, applies to a railroad chartered and partly constructed before the passage of the act. *Sawyer v. Vermont & M. R. Co.*, 105 Mass. 196, 2 Am. Ry. Rep. 459.

Minn. Act of 1872, ch. 25, §§ 1, 2, to compel companies to build proper fences and cattle-guards, is presumed to apply to a railway company operating under a special charter, which is not a public act, in the absence of any charter provision by which the company is taken out of the provisions of such sections. *Whittier v. Chicago, M. & St. P. R. Co.*, 24 Minn. 394.

Minn. Gen. St. ch. 34, § 57, makes the obligation to construct fences, etc., provided by laws 1876, ch. 24, § 1, applicable to all railroad companies in the state. *Gillam v. Sioux City & St. P. R. Co.*, 26 Minn. 268, 3 N. W. Rep. 353.—FOLLOWED IN *Finch v. Chicago, M. & St. P. R. Co.*, 46 Minn. 250.—*Fleming v. St. Paul & D. R. Co.*, 27 Minn. 111, 6 N. W. Rep. 448.

* Object of fence laws, see note, 42 AM. & ENG. R. CAS. 582.

A company was chartered in 1845, the powers and privileges of which passed to several companies in succession, until the bondholders of the last company were incorporated in 1873 with the powers and privileges of the first company. The last company purchased the *locus in quo* in 1868, but the road was not built until 1875. *Held*, that the road must be regarded as constructed under the last act, so as to be amenable to the statutes imposing upon railroad companies, constructed after May, 1850, the duty of fencing their tracks. *Rockwell v. New York & N. E. R. Co.*, 51 Conn. 401.

10. When not applicable.—The general statute of Illinois relating to the building and maintaining of fences between the lands of adjoining proprietors, does not apply to railroad companies. *Cannon v. Louisville, E. & St. L. Con. R. Co.*, 34 Ill. App. 640.

Mass. statutes, imposing upon railroads the burden of maintaining fences by the side of their railroads, do not apply to railroads constructed before their passage. *Bronson v. Coffin*, 108 Mass. 175. *Stearns v. Old Colony & F. R. R. Corp.*, 1 Allen (Mass.) 493.—**DISTINGUISHED IN** *White v. Quincy*, 97 Mass. 430.

In Tennessee neither the common law nor any statute imposes upon railroad companies the duty of fencing or constructing cattle-guards for the protection of crops on lands adjacent to the track, as the ordinary fence laws regulating the rights of adjoining proprietors do not apply; neither does the act of 1875, ch. 64. *Ward v. Paducah & M. R. Co.*, 4 Fed. Rep. 862.

The defendant company, a sublessee of a railroad company under the Canada Railway Act (Consol. St. ch. 66), was not liable for neglecting to maintain a fence, by which plaintiff's cattle had been killed. *Bennett v. Covert*, 24 U. C. Q. B. 38.

11. Effect to repeal or modify previously existing laws.—The Illinois law prohibiting animals from running at large, in force October 1, 1872, does not, by implication, repeal any of the provisions of the act of February 14, 1855, requiring railroad companies to fence their roads; and the same is true with regard to the law preventing male animals from running at large. *Rockford, R. I. & St. L. R. Co. v. Irish*, 72 Ill. 404.—**FOLLOWING** *Ewing v. Chicago & A. R. Co.*, 72 Ill. 25.

The Indiana acts of April 8 and April 13, 1885, relating to the fencing of railroad rights of way, do not repeal the prior statute (§ 4025, Rev. St. Ind. 1881) making companies liable for injury to stock within the corporate limits of a city. *Jeffersonville, M. & I. R. Co. v. Peters*, 1 Ind. App. 69, 27 N. E. Rep. 299.—**FOLLOWED IN** *Stewart v. Pennsylvania Co.*, 2 Ind. App. 142.

The obligation of a company to fence its track where it passes through cultivated lands, under Mo. Rev. St. of 1879, § 809, is not changed by the act of 1879, ch. 159, preventing swine from running at large. *Morrow v. Missouri Pac. R. Co.*, 17 Mo. App. 103.—**FOLLOWING** *Stanley v. Missouri Pac. R. Co.*, 84 Mo. 625.—**APPLIED IN** *Cole v. Chicago, B. & Q. R. Co.*, 47 Mo. App. 624.

Missouri Act of 1879, preventing hogs from running at large, was repealed by the Act of 1883, p. 26, that act being intended to regulate the whole subject of restraining domestic animals; and the previous adoption of the law of 1879 in any county fell with its repeal, and left the county as it was before the adoption of the law. *Crumley v. Kansas City, C. & S. R. Co.*, 32 Mo. App. 505.—**QUOTING** *Berkshire v. Missouri Pac. R. Co.*, 28 Mo. App. 225.

New York Act of 1854, ch. 282, § 8, requiring companies to erect and maintain fences on each side of their tracks, is not a mere modification of the law respecting division fences. *Graham v. Delaware & H. Canal Co.*, 46 Hun 386, 12 N. Y. S. R. 390.—**FOLLOWING** *Corwin v. New York & E. R. Co.*, 13 N. Y. 42.

The 68th section of the Railways Clauses Act of 1845, relating to the duty of a company to maintain sufficient fences along its line, is a substitution for the 10th section of 5 & 6 Vict. c. 55. *Manchester, S. & L. R. Co. v. Wallis*, 7 Railw. Cas. 709, 2 C. L. R. 573, 14 C. B. 213, 18 Jur. 268, 23 L. J. C. P. 85.

II. DUTY TO BUILD AND MAINTAIN.

1. Generally.

12. At common law.*—A railway company is under no common law obliga-

* Obligations of railways to fence, see note, 5 L. R. A. 737.

No obligation to fence at common law, see note, 13 AM. & ENG. R. CAS. 590.

Duty and liability of company in fencing tracks, see note, 7 AM. & ENG. R. CAS. 577. See also 56 AM. & ENG. R. CAS. 166, *abstr.*

tion to fence its track at the peril of responding in damages for injuries arising from its neglect to do so. *Continental Imp. Co. v. Phelps*, 47 Mich. 299, 11 N. W. Rep. 167. *Cowan v. Union Pac. R. Co.*, 35 Fed. Rep. 43. *Oregon C. R. Co. v. Wait*, 3 Oreg. 91, 6 Am. Ry. Rep. 517. *Buxton v. North Eastern R. Co.*, L. R. 3 Q. B. 549, 9 B. & S. 824, 37 L. J. Q. B. 258, 18 L. T. 795, 16 W. R. 1124. *Westbourne Cattle Co. v. Manitoba & N. W. R. Co.*, 6 Man. 553.

At common law proprietors of land are not bound to fence against each other, but each is bound to keep his cattle on his own land. *Indianapolis & C. R. Co. v. Kinney*, 8 Ind. 402.

Railroad companies, like other proprietors, are not bound to inclose their lands to keep off cattle. They are to be considered as proprietors of property, using it for their private gain, but not to be permitted so to use it as to harm or injure others unnecessarily, or if to be avoided. *New Orleans, J. & G. N. R. Co. v. Field*, 46 Miss. 573, 2 Am. Ry. Rep. 439.

The court cannot say that it is a common law duty owed by a railroad company to its employés to keep its road so fenced that cattle may be prevented from straying thereon; and if this be so, even a wilful neglect to fence the road would not of itself constitute guilty negligence. *Wabash R. Co. v. Brown*, 5 Ill. App. 590.

The location of a railroad track near a highway does not make it the duty of the town to build a fence to prevent animals that may be frightened by trains from escaping into adjoining fields; but the necessity of a fence to make a highway safe and convenient is to be determined without consideration of its proximity to the railroad. *Adams v. Natick*, 13 Allen (Mass.) 429.

Though as a proprietor a railroad company is under no greater obligation to fence its road than any other owner of land is to fence the same, if the road be not fenced that fact should be considered in estimating the degree of care to be exercised by the company. *Gorman v. Pacific R. Co.*, 26 Mo. 441.

Owners of lands which adjoin a railroad cannot compel the company to put up a fence along such road, nor require them to contribute thereto. What are called "cattle-guards" at each end are all that can be required. *In re Long Island R. Co.*, 3 Edw. Ch. (N. Y.) 487.—REVIEWING *In re Rensselaer & S. R. Co.*, 4 Paige (N. Y.) 553.

As a railroad company is not advantaged by having fences along its road, there does not exist that mutuality of benefit between the company and owners of adjoining lands which can compel such company to make or contribute to the making of the fences. *In re Long Island R. Co.*, 3 Edw. Ch. (N. Y.) 487.

13. In the absence of a statute or contract.—The matter of the fencing of their lines by railroad companies is wholly one of statute regulation. In the absence of a statute requiring it there is no duty to maintain fences. *Campbell v. New York & N. E. R. Co.*, 13 Am. & Eng. R. Cas. 589, 50 Conn. 128. *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351. *Vandegrift v. Delaware R. Co.*, 2 Houst. (Del.) 287.—CRITICISING *In re Rensselaer & S. R. Co.*, 4 Paige (N. Y.) 553; *Quimby v. Vermont C. R. Co.*, 23 Vt. 387.—*Henry v. Dubuque & P. R. Co.*, 2 Iowa 288. *Day v. New Orleans Pac. R. Co.*, 36 La. Ann. 244.—DISTINGUISHING *Mathews v. St. Paul & S. C. R. Co.*, 18 Minn. 434.—*Tillotson v. Texas & P. R. Co.*, 53 Am. & Eng. R. Cas. 104, 44 La. Ann. 95, 10 So. Rep. 400.—FOLLOWING *Stevenson v. New Orleans Pac. R. Co.*, 35 La. Ann. 498.—*Memphis & C. R. Co. v. Orr*, 43 Miss. 279.—FOLLOWING *Raiford v. Mississippi C. R. Co.*, 43 Miss. 233; *Memphis & C. R. Co. v. Blakeney*, 43 Miss. 218; *Vicksburg & J. R. Co. v. Patton*, 31 Miss. 190; *Mississippi C. R. Co. v. Miller*, 40 Miss. 48; *New Orleans, J. & G. N. Co. v. Enochs*, 42 Miss. 603.—*Hurd v. Rutland & B. R. Co.*, 25 Vt. 116.—QUOTING *Vandegrift v. Rediker*, 22 N. J. L. 185.—*Latyne v. Ohio River R. Co.*, 35 W. Va. 438, 14 S. E. Rep. 123. *Timm v. Northern Pac. R. Co.*, 3 Wash. T. 299, 13 Pac. Rep. 415. *Shoebrink v. Canada Atl. R. Co.*, 37 Am. & Eng. R. Cas. 462, 16 Ont. 515.—QUOTING *Conway v. Canadian Pac. R. Co.*, 12 Ont. App. 721.

A railway company which has acquired the right to construct its road through a farm owes no duty to keep up the fencing on the right of way unless it has bound itself to do so. *St. Louis, A. & T. R. Co. v. Knott*, 54 Ark. 424, 16 S. W. Rep. 9.

While it is true that fences along railroads, protecting the track from cattle on adjoining lands, are an important measure of security, both to the agents and servants of the companies, and to the public, yet, in the absence of a legislative provision making their erection an absolute duty to the

public, the courts cannot properly impose it as a duty, and hold its non-performance to be negligence *per se*, disregarding all other circumstances. *Langlois v. Buffalo & R. R. Co.*, 19 *Barb. (N. Y.)* 364; *affirmed in 19 Barb.* 370, n.

Independent of a statute, it is lawful for a railroad company to inclose its right of way and to construct gates at farm crossings; but in the exercise of this right it must so act as not to negligently injure another. *So held*, where a company was sued for damages to live stock, caused by their trying to pass a barbed wire fence which the company, under the statute, was not bound to maintain. *Louisville & N. R. Co. v. Shelton*, 43 *Ill. App.* 220.

Independently of any statutory requirement, a railroad company is chargeable with the duty to fence its track if required by reasonable prudence and care to keep the track free from obstructions, animate and inanimate. *Donnegan v. Erhardt*, 42 *Am. & Eng. R. Cas.* 580, 119 *N. Y.* 468, 23 *N. E. Rep.* 1051, 29 *N. Y. S. R.* 589, 7 *L. R. A.* 527; *reversing* 16 *N. Y. S. R.* 579, 23 *J. & S.* 502, 3 *N. Y. Supp.* 820.

The rights, duties, and obligations of the New Orleans, O. & G. W. R. Co. are created by express law, and until the legislature requires them to inclose their road, or delegates the power to do so to parochial authorities and the latter exercise the same, the company will be under no obligation to fence any part of its road. *Knight v. New Orleans, O. & G. W. R. Co.*, 15 *La. Ann.* 105.

In Louisiana there are no general statutes compelling railroad companies to fence their tracks; hence a plaintiff suing for stock killed must make his case certain, as in other suits for damages; that is, he must allege and prove that the injury to his property was the result of culpable negligence on the part of the corporation or its employés. (Manning, J., dissenting.) *Stevenson v. New Orleans Pac. R. Co.*, 35 *La. Ann.* 498.—*FOLLOWED IN* *Tillotson v. Texas & P. R. Co.*, 44 *La. Ann.* 95.

The charter of the Vermont Central R. Co. provides that the company, upon complying with the conditions upon which they may take land for the use of their road, shall be "seised and possessed of the land." This does not make them owners of the fee, but gives them a right of way merely. Hence, although the charter makes no pro-

vision in reference to the obligation to maintain fences upon the line of the road, the general law of the state in reference to the obligation of adjoining landowners to maintain the division fences between them does not apply, but the obligation to maintain the fences rests primarily upon the company; and until they have either built fences, or paid the landowner for doing it, a sufficient length of time to enable him to do it, the mere fact that the cattle get upon the road from the land adjoining is no ground for imputing negligence to the owners of the cattle. *Quimby v. Vermont C. R. Co.*, 23 *Vt.* 387.—*CRITICISED IN* *Vandegrift v. Delaware R. Co.*, 2 *Houst. (Del.)* 287. *FOLLOWED IN* *Trow v. Vermont C. R. Co.*, 24 *Vt.* 487. *QUOTED IN* *Congdon v. Central Vt. R. Co.*, 56 *Vt.* 390. *REVIEWED IN* *Waldron v. Portland, S. & P. R. Co.*, 35 *Me.* 422; *Kerwacker v. Cleveland, C. & C. R. Co.*, 3 *Ohio St.* 172.

14. Voluntary building of fence imposes no duty to fence.—Where a railroad company voluntarily fences a part of its track, this will not impose upon it the obligation to fence its entire track. *Tillotson v. Texas & P. R. Co.*, 53 *Am. & Eng. R. Cas.* 104, 44 *La. Ann.* 95, 10 *So. Rep.* 400.

The fact that the proprietors of a railroad have erected fences along the line of their road, against the land of a particular individual, is not of itself evidence of any obligation on the part of the proprietors to make or maintain fences for the benefit of such person. *Morris v. Boston & M. R. Co.*, 2 *Cush. (Mass.)* 536.

2. By Statute.

15. In general.*—Under the common law railroad companies are not obliged to fence their tracks. Where a company is obliged by statute, enacted subsequent to the construction of the railroad, to fence its tracks, it cannot recover the cost of building the fence from the owners of land adjoining its right of way. *Boston & A. R. Co. v. Briggs*, 7 *Am. & Eng. R. Cas.* 541, 132 *Mass.* 24.

16. Where damages for fencing have been assessed and paid.—After a company has condemned a right of way and the damages have been assessed and

*Obligation of company to fence under different state statutes, see full collection of authorities in note, 5 *L. R. A.* 737.

paid, it is not bound to fence on either side of the track. *Alton & S. R. Co. v. Baugh*, 14 Ill. 211.

The statute imposes a duty upon railroads to fence their tracks within a given time; but where, in proceedings to acquire the right of way, damages are assessed against the company for fencing the road, and the assessment is formal and regular and is made a matter of record, then the land is thereafter charged with the fencing, and the company and its legal successors discharged from the duty. *Rockford, R. I. & St. L. R. Co. v. Lynch*, 67 Ill. 149.

Where a railroad was located and damages assessed to a prior property owner before the passage of the Pa. local act of March 28, 1868, P. L. p. 514, which requires railroad companies in certain counties to construct and keep in repair fences along their tracks, in such case the railroad company is not subject to the burden of fencing, as the presumption is the assessment of damages included that burden. *Welles v. Northern C. R. Co.*, 150 Pa. St. 620, 25 Atl. Rep. 51.

If that act was intended to require a railroad company to bear the burden of fencing on land where damages have been assessed, it is open to the constitutional objection of requiring one to pay the private debt of another. *Welles v. Northern C. R. Co.*, 150 Pa. St. 620, 25 Atl. Rep. 51.

A company cannot defend an action for killing stock, where its road should have been fenced, by setting up that in awarding damages for the taking of the right of way through plaintiff's land a sum had been allowed for the fencing of the track. Such an award leaves it to the option of the landowner to fence his land, but at his own convenience; and it is still the duty of the company to the public to keep its road fenced. *Baltimore, P. & C. R. Co. v. Johnson*, 59 Ind. 188.—FOLLOWING New Albany & S. R. Co. v. Maiden, 12 Ind. 10.

17. Relative duties of lessor and lessee roads.*—A lessee company in possession and operating a railroad is deemed the agent of the lessor, within the meaning of Mich. General Railroad Act, § 43; and a failure of the lessee to fence as required by the statute will render the lessor liable. *Bay City & E. S. R. Co. v. Austin*, 21 Mich.

390. *Clement v. Canfield*, 28 Vt. 302.—FOLLOWED IN *Tracy v. Troy & B. R. Co.*, 38 N. Y. 433; *Dolan v. Newburgh, D. & C. R. Co.*, 42 Am. & Eng. R. Cas. 611, 120 N. Y. 571, 24 N. E. Rep. 824, 31 N. Y. S. R. 852. REVIEWED IN *St. Johnsbury & L. C. R. Co. v. Hunt*, 59 Vt. 294.

Where two companies form an agreement, sanctioned by statute, whereby one is operated and controlled by the other, the company operating and in possession is bound to see that the requisite fences are maintained by the company operated, and is liable in damages for an accident resulting from their absence. *Van Natter v. Buffalo & L. H. R. Co.*, 27 U. C. Q. B. 581.—FOLLOWED IN *Holmes v. Grand Trunk R. Co.*, 27 U. C. Q. B. 595.

A railroad company, whether as owner or lessee, is not bound to fence its own land, lying alongside of its track but not used for a right of way, from the track itself; and a failure to do so will not render it liable to its own tenants for loss of cattle straying from such land onto the track. *Potter v. New York C. & H. R. R. Co.*, 38 N. Y. S. R. 798, 60 Hun 213, 15 N. Y. Supp. 12.

18. Decisions under statutes of California.—The proviso in section 30 of the railroad act of May 20, 1861, simply provides that a railroad company shall not be compelled to perform the offer or agreement (referred to in the preceding part of the section) to fence on the sides of its road, where it runs through uninclosed lands, until the owner of the land has built fences abutting on the railroad. It does not exempt the company from the liability created by section 40, for the value of animals killed by its locomotives on unfenced portions of the road. *Fontaine v. Southern Pac. R. Co.*, 1 Am. & Eng. R. Cas. 159, 54 Cal. 645.—QUOTING *Tracy v. Troy & B. R. Co.*, 38 N. Y. 437.

19. — Colorado.—Under the stock-killing act as amended in 1885, before a person could claim that a railway company owed him any duty in respect to fencing its railway it was necessary for him to allege that he was the owner or holder of land adjacent to such railway, and that he had requested the railway company to fence its line and put in cattle-guards and gateways. And moreover, according to said act, the railway company could not, by complying with such request, exempt itself from the unconditional liability otherwise imposed, except

* Duty of lessee to fence, see note, 19 AM. & ENG. R. CAS. 632.

as against the party making the request. *Wadsworth v. Union Pac. R. Co.*, 18 Colo. 600, 33 Pac. Rep. 515.—REVIEWING *Union Pac. R. Co. v. De Busk*, 13 Colo. 294.

20. — Connecticut.—The act of 1873 required railroad companies to make fences along their roads when ordered by the railroad commissioners. The commissioners under it made an order that the defendant company should make a fence. The act was repealed in 1874, and was re-enacted in 1875. *Held*, that the duty of the defendants to make the fence under the order of the commissioners terminated with the repeal of the act in 1874, and was not revived with the re-enactment of the act in 1875. *Kane v. New York & N. E. R. Co.*, 11 Am. & Eng. R. Cas. 467, 49 Conn. 139.

Land was taken for a right of way when a statute was in force requiring companies to fence their tracks except where the railroad commissioners should determine that a fence was not necessary, and in awarding damages to the landowner nothing was allowed for the fence. The statute was afterwards repealed and a new one enacted requiring companies to fence only where the commissioners should order it. *Held*, that the company was not bound to fence in the absence of an order from the railroad commissioners. (Carpenter, J., dissenting.) *Campbell v. New York & N. E. R. Co.*, 13 Am. & Eng. R. Cas. 589, 50 Conn. 128.

21. — Illinois.—The constitutional provision providing that the fee to lands taken for right of way shall not pass, but remain in the landowner, has no application to proceedings completed before the adoption of the constitution, and the duty of companies to fence their track is not affected by the fact whether they own the fee or have only an easement in their right of way. *Toledo, P. & W. R. Co. v. Pence*, 68 Ill. 524.

Where a company, on notice to build a fence along its right of way by the owner of the land over which the road runs, erects a fence several feet inside its right of way, and refuses to let the landowner join his fences with the same, so as to inclose his land, mandamus will lie to compel the company to erect a fence along the line of its right of way. *Ohio & M. R. Co. v. People ex rel.*, 30 Am. & Eng. R. Cas. 427, 121 Ill. 483, 13 N. E. Rep. 236, 11 West. Rep. 375.

It seems that an action to recover the penalty from a company for failing to fence after notice, as required by Ill. Rev. St. of

5 D. R. D.—57.

1887, ch. 114, § 66, should be in debt and not in case. *Indiana & I. S. R. Co. v. Sampson*, 31 Ill. App. 513.

But the notice required to be given before bringing such suit is sufficient if it is addressed to the corporation by its initials, and may be served on its agent, and need not require the fence to be erected within the time prescribed by the statute; neither need it be signed by the landowner, if actually authorized by him. *Indiana & I. S. R. Co. v. Sampson*, 31 Ill. App. 513.

The duty imposed upon railroad companies by St. 1883, ch. 114, § 48, to fence their tracks only applies to damages done on the right of way, and does not make them liable for destruction of crops on lands adjoining the right of way. *Cannon v. Louisville, E. & St. L. Con. R. Co.*, 34 Ill. App. 640.—QUOTING *Peoria, D. & E. R. Co. v. Schiller*, 12 Ill. App. 443; *Clark v. Hannibal & St. J. R. Co.*, 36 Mo. 215.

In an action under the statute for failing to fence a track in six months, the declaration charged that on January 1, 1867, and thenceforth to the commencement of suit, defendant had charge of the railroad, and that defendant, more than six months after said road was in use, and continuously to the time of committing of the grievances, neglected to fence. *Held*, that it was not alleged with sufficient certainty that the company had, for six months after the road was "opened for use," failed to fence, as required by statute. *Toledo, P. & W. R. Co. v. Bookless*, 55 Ill. 230, 2 Am. Ry. Rep. 454.

22. — Indiana.—Although cattle-pits are not expressly required to be constructed at road crossings, they are embraced under the general term "fences." *New Albany & S. R. Co. v. Pace*, 13 Ind. 411.

23. — Iowa.—Section 1289 of the code, providing that "any corporation operating a railway that fails to fence the same against live stock running at large, at all points where such right to fence exists, shall be liable to the owner of any such stock injured or killed by reason of the want of such fence, or for the value of the property or injury caused, unless the same was caused by the wilful act of the owner or his agent," imposes no absolute duty upon a railway company to fence its track, and it cannot be held liable thereunder for an injury to an infant child caused by the absence of such fence alone. *Walkenhauer v. Chicago, B. & Q. R. Co.*, 15 Am. & Eng. R. Cas.

490, 3 *McCrary (U. S.)* 553, 17 *Fed. Rep.* 136.

24. — Kansas.—The act of 1874, ch. 94, requires not merely that a company should fence parallel with its road, but also that, where its track crosses a highway or a place where a side fence is improper, it should protect its track and right of way by cattle-guards and an end fence. *Union Pac. R. Co. v. Harris*, 11 *Am. & Eng. R. Cas.* 431, 28 *Kan.* 206.

No private interest or convenience or inconvenience on the part of a company will alone be sufficient to absolve it from fencing its road where the statute, in express terms, requires that the road shall be fenced. Nor will any private interest or convenience on the part of individuals be sufficient to absolve a railroad company from fencing its road. *Atchison, T. & S. F. R. Co. v. Shaft*, 19 *Am. & Eng. R. Cas.* 529, 33 *Kan.* 521, 6 *Pac. Rep.* 908.

25. — Maine.—By the eleventh section of their charter the Atlantic & St. Lawrence R. Co. are obliged to erect and maintain substantial, legal, and sufficient fences on each side of the land taken by them for their railroad, where the same passes through inclosed and improved lands, and in default of which they are liable for injuries occasioned thereby. *Whitney v. Atlantic & St. L. R. Co.*, 44 *Me.* 362.—REVIEWING *Norris v. Androscoggin R. Co.*, 39 *Me.* 273.

26. — Massachusetts.—The duty of maintaining a fence at a place where one is required to be built by St. 1879, ch. 205, § 1, is not imposed by law upon the owner of land adjoining a railroad constructed prior to St. 1841, ch. 125. *Boston & A. R. Co. v. Briggs*, 7 *Am. & Eng. R. Cas.* 541, 132 *Mass.* 24.

27. — Michigan.—The act of 1847, providing that "no person shall recover for damages done upon lands by beasts, unless in cases where, by the by-laws of the township, such beasts are running at large, except where such lands are inclosed," does not change the common law relating to fences, and does not require landowners to fence, but merely prevents a recovery unless the land is fenced. *Williams v. Michigan C. R. Co.*, 2 *Mich.* 259.

By Mich. statute of 1867, p. 221, the duty of maintaining a fence is imposed upon the owners or occupants of a railroad, as well as upon the company first organized, without

confining it to either. *Bay City & E. S. R. Co. v. Austin*, 2 *Mich. N. P. [Supp.]* 2.

28. — Minnesota.—It is the duty of railroad companies to build the fences and cattle-guards mentioned in Gen. St. ch. 34, §§ 54, 55, although no rules therefor are prescribed by the county commissioners. *Gowan v. St. Paul, S. & T. F. R. Co.*, 25 *Minn.* 328.

Such statute does not make companies liable for damages done by cattle trespassing upon their lands, and passing thence, by reason of a failure to build fences, to the lands of adjoining owners. The liability in such case is upon the owner of the cattle. *Gowan v. St. Paul, S. & T. F. R. Co.*, 25 *Minn.* 328.

Gen. St. 1878, ch. 34, § 57, creating a liability for companies neglecting to fence their roads, applies to all railroads in the state. *Finch v. Chicago, M. & St. P. R. Co.*, 46 *Minn.* 250, 48 *N. W. Rep.* 915.—FOLLOWING *Gillam v. Sioux City & St. P. R. Co.*, 26 *Minn.* 268.

29. — Missouri.—The fact that the proprietor of land adjoining a railroad has failed to fence up to his line does not free the company from its duty to fence where its road passes through uninclosed lands. *Hamilton v. Missouri Pac. R. Co.*, 87 *Mo.* 85.

30. — Nebraska.—The provisions of Comp. St. art. 2, ch. 2, § 18, defining a "lawful fence," apply alone to the inclosing of lands, and do not apply to the fencing of a railway. That matter is governed by Comp. St. ch. 72, art. 1, § 1. *Chicago, B. & Q. R. Co. v. James*, 26 *Neb.* 188, 41 *N. W. Rep.* 992.

31. — New Hampshire.—Railroad corporations are required by statute to maintain fences on the sides of their roads for the protection of all whose land adjoins the railways, and all who are rightfully upon the lands, except where the corporations have settled with and paid the owners of the adjoining lands for building and maintaining the fence. *Cornwall v. Sullivan F. Co.*, 28 *N. H.* 161.—REVIEWED IN *Little Rock & Ft. S. R. Co. v. Chapman*, 39 *Ark.* 463.—*Dean v. Sullivan R. Co.*, 22 *N. H.* 316. *Smith v. Eastern R. Co.*, 35 *N. H.* 356.—FOLLOWING *White v. Concord R. Co.*, 30 *N. H.* 207; *Horn v. Atlantic & St. L. R. Co.*, 35 *N. H.* 169.

32. — New York.—A railroad corporation is bound to maintain one half of a

fence between the land taken for a road and the adjoining land. *In re Rensselaer & S. R. Co.*, 4 *Paige* (N. Y.) 553.

Section 44 of the general railroad act of 1850, as amended by section 8 of the act of April 15, 1854 (laws of 1850, ch. 140, § 44; laws of 1854, ch. 282, § 8), imposes the duty upon railroad companies to fence both sides of their track; and they are liable for damages done to cattle so long as such fences are not made and kept in good order. *Tracy v. Troy & B. R. Co.*, 38 N. Y. 433; *affirming* 55 *Barb.* 529.—FOLLOWING *Shepard v. Buffalo, N. Y. & E. R. Co.*, 35 N. Y. 641.—QUOTED IN *Fontaine v. Southern Pac. R. Co.*, 1 *Am. & Eng. R. Cas.* 159, 54 *Cal.* 645.

The statute requiring companies to fence (section 8) only requires it when needful to prevent animals from straying upon the track, and not to keep children off the track. *Prendegast v. New York C. & H. R. R. Co.*, 58 N. Y. 652.—REVIEWED IN *Fisselmayer v. Third Ave. R. Co.*, 2 N. Y. S. R. 75.

Defendant company was chartered by a special act in 1846, with a provision to the effect that it should erect and maintain fences upon the sides of its track, and should maintain suitable guards to prevent cattle from going on the track, but providing that adjoining landowners should not be prevented from erecting and keeping in repair suitable gates at farm crossings. The general railroad act of 1850, as amended in 1854, § 49, after making it the duty of railroad companies to fence and to make suitable gates or bars, provides that the act should apply to all existing railroads, where "not inconsistent with the provisions of their charters." *Held*, that the general act was not inconsistent with defendant's charter, and it was bound to maintain such fences, gates, or bars as required by the general act. *Staats v. Hudson River R. Co.*, 33 *How. Pr.* (N. Y.) 139, 3 *Keyes* 196, 4 *Abb. App. Dec.* 287; *reversing* 39 *Barb.* 298, 23 *How. Pr.* 463.—QUOTING *Corwin v. New York & E. R. Co.*, 13 N. Y. 53. RECONCILING *Visscher v. Hudson River R. Co.*, 15 *Barb.* 37; *Clarkson v. Hudson River R. Co.*, 12 N. Y. 304.

33. — Ohio.—The obligation to construct and maintain fences upon both sides of railroads, imposed upon railroad companies, is not limited to owners and occupiers of adjoining lands, but extends to the public generally. *Marietta & C. R. Co. v.*

Stephenson, 24 *Ohio St.* 48, 6 *Am. Ry. Rep.* 428.

34. — West Virginia.—The duty to fence its road on the part of a railway company is purely of statutory creation, and is confined to cases coming under the provisions of the statute. *Clark v. Ohio River R. Co.*, 45 *Am. & Eng. R. Cas.* 475, 34 *W. Va.* 200, 12 *S. E. Rep.* 505.

35. — England.—Under the Railways Clauses Act 1845, the duty of the company to fence against the owners and occupiers of adjoining land is co-extensive only with the common law prescriptive obligation to repair fences. *Manchester, S. & L. R. Co. v. Wallis*, 7 *Railw. Cas.* 709, 2 *C. L. R.* 573, 14 *C. B.* 213, 18 *Jur.* 268, 23 *L. J. C. P.* 85.

An arrangement by a company with an owner of land, part of which is taken, relieving the company of the duty to fence, does not exonerate the company from its liability under the Railways Clauses Act of 1845, § 68, to maintain a fence for the benefit of the occupier of such land, so as to prevent his cattle from straying. *Corry v. Great Western R. Co.*, *L. R.* 7 *Q. B. D.* 322, 50 *L. J. Q. B.* 386, 44 *L. T.* 701, 29 *W. R.* 623; *affirming* *L. R.* 6 *Q. B. D.* 237, 50 *L. J. Q. B.* 313.

36. — Canada.—The Grand Trunk R. Co., under the agreement with the Buffalo & Lake Huron R. Co., confirmed by 29 & 30 *Vict. c.* 92, is liable for not keeping up the fences along the latter railway. *Holmes v. Grand Trunk R. Co.*, 27 *U. C. Q. B.* 595.—FOLLOWING *Van Natter v. Buffalo & L. H. R. Co.*, 27 *U. C. Q. B.* 581.

The New Brunswick R. Co. was incorporated before the union of the provinces under the British North America Act, by the provincial statute 33 *Vict. c.* 49, the 14th section of which required the company to erect and maintain substantial fences on each side of the land taken by them for the railway where it passed through improved land. The 92d section of the British North America Act having excluded from the provincial legislature power over local works which, though wholly within the province of the Dominion, were declared by the parliament of Canada to be for the general advantage of Canada, and the Dominion Act 44 *Vict. c.* 42 having declared the work of the New Brunswick R. Co. to be a work for the general advantage of Canada, and the provisions of the Consolidated R. Co., so far as they were applicable to the under-

taking, and not inconsistent with several acts of the company—*held*, that section 13 of "The Railway Act" (Rev. St. Can. c. 109), relating to fencing, was inconsistent with section 14 of the New Brunswick Railway Act, and therefore that the company was bound under the act of incorporation to erect the fences without any written request from the occupant of the land, as provided by section 13 of "The Railway Act." *Levesque v. New Brunswick R. Co.*, 29 *New Brun.* 588.

Parliament, having the exclusive right to legislate on the subject of railways, had, as incident thereto, power to limit the time within which the actions could be brought for damages sustained by reason of the railway; and therefore section 27 of c. 109, which limited the right of action to six months after the alleged damage was sustained, was not *ultra vires*. *Levesque v. New Brunswick R. Co.*, 29 *New Brun.* 588.

The words of section 27, "Injury sustained by reason of the railway," were not confined to neglect in running the trains, nor to improper construction of the railway, but extended to damage arising from the improper construction of cattle-guards, and from neglect to fence the railway, as directed. *Levesque v. New Brunswick R. Co.*, 29 *New Brun.* 588.

If damages are sustained by a person in consequence of the neglect of the railway company to erect fences on each side of the railway, as directed by act 33 Vict. c. 49, § 14, an action will lie therefor. *Levesque v. New Brunswick R. Co.*, 29 *New Brun.* 588. —FOLLOWING *Couch v. Steel*, 3 El. & Bl. 402.

3. By Contract.

37. In general.*—Where a company and a landowner enter into a conveyance under seal, granting the company a right of way, and defining the duty of the company as to fencing the track, it is error to admit oral evidence tending to show a separate verbal agreement between the parties at the time of delivering the deed, which is inconsistent therewith. *Kankakee & S. W. R. Co. v. Fitzgerald*, 17 Ill. App. 525.

In such case, if the deed fails to definitely fix the time when the fences are to be built, the law will imply that they are to be built

within a reasonable time. *Kankakee & S. W. R. Co. v. Fitzgerald*, 17 Ill. App. 525.

A company and a landowner entered into an agreement by which the company agreed to fence its track, in consideration that the landowner would give a right of way, but which he subsequently refused to do, and the company had to buy the right of way. *Held*, that a court of equity would not decree the specific performance of the contract to fence; nor would it direct a fence under the general railroad law, which only applies to corporations formed thereunder; nor under the general fence law, which provides its own remedy for a violation thereof. *Vandorn v. New Jersey Southern R. Co.*, 42 N. J. Eq. 463, 8 Atl. Rep. 99.

The Grand Trunk railway and the Weston plank road crossed the plaintiff's land not far apart on parallel lines. The railway company, it was alleged, found it necessary to change the course of a stream over which the road company had built a bridge, to which the latter consented on the railway company agreeing to make and maintain a bridge for them over the new channel. *Held*, that such agreement could not impose upon defendants any obligation to fence at this latter bridge, or make them liable to the plaintiff for omitting to do so. *Brown v. Grand Trunk R. Co.*, 24 U. C. Q. B. 350.—QUOTED IN *Davis v. Canadian Pac. R. Co.*, 12 Ont. App. 724. REVIEWED IN *Zimmer v. Grand Trunk R. Co.*, 19 Ont. App. 693.

38. Effect of contract with landowner to relieve company of duty to fence.—The liability of a railroad company for failure to erect fences on the sides of its road under a statute cannot be defeated by its contract with another person to erect such fences. *Silver v. Kansas City, St. L. & C. R. Co.*, 19 Am. & Eng. R. Cas. 642, 78 Mo. 528, 47 Am. Rep. 118. *New Albany & S. R. Co. v. Maiden*, 12 Ind. 10.

A company cannot make contracts with private persons to make openings in its fence for private purposes, and thereby relieve itself from the duty it owes to the general public to keep the road securely fenced, except at private farm crossings where the railroad right of way separates tracts of land into two parcels, and to enable the owner to go from one piece of land to another thus separated. *Wabash R. Co. v. Williamson*, 3 Ind. App. 190, 29 N. E. Rep. 455.

* Conditions in conveyances as to fences, etc., see note, 20 AM. & ENG. R. CAS. 344.

Where a company permits or contracts with an individual to put gates in its right of way fence or to make openings therein, when it could not be compelled to do so under the law, it is liable for damages resulting to all except the contracting parties. *Wabash R. Co. v. Williamson*, 3 Ind. App. 190, 29 N. E. Rep. 455.

An agreement between a railroad corporation and an adjoining proprietor, not to require them to fence but one side of their road across his land until notified by him, will not relieve them from any liability they may thereby incur to any person not cognizant of or assenting to it. *Gilman v. European & N. A. R. Co.*, 60 Me. 235.

The duty to fence is a statutory one imposed on railroads, especially toward the adjacent landowner. Such owner and the railroad may agree as between themselves to dispense with such fence, or that the owner should build and maintain it, or to maintain it in common, and in such cases the landowner cannot maintain an action against the railroad for any injury resulting from the absence or bad condition of the fence; but the fact that the fence belonged to the company, and that the fence inclosing the landowner's field was joined to the former's fence with its consent, creates no legal implication that such owner of the land assumed any obligation to aid in keeping up the fence. *Busby v. St. Louis, K. C. & N. R. Co.*, 22 Am. & Eng. R. Cas. 589, 81 Mo. 43.—QUOTED IN *Davis v. Hannibal & St. J. R. Co.*, 19 Mo. App. 425.

Where a company and a landowner enter into a written agreement binding the company to fence on each side of its track and to make crossings, a failure to provide for gates or bars will not exempt the company from its duty to erect and maintain them, as provided by N. Y. Gen. Railroad Act of 1850, § 54. *Poler v. New York C. R. Co.*, 16 N. Y. 476.—FOLLOWED IN *Shepard v. Buffalo, N. Y. & E. R. Co.*, 35 N. Y. 641.

A written agreement by the grantor of the right of way to a railroad company to fence it on each side through his lands will not affect the right of a subsequent purchaser to require the company to fence its road, under the provisions of sections 3324 and 3325, Ohio Rev. St., where the purchase was made without actual or constructive notice of the existence of such agreement. Such agreement not being recorded, the mere use and occupation of the right of

way by the company and its successors for the purpose of a railroad will not constitute constructive notice of the existence of such agreement. *Pittsburg, C. & St. L. R. Co. v. Bosworth*, 38 Am. & Eng. R. Cas. 290, 46 Ohio St. 81, 2 L. R. A. 199, 18 N. E. Rep. 533.—QUOTING *Easter v. Little Miami R. Co.*, 14 Ohio St. 48; *Whitney v. Union R. Co.*, 11 Gray (Mass.) 364.

39. Waiver of statutory requirement by landowner.—Statutes requiring railroads to maintain fences on the sides of their track are designed for the protection of adjoining owners, and their requirements may be waived by such owners. *Enright v. San Francisco & S. J. R. Co.*, 33 Cal. 230. *Thomas v. Hannibal & St. J. R. Co.*, 23 Am. & Eng. R. Cas. 183, 82 Mo. 538.

A railroad company cannot relieve itself from the obligation to erect and maintain fences by a contract with abutting owners. *Missouri Pac. R. Co. v. Harrelson*, 45 Am. & Eng. R. Cas. 457, 44 Kan. 253, 24 Pac. Rep. 465.

An arrangement with the owner of land abutting on the railroad will not exonerate the company from their liability under the Railway Clauses Act 1845 (8 & 9 Vict. c. 20), § 68, to maintain a fence for the benefit of the occupier, so as to prevent his cattle from straying from his land. *Corry v. Great Western R. Co.*, 2 Am. & Eng. R. Cas. 612, L. R. 7 Q. B. D. 322; affirming L. R. 6 Q. B. D. 237.

A conveyance of a right of way contained a reservation of "a right of way for carts, teams, and cattle within the location aforesaid, where the said way now exists, the same to be made and kept by the grantors in a convenient state of use for the purposes aforesaid." At the time there existed a path or crossing over the land, the limits of which were well marked and defined, which was intended to be reserved as a crossing over the track. *Held*, that the company was required to keep the crossing open and unobstructed by gates, bars, or other barriers; and the fact that it was a private way would not create the obligation to erect gates or bars, as provided by Mass. Act of 1846, ch. 271. *Eames v. Worcester & N. R. Co.*, 105 Mass. 193, 2 Am. Ry. Rep. 462.

40. Requirements of the statute of frauds.—A parol agreement between a railroad company and a landowner, based on a sufficient consideration, that the landowner will erect and maintain suitable

fences, is not within that provision of the statute of frauds which makes contracts void which are not to be performed within a year. *Talmadge v. Rensselaer & S. R. Co.*, 13 Barb. (N. Y.) 493.—DISTINGUISHING *Pitkin v. Long Island R. Co.*, 2 Barb. Ch. 221.

Where railroads are required to fence their tracks, an agreement with a landowner to accept a fence with gates is not an agreement in relation to land coming within the statute of frauds. *Great Western R. Co. v. Vilaire*, 11 U. C. C. P. 509.

41. Such contract, when runs with the land.*—Where a railroad company takes a conveyance of a right of way in which it covenants to erect and maintain fences on either side of its track, the covenant is one running with the land, and may be enforced by a subsequent owner. *Moxley v. New Jersey & N. Y. R. Co.*, 49 N. Y. S. R. 363, 66 Hun 632, 21 N. Y. Supp. 347.

A special agreement, made by an agent of a railroad company authorized to make it, with a landowner to erect and keep up good and substantial fences on both sides of their railroad upon his land, will bind the company, although neither the agreement nor the appointment of the agent is under the corporate seal of the company. *Vandegrift v. Delaware R. Co.*, 2 Houst. (Del.) 287.

In such case the remedy must be on the contract itself for a breach of it by the party with whom it is made, or his legal representatives, and not by action of trespass at the suit of a stranger. It does not enure to the benefit of another, such as the tenant of the premises in relation to which it was made; for such a contract cannot be treated as a covenant running with the land, which it undoubtedly is not. *Vandegrift v. Delaware R. Co.*, 2 Houst. (Del.) 287.

A parol agreement for the removal and discontinuance of a fence on the line of a railroad, between the owner of the land and the railroad company, does not run with the land and cannot bind the grantee. *Thomas v. Hannibal & St. J. R. Co.*, 23 Am. & Eng. R. Cas. 183, 82 Mo. 538. *St. Louis, A. & T. H. R. Co. v. Todd*, 36 Ill. 409. *Guilfoos v. New York C. & H. R. R. Co.*, 23 N. Y. Supp. 925.

*When covenants to build and maintain fences run with the land, see note, 38 AM. & ENG. R. CAS. 296.

Where a landowner contracts with a railroad company to fence its right of way through his lands, and subsequently leases the land for a year for farming purposes, at the date of which lease the fence is in bad condition, the tenant cannot maintain an action for damages on the contract. *Hoyleman v. Kanawha & O. R. Co.*, 33 W. Va. 489, 10 S. E. Rep. 816.

Where, in a proceeding by a railroad company in the probate court to appropriate private property, after the jury had viewed the premises described in the company's statement, the record recited that in consideration of the defendant having withdrawn from the jury all claim for damages for the necessity of erecting fences and crossings, the company agreed to erect them, and the verdict denominated the damages as sustained by reason of the appropriation—held: (1) that the agreement ran with the land, and was binding on the assignees of both the parties thereto; (2) that in an action by the vendee of the original owner against the vendee of the company for failure to build said fences and crossings, the rule of damages was the amount of injury to the use and enjoyment of the adjoining land occasioned by the want of such fences and crossings during the time the railroad or right of way was owned by the defendant. *Huston v. Cincinnati & Z. R. Co.*, 21 Ohio St. 235.

A husband and wife who were joint tenants of a parcel of land, having deeded a portion of it to a railroad company for its roadbed prior to the Mass. St. of 1841, ch. 125, delivered to the company, as a part of the same transaction, a receipt not under seal, signed by the husband alone, and not recorded, purporting to be a duplicate receipt for the consideration of the deed, and to be in full "for land and land damages for the track of the road, and for fencing the same." The husband having died, the wife deeded the remainder of the land, making no reference to fences. Held, that there was no contract to fence running with the land which the company could enforce against the purchaser under the statute of 1879, ch. 205, § 2. *Boston & A. R. Co. v. Briggs*, 7 Am. & Eng. R. Cas. 541, 132 Mass. 24.

42. Bond to fence.—Where a bond is given in accordance with Cal. Code of Civ. Pro. § 1248, binding a railway company to build a fence along its track, it is not nec-

essary for an abutting owner to build the fence before instituting an action on the bond. *Farley v. Moran*, (Cal.) 31 Pac. Rep. 158.

Where a company gives such a bond binding itself to complete a fence along that portion of its track which ran through plaintiff's land, the taking of plaintiff's land and devoting it to the public use by building a railroad is sufficient consideration to support the contract contained in the bond. *Farley v. Moran*, (Cal.) 31 Pac. Rep. 158.

4. *Building by Adjoining Owner, where Company Fails to Build.*

43. Does not excuse company from obligation to fence.*—The fact that adjoining landowners may have erected fences along a railroad does not relieve the company from the duty of keeping its track securely fenced. *Louisville, N. A. & C. R. Co. v. White*, 20 Am. & Eng. R. Cas. 449, 94 Ind. 257.—DISTINGUISHING *Louisville, N. A. & C. R. Co. v. Francis*, 58 Ind. 389.—DISTINGUISHED IN *Croy v. Louisville, N. A. & C. R. Co.*, 19 Am. & Eng. R. Cas. 608, 97 Ind. 126.

44. Landowner's right to recover cost of fence from company.—Where a railroad company refuses to fence as required by the statute, after notice from the landowner, the landowner may build it himself and recover the price from the company; and where he builds half of the fence he may bring his action and recover for that portion. *Toledo, P. & W. R. Co. v. Sieberns*, 63 Ill. 217, 7 Am. Rv. Rep. 163.

Under ch. 154, Kan. Laws of 1885, compelling railroad companies to fence their roads through lands inclosed with a lawful fence, before the owner of the lands can recover the value from a railroad company of a fence built by him in accordance with the provisions of the statute he must prove that his lands, or a part thereof, which are claimed to be inclosed have a lawful fence—that is, such a fence as is defined by the statute to be a legal or lawful fence. *Missouri Pac. R. Co. v. Youngstrom*, 47 Kan. 349, 27 Pac. Rep. 982.

Independently of statutes and of any agreement, the taking of land by a company for its road imposes upon the takers no

obligation to fence, but leaves the burden upon the landowner, with the right to recover the reasonable expenses thereof as part of his damages. *Bronson v. Coffin*, 108 Mass. 175.

Under the act touching railroad companies (Wagn. Mo. St. 310, § 43) a corporation is liable to an adjoining owner for fences erected by him in pursuance of that section, notwithstanding the fact that such fences were erected nearer the track than the outer boundary of the land belonging to the road. Such an erection without other acts amounting to a claim of ownership would not constitute an appropriation of the company's land outside the fence. *Marshall v. St. Louis & I. M. R. Co.*, 51 Mo. 138.

If a company whose road runs through an inclosed field fails to fence the sides of its road, as required by the statute (acts 1875, pp. 131, 132; Mo. Rev. St. 1879, § 809), the owner of the field may erect a fence along either side of the road, and will then be entitled under the statute to recover from the company the value of the fence so erected, without fencing the other side also. *Fletcher v. St. Louis, K. C. & N. R. Co.*, 7 Am. & Eng. R. Cas. 556, 73 Mo. 142.

Mo. Rev. St. 1889, § 2611, does not contemplate a notice to the company of the landowner's intention to erect a fence, where none has been built, and such notice is not necessary to recover the cost of the fence from the company. *McNear v. Wabash R. Co.*, 42 Mo. App. 14.

But as there is no obligation on the company to fence until after the road is completed, a landowner cannot recover the cost of erecting the fence himself without showing that the road was completed, so as to make the company liable to build. *McNear v. Wabash R. Co.*, 42 Mo. App. 14.

But as the above statute is penal and must be strictly followed, a provision making it the duty of the company to fence on the "sides of the road" will not authorize the landowner to recover the cost of building a fence inside the right of way. *McNear v. Wabash R. Co.*, 42 Mo. App. 14.—QUOTING *Wabash, St. L. & P. R. Co. v. Zeigler*, 108 Ill. 304.

Under the Ohio Act of April 18, 1874 (71 Laws 85), an action will not lie in favor of a landowner against a company to recover the cost of building a fence along the line of a railroad, where a former owner of the land, for a consideration, released the right of

* Fact that abutting owner fences land does not excuse company, see note, 20 AM. & ENG. R. CAS. 451.

way for the railroad over the lands, and agreed to build and keep up fences on both sides of the line of the road. *Harner v. Baltimore & O. R. Co.*, 31 *Ohio St.* 265.

45. Recovery of double the value of the fence.—Where a company neglects or refuses to build a fence along its right of way, so as to prevent stock from getting upon its track, after notice by the owner of adjoining land, the owner or occupant of such adjoining land may build the fence, and bring his action to recover double the value thereof, against either the corporation owning the road, or any other party actually occupying or using such railroad, at his election. *Ohio & M. R. Co. v. Russell*, 23 *Am. & Eng. R. Cas.* 149, 115 *Ill.* 52, 3 *N. E. Rep.* 561.

To entitle an owner of land in such a case to recover of the company double the value of the fence built by him, the statute must be strictly followed, and the fence must be such as the statute requires, and be built in the mode the statute contemplates. The fence must be built on the sides of the railroad. If built two feet inside of the right of way this penalty cannot be recovered. It is not held, however, that the fence may not be built entirely on the company's right of way, but in doing so it must be on the sides of the road. *Wabash, St. L. & P. R. Co. v. Zeigler*, 15 *Am. & Eng. R. Cas.* 519, 108 *Ill.* 304.—QUOTED IN *People ex rel. v. Ohio & M. R. Co.*, 21 *Ill. App.* 23; *McNear v. Wabash R. Co.*, 42 *Mo. App.* 14. REVIEWED IN *Ohio & M. R. Co. v. People*, 30 *Am. & Eng. R. Cas.* 427, 121 *Ill.* 483, 13 *N. E. Rep.* 236, 11 *West. Rep.* 375.

In such an action it is no defense, so far as the corporation is concerned, that its property, etc., is in the hands of a receiver, or is used by another party. *Ohio & M. R. Co. v. Russell*, 23 *Am. & Eng. R. Cas.* 149, 115 *Ill.* 52, 3 *N. E. Rep.* 561.

5. Time within Which to Fence.

46. When the obligation to fence attaches, generally.—The liability to maintain fences under the statutes attaches as soon as the company takes possession for purposes of construction. *Continental Imp. Co. v. Ives*, 30 *Mich.* 448.—FOLLOWING *Gardner v. Smith*, 7 *Mich.* 410.

Although one of the objects of the statute be the security of passengers and employes in transit, its primary object is to prevent the killing of stock and their trespasses

upon adjoining fields; and when the necessity for such protection to the owners of land and stock begins, then the obligation to fence attaches, and the company will be liable for the damages caused by its failure to fence, after a reasonable time for the erection of fences has elapsed. *Silver v. Kansas City, St. L. & C. R. Co.*, 19 *Am. & Eng. R. Cas.* 642, 78 *Mo.* 528, 47 *Am. Rep.* 118.—RECONCILING *Comings v. Hannibal & C. M. R. Co.*, 48 *Mo.* 512.—RECONCILED AND FOLLOWED IN *Gordon v. Chicago, S. F. & C. R. Co.*, 44 *Mo. App.* 201. REVIEWED IN *Stanley v. Missouri Pac. R. Co.*, 84 *Mo.* 625.

The company is not entitled to postpone the building of fences until its road is so far constructed as to enable it to obtain material from a distance. *Gordon v. Chicago, S. F. & C. R. Co.*, 44 *Mo. App.* 201.—RECONCILING *Silver v. Kansas City, St. L. & C. R. Co.*, 78 *Mo.* 528.

All trains permitted by a railroad corporation to run upon its road, while it is in full possession, are to be treated as its trains for the purpose of enforcing the statutory penalty for operating the road before it is properly fenced. Accordingly the fact that defendant had granted to another railroad company the right to run trains upon its road, and that the engine which did the injury belonged to such other company, was no defense. *Dolan v. Newburgh, D. & C. R. Co.*, 42 *Am. & Eng. R. Cas.* 611, 120 *N. Y.* 571, 24 *N. E. Rep.* 824, 31 *N. Y. S. R.* 852; *reversing* 46 *Hun* 681, *mem.*—DISTINGUISHING *Ditchett v. Spuyten Duyvil & P. M. R. Co.*, 67 *N. Y.* 425; *Knight v. New York, L. E. & W. R. Co.*, 99 *N. Y.* 25. FOLLOWING *Fontaine v. Southern Pac. R. Co.*, 54 *Cal.* 645; *Illinois C. R. Co. v. Kanouse*, 39 *Ill.* 272; *Toledo, P. & W. R. Co. v. Rumbold*, 40 *Ill.* 143; *East St. Louis & C. R. Co. v. Gerber*, 82 *Ill.* 632; *Clement v. Canfield*, 28 *Vt.* 302.—DISTINGUISHED IN *Kelver v. New York, C. & St. L. R. Co.*, 126 *N. Y.* 365.

The provision in the charter of the Vermont & Canada R. Co., requiring them to build and maintain fences on each side of their road, requires them to have such fences at least as soon as they commence running their road. *Clark v. Vermont & C. R. Co.*, 28 *Vt.* 103.

47. During construction.—Under 4 Wm. IV. c. 29, § 9, the Great Western R. Co. are bound to put up sufficient fences

along their line of road while the work is in progress. *Bradley v. Great Western R. Co.*, 11 U. C. Q. B. 220.—APPROVED IN *McDowell v. Great Western R. Co.*, 6 U. C. C. P. 180.

The reasonable construction of Wagn. Mo. St. 310, § 43, is that it requires corporations to have their fences built at least as soon as they commence running their roads; and although, as a matter of law, it may not be that they are bound to erect fences before or while they are constructing their road through any particular landholder's premises, yet they must act with a prudent regard to the rights of others, and if lacking in this duty they are chargeable with negligence and must answer for the consequences. Thus they are bound while laying their road to use reasonable care to prevent the cattle of others from coming on the adjoining owner's fields and injuring him. *Comings v. Hannibal & C. M. R. Co.*, 48 Mo. 512.—RECONCILED IN *Silver v. Kansas City, St. L. & C. R. Co.*, 78 Mo. 528.

48. Six months after taking possession.—The failure of a company to perform the statutory duty to fence its roadway after the expiration of six months renders the corporation liable, *prima facie*, for stock killed or injured by its agents, engines, or cars. The company may, however, avail itself of the whole six months in which to perform the duty; and if, prior to the expiration of that time, stock gets upon the railroad and is killed or injured, the owner cannot recover without proving negligence on the part of the company. *Centralia & C. R. Co. v. Brake*, 125 Ill. 393, 15 West. Rep. 149, 17 N. E. Rep. 820.

A company who take possession of land under the compulsory powers conferred by the statute are bound to erect fences for the proper separation of the railway from the remainder of the land within six months from the time of possession being taken, not from the time of notice being given, requiring such fences to be constructed, which need only be a reasonable notice to fence; and if they neglect to do so they may be enjoined from further using the line of railway. In such a case the owner is not required to erect the fences at his own expense and depend on his recovering damages from the company. *Masson v. Grand Junction R. Co.*, 26 Grant's Ch. (U. C.) 286.

49. Six months after road is open.

—In a proceeding under the Illinois statute to recover for stock injured by reason of a failure of the company to fence, it should appear that the road has been opened for six months or more prior to the injury sued for. *Ohio & M. R. Co. v. Jones*, 27 Ill. 41. *Rockford, R. I. & St. L. R. Co. v. Lynch*, 67 Ill. 149. *Wabash, St. L. & P. R. Co. v. Neikirk*, 13 Ill. App. 387.

When the road has been open and operated for more than six months, and a change of ownership in the road then occurs, the purchasing company cannot escape liability for damages resulting from the neglect of such duty, on the ground that six months had not elapsed since the road came into its possession. *Toledo, P. & W. R. Co. v. Arnold*, 51 Ill. 241.

By a proper construction of the statute the companies are liable, under the statute, if they fail to fence within six months after they begin to run trains on the track for construction purposes. Nor does the fact that the road is still under the control of the contractors change the liability of the company. *Rockford, R. I. & St. L. R. Co. v. Heflin*, 65 Ill. 366.

Neb. Act 1867, § 1, requires every company within six months after its line of railroad or any part thereof is open, to erect and thereafter maintain fences on the sides of said railway, or the part thereof open for use, suitably and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the track, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages, etc. *Chicago, B. & Q. R. Co. v. James*, 26 Neb. 188, 41 N. W. Rep. 992.

Under the statute, where a railway has been in operation in any county of the state for six months, it is its duty to erect and maintain on the sides of its road, except at crossings of public roads and within the limits of cities and villages, suitable and amply sufficient fences to prevent cattle, horses, etc., from getting on the railroad. Gates at farm crossings are a part of the inclosure of the railroad, and must be suitable and amply sufficient to prevent stock from getting on the track. *Fremont, E. & M. V. R. Co. v. Pounder*, 36 Neb. 247, 54 N. W. Rep. 509.

Plaintiff sued the defendants for neglect to fence off their railway from his adjoining land when requested. Defendants pleaded

not guilty by statute, Cons. St. U. C. c. 66, specifying section 83, among others; but at the trial they raised no question under that clause as to the plaintiff's damages being confined to six months, and it was not shown clearly how much of the damage accrued beyond that time. It seemed probable, however, that only eight or ten weeks would be excluded if the clause applied, and the court refused to interfere on this ground. *Nichol v. Canada Southern R. Co.*, 40 U. C. Q. B. 583.

50. One year after completion.—

In an action under the Indiana Act of April 13, 1885, which provides that companies must fence their rights of way within twelve months after the taking effect of the act, or, in case of roads completed subsequently to its taking effect, within twelve months of their completion, and that upon their failure to do so the adjacent owner may, after giving thirty days' notice, build the fence and recover for the cost, a complaint which fails to aver that the road had been completed and operated twelve months before the giving of the notice, and that the road was not fenced at the time the notice was given, is demurrable. *Lake Erie & W. R. Co. v. Lannert*, 1 Ind. App. 102, 27 N. E. Rep. 324.

51. Two years after completion.—

The charter of the St. Paul & Sioux City R. Co. provides that the company, "within two years after the completion of their road through any improved land, shall build, keep, and maintain a legal fence on each side of their road, through such improved land." Held: (1) that defendant is one of the corporations referred to in Minn. Laws 1872, ch. 25, § 4, so that its duty to fence is governed by the charter provision above referred to; and so that laws 1872, ch. 25, §§ 1, 2, 3, providing that "all railroad companies in this state" shall, within six months after the passage of said chapter, build, or cause to be built, good and substantial fences on each side of their roads, are not applicable to defendant; (2) that the duty of fencing, imposed by the charter provision aforesaid, is a duty imposed only with reference to the owner of the improved land required to be fenced, or to those who rightfully occupy or use the same. *Devine v. St. Paul & S. C. R. Co.*, 22 Minn. 8, 19 Am. Ry. Rep. 353.—FOLLOWED IN *Winger v. First Div. St. P. & P. R. Co.*, 22 Minn. 11.

6. Where Fences must be Built.

52. In general.*—Railroad companies are required to erect and maintain fences wherever they may be built, except in towns and cities. *McIntosh v. Hannibal & St. J. R. Co.*, 26 Mo. App. 377.

The provisions of the statute do not apply to such places as public necessity or convenience require should be left unfenced, as the streets of a city or town, depots and contiguous grounds, the crossing of highways, etc. *International & G. N. R. Co. v. Cocke*, 23 Am. & Eng. R. Cas. 226, 64 Tex. 151.—FOLLOWED IN *International & G. N. R. Co. v. Dunham*, 31 Am. & Eng. R. Cas. 530, 68 Tex. 231, 4 S. W. Rep. 472. QUOTED IN *Gulf, C. & S. F. R. Co. v. Wallace*, 2 Tex. Civ. App. 270.

Ind. Rev. St. 1881, § 4031, does not require companies to fence their tracks where it would interfere with the company's free use of its property, or the free use by individuals of their property, or with the rights of the public. *Cincinnati, R. & Ft. W. R. Co. v. Wood*, 82 Ind. 593.—QUOTING *Ohio & M. R. Co. v. Rowland*, 50 Ind. 349.

If the place is one that cannot be fenced without interfering with the business of the company in the discharge of its duty to the public, or is one which cannot be fenced without interfering with the use of a highway, or where a fence would endanger the safety of employes in the management and running of its locomotives and trains, the company is not required to fence. *Ft. Wayne, C. & L. R. Co. v. Herbold*, 23 Am. & Eng. R. Cas. 221, 99 Ind. 91. *Indianapolis, D. & W. R. Co. v. Clay*, 4 Ind. App. 282, 28 N. E. Rep. 567, 30 N. E. Rep. 916. *Pennsylvania Co. v. Lindley*, 2 Ind. App. 111, 28 N. E. Rep. 106.

Still, where the fencing would probably but slightly increase the dangers to trainmen, it cannot be said as a proposition of law that the company was relieved from the obligation of fencing. The burden of showing that a railroad is not required to be fenced at a given point is with the company. *Toledo, St. L. & K. C. R. Co. v. Woody*, 5 Ind. App. 331, 30 N. E. Rep. 1099.

* Where railroad company is obliged to fence, see notes, 11 AM. & ENG. R. CAS. 496; 19 Id. 649.

Points where companies are not bound to fence, see note, 19 AM. & ENG. R. CAS. 539.

Company not bound to fence where there is public user, see note, 13 AM. & ENG. R. CAS. 533.

Built.

companies
tain fences
ept in towns
bal & St. J.

do not ap-
necessity or
ft unfenced,
depots and
ng of high-
N. R. Co. v.
226, 64 Tex.
nal & G. N.
Eng. R. Cas.
2. QUOTED
allace, 2 Tex.

s not require
ks where it
ny's free use
by individ-
the rights of
T. W. R. Co.
ng Ohio &
349.

ot be fenced
usiness of the
duty to the
t be fenced
e of a high-
ndanger the
gement and
trains, the
fence. Ft.
old, 23 Am.
Indianapo-
Ind. App.
E. Rep. 916.
Ind App.

probably but
trainmen, it
of law that
the obliga-
of showing
to be fenced
pany. To-
woody, 5 Ind.

ged to fence,
496; 19 Id.

ot bound to
Cas. 539.
here there is
ENG. R. CAS.

A company is not absolved from complying with the express terms of the statute, except where some paramount interest of the public intervenes, or some paramount obligation or duty to the public rests upon the railroad company, rendering it improper for the company to fence its road. *Atchison, T. & S. F. R. Co. v. Shaft*, 19 Am. & Eng. R. Cas. 529, 33 Kan. 521, 6 Pac. Rep. 908.

No private interest, convenience, or inconvenience on the part of the company will alone be sufficient to absolve it from fencing its road, where the statute in express terms requires that the road shall be fenced. *Prickett v. Atchison, T. & S. F. R. Co.*, 23 Am. & Eng. R. Cas. 232, 33 Kan. 748, 7 Pac. Rep. 611.

Where a company is, for any reason, relieved from fencing its road at some particular place or places, then it must construct fences or other barriers as near thereto as is reasonably practicable. And it devolves upon the railroad company to show that it is so relieved. *Atchison, T. & S. F. R. Co. v. Shaft*, 19 Am. & Eng. R. Cas. 529, 33 Kan. 521, 6 Pac. Rep. 908.

The neglect to fence a railway right of way is not excused by the fact that the construction of cattle-guards so as to completely inclose the track is impracticable. *Nelson v. Great Northern R. Co.*, 52 Minn. 276, 53 N. W. Rep. 1129.

53. Cities and towns — Company cannot fence.—Where a railroad occupies a public street in a city or village, subject to the public easement, it is not entitled to fence its track, and thereby obstruct the street and interfere with its use. *Rippe v. Chicago, M. & St. P. R. Co.*, 40 Am. & Eng. R. Cas. 231, 42 Minn. 34, 5 L. R. A. 864, 43 N. W. Rep. 652. *Russell v. Hannibal & St. J. R. Co.*, 83 Mo. 507.—QUOTING *Tiarks v. St. Louis & I. M. R. Co.*, 58 Mo. 45.

And it makes no difference whether the town is incorporated or not, or whether the streets are in use or opened across the track or not. *Vanderwerker v. Missouri Pac. R. Co.*, 48 Mo. App. 654.—FOLLOWING *Elliott v. Hannibal & St. J. R. Co.*, 66 Mo. 683; *Wymore v. Hannibal & St. J. R. Co.*, 79 Mo. 247. QUOTING *Ells v. Pacific R. Co.*,

*Duty of railroad companies as to fencing their tracks in cities and towns, see notes, 45 AM. & ENG. R. CAS. 470; 19 Id. 561; 13 Id. 528.

48 Mo. 231. *RECONCILING Lane v. Chicago, R. I. & P. R. Co.*, 18 Mo. App. 559.—*Lathrop v. Central Iowa R. Co.*, 69 Iowa 105, 28 N. W. Rep. 465.

A corporation has not the right to fence its track in cities and towns where it is intersected by streets and alleys, notwithstanding the language of the statute (Code Iowa, §§ 1268, 1288) requiring fencing where the road passes through unimproved land, or where the same person owns the land on both sides of the track. (Beck and Reed, JJ., dissenting.) *Blanford v. Minneapolis & St. L. R. Co.*, 29 Am. & Eng. R. Cas. 289, 71 Iowa 310, 32 N. W. Rep. 357.—QUOTING *Davis v. Burlington & M. R. R. Co.*, 26 Iowa 549. *REVIEWING Rogers v. Chicago & N. W. R. Co.*, 26 Iowa 558.

Under the Texas statute which provides that if a railroad company fence in its road it shall only be liable in cases of injury resulting from the want of ordinary care, the converse of the proposition is also law, to wit: that if a company fails to fence its track it is liable for any injury occasioned by it. This rule of fencing or failing to fence cannot, however, be applied to the streets of an incorporated city, for a railroad could not legally exercise the right to fence such streets, and if it did so would not only violate the law against road obstructions, but would create a public nuisance for which it would also be liable in damages. *International & G. N. R. Co. v. Smith*, 1 Tex. App. (Civ. Cas.) 484.

54. — company need not fence.—Railroads are not required by the statutes to fence their roads within the corporate limits of a town. *Chicago & A. R. Co. v. Engle*, 58 Ill. 381. *Edwards v. Hannibal & St. J. R. Co.*, 66 Mo. 567.—FOLLOWING *Lloyd v. Pacific R. Co.*, 49 Mo. 199. QUOTING *Ells v. Pacific R. Co.*, 48 Mo. 231.—FOLLOWED IN *Rhea v. St. Louis & S. F. R. Co.*, 84 Mo. 345.—*Rhea v. St. Louis & S. F. R. Co.*, 84 Mo. 345.—FOLLOWING *Edwards v. Hannibal & St. J. R. Co.*, 66 Mo. 567.

But they may lawfully so fence at any place within the limits of a town where the railroad is not crossed by streets or alleys already opened or dedicated to the public, and where, by so fencing the railroad, the public would not be inconvenienced. *Lane v. Chicago, R. I. & P. R. Co.*, 18 Mo. App. 555.—FOLLOWING *Wymore v. Hannibal & St. J. R. Co.*, 79 Mo. 247; *Young v. Hannibal & St. J. R. Co.*, 79 Mo. 336. QUOTING

Ells v. Pacific R. Co., 48 Mo. 232.—RECONCILED IN *Vanderworker v. Missouri Pac. R. Co.*, 48 Mo. App. 654.

Provided that an ordinance of the town does not prohibit. *Coyle v. Chicago, M. & St. P. R. Co.*, 13 Am. & Eng. R. Cas. 526, 62 Iowa 518, 17 N. W. Rep. 771.

A small assemblage of houses for dwellings or business, or both, in the country constitutes a village, whether they are situated upon regularly laid out streets and alleys or not, within the meaning of the statute requiring railroad companies to fence; and it is not necessary that there be a plat of the same dedicating streets and alleys, as prescribed by statute. *Illinois C. R. Co. v. Williams*, 27 Ill. 48.—QUOTED IN *Toledo, W. & W. R. Co. v. Spangler*, 71 Ill. 568.—*Toledo, W. & W. R. Co. v. Spangler*, 71 Ill. 568.—QUOTING *Illinois C. R. Co. v. Williams*, 27 Ill. 49.

A company is not required to fence its right of way within the limits of a city, town, or village. And where the larger portion of its depot and station grounds is within such limits the company is not required to fence that part of such ground extending outside of the city limits, and upon which abuts a platted addition to such city, when it appears that such grounds are constantly used and are necessary for the proper transaction of its business as a common carrier. *Chicago, B. & Q. R. Co. v. Hogan*, 30 Neb. 686, 46 N. W. Rep. 1015.

55. — company must fence.—A railroad company is not excused from fencing its track merely because it is within the limits of a town, unless it be a place where a fence would be unreasonable or improper. *Wabash R. Co. v. Forshee*, 77 Ind. 158. *Chicago, M. & St. P. R. Co. v. Dumser*, 19 Am. & Eng. R. Cas. 545, 109 Ill. 402. *Indianapolis & C. R. Co. v. Parker*, 29 Ind. 471. *Ells v. Pacific R. Co.*, 48 Mo. 231.—EXPLAINING *Meyer v. North Mo. R. Co.*, 35 Mo. 352; *Iba v. Hannibal & St. J. R. Co.*, 45 Mo. 469.—FOLLOWED IN *Edwards v. Hannibal & St. J. R. Co.*, 66 Mo. 567. QUOTED IN *Lane v. Chicago, R. I. & P. R. Co.*, 18 Mo. App. 555; *Vanderworker v. Missouri Pac. R. Co.*, 48 Mo. App. 654.

The fact that it is necessary to leave the track unclosed at a particular place does not justify the neglect to inclose it beyond that place. *La Paul v. Truesdale*, 45 Am. & Eng. R. Cas. 468, 44 Minn. 275, 46 N. W. Rep. 363.

The statute applies where the railroad is located along the edge of a town, but neither streets nor the limits of the town extend beyond it. *Brandenburg v. St. Louis & S. F. R. Co.*, 44 Mo. App. 224.—FOLLOWING *Kirkland v. Missouri Pac. R. Co.*, 82 Mo. 466.—*Kirkland v. Missouri Pac. R. Co.*, 82 Mo. 466.—FOLLOWED IN *Brandenburg v. St. Louis & S. F. R. Co.*, 44 Mo. App. 224.

Where the streets and alleys of a town end at a railroad track, and terminate at a high bank, which cannot be used for loading or unloading cars, it is the duty of the company to fence; and it is liable for injury to cattle when it does not fence, without regard to the negligence of the owner of the animals. *Toledo, W. & W. R. Co. v. Cary*, 37 Ind. 172, 5 Am. Ry. Rep. 557.

56. Street and highway crossings.*

—It is not the duty of a company to fence at public crossings. *Miller v. Wabash R. Co.*, 47 Mo. App. 630.—APPLYING *Sullivan v. Hannibal & St. J. R. Co.*, 72 Mo. 197; *McPheeters v. Hannibal & St. J. R. Co.*, 45 Mo. 22; *Meyer v. North Mo. R. Co.*, 35 Mo. 352; *Ehret v. Kansas City, St. J. & C. B. R. Co.*, 20 Mo. App. 251.

The statutory rule that railroads need not fence at public crossings applies both to highways *de facto* and *de jure*. *Luckie v. Chicago & A. R. Co.*, 76 Mo. 639.—FOLLOWING *Soward v. Chicago & N. W. R. Co.*, 33 Iowa 387.—FOLLOWED IN *Roberts v. Quincy, O. & K. C. R. Co.*, 43 Mo. App. 287.—*Brown v. Kansas City, St. J. & C. B. R. Co.*, 20 Mo. App. 427.—APPROVING *Soward v. Chicago & N. W. R. Co.*, 33 Iowa 387.—FOLLOWED IN *Roberts v. Quincy, O. & K. C. R. Co.*, 43 Mo. App. 287.—*Jenkins v. Chicago & A. R. Co.*, 27 Mo. App. 578.

The statute does not apply to crossings of streets and alleys of a city or town, or shipping places in front of mills, etc., or depot grounds, etc., for reasons of public convenience. *Flint & P. M. R. Co. v. Lull*, 28 Mich. 510, 12 Am. Ry. Rep. 296.

Where a company sets up the defense that it failed to fence its track at a particular place because a highway crossed there, it is proper to instruct the jury that if the highway had been abandoned, as the evidence intended to show, for over thirty years, it was the same as if it had never

* Street and highway crossings; duty to fence, see notes, 35 AM. & ENG. R. CAS. 173; 19 Id. 542.

existed. *Louisville, N. A. & C. R. Co. v. Shanklin*, 19 *Am. & Eng. R. Cas.* 552, 94 *Ind.* 297.

Chapter 94, Kan. Laws 1874, requires not merely that the company should build a fence parallel with its road, but also that where its track crosses a highway or other place where a side fence is improper, it should protect its track and right of way by cattle-guards and an end fence. *Union Pac. R. Co. v. Harris*, 11 *Am. & Eng. R. Cas.* 431, 28 *Kan.* 206.

Mich. Stat. 3 How. § 3377, which requires railroad companies to provide their right of way fences with suitable connecting fences and cattle-guards at all highway and street crossings, and to keep them in effective repair, and sufficient to prevent stock of all kinds from passing upon the tracks at such crossings, contemplates that the tracks shall be exposed within the limits of the highway only. *Parker v. Lake Shore & M. S. R. Co.*, 93 *Mich.* 607, 53 *N. W. Rep.* 834.

Minn. Gen. St. 1870, ch. 34, § 54, requiring companies to fence their roads and to build cattle-guards at wagon crossings, applies as well to the limits of incorporated cities and villages as to the country. This statute is to be construed as allowing an exception where the company has no legal right to do the act, as where it would obstruct public streets or other public grounds. There is also an implied exception as to places required to be left open by public necessity or convenience, such as station or depot grounds used for the exit or entrance of passengers, or the receipt and delivery of freight. But this public convenience is the limit of the exception. Mere difficulty or inconvenience to the company creates no exception, and will not relieve it from complying with the law. *Greeley v. St. Paul, M. & M. R. Co.*, 19 *Am. & Eng. R. Cas.* 559, 33 *Minn.* 136, 53 *Am. Rep.* 16, 22 *N. W. Rep.* 179.—REVIEWING *Davis v. Burlington & M. R. Co.*, 26 *Iowa* 549.—FOLLOWED IN *Hooper v. Chicago, St. P., M. & O. R. Co.*, 37 *Minn.* 52, 33 *N. W. Rep.* 314. REVIEWED IN *Kelle v. Northern Pac. R. Co.*, 31 *Am. & Eng. R. Cas.* 528, 36 *Minn.* 518, 32 *N. W. Rep.* 783.

The Great Western railway company are bound under the statute, 4 Wm. IV., c. 29, to fence along the line of the route of their railroad where it crosses public highways, either by gates or fences across the highway

or across their road, and are liable for accidents occasioned by the want of such gates or fences. *Parnell v. Great Western R. Co.*, 4 *U. C. C. P.* 517.—FOLLOWED IN *McDowell v. Great Western R. Co.*, 6 *U. C. C. P.* 180.—*McDowell v. Great Western R. Co.*, 6 *U. C. C. P.* 180.—APPROVING *Bradley v. Great Western R. Co.*, 11 *U. C. Q. B.* 220. FOLLOWING *Parnell v. Great Western R. Co.*, 4 *U. C. C. P.* 517.

57. Farm and private crossings.*—

A railroad company is bound to fence across a mere private road which the public is not actually using as a highway, and which it has not the right to use. *Jenkins v. Chicago & A. R. Co.*, 27 *Mo. App.* 578.—QUOTING *Walton v. St. Louis, I. M. & S. R. Co.*, 67 *Mo.* 56.—*Terre Haute & I. R. Co. v. Elam*, 20 *Ill. App.* 603. *Baltimore, O. & C. R. Co. v. Kreiger*, 13 *Am. & Eng. R. Cas.* 602, 90 *Ind.* 380.—OVERRULING *Indianapolis & C. R. Co. v. Adkins*, 23 *Ind.* 340.—QUOTED IN *Banister v. Pennsylvania Co.*, 98 *Ind.* 220.

Railroad companies are bound to maintain fences at private crossings, as to animals entering them, except that the duty is not owing to one who has undertaken to maintain the fence, nor to one for whose benefit the private crossing is maintained. *Louisville, N. A. & C. R. Co. v. Consolidated Tank Line Co.*, 4 *Ind. App.* 40, 30 *N. E. Rep.* 159. *Evansville & T. H. R. Co. v. Mosier*, 22 *Am. & Eng. R. Cas.* 569, 101 *Ind.* 597.

Where a company has no right by fencing in its track to exclude proprietors from their private passage to the highway, it is not liable under the statute for injury to cattle. *Croy v. Louisville, N. A. & C. R. Co.*, 19 *Am. & Eng. R. Cas.* 608, 97 *Ind.* 126.—DISTINGUISHING *Louisville, N. A. & C. R. Co. v. White*, 94 *Ind.* 257; *Louisville, N. A. & C. R. Co. v. Shanklin*, 94 *Ind.* 297.

In the New York General Railroad Law, requiring every corporation formed under it to erect and maintain fences on the sides of its road, no exception is made or permission given for openings or gates for the use of the corporation, or its customers, or the public generally, but only for the use of adjoining proprietors. *Spinner v. New York C. & H. R. R. Co.*, 67 *N. Y.* 153, 15 *Am. Ry. Rep.* 126; affirming 6 *Hun* 600.

* Private crossings, liability of company to fence at, see note, 35 *AM. & ENG. R. CAS.* 184.

Where a private road extends across the track and right of way, and connects with a public highway, the company is required to maintain across such private road suitable fences, or provide other protection against injuries which may result from animals passing from such highway through the private road on or along the railroad track. *Pittsburg & L. E. R. Co. v. Cunningham*, 13 *Am. & Eng. R. Cas.* 529, 39 *Ohio St.* 327.—APPROVING Indianapolis, P. & C. R. Co. v. Thomas, 84 *Ind.* 194. REVIEWING Cleveland, C., C. & I. R. Co. v. Newbrander, 40 *Ohio St.* 15.

59. Station and depot grounds—Company need not fence.*—A company is not required to fence its track upon depot grounds in an incorporated town or village. *Galena & C. U. R. Co. v. Griffin*, 31 *Ill.* 303.—REVIEWED IN Davis v. Burlington & M. R. Co., 26 *Iowa* 549.

A company need not fence in its tracks at a station in a hamlet laid off in lots and blocks, but not incorporated. *Louisville, E. & St. L. Con. R. Co. v. Scott*, 34 *Ill. App.* 635.—FOLLOWED IN Cleveland, C., C. & St. L. R. Co. v. Roper, 47 *Ill. App.* 320.

Railroad companies are under no obligation to fence their depot grounds so as to exclude cattle. *Smith v. Chicago, R. I. & P. R. Co.*, 34 *Iowa* 506, 5 *Am. Ry. Rep.* 535.—EXPLAINED IN Kuhn v. Chicago, R. I. & P. R. Co., 42 *Iowa* 420.—*Kyser v. Kansas City, St. J. & C. B. R. Co.*, 56 *Iowa* 207, 9 *N. W. Rep.* 133. *Chicago & G. T. R. Co. v. Campbell*, 7 *Am. & Eng. R. Cas.* 545, 47 *Mich.* 265, 11 *N. W. Rep.* 152.—QUOTED IN Chicago, B. & Q. R. Co. v. Hans, 111 *Ill.* 114.—*Lehey v. Hudson River R. Co.*, 4 *Robt. (N. Y.)* 204.

A company is not bound to fence its depot grounds, and the tracks and switches adjacent thereto, in towns and villages, so far as their proper use and convenience require that they should be left open for the transaction of its business with the public. *Toledo, St. L. & K. C. R. Co. v. Thompson*, 48 *Ill. App.* 36.—QUOTING Chicago, B. &

Q. R. Co. v. Hans, 111 *Ill.* 119.—*Cleveland, C., C. & St. L. R. Co. v. Myers*, 43 *Ill. App.* 251.—FOLLOWED IN Cleveland, C., C. & St. L. R. Co. v. Roper, 47 *Ill. App.* 320.—*Prickett v. Atchison, T. & S. F. R. Co.*, 23 *Am. & Eng. R. Cas.* 232, 33 *Kan.* 748, 7 *Pac. Rep.* 611. *McGrath v. Detroit, M. & M. R. Co.*, 22 *Am. & Eng. R. Cas.* 574, 57 *Mich.* 555, 24 *N. W. Rep.* 854. *Smith v. Minneapolis & St. L. R. Co.*, 37 *Minn.* 103, 33 *N. W. Rep.* 316. *Pearson v. Chicago, B. & K. C. R. Co.*, 33 *Mo. App.* 543.—DISTINGUISHING *Morris v. St. Louis, K. C. & N. R. Co.*, 58 *Mo.* 78. FOLLOWING *Lloyd v. Pacific R. Co.*, 49 *Mo.* 199.—*Crenshaw v. St. Louis, K. & N. W. R. Co.*, 54 *Mo. App.* 233. *Dixon v. New York C. & H. R. R. Co.*, 22 *N. Y. S. R.* 61, 51 *Hun* 644, 4 *N. Y. Supp.* 296.

Fences are not required at stations and side tracks, where freight and passengers are received and discharged. *Indiana, B. & W. R. Co. v. Quick*, 109 *Ind.* 295, 9 *N. E. Rep.* 788, 925. *Becholdt v. Grand Rapids & I. R. Co.*, 35 *Am. & Eng. R. Cas.* 168, 113 *Ind.* 343, 15 *N. E. Rep.* 686, 13 *West. Rep.* 53. *Stewart v. Pennsylvania Co.*, 2 *Ind. App.* 142, 28 *N. E. Rep.* 211. *Plunkett v. Minneapolis, S. St. M. & A. R. Co.*, 79 *Wis.* 222, 48 *N. W. Rep.* 519. *Houston & T. C. R. Co. v. Boozier*, 2 *Tex. Unrep. Cas.* 452.

Although a station is used as such only at irregular intervals, by picnic parties and for camp meetings, it is still a station within the meaning of the law, and the company is not required to fence its track. *Stewart v. Pennsylvania Co.*, 2 *Ind. App.* 142, 28 *N. E. Rep.* 211.

A company is not guilty of negligence in failing to place fences or screens along its tracks in its station grounds for the purpose of preventing the frightening of horses approaching its station. *Flagg v. Chicago, D. & C. G. T. J. R. Co.*, 96 *Mich.* 30, 55 *N. W. Rep.* 444.—DISTINGUISHING *Hurlbert v. New York C. R. Co.*, 40 *N. Y.* 145; *Cross v. Lake Shore & M. S. R. Co.*, 69 *Mich.* 363.

A company is not required by statute to fence its road, where such fencing would result in cutting itself from the use of its own lands, or leased property or buildings, or woodsheds, although the buildings and the sheds may not be in present use. *Jeffersonville, M. & I. R. Co. v. Beatty*, 36 *Ind.* 15, 5 *Am. Ry. Rep.* 543.

If the circumstances are such as to justify a failure to fence one side of a railroad track,

* Depot and shop grounds; duty to fence, see notes, 35 *AM. & ENG. R. CAS.* 132, 172; 13 *Id.* 537; 23 *Id.* 234. See also 42 *AM. & ENG. R. CAS.* 578, *abstr.*

Company not liable for failure to fence depot grounds, but extent of grounds is for the jury, see 38 *AM. & ENG. R. CAS.* 290, *abstr.*

What are depot grounds, where fence not required, see 49 *AM. & ENG. R. CAS.* 554, *abstr.*

none is required on the other side, where similar conditions exist; as where on one side freight is loaded and discharged, and there is on the other side a grain elevator from which grain is loaded on the cars for shipment. *Wabash, St. L. & P. R. Co. v. Nice*, 23 *Am. & Eng. R. Cas.* 168, 99 *Ind.* 152.

Station grounds need not be fenced, but their extent is not fixed according to the continuous actual use of every part of them; nor can their proper limits be collaterally determined by a jury in an action brought against the company for the loss of a cow that came upon the track near the station, where there was no fence. *McGrath v. Detroit, M. & M. R. Co.*, 22 *Am. & Eng. R. Cas.* 574, 57 *Mich.* 555, 24 *N. W. Rep.* 854.—FOLLOWED IN *Rinear v. Grand Rapids & I. R. Co.*, 70 *Mich.* 620.

The survey, allotment, and use of station grounds constitute very strong, if not conclusive, evidence that their boundaries and extent are such as, and no more than, are necessary and proper. *Cole v. Chicago & N. W. R. Co.*, 38 *Iowa* 311.

In determining what are depot grounds within the meaning of the statute, the criterion is not whether all the grounds set apart by the company for depot and station purposes have been actually used as such, but whether, in view of the present or prospective needs of such grounds for station or depot purposes, the company has used reasonable discretion in throwing them open for that purpose. *Rinear v. Grand Rapids & I. R. Co.*, 35 *Am. & Eng. R. Cas.* 166, 70 *Mich.* 620, 14 *West. Rep.* 908, 38 *N. W. Rep.* 599.—APPROVED IN *Denver & R. G. R. Co. v. Outcalt*, 2 *Colo. App.* 395.

The extent of station grounds is a matter of discretion, the reasonableness of which is the subject of review by the courts. *Straub v. Eddy*, 47 *Mo. App.* 189.—APPLYING *Jennings v. St. Joseph & St. L. R. Co.*, 37 *Mo. App.* 651.

The discretion exercised by a company in establishing station grounds and switch limits to be kept unfenced must be a reasonable discretion, subject to contradiction by competent evidence and to review by the courts. *Johnson v. Chicago, B. & K. C. R. Co.*, 27 *Mo. App.* 379.—QUOTING *Russell v. Hannibal & St. J. R. Co.*, 26 *Mo. App.* 368; *Atchison, T. & S. F. R. Co. v. Shaft*, 33 *Kan.* 521, 6 *Pac. Rep.* 908.

Grounds along a main track, on which are

also a side track, a water tank, and a building containing a telegraph office, a ticket office, and eating and sleeping rooms occupied by the station agents, with a platform in front, where passengers are received and discharged, are depot grounds, within the meaning of the *Wis. Rev. St.* § 1810, as amended in 1881, ch. 193, and need not be fenced. *Peters v. Stewart*, 35 *Am. & Eng. R. Cas.* 174, 72 *Wis.* 133, 39 *N. W. Rep.* 380.

The Minnesota statute requiring railways to be fenced is not a law for line or partition fences, but a police regulation, the object of which is to inclose the roads so that cattle cannot get upon them; and when station grounds are required by public necessity or convenience to be left uninclosed, a railway company owes no duty to the owner of abutting land to build a fence between his land and such station grounds. *Smith v. Minneapolis & St. L. R. Co.*, 37 *Minn.* 103, 33 *N. W. Rep.* 316.

59. Station and depot grounds—Company must fence.—

Where station grounds are not necessary for the operation of the road, and are not so used, they should be fenced. *Atchison, T. & S. F. R. Co. v. Shaft*, 19 *Am. & Eng. R. Cas.* 529, 33 *Kan.* 521, 6 *Pac. Rep.* 908. *Latty v. Burlington, C. R. & M. R. Co.*, 38 *Iowa* 250.

And whether the public use or convenience requires grounds at a particular place to be left open is a question of fact for the jury. *Toledo, St. L. & K. C. R. Co. v. Thompson*, 48 *Ill. App.* 36.

The provision of *Ill. Act of 1874*, § 1, as amended in 1879, making it the duty of companies to fence their tracks, "except at crossings of public roads and highways, and within such portions of cities and incorporated towns and villages as are, or may hereafter be, laid out and platted into lots and blocks," requires a company to fence a station not within the limits of an incorporated town. *Chicago, M. & St. P. R. Co. v. Dumser*, 19 *Am. & Eng. R. Cas.* 545, 109 *Ill.* 402.—EXPLAINED AND OVERRULED IN *Chicago, B. & Q. R. Co. v. Hans*, 111 *Ill.* 114.

Where a station in an incorporated village is in a public highway, and around the station are yards, cribs, and grain dumps, the company is not relieved from a duty of fencing the track for a space of eighty rods on either side of the station. *Iowa C. R. Co. v. Gushee*, 49 *Ill. App.* 609.

The implied exception to the statute.

which allows places to be left open to afford necessary and suitable access to station and depot grounds, simply modifies the general obligation to fence, so far as the necessity upon which the exception rests requires. It is, nevertheless, the duty of a company to erect and maintain suitable fences and guards to prevent domestic animals from passing over or through the depot grounds, onto the track, beyond the limits of such grounds. *Kobe v. Northern Pac. R. Co.*, 31 *Am. & Eng. R. Cas.* 528, 36 *Minn.* 518, 32 *N. W. Rep.* 783.—REVIEWING *Greeley v. St. Paul, M. & M. R. Co.*, 33 *Minn.* 136, 22 *N. W. Rep.* 179.

Failure to fence a railroad track at a point some distance from the depot is not excused by proof merely that some freight was received and discharged at that place. *Moser v. St. Paul & D. R. Co.*, 42 *Minn.* 480, 44 *N. W. Rep.* 530. *Jaeger v. Chicago, M. & St. P. R. Co.*, 40 *Am. & Eng. R. Cas.* 194, 75 *Wis.* 130, 43 *N. W. Rep.* 732.—DISTINGUISHING *Dinwoodie v. Chicago, M. & St. P. R. Co.*, 70 *Wis.* 160. REVIEWING *McDonough v. Milwaukee & N. R. Co.*, 73 *Wis.* 223.—REVIEWED IN *Anderson v. Stewart*, 76 *Wis.* 43.

The fact that it would be inconvenient for a company to construct a fence near a depot does not relieve it from liability for failing to fence, as required by N. Y. Act of 1854, ch. 282, § 8, requiring railroad companies to fence their roads and to erect cattle-guards at crossings sufficient to keep ordinary domestic animals off the track. *Bradley v. Buffalo, N. Y. & E. R. Co.*, 34 *N. Y.* 427.

When it is fairly debatable under the evidence whether it was necessary for the railway company to leave unfenced a part of its road near a depot in a town, in order to avoid danger to its employes, and for the purposes of the safe and convenient transaction of its business with the public, it cannot be held as a matter of law that the railway company is relieved from its obligation to fence that part of its road. *Brandenburg v. St. Louis & S. F. R. Co.*, 44 *Mo. App.* 224.—FOLLOWING *Bean v. St. Louis, I. M. & S. R. Co.*, 20 *Mo. App.* 641.

In an action for the killing of horses upon a track, the evidence showed, among other things, that they came upon the track at a point where a town plat had recently been laid out; that a side track and platform had been maintained there for a long time, but there were no depot buildings and no agent

or employe of the company; that no tickets were sold or freight billed to or from the place, and that trains stopped only when flagged; that there were but two houses and a store on the plat, and that since it was laid out nothing had been done toward making depot grounds except to remove the fences for about 400 feet along the track, and to put in cattle-guards. Held, that the trial court was warranted in holding that the place was not "depot grounds" within the meaning of Wis. Rev. St. § 1810. *Anderson v. Stewart*, 76 *Wis.* 43, 44 *N. W. Rep.* 1091.—REVIEWING *Jaeger v. Chicago, M. & St. P. R. Co.*, 75 *Wis.* 130; *Dinwoodie v. Chicago, M. & St. P. R. Co.*, 70 *Wis.* 160; *McDonough v. Milwaukee & N. R. Co.*, 73 *Wis.* 223.—*McDonough v. Milwaukee & N. R. Co.*, 73 *Wis.* 223, 40 *N. W. Rep.* 806.—REVIEWED IN *Jaeger v. Chicago, M. & St. P. R. Co.*, 40 *Am. & Eng. R. Cas.* 194, 75 *Wis.* 130, 43 *N. W. Rep.* 732; *Anderson v. Stewart*, 76 *Wis.* 43.

60. Switches and sidings.—A company is not required, under Ind. Rev. St. 1881, § 4031, to fence its track at places where it would interfere with the operation of the road or the transaction of its business, or where it would interfere with the public in doing business with the company, or where it would imperil the lives of the company's employes, such as at switches where freight is loaded and unloaded. *Evansville & T. H. R. Co. v. Willis*, 19 *Am. & Eng. R. Cas.* 565, 93 *Ind.* 507.

Or where a side track is laid alongside of a grain elevator. *Lake Erie & W. R. Co. v. Kneadle*, 19 *Am. & Eng. R. Cas.* 568, 94 *Ind.* 454.—FOLLOWING *Evansville & T. H. R. Co. v. Willis*, 93 *Ind.* 507.—QUOTED IN *Indianapolis, D. & W. R. Co. v. Clay*, 4 *Ind. App.* 282.

But side tracks not at stations or depots, and such parts of side tracks as do not constitute a part of the depot yard, may well be held to be within the statute. *Chicago, E. & Q. R. Co. v. Hans*, 111 *Ill.* 114.—EXPLAINING AND OVERRULING IN PART *Chicago, M. & St. P. R. Co. v. Dumsier*, 109 *Ill.* 402.—QUOTED IN *Cleveland, C., C. & St. L. R. Co. v. Abney*, 43 *Ill. App.* 92. REVIEWED IN *Terre Haute & I. R. Co. v. Bowles*, 16 *Ill. App.* 261.

A company is not required to fence so much of its switch grounds as are necessary to remain open for the use of the public and the necessary transaction of business

at its depot; and as to what is necessary is not left to the arbitrary judgment of the company but is a question for the courts. *Vanderwerker v. Missouri Pac. R. Co.*, 51 Mo. App. 166.

Where, from the agreed statement of facts in a case, it is made to appear that the corporate limits of a city, with buildings thereon, extend along one side of the various side tracks of a railway, the land on the other side not being platted; that the side tracks thus established were necessary and proper for the transaction of the business of the railway; and that it would be inconvenient and unsafe to the employes of the company if a cattle-guard and fence were erected—the company is not required to fence its tracks at that point, and will not be liable for stock killed by its engines and cars at that place unless guilty of negligence. *Chicago, B. & Q. R. Co. v. Hogan*, 27 Neb. 801, 43 N. W. Rep. 1148.

Where a company had a switch outside the limits of an unincorporated village, but adjacent to the same, and in this locality there was a warehouse and a store, and it was used by the public as much as any portion of the village, and the switch was so located that it could not be reached by teams for loading and unloading if there was a fence erected there, the facts were sufficient to justify the inference that the place was ground open to the public, where a fence was not required. *Toledo, W. & W. R. Co. v. Chapin*, 66 Ill. 504.

While a railroad company is under no obligation to fence its depot and station grounds in order to protect itself from liability for stock killed, such is not the case where it has a switch merely, unless the same is upon or a part of a station ground; and the onus is upon the company to show this. *Comstock v. Des Moines Valley R. Co.*, 32 Iowa 376, 10 Am. Ry. Rep. 23.

The exception cannot be extended to a siding used merely for the loading of ties, wood, and piling purchased by the company (there being no testimony tending to show the amount of such business), and for the passing of trains, at a point where no depot is maintained, no employé stationed, and where persons desiring to take passage are obliged to flag the trains themselves. *Hurt v. St. Paul, M. & M. R. Co.*, 39 Minn. 485, 40 N. W. Rep. 613.—QUOTING *Fowler v. Farmers' L. & T. Co.*, 21 Wis. 77.

Where a switch extends along the main
5 D. R. D.—32.

track through an open prairie, it is as necessary and practicable to have the road fenced as at any other point. *Russell v. Hannibal & St. J. R. Co.*, 26 Mo. App. 368.—QUOTED IN *Johnson v. Chicago, B. & K. C. R. Co.*, 27 Mo. App. 379.

The duty of a company to fence, under Mo. Rev. St. § 809, applies to grounds used for switching purposes, used in connection with the depot or station, if the company could maintain fences and cattle-guards without interference with its business or inconvenience to the public. *Chouteau v. Hannibal & St. J. R. Co.*, 28 Mo. App. 556.

61. Mill adjoining railway.—The open space in front of a mill, necessary for the convenience of shipment, is such a place as the company need not fence. *Indianapolis & C. R. Co. v. Kinney*, 8 Ind. 402. *Dolan v. Newburgh, D. & C. R. Co.*, 42 Am. & Eng. R. Cas. 611, 120 N. Y. 571, 24 N. E. Rep. 824, 31 N. Y. S. R. 852; reversing 46 Hun 681, mem.—DISTINGUISHED IN *Klock v. New York C. & H. R. R. Co.*, 42 N. Y. S. R. 200.

62. Where there is another parallel railway.—Under the Conn. Gen. St. § 3505, making it the duty of railroad companies to fence, "except at such place or places as the railroad commissioners shall judge them unnecessary," one company is not required to fence where its track runs nearly parallel with that of another company, although the latter company has not fenced on either side of its track. *Gallagher v. New York & N. E. R. Co.*, 40 Am. & Eng. R. Cas. 197, 57 Conn. 442, 18 Atl. Rep. 786, 5 L. R. A. 737.

63. Along or parallel with highway.*—Where a railroad and a highway parallel each other, the railroad company must fence between the two if there is room to do so. *Louisville, N. A. & C. R. Co. v. Shanklin*, 19 Am. & Eng. R. Cas. 552, 94 Ind. 297.—DISTINGUISHED IN *Croy v. Louisville, N. A. & C. R. Co.*, 19 Am. & Eng. R. Cas. 608, 97 Ind. 126.—*Missouri Pac. R. Co. v. Eckel*, 49 Kan. 794, 31 Pac. Rep. 693.

In such cases damages may be recovered for injury to horses being driven with due care on the highway, which results from failure to fence. *Illinois C. R. Co. v. Trowbridge*, 31 Ill. App. 190.—QUOTING *Rock-*

* Fences at points used by the public and where highways run parallel with track see notes, 19 Am. & Eng. R. Cas. 558, 674.

ford, R. I. & St. L. R. Co. v. Lynch, 67 Ill. 149.

A railroad company is not relieved from the duty to fence, as required by Mo. Rev. St. 1879, § 809, by the fact that a public highway runs alongside of the railroad and joins it. *Morris v. Hannibal & St. J. R. Co.*, 19 Am. & Eng. R. Cas. 666, 79 Mo. 367.—DISTINGUISHING *Walton v. St. Louis, I. M. & S. R. Co.*, 67 Mo. 58.—FOLLOWED IN *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 382.

The fact that a public highway runs along the side of a railroad track does not of itself show a valid reason why a fence could not be maintained between the highway and the track, but rather shows the stronger reason why the railroad should be fenced. *Indianapolis & C. R. Co. v. McKinney*, 24 Ind. 283. *Louisville, N. A. & C. R. Co. v. Shanklin*, 19 Am. & Eng. R. Cas. 555, 98 Ind. 573. *Rutledge v. Hannibal & St. J. R. Co.*, 19 Am. & Eng. R. Cas. 669, 78 Mo. 286.—FOLLOWING *Robinson v. Chicago & A. R. Co.*, 57 Mo. 494. RECONCILING *Walton v. St. Louis, I. M. & S. R. Co.*, 67 Mo. 56.—FOLLOWED IN *Rozzelle v. Hannibal & St. J. R. Co.*, 19 Am. & Eng. R. Cas. 591, 79 Mo. 349.

The statute requires companies to fence their roads except at the crossing of public roads and highways; and a company must fence where its road is constructed parallel with a highway, but partially on it, as such a place is not a crossing. *Illinois C. R. Co. v. Trowbridge*, 31 Ill. App. 190. *Jeffersonville, M. & I. R. Co. v. Sweeney*, 32 Ind. 430.

Where there was a highway on each side of a railroad, and the track was in one of them, such place is not excepted by the terms of the statute, and there was no exemption on account of public interest, as the usefulness of the highway would not be impaired by the fence, and public accommodation and convenience in their use did not require that the railroad should not be fenced. *Iowa C. R. Co. v. Gushee*, 49 Ill. App. 609.

Where a highway has not been in a condition for use by the public, and has not been used for thirty-six years, the presumption of its abandonment is justified, and the right to its full use by the owner is restored, and the duty to fence is imposed on a railroad company using a portion of it for its track. *Jeffersonville, M. & I. R. Co. v. O'Connor*, 37 Ind. 95, 5 Am. Ry. Rep. 566.

Where with the permission of the proper board of commissioners a railroad is located upon part of the public highway, the remainder of which is still used by the public, the company is not bound to fence its right of way. *Louisville, N. A. & C. R. Co. v. Francis*, 58 Ind. 389.

Where a railroad is constructed for some distance alongside of and very near to a highway before it crosses it, the company should fence to the place of crossing, and there put in cattle-guards, to relieve itself from liability under Iowa Act of 1862, ch. 169, § 9. *Andre v. Chicago & N. W. R. Co.*, 30 Iowa 107.—DISTINGUISHING *Davis v. Burlington & M. R. Co.*, 26 Iowa 549.

64. Along or over watercourses.—Where a railroad passes upon an embankment erected in the bed of a canal, such embankment must be guarded by fences. *White Water Valley R. Co. v. Quick*, 31 Ind. 127.

A company is bound to fence at a place where its road is situate on the tow path of a canal abandoned as a thoroughfare. *White Water Valley R. Co. v. Quick*, 30 Ind. 384.

A company is not excused from building and maintaining a fence because its right of way runs along a stream in such a manner as to cause the fence to be erected inside the boundary of the right of way. *Wabash R. Co. v. Forshee*, 77 Ind. 158.

It is not negligence to fail to fence a trestle over a small canal in an open field where there is no public road or general thoroughfare. *Tillotson v. Texas & P. R. Co.*, 53 Am. & Eng. R. Cas. 104, 44 La. Ann. 95, 10 So. Rep. 400.

The channels or creeks flowing around islands in the Hudson river are a part of the river, within the meaning of a provision in a railroad charter exempting the company from the duty to fence "in the river." *Schermerhorn v. Hudson River R. Co.*, 38 N. Y. 103.—DISTINGUISHED IN *Klock v. New York C. & H. R. R. Co.*, 42 N. Y. S. R. 200.

A railroad was laid some distance back from a navigable river, and the company owned all the land between the track and the river bank, over which plaintiff had a right of way for passage from his land on the opposite side of the track to the river. *Held*, that under the N. Y. General Railroad Act of 1850, as amended in 1854, the company was bound to maintain a fence between its track and its lands on the river side of the road. *Klock v. New York C. & H. R. R. Co.*

H. R. R. Co., 42 *N. Y. S. R.* 200, 62 *Hun* 291, 17 *N. Y. Supp.* 120.—DISTINGUISHING *Schermerhorn v. Hudson River R. Co.*, 38 *N. Y.* 103; *Dolan v. Newburgh, D. & C. R. Co.*, 120 *N. Y.* 571, 31 *N. Y. S. R.* 852; *Potter v. New York C. & H. R. R. Co.*, 60 *Hun* 314, 38 *N. Y. S. R.* 798. REVIEWING *Kelver v. New York, C. & St. L. R. Co.*, 35 *N. Y. S. R.* 673, 126 *N. Y.* 365, 37 *N. Y. S. R.* 485.

In such case the fact that the river was navigable would not justify the court in saying, as a matter of law, that it was such a natural barrier as to relieve the company from the duty to fence. *Klock v. New York C. & H. R. R. Co.*, 42 *N. Y. S. R.* 200, 62 *Hun* 291, 17 *N. Y. Supp.* 120.—QUOTING *Shepard v. Buffalo, N. Y. & E. R. Co.*, 35 *N. Y.* 646.

65. Inclosed or cultivated fields.—

There is no principle of the common law which obliges a railroad corporation to fence its track or to provide cattle-guards, where the line traverses improved land. *St. Louis, I. M. & S. R. Co. v. Walbrink*, 26 *Am. & Eng. R. Cas.* 604, 47 *Ark.* 330, 1 *S. W. Rep.* 545.

The 51st section of the Mo. General Railroad Act of February 24, 1853 (Sess. Acts 1853, pp. 121, 143), requiring railroad corporations to erect and maintain fences along the lines of their roads where they pass through inclosed fields, and cattle-guards at all road crossings, was applicable to and binding upon the Pacific R. Co. whether the provisions of said act were accepted or not by said corporation. *Gorman v. Pacific R. Co.*, 26 *Mo.* 441.—APPROVING *Waldron v. Rensselaer & S. R. Co.*, 8 *Barb. (N. Y.)* 390. REVIEWING *Norris v. Androscoggin R. Co.*, 39 *Me.* 273; *Lyman v. Boston & W. R. Corp.*, 4 *Cush. (Mass.)* 288.

The statute concerning railroad corporations (Wagn. Stat. 310, § 43) intended that railroad companies should fence in the line of their roads adjoining all inclosed lands, whether timbered or otherwise. *Slattery v. St. Louis, K. C. & N. R. Co.*, 55 *Mo.* 362.—FOLLOWED IN *Saunders v. St. Louis, K. C. & N. R. Co.*, 57 *Mo.* 117; *Sparr v. St. Louis, K. C. & N. R. Co.*, 57 *Mo.* 152. REVIEWED IN *Tiarks v. St. Louis & I. M. R. Co.*, 58 *Mo.* 45.—*Saunders v. St. Louis, K. C. & N. R. Co.*, 57 *Mo.* 117.—FOLLOWING *Hudson v. St. Louis, K. C. & N. R. Co.*, 53 *Mo.* 525; *Slattery v. St. Louis, K. C. & N. R. Co.*, 55 *Mo.* 362; *Seaton v. Chicago, R. I. & P. R.*

Co., 55 *Mo.* 416.—*Sparr v. St. Louis, K. C. & N. R. Co.*, 57 *Mo.* 152.—FOLLOWING *Hudson v. St. Louis, K. C. & N. R. Co.*, 53 *Mo.* 525; *Slattery v. St. Louis, K. C. & N. R. Co.*, 55 *Mo.* 362; *Fickle v. St. Louis, K. C. & N. R. Co.*, 54 *Mo.* 220; *Seaton v. Chicago, R. I. & P. R. Co.*, 55 *Mo.* 416.

The spirit of the statute (Wagn. St. 310, 311, § 43) contemplates that all railroad corporations shall fence the line of their roads along an inclosed field, although a public highway abuts upon the road and intervenes between it and the field. *Robinson v. Chicago & A. R. Co.*, 57 *Mo.* 494.—DISTINGUISHED AND CRITICISED IN *Walton v. St. Louis, I. M. & S. R. Co.*, 67 *Mo.* 56. FOLLOWED IN *Rutledge v. Hannibal & S. J. R. Co.*, 78 *Mo.* 286.

The fact that a railroad track runs parallel with and adjoining a public highway or another railroad track does not exempt the company from the duty of fencing when it passes through inclosed and cultivated fields or uninclosed lands. *Rozzelle v. Hannibal & St. J. R. Co.*, 19 *Am. & Eng. R. Cas.* 591, 79 *Mo.* 349.—FOLLOWING *Rutledge v. Hannibal & St. J. R. Co.*, 78 *Mo.* 286.—FOLLOWED IN *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 *Mo. App.* 382; *Jackson v. St. Louis, I. M. & S. R. Co.*, 43 *Mo. App.* 324.

A company is bound to fence its track through lands which, though not under actual cultivation in the immediate vicinity of the track, form portions of a tract under cultivation, and which are cultivated within a quarter of a mile of the track, under Utah Sess. Laws of 1890, p. 78, requiring railroad companies to maintain fences on each side of their roads where they pass through lands owned and settled or occupied by private owners. *Stimpson v. Union Pac. R. Co.*, 8 *Utah* 349, 31 *Pac. Rep.* 449.

66. Uninclosed and unimproved lands.—A company is not bound to maintain fences on the line of their road except when the same passes through inclosed or improved land. *Perkins v. Eastern R. Co.*, 29 *Me.* 307.

Railroad companies cannot be required to erect and maintain fences along uninclosed and unimproved lands, nor in the platted portions of cities, towns, and villages; but they are, nevertheless, liable for injury to animals that enter upon their tracks at such places in case the track was not, but might have been, securely fenced

without interfering with the discharge of their duty to the public, or without increasing the danger to their employes in the discharge of their duties. *Pennsylvania Co. v. Mitchell*, 124 Ind. 473, 24 N. E. Rep. 1065.

The 43d section of the Mo. railroad law, as it has stood since the amendment of 1875 (Sess. Acts, p. 131), requires railroad companies to fence the sides of their roads where they run through uninclosed lands, whether prairie or timber, as well as where they pass through, along, or adjoining inclosed and cultivated fields. *Snider v. St. Louis, I. M. & S. R. Co.*, 7 Am. & Eng. R. Cas. 558, 73 Mo. 465. *Razor v. St. Louis, I. M. & S. R. Co.*, 7 Am. & Eng. R. Cas. 562, 73 Mo. 471.

The duty of a railway company to fence where its road passes through uninclosed lands is imposed upon it for the benefit of the general public, and not for adjoining owners only. *Jackson v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 324.—FOLLOWING *Rozzelle v. Hannibal & St. J. R. Co.*, 79 Mo. 349; *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 382.

The power of the Mo. legislature of 1860 to contract the territorial limits of a town was absolute; and when the limits were so abridged a railroad company was bound to fence that portion of its road which ran through uninclosed fields thus thrown outside the new limits. *McCormick v. St. Louis, I. M. & S. R. Co.*, 20 Mo. App. 640.

The charter of the North Missouri R. Co. made it the duty of that company to fence its road where it passes through lands which might be improved at any time after the statute should go into effect, and with reference to the road to be constructed in future. *Roberts v. Wabash, St. L. & P. R. Co.*, (Mo.) 25 Am. & Eng. R. Cas. 298, 3 West. Rep. 783.

67. Natural barriers, bluffs, cuts, etc.—There is no duty or obligation on railroad companies to fence in or place guards along their roads where there may be cuts or embankments, notwithstanding a public road may run parallel with such railroads. *Collier v. Georgia R. Co.*, 76 Ga. 611.

The fact that a railroad is constructed on an embankment from twelve to twenty feet high does not relieve the company from the duty to fence, where it appears that the embankment is so gradual that cattle might descend it. *Toledo, P. & W. R. Co. v. Sweeney*, 41 Ill. 226.

A steep bluff, a hedge, a ditch, or the like, which furnishes as effectual security to the inclosure as the fence prescribed by statute, may be regarded as a lawful fence. *Hilliard v. Chicago & N. W. R. Co.*, 37 Iowa 442.

The provision of the N. Y. General Railroad Act (§ 44, ch. 140, Laws of 1850, as amended by § 8, ch. 282, Laws of 1854) imposes a several obligation upon every railroad company to fence its road unless a natural or artificial barrier exists which will prevent animals from reaching the track. *Kelver v. New York, C. & St. L. R. Co.*, 49 Am. & Eng. R. Cas. 551, 126 N. Y. 365, 27 N. E. Rep. 553, 37 N. Y. S. R. 485; *affirming* 35 N. Y. S. R. 673, 12 N. Y. Supp. 723.—REVIEWED IN *Klock v. New York C. & H. R. R. Co.*, 42 N. Y. S. R. 200.

68. Obligation to fence, whether a question of law or fact.—The question whether a company should fence its track at a particular place is one of law, and it is error to leave it to the jury. *Illinois C. R. Co. v. Whalen*, 42 Ill. 396. *Jeffersonville, M. & I. R. Co. v. Peters*, 1 Ind. App. 69, 27 N. E. Rep. 299.

Under the statute depot grounds may be left unfenced when the interests of the road and the public require it; but whether a place where the freight business of a single shipper is transacted should be left unfenced is a question of fact for the jury. *Rhines v. Chicago & N. W. R. Co.*, 35 Am. & Eng. R. Cas. 123, 75 Iowa 597, 39 N. W. Rep. 912.

Where it is in question whether a railroad could properly be fenced at a certain place, it is not competent to take the opinion of witnesses upon the question, but the jury must be left to decide that question upon the facts proved. *Indiana, B. & W. R. Co. v. Hale*, 19 Am. & Eng. R. Cas. 562, 93 Ind. 79.—QUOTING *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401.

7. Against Whom must Fence.

69. Adjoining owners and occupiers.—The duty of fencing the sides of its road is imposed by the statute upon the company for the benefit of adjoining proprietors, and not for the benefit of strangers. *Berry v. St. Louis, S. & L. R. R. Co.*, 65 Mo. 172.—APPROVING *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150; *Morse v. Rutland & B. R. Co.*, 27 Vt. 49. QUOTING *Brooks v. New York & E. R. Co.*, 13 Barb. (N. Y.) 594.—*Summers v. Hannibal & St. J. R. Co.*,

29 Mo. App. 41. *Ryan v. Rochester & S. R. Co.*, 9 How. Pr. (N. Y.) 453. *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150.—DISTINGUISHED IN *Alabama G. S. R. Co. v. Powers*, 19 Am. & Eng. R. Cas. 502, 73 Ala. 244; *Busby v. St. Louis, K. C. & N. R. Co.*, 81 Mo. 43; *Kaes v. Missouri Pac. R. Co.*, 6 Mo. App. 397. FOLLOWED IN *Morse v. Rutland & B. R. Co.*, 27 Vt. 49. LIMITED IN *Kansas C. R. Co. v. Allen*, 22 Kan. 285. QUOTED IN *New York & N. E. R. Co. v. Comstock*, 60 Conn. 200; *Connecticut & P. R. R. Co. v. Holton*, 32 Vt. 43.—*Westbourne Cattle Co. v. Manitoba & N. W. R. Co.*, 6 Man. 553.

But the duty to fence exists in favor of any lessee, occupier, or licensee of the owner of land whose cattle are running upon the land with his consent, express or implied. *Summers v. Hannibal & St. J. R. Co.*, 29 Mo. App. 41. *Brown v. Grand Trunk R. Co.*, 24 U. C. Q. B. 350.

The obligation to fence the tracks where they pass through uninclosed lands is for the benefit of the general public, and not for the owners of such lands. *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 382.—FOLLOWING *Rozelle v. Hannibal & St. J. R. Co.*, 79 Mo. 349; *Morris v. Hannibal & St. J. R. Co.*, 79 Mo. 367.—FOLLOWED IN *Jackson v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 324.—*Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 574.

The duty of railroad companies to fence on both sides of their tracks, under N. Y. Act of 1854, ch. 282, § 8, is one enjoined both for the benefit of adjoining landowners and the public; to the landowner for the protection of his live stock, and to the public that they may have a clear track. *Graham v. Delaware & H. Canal Co.*, 46 Hun 386, 12 N. Y. S. R. 390.—FOLLOWING *Corwin v. New York & E. R. Co.*, 13 N. Y. 53.

No action will lie against a railroad for damages arising from injuries done to a person while at work on their land, where the injury happened by reason of the negligence of the company in not building a fence on the line of their land upon a precipice, whereby a horse, which belonged to the owner of the land adjoining the company's land, escaped from the field on the company's land and fell down the precipice onto the plaintiff and broke his leg. *Ryan v. Rochester & S. R. Co.*, 9 How. Pr. (N. Y.)

453.—DISTINGUISHED IN *Hazman v. Hoboken L. & I. Co.*, 50 N. Y. 53.

Section 68 of the Railways Clauses Act 1845, requiring railway companies to fence against adjoining landowners, does not apply where the adjoining land belongs to the company. *Marfell v. South Wales R. Co.*, 8 C. B. N. S. 525, 7 Jur. N. S. 240, 29 L. J. C. P. 315, 8 W. R. 765, 2 L. T. 629.

By Act 41 Vict. c. 92, § 22, a railway company were bound to erect and maintain sufficient fences on each side of their line where it passed through inclosed or improved land, and were made liable for all damages sustained by reason of neglect to maintain such fences. Plaintiff's cow strayed from his land into the highway, and thence into land belonging to H. adjoining the railway, and from thence out upon the railway track through a defective fence, and was killed by a train, but without any negligence in the management of the train. Held, that the obligation to fence was general, and not merely as against the occupiers of land adjoining the railway, and that the company were liable for killing the cow. *St. John & M. R. Co. v. Montgomery*, 21 New Brun. 441.

70. Passengers and persons on the line.—A company is not obliged to fence its line as to passengers and persons already on the line. The duty to fence is toward persons off the line, to prevent them from getting or straying upon it. *Harrold v. Great Western R. Co.*, 14 L. T. 440.

No duty is imposed upon companies by section 68 of the Railways Clauses Act 1845, toward their passengers, to keep up fences, nor are companies bound at common law to maintain fences sufficient to keep cattle off the track under all circumstances. They are obliged only to use reasonable care. *Buxton v. North Eastern R. Co.*, L. R. 3 Q. B. 549, 9 B. & S. 824, 37 L. J. Q. B. 258, 18 L. T. 795, 16 W. R. 1124.

71. Children.*—In Michigan the railroad is required to be fenced for the protection of children as well as to protect cattle and other animals. *Keyser v. Chicago & G. T. R. Co.*, 31 Am. & Eng. R. Cas. 399, 66 Mich. 390, 10 West. Rep. 646, 33 N. W. Rep. 867.

The Minn. statutes of 1876 and 1877, requiring railroad companies to fence their roads, and making them liable for damages

* See CHILDREN, INJURIES TO, 34-41.

sustained in consequence of neglect to do so, are inapplicable to the case of an infant straying on an unfenced track. *Fitzgerald v. St. Paul, M. & M. R. Co.*, 8 Am. & Eng. R. Cas. 310, 29 Minn. 336, 43 Am. Rep. 212, 13 N. W. Rep. 168.

72. Employees.—The duty imposed upon railroad companies by the N. Y. Gen. Railroad Act, § 44, to erect and maintain fences upon the sides of their roads, and making them liable for all damages done to live stock thereon, is a duty imposed for the benefit of the owners of live stock only; and companies are not liable to their own servants for injuries caused by a failure to fence. *Langlois v. Buffalo & R. R. Co.*, 19 Barb. (N. Y.) 364; affirmed in 19 Barb. 370, n.—DISAPPROVED IN *Donnegan v. Erhardt*, 42 Am. & Eng. R. Cas. 580, 119 N. Y. 468, 23 N. E. Rep. 1051, 29 N. Y. S. R. 589, 7 L. R. A. 527.

73. Travelers on the highway.—The provision of the N. Y. General Railroad Act, as amended in 1854 (ch. 282, Laws of 1854), imposing upon corporations formed under it the duty of erecting and maintaining fences on the sides of their roads, does not apply to fences for the protection of travelers upon a highway. *Ditchett v. Spuyten Duyvil & P. M. R. Co.*, 67 N. Y. 425, 15 Am. Ry. Rep. 109; reversing 5 Hun 165.

Whether the lessor of a railroad who has parted with possession can be held liable for the negligence of the lessee, under the statute in question, in a case where it does apply, *quere*. *Ditchett v. Spuyten Duyvil & P. M. R. Co.*, 67 N. Y. 425, 15 Am. Ry. Rep. 109; reversing 5 Hun 165.

74. Trespassers.*—A company is not required to fence its tracks against trespassers. Fences are required along its tracks to protect animals, not rational, intelligent beings. *Nolan v. New York, N. H. & H. R. Co.*, 25 Am. & Eng. R. Cas. 342, 53 Conn. 461, 4 Atl. Rep. 106. *Cornwall v. Sullivan R. Co.*, 28 N. H. 161.—FOLLOWING TOWNS *v. Cheshire R. Co.*, 21 N. H. 363.—FOLLOWED IN *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304.

The obligation upon companies to build a fence along their roads only extends to the owner or rightful occupier of the adjoining fields, and not to mere trespassers there-

in. *Bemis v. Connecticut & P. R. R. Co.*, 42 Vt. 375.

8. Sufficiency of Fences.

75. What is a sufficient fence, generally.*—A railroad company is only required to make and keep up a legal fence—such a one as good husbandmen generally keep. *Toledo & W. R. Co. v. Thomas*, 18 Ind. 215.

The Cal. Act of 1861, requiring companies to make and maintain a good and sufficient fence on both sides of their property, not prescribing any standard of sufficiency, must be considered as adopting the standard established by the act of 1855, providing what is a lawful fence generally. *Enright v. San Francisco & S. J. R. Co.*, 33 Cal. 230.

A steep bluff, a hedge, or a ditch which furnishes as effectual security to lands as a fence prescribed by the statute, is a lawful fence within the meaning of the Iowa Rev. 1860, § 1544, which defines a lawful fence and then further provides for "such other construction or fence as may, in the opinion of the fence viewers, be of equal strength and security." *Hilliard v. Chicago & N. W. R. Co.*, 37 Iowa 442.

A company is not liable for injury to domestic animals which get upon the track by breaking through a fence which is reasonably sufficient to turn live stock. *Shellabarger v. Chicago, R. I. & P. R. Co.*, 19 Am. & Eng. R. Cas. 527, 66 Iowa 18, 23 N. W. Rep. 158. *Tallman v. Syracuse, B. & N. Y. R. Co.*, 4 Abb. App. Dec. (N. Y.) 351, 4 Keyes 128.—FOLLOWING *Corwin v. New York & E. R. Co.*, 13 N. Y. 42.

It is not negligence for a company to allow snowdrifts to remain over its fences so that they do not serve the purpose of restraining stock from crossing over into their right of way. *Tatten v. Chicago, M. & St. P. R. Co.*, 75 Iowa 459, 39 N. W. Rep. 708.

Mass. Gen. St. ch. 63, § 43, requiring companies to erect and maintain on both sides of their roads "suitable fences," does not necessarily mean such fence as is required by general law between lands of adjoining owners. *Eames v. Salem & L. R. Co.*, 98 Mass. 560.—DISTINGUISHING *Browne v. Providence, H. & F. R. Co.*, 12 Gray (Mass.) 55; *Corwin v. New York & E. R. Co.*, 13 N. Y. 42.—DISTINGUISHED IN *Bostwick v.*

* Failure to fence track as affecting trespassers, see note, 31 AM. & ENG. R. CAS. 423.

* What is a sufficient fence, see 42 AM. & ENG. R. CAS. 579, *abstr.*

Minneapolis & P. R. Co., 2 N. Dak. 440; *Keliher v. Connecticut River R. Co.*, 107 Mass. 411; *Gilman v. European & N. A. R. Co.*, 60 Me. 235; *Maynard v. Boston & M. R. Co.*, 115 Mass. 458. FOLLOWED IN *McDonnell v. Pittsfield & N. A. R. Corp.*, 115 Mass. 564.

The Mich. law (act 189 of 1873, art. 4, § 15), in requiring companies to fence their tracks, only required reasonable partition fences four and a half feet high, and fairly adapted, so far as their strength and mode of construction were concerned, to keep animals from getting on the track. But act 175 of 1881 leaves them to be approved and regulated by the commissioner of railroads. *Davidson v. Michigan C. R. Co.*, 49 Mich. 428, 13 N. W. Rep. 804.

A fence erected by the owner of land adjoining a railroad meets the statutory requirement of the company to fence. *Hovorka v. Minneapolis & St. L. R. Co.*, 13 Am. & Eng. R. Cas. 605, 31 Minn. 221, 17 N. W. Rep. 376.—FOLLOWED IN *Hovorka v. Minneapolis & St. L. R. Co.*, 34 Minn. 281.

A post and plank fence four and one half feet high is a lawful fence within the meaning of the 43d section of the Mo. railroad law. *King v. Chicago, R. I. & P. R. Co.*, 79 Mo. 328.

The provision of the N. Y. Gen. Railroad Act of 1850, § 44, is sufficiently complied with by erecting what is known as a worm or Virginia fence, the centre of which is on the line between the right of way and adjoining land, with the corners alternately lapping over on the right of way or the adjoining land. *Ferris v. Van Buskirk*, 18 Barb. (N. Y.) 397.

Section 44 requires railroad corporations to erect and maintain fences "of the height and strength of a division fence required by law"; but there is no law providing for the height or strength of division fences. *Held*, that this did not render the statute inoperative, but required a sufficient fence. *Tallman v. Syracuse, B. & N. Y. R. Co.*, 4 Abb. App. Dec. (N. Y.) 351, 4 Keyes 128.

76. What fence is insufficient.—The statutory requirement that railway companies shall erect a fence on "both sides of the road," is not complied with by constructing a fence several feet within the right of way. The statute contemplates that the fences shall embrace the entire right of way. *Ohio & M. R. Co. v. People ex rel.*, 30 Am. & Eng. R. Cas. 427, 121 Ill.

483, 13 N. E. Rep. 236, 11 West. Rep. 375.—*REVIEWING Wabash, St. L. & P. R. Co. v. Zeigler*, 108 Ill. 304.—*People ex rel. v. Ohio & M. R. Co.*, 21 Ill. App. 23.—*QUOTING Wabash, St. L. & P. R. Co. v. Zeigler*, 108 Ill. 306.

Where, in the absence of a showing that it is reasonably impracticable to do otherwise, a company maintains a bridge in such a condition that animals may enter upon it from a public highway, thus putting in jeopardy the safety of trains as well as the lives of the animals, the railroad is not securely fenced. *Cincinnati, H. & I. R. Co. v. Jones*, 31 Am. & Eng. R. Cas. 491, 111 Ind. 259, 9 West. Rep. 602, 12 N. E. Rep. 113.

A company, being obliged by their charter to fence their road, commenced to plant willow trees on each side of their track within three feet of the division line between the railroad and the orator's land, which was meadow land, liable to overflow, with the intention of having them remain and grow, and of using them to attach boards to, and thus make a fence which was alleged to be more beneficial and economical than one made in any other manner. It having been proved that such trees, by spreading their roots and branches into and over the orator's land, would be a serious injury thereto, and that there was no controlling necessity for this method of fencing—*held*, that the corporation might properly be enjoined by a court of chancery from planting such trees. *Brock v. Connecticut & P. R. Co.*, 35 Vt. 373.—*DISTINGUISHING Brainard v. Clapp*, 10 Cush. (Mass.) 6.

77. Wire fences.—A wire fence constructed in accordance with the provisions of Minn. Gen. St. 1878, ch. 18, § 2, would be a compliance with Gen. St. 1878, ch. 34, § 54, requiring railroad companies to fence their roads. *Halverson v. Minneapolis & St. L. R. Co.*, 19 Am. & Eng. R. Cas. 526, 32 Minn. 88, 19 N. W. Rep. 392.—FOLLOWED IN *Wessbecher v. Minneapolis & St. L. R. Co.*, 32 Minn. 89, n.

A company has no right to erect on its line a barbed-wire fence which is a source of danger and probable cause of injury to cattle running in an adjoining field; and it is a question for the jury whether a barbed-wire fence between a railroad and adjoining pasture field is dangerous to cattle running in the field. *Rehler v. Western N. Y. & P. R. Co.*, 28 N. Y. S. R. 311, 8 N. Y. Supp. 286.

At the time of the erection of a barbed-wire fence, the old bed of a creek was full of water, and such was the case for some time afterwards; but when the water by absorption and evaporation disappeared, a space between the bottom wire and the bed of the creek occurred, leaving an opening sufficient to admit cattle. *Held*, that under the facts there was a failure to erect, rather than to maintain, a lawful fence at that point. *Selders v. Kansas City, Ft. S. & G. R. Co.*, 19 Mo. App. 334.

78. Cattle-guards.—Building fences along the sides of a railroad is not alone sufficient. The railroad must be "inclosed" with fences or other barriers; and whenever, for that purpose, cattle-guards are necessary at the crossing of public highways or other public places, cattle-guards must be put in. *Atchison, T. & S. F. R. Co. v. Shaft*, 19 Am. & Eng. R. Cas. 529, 33 Kan. 521, 6 Pac. Rep. 908.—QUOTED IN *Johnson v. Chicago, B. & K. C. R. Co.*, 27 Mo. App. 379.—*Wabash, St. L. & P. R. Co. v. Tretts*, 19 Am. & Eng. R. Cas. 601, 96 Ind. 450. *Pittsburgh, C. & St. L. R. Co. v. Ehrhart*, 36 Ind. 118, 5 Am. Ry. Rep. 541.—APPROVED IN *Cleveland, C., C. & I. R. Co. v. Scudder*, 13 Am. & Eng. R. Cas. 561, 40 Ohio St. 173.

If a company makes gates in its fences at a farm crossing and does not protect the crossing by cattle-guards, the road is not "securely fenced," within the meaning of Ind. Rev. St. 1881, § 4031. *Grand Rapids & I. R. Co. v. Jones*, 81 Ind. 523.—EXPLAINED IN *Wabash R. Co. v. Williamson*, 23 Am. & Eng. R. Cas. 203, 104 Ind. 154.

Although there are sufficient fences running parallel with the track, at the point where animals entered upon it, yet if there are no wing fences connecting the parallel fences with the cattle-guards, the road, beyond such cattle-guards at least, is not securely fenced. *Louisville, E. & St. L. R. Co. v. Thomas*, 106 Ind. 10, 5 N. E. Rep. 198.

79. Gates.—A gate in a fence which railroad companies are required to erect and maintain, under Me. Rev. St. ch. 51, § 23, is a part of the fence. *Estes v. Atlantic & St. L. R. Co.*, 63 Me. 308.—FOLLOWED IN *Farwell v. Atlantic & St. L. R. Co.*, 63 Me. 311.—*Morrison v. Kansas City, St. J. & C. B. R. Co.*, 27 Mo. App. 418.

If a company permits or acquiesces in the use, in its business, by its customers, of a gate constructed by it at a farm crossing, so

that the gate does not serve the end of a fence, it is in default. *Spinner v. New York C. & H. R. R. Co.*, 67 N. Y. 153, 15 Am. Ry. Rep. 126; affirming 6 Hun 600.—APPLIED IN *Hungerford v. Syracuse, B. & N. Y. R. Co.*, 46 Hun 339, 12 N. Y. S. R. 204. REVIEWED IN *Diamond Brick Co. v. New York C. & H. R. R. Co.*, 28 N. Y. S. R. 95, 7 N. Y. Supp. 868, 5 Silv. Sup. Ct. 321, 55 Hun 605, mem.

A company is not required to fasten gates in its fences so that it is impossible for stock to open them under any and all circumstances. It has a right to use fastenings commonly adopted in the country by persons reasonably prudent and careful, and regarded by them as safe for the purpose. *Chicago & A. R. Co. v. Buck*, 14 Ill. App. 394.

80. Evidence on question of sufficiency—Opinions.—Where it is sought to show that a gate in a railroad fence is insufficient, it is not competent for the company to prove that the foreman of the section hands erecting the gate was a competent and careful man. Such evidence is too remote. *Chicago & A. R. Co. v. O'Brien*, 34 Ill. App. 155.

Where one of the issues in an action is whether a fence is sufficient to turn stock, it is error to permit witnesses, who show no other qualification than that they had seen the fence, to give to the jury their opinions as to the sufficiency of the fence to turn stock. *Baltimore & O. R. Co. v. Schultz*, 22 Am. & Eng. R. Cas. 579, 23 Am. & Eng. R. Cas. 211, 43 Ohio St. 270, 54 Am. Rep. 805, 1 N. E. Rep. 324.—QUOTING *Veerhusen v. Chicago & N. W. R. Co.*, 53 Wis. 689; *Enright v. San Francisco & S. J. R. Co.*, 33 Cal. 230; *Sowers v. Dukes*, 8 Minn. 23.—*Chicago & A. R. Co. v. O'Brien*, 34 Ill. App. 155.

81. Question of sufficiency is for the jury.—The question whether the railroad company has securely fenced the track is a question of fact, to be determined by the jury. *Toledo, W. & W. R. Co. v. Cory*, 39 Ind. 218, 10 Am. Ry. Rep. 377.

It is a question for the jury whether a barbed-wire fence was so negligently and improperly constructed and maintained as to be more dangerous to stock than breachy or unruly than it would have been if reasonable care had been used in building and maintaining it, and whether or not these acts of negligence were the proximate causes of the

injury. *Louisville & N. R. Co. v. Shelton*, 43 Ill. App. 220.—APPLYING *Headen v. Rust*, 39 Ill. 186; *Great Western R. Co. v. Morthland*, 30 Ill. 451; *Illinois C. R. Co. v. Phelps*, 29 Ill. 447.

It is for the jury to determine whether or not the defendants were guilty of negligence in the matter of keeping their fences in repair. *Estes v. Atlantic & St. L. R. Co.*, 63 Me. 308.

Where the proof shows that a railroad fence had become broken down until it was only two feet and eight inches high, the jury may decide from their own knowledge, that it was insufficient to turn cattle; and it is not necessary to prove its insufficiency by expert witnesses. *Leyden v. New York C. & H. R. R. Co.*, 57 Hun 114, 28 N. Y. S. R. 72, 8 N. Y. Supp. 187.

9. Against What must Fence.

82. In general.—The liability of a company for defect of fences extends to all kinds of animals that would be kept from the track by an ordinary fence, without reference to the question whether they are large enough to throw a train off the track when run over by it. *Indianapolis, P. & C. R. Co. v. Marshall*, 27 Ind. 300. *Missouri Pac. R. Co. v. Baxter*, 45 Am. & Eng. R. Cas. 471, 45 Kan. 520, 26 Pac. Rep. 49. *Missouri Pac. R. Co. v. Bradshaw*, 33 Kan. 533, 6 Pac. Rep. 917. *Smith v. Barre R. Co.*, 64 Vt. 21, 23 Atl. Rep. 632.

The Illinois statute makes it the duty of railroad companies to erect and maintain fences suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting upon their roads. *Chicago & A. R. Co. v. Umphenour*, 69 Ill. 198.

That statute, being a remedial statute, intended for the protection of domestic animals, should receive a liberal construction; and under such construction the terms "horses" and "cattle" include mules and asses. *Ohio & M. R. Co. v. Brubaker*, 47 Ill. 462.—FOLLOWED IN Toledo, W. & W. R. Co. v. Cole, 50 Ill. 184.

83. Unruly and trespassing stock.—"A good and sufficient fence," under the Illinois statute requiring railroad companies to fence against cattle, must not be one which will turn ordinary stock, but one that will turn stock even though to some extent unruly. *Chicago, B. & Q. R. Co. v. Bryant*, 29 Ill. App. 17.—QUOTING AND FOLLOW-

ING *Chicago & A. R. Co. v. Utley*, 38 Ill. 413.

A railroad company is not bound to maintain a fence against cattle unlawfully in an adjoining pasture. *Mayberry v. Concord R. Co.*, 47 N. H. 391.—FOLLOWING *Chapin v. Sullivan R. Co.*, 39 N. H. 53.

84. Swine and sheep.*—The local regulation in force in Linn county, under section 1545 of the Iowa Revision of 1860, prohibiting swine and sheep from running at large, and defining what shall constitute a legal fence, does not apply to a fence along a railway. And though it may admit of some doubt whether companies would be liable for swine or sheep improperly at large, they are clearly liable if the stock pass the owner's inclosure directly to the unfenced track of the road which passes through the same, where they are killed. *Fernow v. Dubuque & S. W. R. Co.*, 22 Iowa 528.

The Kansas Railroad Stock Law of 1874 imposes an obligation upon companies to fence their tracks against all animals, including hogs, against which a good and lawful fence would be a protection. *Missouri Pac. R. Co. v. Roads*, 23 Am. & Eng. R. Cas. 165, 33 Kan. 640, 7 Pac. Rep. 213.—FOLLOWING *Missouri Pac. R. Co. v. Bradshaw*, 33 Kan. 533.—DISTINGUISHED IN *Heller v. Abbot*, 79 Wis. 409. FOLLOWED IN *Missouri Pac. R. Co. v. Johnston*, 35 Kan. 58.

The fence law makes a distinction as to animals and lawful fences. Where hogs are permitted to run at large a certain fence is a lawful one; where they are not allowed to run at large another standard is adopted. *Missouri Pac. R. Co. v. Baxter*, 45 Am. & Eng. R. Cas. 471, 45 Kan. 520, 26 Pac. Rep. 49.

The word "cattle" in section 68 of the Railways Clauses Act 1845, relating to railway fences, includes pigs; and a fence which allows a pig to crawl through is insufficient. *Child v. Hearn, L. R.* 9 Ex. 176, 43 L. J. Ex. 100, 22 W. R. 864.

10. Duty to Repair and Rebuild.

85. Statutory requirements.—It is not only the duty of the company to fence its track, but also to maintain the fence.

* Duty to maintain hog-tight fences, see note, 23 AM. & ENG. R. CAS. 168.

Congdon v. Central Vt. R. Co., 20 Am. & Eng. R. Cas. 469, 56 Vt. 399, 48 Am. Rep. 793.—QUOTING *Quimby v. Vermont C. R. Co.*, 23 Vt. 387; *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116.—*Davis v. Hannibal & St. J. R. Co.*, 19 Mo. App. 425.

But the mere building of a fence does not require the company to keep it in repair unless the railroad has been in operation for six months. *Duggan v. Peoria, D. & E. R. Co.*, 42 Ill. App. 536. *Toledo, P. & W. R. Co. v. Miller*, 45 Ill. 42.

The duty enjoined on railroads to erect and keep fences in repair includes the duty of keeping gates closed. *West v. Missouri Pac. R. Co.*, 26 Mo. App. 344.

Under Mo. Rev. St. § 809, the duty of a company to maintain a gate is the same as to erect it in the first instance. *Morrison v. Kansas City, St. J. & C. E. R. Co.*, 27 Mo. App. 418.

Section 68 of the Railways Clauses Act 1845, relating to the making and repairing of fences, does not impose upon railway companies any duty more extensive than that imposed on ordinary tenants by the common law. *Ricketts v. East & W. I. Docks Co.*, 7 Railw. Cas. 295, 12 C. B. 160, 16 Jur. 1072, 21 L. J. C. P. 201.

86. Care and diligence required in looking after fences.*—A company is required to use only ordinary and reasonable care and diligence in maintaining and keeping in repair a fence constructed along its line of road. *Lemmon v. Chicago & N. W. R. Co.*, 32 Iowa 151, 10 Am. Ry. Rep. 32. *Chicago & N. W. R. Co. v. Barrie*, 55 Ill. 226, 2 Am. Ry. Rep. 451. *Carey v. Chicago, M. & St. P. R. Co.*, 20 Am. & Eng. R. Cas. 469, 61 Wis. 71, 20 N. W. Rep. 648.

Any evidence tending to establish the exercise of such care in respect to the maintaining and keeping in repair of the fence is admissible on the part of the company. *Lemmon v. Chicago & N. W. R. Co.*, 32 Iowa 151, 10 Am. Ry. Rep. 32.

Ordinary care, however, is a relative term, to be measured by the nature of the case, the hazard, and the situation. In keeping up its fences, the care required by a railroad company is not limited to such as would be used and exercised by an ordinarily careful farmer. *Rutledge v. Hannibal & St. J. R. Co.*, 19 Am. & Eng. R. Cas.

669, 78 Mo. 286.—FOLLOWED IN *Rozzelle v. Hannibal & St. J. R. Co.*, 19 Am. & Eng. R. Cas. 591, 79 Mo. 349. QUOTED IN *Jones v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 158.

The duty to fence imposed by the statute is in the nature of a police regulation, and is designed as a means of greater security to the lives and limbs of passengers on the trains, and also for the prevention of injuries to animals liable to be about the track. Therefore, as the corporation must maintain the fence to such an important end, the law exacts of it a degree of care and vigilance in looking after its fences commensurate with the peril to life and property. *Davis v. Hannibal & St. J. R. Co.*, 19 Mo. App. 425.—QUOTING *Busby v. St. Louis, K. C. & N. R. Co.*, 81 Mo. 43.

Where a company has erected a sufficient fence, it is only bound to reasonable diligence in keeping it up, and is not bound to patrol the track at night. *Illinois C. R. Co. v. Dickerson*, 27 Ill. 55.

While a company is not obliged to construct farm crossings and necessary gates, fences, and cattle-guards pertaining thereto, unless requested so to do by the landowner, yet if it does construct them, whether by request or not, it is bound to keep them in sufficient repair. *Miller v. Chicago, R. I. & P. R. Co.*, 23 Am. & Eng. R. Cas. 235, 66 Iowa 546, 24 N. W. Rep. 36.

Railroads in Indiana are bound to fence their roads and keep the fences in repair; if the fences are not in repair the roads will be held to the common law liability, simply for negligence. *New Albany & S. R. Co. v. Pace*, 13 Ind. 411.

A company must be as watchful to keep its fences in repair as any prudent person would be in maintaining fences to protect his own property. *Crosby v. Detroit, G. H. & M. R. Co.*, 58 Mich. 458, 25 N. W. Rep. 463.

Whether an inspection of fences by a company every two days is a sufficient exercise of diligence is a question of fact to be determined by jury, with reference to the circumstances of the case. *Evans v. St. Paul & S. C. R. Co.*, 30 Minn. 489, 16 N. W. Rep. 271.

Where railroad fences get out of repair by some accident or event beyond the control of the company, it is not responsible, if those patrolling the track report the matter, and repairs are made with reasonable dili-

* Duty of company to repair, see notes, 19 AM. & ENG. R. CAS. 674; 13 Id. 561.

gence. *Antidel v. Chicago & N. W. R. Co.*, 26 Wis. 145, 2 Am. Ry. Rep. 467. *Brown v. Milwaukee & P. du C. R. Co.*, 21 Wis. 39.

But reasonable diligence in such a case means a high degree of diligence, exceeding that which men in general exercise in their own affairs; hence it is proper to refuse an instruction that a company is only required "to exercise ordinary care and diligence in maintaining fences." *Antidel v. Chicago & N. W. R. Co.*, 26 Wis. 145, 2 Am. Ry. Rep. 467.—APPLYING *Ward v. Jefferson*, 24 Wis. 342.

The obligation of a railway company, under section 13 of "The Railway Act," to maintain fences on each side of their track involves the duty of a continuous watchful inspection, and they must take notice of its state at all times. *Studer v. Buffalo & L. H. R. Co.*, 25 U. C. Q. B. 160.

87. Reasonable time within which to repair.*—Where a company has erected a sufficient fence and it has become broken down by accident, it is entitled to a reasonable time within which to repair it. *Illinois C. R. Co. v. Swearingen*, 33 Ill. 289.—REVIEWED IN *Chicago, B. & Q. R. Co. v. Kennedy*, 22 Ill. App. 308.—*McCormick v. Chicago, R. I. & P. R. Co.*, 41 Iowa 193.—FOLLOWED IN *Brentner v. Chicago, M. & St. P. R. Co.*, 7 Am. & Eng. R. Cas. 574, 58 Iowa 625.—*King v. Chicago, R. I. & P. R. Co.*, 90 Mo. 520, 3 S. W. Rep. 217.—APPLYING *Clardy v. St. Louis, I. M. & S. R. Co.*, 73 Mo. 577.—*Munch v. New York C. R. Co.*, 29 Barb. (N. Y.) 647.—APPROVING *Corwin v. New York & E. R. Co.*, 13 N. Y. 42.

And proof that such fence was torn down by a trespasser, but allowed to remain so for several weeks, is sufficient to justify a jury in finding that the company was negligent. *Munch v. New York C. R. Co.*, 29 Barb. (N. Y.) 647.

The excuse that a reasonable time has not elapsed within which to repair a fence must be alleged and proved. *Jeffersonville, M. & I. R. Co. v. Sullivan*, 38 Ind. 262, 10 Am. Ry. Rep. 279.

The doctrine that a reasonable time must elapse after a gate or a fence gets out of repair, in which a railroad company may discover its condition, does not apply where

the gate never had such a fastening as the law required. *Duncan v. St. Louis, I. M. & S. R. Co.*, 91 Mo. 67, 3 S. W. Rep. 835.

It cannot be said as a matter of law that from Friday evening to Sunday evening was not a reasonable time for a railway company to rebuild thirty rods of fence destroyed by fire. It was a proper question to submit to the jury with all the facts. *Bell v. Chicago, B. & Q. R. Co.*, 64 Iowa 321, 20 N. W. Rep. 456.—FOLLOWED IN *Wait v. Burlington, C. R. & N. R. Co.*, 35 Am. & Eng. R. Cas. 194, 74 Iowa 207, 37 N. W. Rep. 159.

A railroad fence being discovered on fire about six or seven o'clock in the evening, the section foreman, getting notice thereof at about eight o'clock that evening, proceeded the next morning, before six o'clock, to repair the same, as soon as practicable, from the nearest materials belonging to the company, which were about half a mile distant. *Held*, that the company were not guilty of a breach of their duty, under the statute, to repair the same without unreasonable delay. *Stephenson v. Grand Trunk R. Co.*, 34 Mich. 323.—DISTINGUISHED IN *Crosby v. Detroit, G. H. & M. R. Co.*, 58 Mich. 458.

Under such circumstances it is no error to exclude evidence that the repairs might have been more quickly made of suitable materials which were near at hand, but which it is conceded did not belong to the company, and which were not shown to have been available to it for that purpose. *Stephenson v. Grand Trunk R. Co.*, 34 Mich. 323.

Toward night a fence was found burned. *Held*, in an action to recover for an animal killed on that night, that the question as to whether it was negligence to postpone the repair of the fence until morning was for the jury. *Crosby v. Detroit, G. H. & M. R. Co.*, 58 Mich. 458, 25 N. W. Rep. 463.

88. Notice of defects—Knowledge.*

—Where a railroad company knows, or by the exercise of reasonable diligence might have known, of defects in its fences, required to be kept in repairs, and fails to make the necessary repairs within a reasonable time after the acquisition of such knowledge, or after such knowledge should have been acquired, it is liable for damages resulting from such failure or neglect. *Wil-*

* Company bound to repair only within reasonable time, see note, 13 AM. & ENG. R. CAS. 567.

* Notice of defects in fences, see note, 19 AM. & ENG. R. CAS. 674.

son v. St. Louis, I. M. & S. R. Co., 87 Mo. 431.—FOLLOWED IN *Foster v. St. Louis, I. M. & S. R. Co.*, 44 Mo. App. 11.

A company maintaining an apparently good fence will not be liable for injuries on account of defects therein, unless it has notice of the same. *Chicago, B. & Q. R. Co. v. Seirer*, 60 Ill. 295, 12 Am. Ry. Rep. 315. *Chicago & A. R. Co. v. Umphenour*, 69 Ill. 198.

Where a company has once erected a fence along its track as required by law, which has since been broken down, the burden of proof is upon plaintiff to show that the company knew of the damage to the fence or that it had been down for such a length of time as to enable it by the exercise of due care to have obtained knowledge of the defect. *Young v. Hannibal & St. J. R. Co.*, 82 Mo. 427.

Where a fence has been out of repair for a considerable period, a railroad company will be presumed to have had notice through its agent of said defective condition, and is chargeable with constructive notice. *McGuire v. Ogdensburgh & L. C. R. Co.*, 44 N. Y. S. R. 348, 63 Hun 632, 18 N. Y. Supp. 313.—APPLYING *Hodge v. New York C. & H. R. R. Co.*, 27 Hun 395; *Hungerford v. Syracuse, B. & N. Y. R. Co.*, 46 Hun 340, 12 N. Y. S. R. 204. DISTINGUISHING *Wheeler v. Erie R. Co.*, 2 T. & C. (N. Y.) 636; *Murray v. New York C. R. Co.*, 4 Keyes (N. Y.) 278.

Plaintiff's action being based upon the unsafe condition of the fence as originally constructed, proof that the defendant had knowledge of its defective condition was unnecessary. *Morrison v. Burlington, C. R. & N. R. Co.*, 84 Iowa 663, 51 N. W. Rep. 75.

A company bound by law to erect and maintain a fence is liable to adjoining landowners for damages to their stock, where the fence is allowed to remain down for several days after constructive notice of the fact; and proof that there was no negligence in the manner of running the train doing the damage, and that the landowner had taken the contract from the company to erect the fence and had erected it imperfectly, will not relieve the company from liability. *Norris v. Androscoggin R. Co.*, 39 Me. 273.—QUOTING *Trow v. Vermont C. R. Co.*, 24 Vt. 488.—REVIEWED IN *Whitney v. Atlantic & St. L. R. Co.*, 44 Me. 362; *Iba v. Hannibal & St. J. R. Co.*, 45 Mo. 469.

Under the statute the primary duty of erecting and maintaining fences along a track rests upon the company, yet adjoining proprietors, when defects have come to their knowledge, must make suitable effort to notify the company thereof; and where both are charged with negligence in this regard, the question must be left to the jury to decide which was negligent. *Poler v. New York C. R. Co.*, 16 N. Y. 476.

80. Presumption of negligence from time of existence of defect.*—

Where a fence has been washed away, the company is entitled to a reasonable time in which to rebuild; but proof of a failure to rebuild for two months will justify a finding that the company was negligent. *Fritz v. Kansas City, St. J. & C. B. R. Co.*, 13 Am. & Eng. R. Cas. 558, 61 Iowa 323, 16 N. W. Rep. 144.

The proof showed that plaintiff's horses escaped from his field to defendant's track over bars that the company was bound to maintain; and that they had been erected six years before, of small poplar poles, and were found broken down and half rotten after the accident. *Held*, sufficient to show negligence on the part of the company. *Hovorka v. Minneapolis & St. L. R. Co.*, 34 Minn. 281, 25 N. W. Rep. 595.—FOLLOWING *Hovorka v. Minneapolis & St. L. R. Co.*, 31 Minn. 221.

The evidence showed that a fence which defendant company was bound to maintain was broken down by ice and high water about the middle of April, of which the company had notice, but made no effort to repair it until the 22d of the following May, when plaintiff's cattle went upon the track and were killed. The evidence also tended to show that for a considerable time before the accident there were but a few inches of water at the place, and that the accident might have been prevented by setting posts and stringing wires thereon. *Held*, sufficient to sustain a verdict finding the company guilty of negligence in failing to seasonably repair the fence. *Graves v. Chicago, M. & St. P. R. Co.*, 47 Minn. 429, 50 N. W. Rep. 474.

The opening at the end of a gate had existed at least two months, and the section men had repeatedly been asked to repair it. The section boss had refused to allow the

* Inference of negligence from lapse of time during which fence is in bad repair, see note, 13 AM. & ENG. R. CAS. 561.

plaintiff to fix it, and had promised that he would attend to it. *Held*, that the defendant was guilty of negligence. *Stuetgen v. Wisconsin C. Co.*, 80 Wis. 498, 50 N. W. Rep. 407.

90. Duty of landowner to repair.—Under Ill. Act of 1855, requiring railroad companies to fence, but providing that they may be released by adjoining landowners, the company is only released when the duty to fence is assumed by the landowner; and a mere contract, by which the landowner undertakes to build a fence for the company, does not relieve the latter. *Illinois C. R. Co. v. Swearingen*, 33 Ill. 289.

The duty of keeping railroad fences, gates, and bars in repair cannot be shifted from the company to the owner of the stock injured merely because, through the company's neglect, such owner has found it necessary to make some temporary repairs thereon. *Peoria, D. & E. R. Co. v. Babbs*, 23 Ill. App. 454.

A landowner who joins his fence with that erected by a railroad company, with its consent, is under no obligation to aid in keeping the company's fence in repair. *Bushy v. St. Louis, K. C. & N. R. Co.*, 22 Am. & Eng. R. Cas. 589, 81 Mo. 43.

A landowner whose stock has been killed is not prevented from recovering by proof that he knew the railroad fence was defective, and did not repair it. *Wilson v. St. Louis, I. M. & S. R. Co.*, 87 Mo. 431.

The right given to a landowner to repair or build fences and cattle-guards at the expense of the railway company is a cumulative right. He is not bound to avail himself of it, and if he does not do so, the company's liability for its failure to erect fences is not lessened thereby. *Buttles v. Chicago, S. F. & C. R. Co.*, 43 Mo. App. 280.—*FOLLOWING* *Carpenter v. St. Louis, I. M. & S. R. Co.*, 20 Mo. App. 644.

As between a tenant and his landlord, in the absence of any special covenant requiring the landlord to maintain fences along a railroad, which the landlord has agreed with the company to maintain, it is incumbent on the tenant to keep such fences in repair. *Hoyleman v. Kanawha & O. R. Co.*, 33 W. Va. 489, 10 S. E. Rep. 816.

91. Matters of defense.—Where a company has erected, and for a number of years maintained, a fence along the side of and near its right of way, and near a station, but suffered it to become defective, whereby

stock got upon its track and were killed, it cannot exonerate itself from liability on the ground of its higher duty to the public of keeping its depot grounds open for the convenience of those having business with the road. So long as it permits such fence to stand and be relied on by others as a fence required by statute, it will be estopped from denying its duty to keep it in proper repair. *Chicago & E. I. R. Co. v. Guertin*, 24 Am. & Eng. R. Cas. 385, 115 Ill. 466, 4 N. E. Rep. 507.

As to third persons it is the duty of companies not only to fence their roads, but to keep the gates at private crossings in repair and closed; but where a road is properly fenced and the company uses the necessary care and caution in keeping it up or in good condition, and it is thrown and left down or open by the act of a third person, without the fault of the company, the liability for the injury is upon the party thus throwing down or leaving open the fence, and not upon the company. *Russell v. Hanley*, 20 Iowa 219.—*DISTINGUISHED IN* *Tyson v. Keokuk & D. M. R. Co.*, 43 Iowa 207; *Gill v. Atlantic & G. W. R. Co.*, 27 Ohio St. 240. *FOLLOWED IN* *Evans v. Burlington & M. R. R. Co.*, 21 Iowa 374.

III. LIABILITY FOR FAILURE TO BUILD AND MAINTAIN.

1. Generally.

92. Landowner's right of action, generally.—Where a company fails to fence its track as required by statute, it takes the hazard of injuries that may result therefrom, and must respond in damages to one injured. *Toledo, P. & W. R. Co. v. Lavery*, 71 Ill. 522. *Boggs v. Missouri Pac. R. Co.*, 18 Mo. App. 274.

Where a company takes a deed of a right of way on condition that it will fence its track within a reasonable time, an action on the case will lie against the company for a failure to do so. *Conger v. Chicago & R. I. R. Co.*, 15 Ill. 366.

Where a company, in part consideration for the right of way over land, promises the landowner to erect fences on each side of its railroad through the land, and to make cattle-guards and farm crossings, the company is liable, upon its failure to perform such promise, for the cost of constructing such fences, etc., and it is not necessary, in order

to recover such damages, that the fences, etc., should have been constructed by the plaintiff before bringing suit. *Logansport, C. & S. W. R. Co. v. Wray*, 52 Ind. 578.—EXPLAINING *Indiana C. R. Co. v. Moore*, 23 Ind. 14.

Wagn. Mo. St. 309, 311—providing that the penalties against railroads, of double damages for a failure to maintain fences, shall be recovered in the name of the state, so far as the rights of individuals to recover damages are concerned—is remedial and not penal; or, at most, gives only an additional method of prosecuting for damages. The party injured is the proper plaintiff. *Hudson v. St. Louis, K. C. & N. R. Co.*, 53 Mo. 525.—FOLLOWED IN *Saunders v. St. Louis, K. C. & N. R. Co.*, 57 Mo. 117; *Sparr v. St. Louis, K. C. & N. R. Co.*, 57 Mo. 152; *Fickle v. St. Louis, K. C. & N. R. Co.*, 54 Mo. 219.

A company which fails to fence as required by statute becomes amenable to the penalties, whether guilty of negligence or not. *Smith v. St. Louis, I. M. & S. R. Co.*, 91 Mo. 58, 3 S. W. Rep. 836.

A landowner executed to a company an irrevocable license to enter and occupy certain land as a right of way, the deed thereof to be made when the road was finally located and built. Held, that the failure of the company to perform conditions subsequent, such as fencing, constituted no ground for revoking the license, and would not enable the landowner to recover the right of way in ejectment. *Morris v. Indianapolis, B. & W. R. Co.*, 76 Ill. 522.

93. Injuries to cattle.*—A company which is bound to erect and maintain fences and cattle-guards at a crossing near where a cow was run over, having failed to do so, is liable to the owner for damages. *Brady v. Kesselaer & S. R. Co.*, 1 Hun (N. Y.) 378, 3 T. & C. 537.

The fact that the owner of stock permits it to run at large in violation of the law does not relieve the company from its duty to fence, or its liability to stock injured in consequence of failure to do so. *Ewing v. Chicago & A. R. Co.*, 72 Ill. 25.

Under the provision of the N. Y. General

Railroad Act (§ 44, ch. 140, laws 1850, as amended by § 8, ch. 282, laws 1854), requiring corporations to erect fences along their roads and making them liable for damages which shall be done by agents or engines of the corporation to animals thereon, to create the liability there must be some action on the part of the corporation, by its mechanical or other agents, producing the injury. *Knight v. New York, L. E. & W. R. Co.*, 23 Am. & Eng. R. Cas. 188, 99 N. Y. 25, 1 N. E. Rep. 108; reversing 30 Hun 415.

In a suit brought since the passage of the Tenn. Act of 1891, to enforce the liability of a company for injury to live stock by its moving trains upon an unfenced track, evidence tending to show observance of statutory precautions is irrelevant and properly excluded. *Cincinnati, N. O. & T. P. R. Co. v. Russell*, 92 Tenn. 108, 20 S. W. Rep. 784.

Under the provisions of the statute, a failure to fence the railway is conclusive evidence of the want of due care. If, however, the road be fenced, then the burden of proving the want of due care rests upon the plaintiff who seeks to recover for injuries done to his stock. *International & G. N. R. Co. v. Cocke*, 23 Am. & Eng. R. Cas. 226, 64 Tex. 151.

Under the Tex. Rev. St. art. 4245, providing that every railroad shall be liable for stock killed on its track, but that if a company fence its road it shall be only liable for want of ordinary care, a company which has not fenced its road has no right to enter into an inquiry as to whether the injury would have occurred had it been properly fenced. *Gulf, C. & S. F. R. Co. v. Hudson*, 77 Tex. 494, 14 S. W. Rep. 158.

94. Failure to build cattle-guards is failure to fence.—The failure to construct cattle-guards, where it is the duty of the railroad company to construct them, is regarded as a failure to fence. *Wells v. Indianapolis & V. R. Co.*, 24 Am. & Eng. R. Cas. 371, 105 Ind. 55, 4 N. E. Rep. 410.

95. Liability of lessor company.—A company owning a track and permitting another company to use it is liable for stock killed by the latter's cars by reason of the track not being fenced. *Toledo, P. & W. R. Co. v. Rumbold*, 40 Ill. 143.—FOLLOWING *Illinois C. R. Co. v. Kanouse*, 39 Ill. 272.—DISTINGUISHED IN *West v. St. Louis, V. & T. H. R. Co.*, 63 Ill. 545. FOLLOWED IN *Dolan v. Newburgh, D. & C. R. Co.*, 42 Am.

* See important note on injuries to animals on railroad track, 31 AM. & ENG. R. CAS. 496.

Trespassing animals injured, caused by failure to fence. Liability of company, see note, 22 AM. & ENG. R. CAS. 614. See also title ANIMALS, INJURIES TO.

& Eng. R. Cas. 611, 120 N. Y. 571, 24 N. E. Rep. 824, 31 N. Y. S. R. 852. QUOTED IN *Fontaine v. Southern Pac. R. Co.*, 1 Am. & Eng. R. Cas. 159, 54 Cal. 645.

96. Pleading.*—The declaration should show that the accident sued for happened at a place where the company, under the statute, is bound to maintain a fence. *Illinois C. R. Co. v. Williams*, 27 Ill. 48.

A failure to state that it was the duty of the company to fence at the place of the accident must be taken advantage of by demurrer, and not by instruction to the jury; but such defect in the declaration is cured by going to trial and proof showing that a fence was necessary at the place of the accident. *Toledo, P. & W. R. Co. v. McClannan*, 41 Ill. 238.

As the statute does not require companies to fence until the road has been opened for use for six months, a declaration in an action for a failure to fence must allege that the road has been opened for six months or more prior to the injury sued for. *Cannon v. Louisville, E. & St. L. Con. R. Co.*, 34 Ill. App. 640.

A complaint which alleges that the company failed to maintain lawful fences, cattle-guards, gates, and openings along the sides of its road, states, and attempts to state, but one cause of action, and proof of failure to maintain any one, with proof of the other necessary averments, will entitle plaintiff to recover. *Duncan v. St. Louis, I. M. & S. R. Co.*, 91 Mo. 67, 3 S. W. Rep. 835.

An allegation that defendant, a consolidated company, neglected to erect a fence as required by statute is sufficient. If its predecessor had erected a fence at the place in question, that was matter of defense. *Roberts v. Wabash, St. L. & P. R. Co.*, (Mo.) 25 Am. & Eng. R. Cas. 298, 3 West. Rep. 783.

Proof of conditions which would release a company from the duty of fencing its track at a particular point may be given under the general denial. *Indianapolis, D. & W. R. Co. v. Clay*, 4 Ind. App. 282, 28 N. E. Rep. 567, 30 N. E. Rep. 916.

97. Defenses—Contributory negligence—Burden of proof.†—In actions to recover damages for injuries sustained

through the omission of a corporation to fence its road, as required by section 51 of the Mo. General Railroad Act of February 24, 1853, the question of care and diligence on the part of the corporation, through its agents and servants, cannot arise. If the road be not fenced as required by law, it matters not that the highest care is exercised by the agents of the corporation. *Gorman v. Pacific R. Co.*, 26 Mo. 441.

Contributory negligence is not a defense to an action based upon the statute imposing upon companies the duty of fencing their tracks. *Welty v. Indianapolis & V. R. Co.*, 24 Am. & Eng. R. Cas. 371, 105 Ind. 55, 4 N. E. Rep. 410.—DISTINGUISHING *Cincinnati, W. & M. R. Co. v. Hiltzhauser*, 99 Ind. 486.

New York Acts of 1848, ch. 140, § 42, and of 1850, ch. 140, § 42, requiring railroad companies to fence their roads, render the companies responsible when they omit to make the fences if the damages are caused by them, whether from carelessness, mismanagement, wilfulness, or inevitable accident. But they do not make them answerable for the carelessness or wilful misconduct of those who, from such causes, sustain injuries from them. *Marsh v. New York & E. R. Co.*, 14 Barb. (N. Y.) 364.—DISTINGUISHING *Suydam v. Moore*, 8 Barb. 358; *Waldron v. Reischer & S. R. Co.*, 8 Barb. 390.—APPLIED IN *Terry v. New York C. R. Co.*, 22 Barb. 574. DISTINGUISHED IN *Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141.

The omission of a company, under Minn. Act of 1872, ch. 25, to fence its road is negligence *per se*; but where such omission has been assented to by the landowner, the rule of contributory negligence applies, and he cannot recover for cattle killed in consequence of it. *Whittier v. Chicago, M. & St. P. R. Co.*, 24 Minn. 394.

Where the location of the road has been filed and its construction begun prior to Mass. Act of 1846, ch. 271, § 3, the company is not bound to erect and maintain fences; and where a company is sued for failing to maintain sufficient fences the burden is upon the plaintiff to prove all the facts necessary to bring the company within the provisions of the statute. *Baxter v. Boston & W. R. Corp.*, 102 Mass. 383.

98. Instructions to the jury.—Where there is no statute requiring a railroad company to fence its track for the prevention of personal injuries, a charge that if

* Pleading as to duty of fencing, see note, 19 AM. & ENG. R. CAS. 580.

† Burden of proof on company to show no obligation to fence, see note, 19 AM. & ENG. R. CAS. 624.

a fence would have prevented such injury it was negligent not to have had it, is all that can be asked in an action therefor against the company. *Marcott v. Marquette, H. & O. R. Co.*, 8 Am. & Eng. R. Cas. 306, 49 Mich. 99, 13 N. W. Rep. 374.

99. Measure of damages, generally.

—For the breach of a contract by a company with a landowner to fence its right of way, the cost of erecting the fence and also special damages for animals killed, for damage done by trespassing animals, and for the loss of pasturage, may be recovered. *Louisville, N. A. & C. R. Co. v. Sumner*, 24 Am. & Eng. R. Cas. 641, 106 Ind. 55, 5 N. E. Rep. 404.—FOLLOWED IN *Louisville, N. A. & C. R. Co. v. Moore*, 106 Ind. 600; *Louisville, N. A. & C. R. Co. v. Power*, 119 Ind. 269.—*Louisville, N. A. & C. R. Co. v. Power*, 119 Ind. 269, 21 N. E. Rep. 751.—FOLLOWING *Louisville, N. A. & C. R. Co. v. Sumner*, 106 Ind. 55.

Where a company agrees to build and maintain a fence on both sides of their right of way through a certain farm, after having built it, the measure of damages for the breach of the remainder of their contract is the annual cost of keeping and maintaining the fence. *Erie & P. R. Co. v. Johnson*, 101 Pa. St. 555.

100. Deprivation of use of land.—

A landowner cannot be deprived of the use of his lands because of the neglect of the railroad to construct fences according to law. *McCoy v. California Pac. R. Co.*, 40 Cal. 532. *Donovan v. Hannibal & St. J. R. Co.*, 26 Am. & Eng. R. Cas. 588, 89 Mo. 147, 1 S. W. Rep. 232.

The neglect of the company to build the fence does not operate to dispossess the occupant of his entire field, or prevent him from making a lawful use of it. *McCoy v. California Pac. R. Co.*, 40 Cal. 532.—APPROVED IN *Cleveland, C., C. & I. R. Co. v. Scudder*, 13 Am. & Eng. R. Cas. 561, 40 Ohio St. 173. QUOTED IN *Atchison, T. & S. F. R. Co. v. Walton*, 3 N. Mex. 319.

101. Decrease in value of land.*—

For the neglect of a company to fence its track as required by statute, the landowner over whose farm the same is laid may recover, as damages, diminution of the rental value of the farm caused thereby. Such damages are not necessarily limited to what

it would cost to build a fence. *Emmons v. Minneapolis & St. L. R. Co.*, 35 Am. & Eng. R. Cas. 126, 38 Minn. 215, 36 N. W. Rep. 340.—REVIEWING *Emmons v. Minneapolis & St. L. R. Co.*, 35 Minn. 503, 29 N. W. Rep. 202.—FOLLOWED IN *Emmons v. Minneapolis & St. L. R. Co.*, 40 Am. & Eng. R. Cas. 236, 41 Minn. 133, 42 N. W. Rep. 789. REVIEWED IN *Nelson v. Minneapolis & St. L. R. Co.*, 40 Am. & Eng. R. Cas. 234, 41 Minn. 131, 42 N. W. Rep. 788.—*Finch v. Chicago, M. & St. P. R. Co.*, 46 Minn. 250, 48 N. W. Rep. 915.

The measure of damages in such a case is the depreciation in the rental value of the farm, which means the value of its use for any purpose for which it is adapted in the hands of a prudent and discreet farmer upon a judicious system of husbandry; and evidence of any fact tending to show how and to what extent the absence of a railway fence injuriously affected the value of such use is competent. *Nelson v. Minneapolis & St. L. R. Co.*, 40 Am. & Eng. R. Cas. 234, 41 Minn. 131, 42 N. W. Rep. 788.—REVIEWING *Emmons v. Minneapolis & St. L. R. Co.*, 38 Minn. 215, 36 N. W. Rep. 340.—FOLLOWED IN *Emmons v. Minneapolis & St. L. R. Co.*, 40 Am. & Eng. R. Cas. 236, 41 Minn. 133, 42 N. W. Rep. 789.

102. Injuries to passengers.*—

One of the objects of a statute requiring railroad companies to fence their tracks is for the safety of passengers. So proof that a passenger was injured by reason of a failure to fence, as the statute required, is sufficient proof of negligence to render the company liable. *Blair v. Milwaukee & P. du C. R. Co.*, 20 Wis. 254. *Donnegan v. Erhardt*, 42 Am. & Eng. R. Cas. 580, 119 N. Y. 468, 23 N. E. Rep. 1051.

2. For Injury to Crops, Pasturage, etc.

103. Injuries to crops, generally.†

—The liability of a company under Wagn. Mo. St. 310, 311, § 43, extends not only to cases where the traveling public would be endangered by the act which caused the damage to the adjoining owner, but to those where, by reason of the failure to fence, cattle stray from the track onto the land bordering the road, and destroy the

* Liability of company for decrease in value of land on account of failure to fence, see 56 AM. & ENG. R. CAS. 173, *abstr.*

* Injury to passengers owing to failure to fence, see note, 42 AM. & ENG. R. CAS. 582.

† Injuries to crops from failure to fence, see note, 19 AM. & ENG. R. CAS. 622.

crops. *Trice v. Hannibal & St. J. R. Co.*, 49 Mo. 438, 2 Am. Ry. Rep. 445. *Ackley v. St. Louis, I. M. & S. R. Co.*, 30 Mo. App. 637. *Baker v. Chicago, M. & St. P. R. Co.*, 41 Mo. App. 260. *Gordon v. Chicago, S. F. & C. R. Co.*, 44 Mo. App. 201.—FOLLOWING *Silver v. Kansas City, St. L. & C. R. Co.*, 78 Mo. 528.

Prior to the passage of Miss. Act of March 13, 1884, making it the duty of companies to erect stock gaps and guards wherever their roads intersect inclosure fences, a company removing such fence from its right of way did not incur the penalty provided by the code of 1880, § 989, against any person throwing down any fence inclosing land not his own. *Fairchild v. New Orleans & N. E. R. Co.*, 62 Miss. 177.

104. Injuries to pasture land.—Under the Minn. Gen. St. 1878, ch. 34, § 57, damages may be recovered against a railroad company for injury done to a farm by rendering it less fit for pasturing cattle, in consequence of failure to fence the road as required by the statute. *Emmons v. Minneapolis & St. L. R. Co.*, 35 Minn. 503, 29 N. W. Rep. 202.—QUOTING *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 515.—FOLLOWED IN *Nelson v. Minneapolis & St. L. R. Co.*, 40 Am. & Eng. R. Cas. 234, 41 Minn. 131, 42 N. W. Rep. 788; *Emmons v. Minneapolis & St. L. R. Co.*, 40 Am. & Eng. R. Cas. 236, 41 Minn. 133, 42 N. W. Rep. 789. REVIEWED IN *Emmons v. Minneapolis & St. L. R. Co.*, 35 Am. & Eng. R. Cas. 126, 38 Minn. 215, 36 N. W. Rep. 340.

The statutory obligation imposed upon railroad companies to erect and maintain suitable fences on each side of their tracks is imperative, and a failure to do so renders a company liable to an adjoining landowner for the loss of the use of pasture lands by reason of an insufficient fence. *Leggett v. Rome, W. & O. R. Co.*, 41 Hun 80, 2 N. Y. S. R. 312.—DISTINGUISHING *Knight v. New York, L. E. & W. R. Co.*, 99 N. Y. 25. REVIEWING *Corwin v. New York & E. R. Co.*, 13 N. Y. 42; *Thomas v. Utica & B. R. R. Co.*, 97 N. Y. 245.

105. Who may sue.—In order to maintain trespass for damage done by stock, the owner of the close must have it surrounded by a good and sufficient fence. *Headen v. Rust*, 39 Ill. 186.—FOLLOWING *Seeley v. Peters*, 10 Ill. 130.—APPLIED IN *Louisville & N. R. Co. v. Shelton*, 43 Ill. App. 220.

5 D. R. D.—53.

106. Rights of tenants, licensees, etc.—A company which has purchased from the owner of land a right of way through the same is liable to the tenant of that owner for any damage sustained by its having thrown down the fence inclosing and protecting his growing crops, in consequence of which cattle entered and destroyed those crops, irrespective of whether or not the landlord would be liable for failure to keep up the fence. *Chattanooga, R. & C. R. Co. v. Brown*, 43 Am. & Eng. R. Cas. 611, 84 Ga. 256, 10 S. E. Rep. 730.

A company which has condemned and paid for land for its right of way is liable in damages to the tenants of the prior owner for injuries to their crops by invading cattle which were allowed entrance by the right of way condemned—the crops having been protected by stock gaps before the condemnation, and these stock gaps having been filled up by the company afterwards. *Rome & C. Constr. Co. v. Jennings*, 85 Ga. 444, 11 S. E. Rep. 839.

In a suit brought by a tenant against a company for damage to a growing crop, the tenant is entitled to recover all the damages incurred, and not a share proportionate to his ultimate interest in the crop. *Texas & P. R. Co. v. Bayliss*, 62 Tex. 570.

One having a license to graze cattle upon land adjoining a track may maintain an action for injury to the cattle, owing to the neglect of the company to construct a fence required by statute. *Dawson v. Midland R. Co.*, 4 L. J. Ex. 49, L. R. 8 Ex. 8, 21 W. R. 56.

107. Who liable.—The law does not impose upon a railroad company the duty of making and keeping up stock gaps where its tracks enter inclosed lands, and it is not liable for a failure to do so, in the absence of a special contract; nor can the duty to do so be inferred from the fact that the plaintiff has voluntarily conveyed the right of way. *Rossignoll v. Northeastern R. Co.*, 75 Ga. 354.

A company is liable for injuries to crops from defective fences, though the road is being built by a contractor, he having nothing to do with the fencing. *Pound v. Port Huron & S. W. R. Co.*, 19 Am. & Eng. R. Cas. 640, 54 Mich. 13, 19 N. W. Rep. 570.

Where a company had acquired a right of way across a farm and had taken down the fences already on the premises, it was liable for injuries done to the crops by cattle which had come upon the right of way

and had escaped therefrom upon the farm. *Pound v. Port Huron & S. W. R. Co.*, 19 *Am. & Eng. R. Cas.* 640, 54 *Mich.* 13, 19 *N. W. Rep.* 570.

The Missouri statute laying on railroad companies the obligation of fencing their tracks along "inclosed or cultivated fields" (*Wagn. St.* 310, 311, § 43) does not require that the fields should be protected by the owner with a lawful fence on other sides, in order to hold the road for failure to fence the side adjacent to the roadbed. But the incursion of stock and injuries to crops must result from the failure of the company to erect such fence. Where caused by insufficiency of the fence put up by the owner, the company will not be responsible. *Biggerstaff v. St. Louis, K. C. & N. K. Co.*, 60 *Mo.* 567.

Where a company has operated its road for years through a field, and has never built fences along the sides of its right of way, but only placed a cattle-guard at its entry into such field, and in repairing and improving its roadbed and track it removes said cattle-guard for a week or more, and stock passes into said field and destroys the crop, it is liable under *Mo. Rev. St.* 1879, § 500, and cannot defend by the fact that it kept a watchman there, or on the theory that it is entitled to a reasonable time after the discovery of defects to repair fences along the right of way. *Shotwell v. St. Joseph & St. L. R. Co.*, 37 *Mo. App.* 654.—FOLLOWED IN *Gordon v. St. Joseph & St. L. R. Co.*, 37 *Mo. App.* 662.

The owner of land adjoining a railway is not liable to one who hires from the company surplus land, for damage caused by his horses passing their heads over a low fence and injuring the tenant's crops, since the statute imposes the duty of fencing upon the railway company. *Wiseman v. Booker*, *L. R.* 3 *C. P. D.* 184, 38 *L. T.* 292, 26 *W. R.* 634.

108. Pleading.—The owner of property on which repeated acts of depredation have been committed by cattle, owing to the failure of an adjoining railroad to maintain a sufficient fence, may sue for the entire damage in one count, and cannot be compelled to elect as to which trespass or neglect he will proceed upon. *Ray v. St. Louis, I. M. & S. R. Co.*, 25 *Mo. App.* 104.

Where an action is commenced before a justice of the peace to recover damages from a railroad company, caused by stock

going upon plaintiff's lands and destroying his crops for a want of proper cattle-guards, the action is not one of trespass on real estate, within the meaning of *Kan. Comp. Laws* 1879, ch. 81, § 6, but is an action for an omission of a statutory duty; and the plaintiff may include a claim for the value of services in driving out and herding the stock, and in preventing further damages. *St. Louis & S. F. R. Co. v. Sharp*, 13 *Am. & Eng. R. Cas.* 595, 27 *Kan.* 134.—FOLLOWED IN *St. Louis & S. F. R. Co. v. Edwards*, 27 *Kan.* 137; *St. Louis & S. F. R. Co. v. Ritz*, 19 *Am. & Eng. R. Cas.* 611, 33 *Kan.* 404; *Missouri Pac. R. Co. v. Ricketts*, 45 *Kan.* 617.

In a suit against a railroad company for damages to crops, caused by the failure of defendant to fence its line of road through plaintiff's premises, where it appeared from the petition that the company had constructed its "roadbed," but no allegation showed that the road was completed—*held*, that though the petition was not good as a pleading framed on the statute (*Wagn. St.* 310, § 43), it set forth a good cause of action at common law, and should be proceeded with; and as a common law action it was not demurrable because it asked for a judgment for double damages. The character of the petition is not always determined by the relief it prays for. The court may grant any relief consistent with the case and embraced in the issues. *Comings v. Hannibal & C. M. R. Co.*, 48 *Mo.* 512.

A complaint in an action under the forty-third section of the Missouri railroad law, to recover double damages for injury to crops, alleged that "at a point on defendant's railroad where defendant had failed to erect and maintain lawful fences on the sides of its road, as required by the said forty-third section, where the same passed through, along, or adjoining inclosed or cultivated fields or uninclosed lands, and by reason of said failure," certain hogs broke into and destroyed plaintiff's corn. *Held*: (1) that even had it been necessary so to do, this complaint negated the possibility of the hogs having entered at the crossing of a public highway; (2) that in actions for damages to crops there is no necessity for negating this possibility. *Clare v. Chicago, R. I. & P. R. Co.*, 19 *Am. & Eng. R. Cas.* 621, 79 *Mo.* 39.

109. Measure of damages for injury to crops.—In estimating the dam-

destroying
cattle-guards,
on real es-
Kan. Comp.
action for an
d the plain-
the value of
erding the
r damages.

Corp. 13 *Am.*
34. — *FOL-*
Co. v. Ed-
& S. F. R.
Cas. 611, 33
v. Ricketts,

ompany for
e failure of
oad through
beared from
y had con-
allegation
leted—held,
not good as
ute (Wagn.
cause of
ould be pro-
n law action
it asked for
The char-
ways deter-
The court
nt with the
s. *Comings*
Mo. 512.

er the forty-
railroad law,
or injury to
on defend-
ad failed to
ces on the
by the said
ame passed
nclosed or
ands, and by
hogs broke
orn. *Held:*
essary so to
e possibility
he crossing
n actions for
necessity for
are *v. Chi-*
& Eng. R.

es for in-
g the dam-

ages to a landowner for a breach of covenant by a company to erect and maintain fences, it is proper to show how much the land would have yielded, and the market value of the crops at harvest, less the cost of tilling, harvesting, and marketing. *Chicago & R. I. R. Co. v. Ward*, 16 *Ill.* 522.—
OVERRULED IN *Chicago v. Huenerbein*, 85 *Ill.* 594.

In estimating such damages it is proper to prove what the crops would have been worth at maturity had the track been fenced, by taking the relative value of growing crops for a series of preceding years. *Chicago & R. I. R. Co. v. Ward*, 16 *Ill.* 522.

Where a landowner suffers injury by reason of a company failing to maintain proper cattle-guards, he is entitled not only to compensation for the crops actually destroyed, but also to reasonable compensation for the time and labor necessarily expended in an effort to protect his crops and to prevent further damages; but in any event the damage must be limited to the injury that might have occurred had no such effort been made. *St. Louis & S. F. R. Co. v. Ritz*, 19 *An. & Eng. R. Cas.* 611, 33 *Kan.* 404, 6 *Pac. Rep.* 533.—*FOLLOWING* *St. Louis & S. F. R. Co. v. Sharp*, 27 *Kan.* 134.

A company is liable for double damages, under Mo. Rev. St. 1879, § 809, where cattle pass through a space under its bridge on either side of a stream, which might properly have been fenced without obstruction to the stream, and enter cultivated lands and injure the crops. The true interpretation of the statute is that animals shall not only be fenced off the track, but shall be prevented also from trespassing on adjoining lands. *Baker v. Chicago, M. & St. P. R. Co.*, 41 *Mo. App.* 260.

110. Measure of damages for injury to pasturage.—Where plaintiff sues for damages occasioned by permitting stock to enter his pasture and depredate thereon, the measure of his damages, as to the grass consumed, is its value at the time of its consumption, with legal interest thereon to be computed to the time of trial. *Gulf, C. & S. F. R. Co. v. Jones*, 1 *Tex. Civ. App.* 372, 21 *S. W. Rep.* 145.

In an action for the destruction of growing grass through the incursions of stock—*held*, that the damages could be established by evidence tending to show how many cattle could be grazed upon the land during the

period of time in question, and what such pasturage was reasonably worth. The rule of damages in such case distinguished from that in the case of the wrongful destruction of growing crops, wherein a deduction for future cultivation and the cost of gathering the crop would be necessary. *Buttles v. Chicago, S. F. & C. R. Co.*, 43 *Mo. App.* 280.

FERRIES.

Damages for diversion of traffic from, see EMINENT DOMAIN, 1193.

Impairment of franchise of, as an element of land damages, see EMINENT DOMAIN, 688.

Jurisdiction over ferries, see ADMIRALTY, 1.

Right to maintain, see EASTERN R. CO., 6.

1. General nature.—A ferry forms part of, and can only exist in connection with, a public highway, or as a connecting link between places in which the public has rights, on paying the tolls prescribed by public authority. *Hackett v. Wilson*, 12 *Oreg.* 25, 6 *Pac. Rep.* 652.

2. Power to establish and license.—It is within the power of a railroad to own and operate a steam ferry, necessary for transporting its goods and passengers across any rivers, bays, or arms of the sea, and such ferry is a part of the railroad. *Wheeler v. San Francisco & A. R. Co.*, 31 *Cal.* 46.—*QUOTING* *Wilby v. West Cornwall R. Co.*, 30 *L. T.* 261; *Noyes v. Rutland & B. R. Co.*, 27 *Vt.* 111.

The various acts of the legislature relating to the Southern Minnesota railroad give it the right to operate a ferry on the Mississippi river from any point not already occupied, where, in following the line pointed out in its charter, the road would or might run to or connect with such river, provided portions of the road were completed in the time specified. *McRoberts v. Southern Minn. R. Co.*, 18 *Minn.* 108 (*Gil.* 91).

Under what is known as the Montgomerie charter of 1730, New York city, as a corporation, owns the exclusive right to all ferry franchises in and about Manhattan island; and said right is not limited to such ferries as existed at that time, but extends to all other ferries which the city might at any time establish from any point on said island to any opposite shore. *Mayor, etc., of N. Y. v. New York & S. I. Ferry Co.*, 8 *J. & S. (N. Y.)* 232, 49 *How. Pr.* 250;

affirmed in 64 N. Y. 622, mem.—FOLLOWING *Benson v. Mayor, etc.*, of N. Y., 10 Barb. 223; *People v. Mayor, etc.*, of N. Y., 32 Barb. 102; *Milhau v. Sharp*, 27 N. Y. 619.

And the ferry operated from a point on said island to a point on any opposite shore is unlawful unless licensed by the said city. *Mayor, etc.*, of N. Y. v. *New York & S. I. Ferry Co.*, 8 J. & S. (N. Y.) 232, 49 How. Pr. 250; affirmed in 64 N. Y. 622, mem.

New York Act of 1871, ch. 574, among other things creating the department of docks as one of the departments of the city government of New York, and the subsequent amendments thereto, have not conferred upon said department the power to grant a ferry license. *Mayor, etc.*, of N. Y. v. *New York & S. I. Ferry Co.*, 8 J. & S. (N. Y.) 232, 49 How. Pr. 250; affirmed in 64 N. Y. 622, mem.

In 1874 part of another county was annexed by the legislature of New York to the city of New York, and declared to be a part of the city as if it had always been so, and the like powers were given to the corporation over the annexed territory as if it had always been a part of the city. Afterwards a ferry-boat, fitted up to transport railroad cars only, was run to and fro between a place in such annexed territory and a place in New Jersey opposite the city of New York, connecting with railroads running from the termini of the ferry. The boat was provided with two railroad tracks, which prevented the entrance of ordinary vehicles and of foot passengers, except as transported in the cars. *Held*, that such ferry was not such a ferry as the charter contemplated, and did not invade the exclusive franchise of the corporation. *Mayor, etc.*, of N. Y. v. *New England Transfer Co.*, 14 Blatchf. (U. S.) 159.—DISTINGUISHING *Aikin v. Western R. Corp.*, 20 N. Y. 370. RECONCILING *Fitch v. New Haven, N. L. & S. R. Co.*, 30 Conn. 38.

The primary object of the Oregon statute conferring jurisdiction upon county courts to license ferries is to secure the public accommodation; the right to take tolls is conferred as an equivalent for the obligation to accommodate the traveling public. Although the right to take toll is *privati juris* and incident to the franchise, a ferry is *publici juris* and cannot be created without a license. *Hackett v. Wilson*, 12 Oreg. 25, 6 Pac. Rep. 652.

When the county court has exercised its authority by granting a license at the suggestion of the public convenience, and a ferry is established connecting certain highways or places, it has exhausted its jurisdiction as to such highways or places while such franchise exists, and cannot license another ferry at substantially the same place. *Hackett v. Wilson*, 12 Oreg. 25, 6 Pac. Rep. 652.

A railroad corporation may be a joint owner of a ferry where not inconsistent with its constitution, and as such entitled to share in its earnings, and to that end may have an accounting. *Hackett v. Multnomah R. Co.*, 12 Oreg. 124, 6 Pac. Rep. 659.

The power conferred on a municipal corporation to establish ferries carries with it authority to do such acts as may be necessary to construct permanent ferries, and to operate them, either through the agents of the corporation, or any other agencies the corporation may provide. *Macdonell v. International & G. N. R. Co.*, 60 Tex. 590.

3. Franchise, generally.—A railroad was chartered across a harbor, and the company was specially authorized to establish a ferry from the termination of its road on one side of the harbor to some convenient point on the other side, "as a part of their railroad or route, to connect the same with the said railroad" on the other side. *Held*, that a general ferry was not granted, and the company might be enjoined from using it as a ferry, except for the transportation of its passengers and freight. *Fitch v. New Haven, N. L. & S. R. Co.*, 30 Conn. 38.—FOLLOWING *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210.—RECONCILED IN *Mayor, etc.*, of N. Y. v. *New England Transfer Co.*, 14 Blatchf. (U. S.) 159.

A railroad company was chartered so as to cross a river near an existing ferry. The company bridged the river, but the bridge was afterward burned, and until it was rebuilt the company ferried its passengers and freight across the river. *Held*, that the company was not liable to the penalty, provided by N. Car. Rev. Code, ch. 101, § 30, providing a penalty "if any unauthorized person" should operate a ferry within a certain distance of an existing ferry. *Pugh v. Raleigh & G. R. Co.*, Phil. (N. Car.) 359.

Vessels which a railway company has authority to keep for the purposes of a ferry, may, when otherwise unemployed, be

used by the company for excursion trips to the sea. *Forrest v. Manchester, S. & L. R. Co.*, 30 *Beav.* 40.

4. — **sale or lease.**—Under the New York City Consolidation Act of 1882, ch. 410, §§ 170, 180, the commissioners of the sinking fund, when about to lease the franchise of a ferry, are authorized to lease, along with the franchise, wharves or piers used or acquired for the purpose of the ferry, such lease to be for the highest marketable price or rental, at public auction or by sealed bids, and the wharf or pier to be leased with the ferry franchise as a part thereof, and as one entire piece of property. *Starin v. Edson*, 112 *N. Y.* 206, 19 *N. E. Rep.* 670, 20 *N. Y. S. R.* 898; *reversing* 42 *Hun* 549, 4 *N. Y. S. R.* 588, and *affirming* 1 *N. Y. S. R.* 544.

In making such lease the city has power to include in one leasing, or sale, two ferry franchises, with the wharves or piers used in connection therewith, in the discretion of the commissioners; and in the absence of evidence of an abuse of that discretion, the courts will not interfere. *Starin v. Edson*, 112 *N. Y.* 206, 19 *N. E. Rep.* 670, 20 *N. Y. S. R.* 898; *reversing* 42 *Hun* 549, 4 *N. Y. S. R.* 588, and *affirming* 1 *N. Y. S. R.* 544.

The successful bidder for a ferry franchise lease was a railroad corporation. In an action brought by a taxpayer, under the *N. Y. Act of 1881*, "for the protection of taxpayers" (laws of 1881, ch. 531), to set aside the lease—*held*, that conceding the action was maintainable under said act, plaintiff could not raise the question as to the lack of power of said corporation to make the contract. *Starin v. Edson*, 112 *N. Y.* 206, 19 *N. E. Rep.* 670, 20 *N. Y. S. R.* 898; *reversing* 42 *Hun* 549, 4 *N. Y. S. R.* 588, and *affirming* 1 *N. Y. S. R.* 544.

The lease of a ferry provided that the lessor should be entitled to a percentage of the gross receipts. The only provision as to the rate of fare was that it should not be less than five cents. The lessee also owned a railroad which connected with the ferry. The same charge was made for transporting persons who simply desired to cross the ferry as for transporting those who also traveled by the railroad. *Held*, that the lessor was not entitled to a percentage of the whole fare charged for transportation over both the ferry and the railroad, but only to a percentage upon such sum as fairly represented the proportionate earnings of the ferry. *Staten Island R. T. R. Co. v.*

Mayor, etc., of N. Y., 40 *Am. & Eng. R. Cas.* 607, 119 *N. Y.* 96, 23 *N. E. Rep.* 175, 28 *N. Y. S. R.* 805; *affirming* 53 *Hun* 630, *mem.*, 25 *N. Y. S. R.* 1034, *mem.*, 5 *N. Y. Supp.* 575, which *affirms* 2 *N. Y. Supp.* 680.

The power conferred on a city to fix the rates, fees, and rents of a ferry is broad enough to authorize the city to rent the ferry to another, to be operated by him. *Macdonell v. International & G. N. R. Co.*, 60 *Tex.* 590.

A city owning a ferry landing, with boats and appurtenances to operate a ferry, and having a charter power to operate the ferry and to fix the rates, fees, and rents thereof, may do with such property whatever a private person could do if he were the owner, except that, holding it as an agent for the state, for a public purpose, it could not surrender its control and supervision to the unrestricted management and control of another person. It may lease to another, retaining by ordinance supervisory control. *Macdonell v. International & G. N. R. Co.*, 60 *Tex.* 590.

5. **Remedies for disturbance, generally.**—Equity will protect by injunction the owner of a ferry franchise on the Hudson river, against the infringement of a rival ferry without a license from New Jersey or New York, such infringement consisting of regular hourly trips by a ferry-boat, and the solicitation of passengers on their way to complainants' ferry. *Midland T. & F. Co. v. Wilson*, 28 *N. J. Eq.* 537.

The right of a ferryman to his toll is by the common law; and every subtraction from his profits, by carrying his customers over the same stream, whether for pay or not, is an injury for which he may recover damages. *Taylor v. Wilmington & M. R. Co.*, 4 *Jones (N. Car.)* 277.

An action for a loss of traffic cannot be maintained by the owner of a ferry, where such loss is caused by a new highway, or by a bridge or ferry made to provide for a new traffic. *Hopkins v. Great Northern R. Co.*, *L. R.* 2 *Q. B. D.* 224, 46 *L. J. Q. B. D.* 205, 36 *L. T.* 898.—*OVERRULING* *Reg. v. Cambrian R. Co.*, *L. R.* 6 *Q. B.* 422, 19 *W. R.* 1138, 40 *L. J. Q. B.* 169, 25 *L. T.* 84.—*CONSIDERED* IN *Great Western R. Co. v. Swindon & C. E. R. Co.*, *L. R.* 9 *App. Cas.* 787, 53 *L. J. Ch. D.* 1075, 32 *W. R.* 957.

The mere fact that parties claiming and using a ferry right have not regularly paid the license thereof, is not available as a de-

fense to one disturbing those who possess the right, or who is attempting to destroy or injure the same, but might perhaps be ground for proceedings to declare the same forfeited. *New Albany & S. R. Co. v. Huff*, 19 Ind. 315.

6. — disturbance by a railroad company.—A complaint by the owner of a ferry right granted under the Arkansas statutes, seeking damages because of the erection by defendant of a bridge within plaintiff's ferry limits, must allege that the plaintiff is authorized to receive tolls by reason of a license duly granted to him, that his franchise has been damaged by the building of the bridge, and that defendant has collected tolls without lawful authority. *Hanger v. Little Rock Junction R. Co.*, 52 Ark. 61, 11 S. W. Rep. 965.

Where a railroad company is authorized to bridge a river so as to connect its road with a city, its rights of ferrying across the river are limited to the transportation of its own servants, passengers, and freight on its road; and running a ferry on which no tolls are taken, is a violation of an existing ferry franchise, and subjects the company to damages. *Aikin v. Western R. Corp.*, 20 N. Y. 370; reversing 30 Barb. 305.—**APPLYING** *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420. — **DISTINGUISHED IN** *Mayor, etc., of N. Y. v. New England Transfer Co.*, 14 Blatchf. (U. S.) 159.

Where a railroad is so constructed as to interfere with a ferry landing, in which the owner of a ferry franchise only has a leasehold estate, the measure of damages is the depreciation in value of the landing for the term of the lease, and it is error to allow damages for a depreciation of the value of the franchise unconnected with the leasehold. *Pittsburgh & L. E. R. Co. v. Jones*, 23 Am. & Eng. R. Cas. 77, 111 Pa. St. 204, 2 Atl. Rep. 410.

Where the legislature granted the right to navigate a river with a public ferry, together with the use of part of a public street for a landing, the owner of the franchise was not entitled to maintain a private action to recover damages for the subsequent taking of such street by a railroad company, the legislature having no power to give the right to take land for such purpose without the owner's consent, or without first making compensation or giving security for payment of its value to the owner. *Pittsburgh & L. E. R. Co. v. Jones*,

23 Am. & Eng. R. Cas. 77, 111 Pa. St. 204, 2 Atl. Rep. 410.

Where a ferry is attached to a person's land as a private right, and injury thereto is caused by the works of a railway company on the other side of the river by cutting off communication, the owner of such land may claim compensation. *In re Cooling*, 6 Railw. Cas. 246, L. R. 14 Q. B. 25, 14 Jur. 128, 19 L. J. Q. B. 25.

The owner of a ferry may maintain an action, without any allegation of special damage, against a railway company violating a statutory prohibition against making a line to another ferry until a branch railway should be made from the main line to the plaintiff's ferry, since such prohibition is obviously intended for his special protection. *Chamberlain v. Chester & B. R. Co.*, 1 Ex. 870, 18 L. J. Ex. 494.

The complainants, under license granted them by the Cherokee Nation, occupied a tract of land in the Indian Territory fronting on the Arkansas river opposite the city of Fort Smith, and were engaged in operating a ferry at that point. The Kansas & A. V. R. Co. in 1888, under act of Congress of June 1, 1886, which authorized it to build a railroad through the Indian Territory, and to condemn lands to be used for railway, telegraph, and telephone purposes only, condemned a right of way through said tract of land to the river. On March 15, 1890, by act of congress the railway company was authorized to build a bridge across the Arkansas river to be used as a railway, passenger, and wagon bridge. Said act recited that the building of the railway, as authorized by the act of June 1, 1886, involved the necessity of constructing the bridge. *Held*: (1) that the railway company, by the act of March 15, 1890, was impliedly authorized by congress to use its right of way as a roadway for ordinary travel, so far as might be found necessary to give vehicles and foot passengers access to the bridge, and that the grant of the right to build a bridge for the purposes of general travel did not infringe the ferry franchise, and that the complainants were not entitled to compensation for the loss of ferry patronage, since the building of the bridge had not cut off access to the ferry landing or rendered it any less feasible than before to operate the ferry; (2) that a court of equity would not enjoin the railway company from permitting foot passengers and vehicles to travel over

its right of way to such extent as might be necessary to reach the bridge, since the damages, if any, incident to such use might be recovered in an action at law, inasmuch as the railway company did not propose to intrude upon the possession of any lands occupied by complainants. *Kansas & A. V. R. Co. v. Payne*, 51 *Am. & Eng. R. Cas.* 518, 49 *Fed. Rep.* 114, 4 *U. S. App.* 77, 1 *C. C. A.* 183.—FOLLOWED IN *Kansas & A. V. R. Co. v. Le Flore*, 49 *Fed. Rep.* 119, 4 *U. S. App.* 93, 1 *C. C. A.* 192.

7. Contracts of ferriage.—A railroad company whose line terminated on the bank of a river entered into an agreement with the owner of a ferry, by which the latter agreed to transport all passengers, freight, baggage, etc., presented for ferriage by the railroad company. The railroad company agreed to pay the ferryman "one fifth of the actual gross earnings" of the railway on all passengers, freight, etc., carried across the river. The company let the contract to haul its passengers to a transfer company, which ostensibly charged 25 cents for transporting each passenger to or from the terminus of the track and points in the town across the river. The fare from one terminus of the railroad to the other was 50 cents, which sum added to the hack fare made 75 cents for the complete trip. Passengers were not required to purchase hack tickets, and the railway fare entitled them to free ferriage. *Held*, that under the agreement the ferryman was entitled to one fifth of the gross receipts for the carriage of the passengers in the hack, and not merely to one fifth of the sum retained by the railroad company after deducting the compensation of the transfer company. *Dardanelle & R. R. Co. v. Shinn*, 40 *Am. & Eng. R. Cas.* 570, 52 *Ark.* 93, 12 *S. W. Rep.* 183.—QUOTING *Union Pac. R. Co. v. United States*, 99 *U. S.* 419.

A contract between a railway company and a ferry company bound the railway company to employ the ferry company to transport for it, across the Mississippi river, at St. Louis, all persons and property which should be taken across the river, either way, by the railway company, to or from Bloody island, either for the purpose of being transported on the road eastward, or which had been brought to the river over the road, destined to St. Louis or points beyond. *Held*, that the operation of the contract was confined to the territorial limits of Bloody

island, and that the railway company was not prohibited from extending its track to another point on the river, and then employing another ferry to transport passengers and freight across the river, from such point to St. Louis, and from St. Louis to such point. *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 72 *Ill.* 360.

A ferry company which had an exclusive charter right of ferriage across a river, and which owned considerable land on one side, entered into a contract with a railroad company which had built to the opposite side, by which it was to allow the railroad company to lay tracks on the land and maintain a depot, in consideration that the ferry company have the exclusive ferriage of all the travel and traffic of the railroad. *Held*, that the contract was not void as against public policy, nor in restraint of trade; and that the ferry company could recover damages from the railroad for afterward diverting its business to another ferry. *Wiggins Ferry Co. v. Chicago & A. R. Co.*, 5 *Am. & Eng. R. Cas.* 1, 73 *Mo.* 389, 39 *Am. Rep.* 519; *reversing* 5 *Mo. App.* 347.

8. Fares and tolls.—The transportation of freight from various points on the line of a railroad, and delivery thereof over a wharf leased from the harbor commissioners of San Francisco, for the benefit of the railroad, is not ferriage within the meaning of the *Cal. St.* 1863-64, p. 140, § 4—providing for ferriage by the company leasing such wharf, free of any toll or charge—so as to exempt the railroad from the payment of tolls upon the merchandise so landed. *People v. San Francisco & A. R. Co.*, 35 *Cal.* 606.

The provision of the *Mass. St.* 1864, 229, § 26, limiting rates of toll to be charged by ferry companies for passengers transported on the cars of street railway companies, is constitutional, and binds a ferry company, although incorporated before its passage, whose charter is liable to alteration or repeal. *Parker v. Metropolitan R. Co.*, 109 *Mass.* 506, 7 *Am. Ry. Rep.* 521.—QUOTED IN *Montclair v. New York & G. L. R. Co.*, 45 *N. J. Eq.* 436.

The power given by the New Jersey Act of 1799, to the boards of chosen freeholders, to regulate rates of ferriage, applies to ferries of which only one landing is in the county, and the other landing in another county or state. Each county may regulate the fare to be taken at the landing

within it. *Chosen Freeholders of Hudson County v. State*, 24 N. J. L. 718; affirming 23 N. J. L. 206.

When the law making power undertakes to so regulate the tolls of a ferry as to require its operation at less than the actual operating expenses, it is a taking of private property for public use without compensation, and the courts should interfere. *Com. v. Covington & C. Bridge Co.*, (Ky.) 54 Am. Eng. R. Cas. 461, 21 S. W. Rep. 1042.

New York Act of 1888, ch. 260, provides that ferry companies operating at cities of 50,000 inhabitants or over, shall post a schedule of rates at a conspicuous place outside of the ferry entrance and in at least four accessible places upon each of the boats, and in default thereof to be liable to a penalty of \$50. Held, that in an action to recover the penalty a company is entitled to be informed as to the precise violations with which it is charged, whether a failure to post the schedule at the ferry entrance or in the boats. *Wray v. Pennsylvania R. Co.*, 19 N. Y. S. R. 53, 4 N. Y. Supp. 354.

And where the company, under the above statute, is charged with failing to post the schedule of rates in its boats, it is entitled to a bill of particulars giving the names of the boats on which it is claimed such schedules had not been posted. *Wray v. New York C. & H. R. R. Co.*, 4 N. Y. Supp. 355.

D. Liability of ferry owners, generally.*—A railroad company operating a ferry must furnish safe passageways and approaches to and from the ferry, not only for those who are familiar with it, but for all others who may have occasion to use it, whether in the daytime or at night. *Margorie v. Little*, 23 Blatchf. (U. S.) 399, 25 Fed. Rep. 627.

Plaintiff, a boy, with others, was injured by the giving way of certain attachments of defendant's ferry bridge at a landing, which was shown to be so defective as to be eminently dangerous. The place was open to the public, which had been accustomed to use it for a long time, but plaintiff had resorted to the place without any business connected with the ferry company. Held, that the company was liable. *Fitzpatrick v. Garrisons & W. P. Ferry Co.*, 49 Hun 286, 17 N. Y. S. R. 736, 1 N. Y. Supp. 794.

* Duties and liabilities of keepers of public ferries, see note, 87 AM. DEC. 720.

10. — as carriers of merchandise or live stock.—Ferryman, like all other common carriers, are regarded in law as insurers of the property committed to their care, and are responsible for all losses and damages to it which do not come within the excepted cases of the acts of God and the public enemy. *Harvey v. Rose*, 26 Ark. 3.

As a common carrier a ferryman is compelled to receive all goods and property offered for transportation, and in such capacity he is presumed to have charge of it; and the burden is upon him to show that he had not such control over it as to invest him with that character in respect to it. *Harvey v. Rose*, 26 Ark. 3.

Where it affirmatively appears that the owner retains the exclusive control of the property, the ferryman is not chargeable, if loss occur, as a common carrier or insurer, but is only answerable for actual negligence; and if in such case the loss be occasioned by the wilful wrong or negligence of the owner, so that but for it the loss would not have occurred, the owner cannot recover, except where the direct cause of the loss is the omission of the ferryman, after becoming aware of the owner's negligence, to use a proper degree of care to avoid the consequence of such negligence. *Harvey v. Rose*, 26 Ark. 3.—REVIEWING *White v. Winnisimmet Co.*, 7 Cush. (Mass.) 155.

The owner of a private ferry may so use it, although on a road not opened by public authority or repaired by public labor, as to subject himself to the liabilities of a common carrier. *Hall v. Kenfro*, 3 Metc. (Ky.) 51.

Ferryman are held to extreme diligence and care, and to a stringent liability for any neglect or omission of duty, but they do not assume all the liability of common carriers. They are not chargeable as such for the absolute safety of property retained by a passenger in his own custody and under his own control. *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32.

The property in such case is not at the sole risk of either party. The ferryman undertakes for its safety as against defects and insufficiencies of his boat and other appliances for the performance of the services, and for the neglect or want of skill of himself and his servants; but the owner is bound to use ordinary care and diligence to prevent loss or injury. *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32.

But in such case, where a loss of goods occurs through the apparent negligence of the ferry owner, through a failure to provide safe means of carriage, the burden is cast upon him of showing that the loss did not result from his fault. *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32.

A ferryman who has not given a valid bond in conformity to the statute is liable as a common carrier. *Johnson v. Erskine*, 9 Tex. 1.

The rule as to the effect of mutual negligence in cases of accidental injury has no application to a loss sustained in attempting to cross a ferry, for which the ferryman, as a common carrier, is ordinarily liable. *Albright v. Penn.*, 14 Tex. 290.—DISTINGUISHING *Williams v. Holland*, 6 C. & P. 23; *Pluckwell v. Wilson*, 5 C. & P. 375; *Hawkins v. Cooper*, 8 C. & P. 473; *Davies v. Mann*, 10 M. & W. 546; *Smith v. Smith*, 2 Pick. (Mass.) 621.

11. — as carriers of passengers.

—(1) *General rules.*—The duty a ferry company owes to passengers going on and off its boats, is simply to conduct its business with such care and skill as will make the entrance upon its boats safe for persons of ordinary prudence; and if a passenger is injured because of failure to exercise such prudence the company is not liable. *Race v. Union Ferry Co.*, 138 N. Y. 644, 34 N. E. Rep. 280; reversing 19 N. Y. Supp. 675.

While a ferry company is bound to use the strictest diligence in providing suitable and safe accommodation for landing passengers from its boats, it is not bound to so provide against any possibility of danger that they can meet with no casualty. *Loftus v. Union Ferry Co.*, 84 N. Y. 455.—FOLLOWING *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1; *Crocheron v. North Shore S. I. Ferry Co.*, 56 N. Y. 656; *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306.—REVIEWED IN *Lafflin v. Buffalo & S. W. R. Co.*, 106 N. Y. 136.

If the employes of a ferry company let down the chain which guards the passage from the boat to the landing before the boat is properly secured, and a passenger sustains an injury in consequence, the company is liable. *Ferris v. Union Ferry Co.*, 36 N. Y. 312. *New Jersey R. Co. v. Palmer*, 33 N. J. L. 90.

Where a passenger attempts to step from a bridge to a ferry in a storm, while there is yet considerable space between the bridge

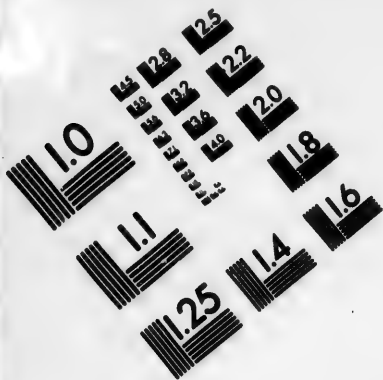
and the boat, and while they are being brought together, and slips and falls between them, he is guilty of such contributory negligence as to bar a recovery for any injury received. *McKenna v. East River Ferry Co.*, 8 N. Y. S. R. 802, 44 Hun 628; affirmed in 113 N. Y. 636, mem., 21 N. E. Rep. 413, 22 N. Y. S. R. 997.

Where a passenger on a ferry-boat is injured through alleged negligence of those in charge in striking the wharf with too great force, the company is not relieved of liability by the fact that such persons in charge of the boat possessed proper skill and knowledge, unless they exercised the same in the management of the boat. *Bartlett v. New York & S. B. F. & S. Transp. Co.*, 25 J. & S. 348, 29 N. Y. S. R. 357, 8 N. Y. Supp. 309; affirmed in 130 N. Y. 659, mem., 41 N. Y. S. R. 951, 29 N. E. Rep. 1033.

(2) *Illustrations.*—The defendant's steam ferry-boat crossed the Wallamet river to Portland on a dark night, with passengers from its railway, and P., in stepping from the boat to the pontoon at the landing, stumbled and fell into the river, and was drowned. Held, that the want of a guard to prevent the passengers from attempting to go ashore before the landing was safely made, and some sufficient signal to warn passengers when it was proper to go ashore, and particularly the want of sufficient light upon the boat and pontoon to enable passengers to readily observe the same, and their relative situation, was negligence, and caused the death of P. *Holmes v. Oregon & C. R. Co.*, 6 Savoy. (U. S.) 262.

Defendant owned and ran a ferry-boat between Hudson and Athens, on opposite sides of the Hudson river. On a regular trip the pilot took on a boatman without compensation, agreeing to put him on his boat in a tow passing up the river. Similar acts had occasionally been done before, but not to defendant's knowledge. The ferry-boat diverged from its regular course, and negligently colliding with a canal boat, killed the plaintiff's intestate. Held, that the defendant was liable. *Quinn v. Power*, 87 N. Y. 535, 41 Am. Rep. 392.—APPLYING *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 486.—QUOTED IN *Pittsburgh, C. & St. L. R. Co. v. Kirk*, 102 Ind. 399, 52 Am. Rep. 675. REVIEWED IN *Tinker v. New York, O. & W. R. Co.*, 71 Hun (N. Y.) 431.

Plaintiff's intestate stood in the midst of



1.4 1.28
1.6 1.2
1.8 1.0
2.0 0.8
2.2 0.6
2.5 0.5

10
0.1

a crowd awaiting the arrival of a ferry-boat, and when the door or gate was opened, teams were going off the boat rapidly up the roadway, and the crowd pressed forward and the intestate either walked or was pushed under a wagon and killed. The evidence showed that every ferry house in the city was constructed in the same manner, and that no similar accident had occurred before; but there was evidence showing that it was a matter of frequent occurrence, upon the opening of the doors, that men would be forced over into the roadway. *Held*, under these circumstances it was clearly negligent to open the doors when heavy trucks were passing. *See* *Snelling v. New York Ferry Co.*, 14 N. Y. S. R. 574; affirmed in 113 N. Y. 653, mem., 21 N. E. Rep. 414, mem., 22 N. Y. S. R. 998, mem.

As a ferry-boat was entering a slip in approaching a wharf, and after the side of the boat had struck, plaintiff, a passenger, arose to be ready to leave the boat, and was thrown down by a second strike against the dock. The evidence showed that it struck with unusual violence, without anything to make a landing difficult in the way of weather or tides. *Held*, sufficient evidence of negligence to justify a submission to the jury. *Snelling v. Brooklyn & N. Y. Ferry Co.*, 13 N. Y. Supp. 398; affirmed in 128 N. Y. 579, mem., 28 N. E. Rep. 250, mem., 38 N. Y. S. R. 1010, mem.

And the fact that plaintiff did not retain his seat until after the boat struck the dock is not evidence of such contributory negligence as to justify withdrawing the case from the jury. *Snelling v. Brooklyn & N. Y. Ferry Co.*, 13 N. Y. Supp. 398; affirmed in 128 N. Y. 579, mem., 28 N. E. Rep. 250, mem., 38 N. Y. S. R. 1010, mem.

Plaintiff was a passenger on the upper deck of a ferry-boat, which, upon landing, struck the wharf with such force as to rebound and throw plaintiff, who was standing near the head of the stairway, or probably descending, down stairs. *Held*: (1) that plaintiff was not guilty of contributory negligence in standing where she did, where it appears that the position was not dangerous if the boat had landed in the ordinary way; (2) nor in attempting to descend without holding to the stair rail, where it did not appear that such was dangerous under ordinary circumstances; (3) nor did the fact of plaintiff's impaired sight or other physical weakness make her conduct contrib-

utory negligence as a matter of law. *Bartlett v. New York & S. B. F. & S. Transp. Co.*, 25 J. & S. 348, 29 N. Y. S. R. 357, 8 N. Y. Supp. 309; affirmed in 130 N. Y. 659, mem., 41 N. Y. S. R. 951, mem., 29 N. E. Rep. 1033, mem.

In such case it was proper to refuse an instruction that the company was not liable, if the pilot brought the boat into the slip at a speed which he believed to be necessary, as what he believed to be necessary was not the test, but whether he exercised ordinary diligence under the circumstances. *Bartlett v. New York & S. B. F. & S. Transp. Co.*, 25 J. & S. 348, 29 N. Y. S. R. 357, 8 N. Y. Supp. 309; affirmed in 130 N. Y. 659, mem., 41 N. Y. S. R. 951, mem., 29 N. E. Rep. 1033, mem.

The mere fact that plaintiff had not paid her fare would not prevent a recovery, where there was nothing to show that it had been demanded, or that she intended to evade payment. *Bartlett v. New York & S. B. F. & S. Transp. Co.*, 25 J. & S. 348, 29 N. Y. S. R. 357, 8 N. Y. Supp. 309; affirmed in 130 N. Y. 659, mem., 41 N. Y. S. R. 951, mem., 29 N. E. Rep. 1033, mem.

The ticket issued to M., a traveler by rail, entitled him to cross the St. John harbor by ferry, and the coupon attached to the ticket was accepted in payment of his fare. The ferry was under the control and management of the corporation of St. John. *Held*, that an action would lie against the corporation for injuries to M., caused by the negligence of the officers of the boat during the passage. *St. John v. MacDonald*, 14 Can. Sup. Ct. 1; affirming 35 New Brun. 318.

The approaches of the ferry to the wharf were guarded by a chain extending from side to side of the boat, at a distance of about 14 feet from the end. On approaching the wharf the man whose duty it was to moor the boat unloosed the chain at one side, and when near enough jumped on the floats to bring the mooring chain aboard. A number of the passengers rushed toward the floats, and M., seeing the chain down, and thinking it safe to land, followed them and fell through a space between the boat and the wharf and was injured. When this happened the boat was not moored. *Held*, that the corporation of the city were liable to M. for the injuries sustained by the negligent manner of mooring the boat, and that he was not guilty of such contributory negligence as would avoid that liability. *St.*

John v. MacDonald, 14 *Can. Sup. Ct.* 1; *affirming* 25 *New Brun.* 318.

12. Sale of ferry-boats.—The title to ferry-boats running in the harbor of St. John must be transferred according to the provisions of the Merchant Shipping Act, and cannot pass by an ordinary railroad mortgage. *Lloyd v. European & N. A. R. Co.*, 18 *New Brun.* 194.

13. Wharfage for ferry purposes.—Under Cal. St. 1863-64, p. 140, § 4, providing for the leasing of city wharfage to ferry companies, for the purpose of ferriage, no lease is authorized to be made to railroads as such. *People v. San Francisco & A. R. Co.*, 35 *Cal.* 606.

California Act of March 4, 1864, § 4, providing that the state harbor commissioners for the city of San Francisco shall grant certain wharves to the owners of ferry-boats, free of rent or charge, on condition that the lessees keep the same in repair, construed to mean that they shall make no charge for the use of the same by ferry passengers, and that the wharves shall not be used by the ferry companies for any other purpose than that of ferriage. *People v. San Francisco & A. R. Co.*, 35 *Cal.* 606.

And the above section further construed to grant to ferry companies the use of wharves free of charge only so far as they may require their use as a landing for their boats, and that the leasing of the entire estate in the wharves would not secure any greater right. *People v. San Francisco & A. R. Co.*, 35 *Cal.* 606.

14. Taxation.—A ferry company existing under the laws of one state, and engaged in carrying persons and property across a river into another state, is engaged in interstate commerce, within the meaning of the constitution, and cannot be taxed in the latter state. *Gloucester Ferry Co. v. Pennsylvania*, 114 *U. S.* 196, 5 *Sup. Ct. Rep.* 826.—FOLLOWED IN *People ex rel. v. Wemple*, 138 *N. Y.* 1. QUOTED IN *Com. v. Smith*, 92 *Ky.* 38.

Ferry-boats owned by a foreign corporation, enrolled in the New York custom house, used for carrying freight and passengers between Jersey City and New York, and having no permanent location in Jersey City, are not liable to be taxed there; such property cannot be said to be situate in any township or ward. *State v. Haight*, 30 *N. J. L.* 428.

FIDUCIARY RELATION.

- Of directors to company, see DIRECTORS, ETC., 44-54; OFFICERS, 3.
- station agent with the company, see STATION AGENTS, 2.

FILING.

- Of articles of association, maps, plats, etc., see PUBLIC LANDS, 42, 43.
- award for land damages, interest from time of, see EMINENT DOMAIN, 464, 764.
- bond on appeal in condemnation proceedings, see EMINENT DOMAIN, 943.
- bond to secure land damages, see EMINENT DOMAIN, 404-411.
- charters, see CHARTERS, 10.
- consent of city to use of street, see STREET RAILWAYS, 101.
- exceptions in condemnation proceedings, see EMINENT DOMAIN, 934.
- freight and passenger schedules, see INTERSTATE COMMERCE, 131-141.
- garnishee's answer, see ATTACHMENT, ETC., 57.
- interrogatories in foreclosure, see MORTGAGES, 205.
- map of land grant, effect of, see LAND GRANTS, 67, 78, 87, 94.
- maps, plans, profiles, and surveys, see EMINENT DOMAIN, 332-340.
- mortgages, see MORTGAGES, 67, 68.
- mortgages of rolling stock, see MORTGAGES, 51.
- petition, estimating land damages from time of, see EMINENT DOMAIN, 460.
- in condemnation proceedings, see EMINENT DOMAIN, 310.
- plans and book of reference under Canadian statutes, see EMINENT DOMAIN, 1221.
- proceedings for consolidation, see CONSOLIDATION, 18.
- report of referee, see REFERENCE, 5.
- statement of claim for laborer's lien, see LIENS, 49.
- subscription papers with secretary of state, see SUBSCRIPTIONS TO STOCK, 10.
- written location, maps, plans, etc., see LOCATION OF ROUTE, 14-16.

FILLING BLANKS.

- In corporate bonds, see BONDS, 28.

FILLING VACANCIES.

- Among mortgage trustees, see MORTGAGES, 134.

FINAL CARRIER.

- Duty of, to receive from connecting lines, see CARRIAGE OF MERCHANDISE, 660.
 — — intermediate carrier to deliver to, see CARRIAGE OF MERCHANDISE, 637.
 Liability of, see EXPRESS COMPANIES, 79.
 — — for baggage, see BAGGAGE, 23, 24.
 Lien of, for charges, see CARRIAGE OF MERCHANDISE, 384.
 Right of, to demand charges, see CHARGES, 79-82.
 Rights, duties, and liabilities of, see CARRIAGE OF MERCHANDISE, 644-664; CARRIAGE OF PASSENGERS, 512-516.
 See also CONNECTING LINES.

FINALITY

- Of award of arbitrators in Canadian expropriation proceedings, see EMINENT DOMAIN, 1263.
 — decision of lower court by statute, see EMINENT DOMAIN, 888.
 — judgments and orders, see APPEAL AND ERROR, 7-12; EMINENT DOMAIN, 847, 884, 885.
 — surveys of public lands, see PUBLIC LANDS, 23.

FINDINGS.

- As to contributory negligence, see CROSSINGS, INJURIES, ETC., AT, 228.
 By the court, generally, see TRIAL, 201.
 — court or referee in suits against elevated railway company, see ELEVATED RAILWAYS, 174-180.
 — review of, on appeal, see APPEAL AND ERROR, 123; EMINENT DOMAIN, 900.
 In actions for injuries to children, see CHILDREN, INJURIES TO, 195.
 — — — killing stock, interpretation of, see ANIMALS, INJURIES TO, 555, 558.
 — — on construction contracts, see CONSTRUCTION OF RAILWAYS, 117.
 Of fact, objections to, how to be taken, see APPEAL AND ERROR, 102.
 — interstate commerce commission, effect and force of, see INTERSTATE COMMERCE, 147-149.
 — referees, review of, see ELEVATED RAILWAYS, 188.
 On trial of ejectment suits, see EJECTMENT, 31.
 See also SPECIAL FINDINGS.

FINES.

- For contempt, see CONTEMPT, 10.
 — failure to construct highway crossings, see CROSSING OF STREETS AND HIGHWAYS, 14.

FIREARMS.

When may be carried as baggage, see BAGGAGE, 33.

FIRE INSURANCE.

Cost of, as an element in land damages, see EMINENT DOMAIN, 614, 704.

- I. IN GENERAL..... 844
 II. SUBROGATION..... 847
 III. ACTIONS..... 850

I. IN GENERAL.**1. Insurable interest of carriers.—**

A common carrier has an insurable interest in the goods carried by him, which he may insure to their full value, without regard to his liability to the owner of the goods. *Eastern R. Co. v. Relief F. Ins. Co.*, 98 Mass. 420. *Fire Ins. Assoc. v. Merchants' & M. Transp. Co.*, 28 Am. & Eng. R. Cas. 43, 66 Md. 339, 7 Atl. Rep. 905.

A common carrier, being bound to make safe delivery of goods at the place of destination, such obligation, together with his claim for advances and freight, gives him an insurable interest to the extent of the fair value of the property insured. The measure of the damage is the true value of the goods at the time and place where the loss occurred. *Savage v. Corn Exchange Ins. Co.*, 36 N. Y. 655; *affirming 4 Bosw. 1*.

A carrier has such insurable interest in goods intrusted to him for carriage that he may insure not only his interest or his liability, but the whole value of the goods. And in such case he may collect the whole value, and, reimbursing himself for his special loss, he will hold the surplus in trust for the owners. *Lancaster Mills v. Merchants' C. & S. Co.*, 45 Am. & Eng. R. Cas. 423, 89 Tenn. 1, 14 S. W. Rep. 317. *British & F. M. Ins. Co. v. Gulf, C. & S. F. R. Co.*, 21 Am. & Eng. R. Cas. 112, 63 Tex. 475. *London & N. W. R. Co. v. Glyn, 1 El. & El. 652*, 5 Jur. N. S. 1004, 28 L. J. Q. B. 188.

2. — of compress and warehouse companies.—

Where a compress company receives cotton and gives a receipt therefor, which is exchanged with a railroad company for a bill of lading, the railroad company has an insurable interest in the cotton, which may be covered by a policy issued to the compress company. *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. Rep. 365.

In such case the railroad company only

age, see BAG-

E.
damages, see
4.

..... 844
..... 847
..... 850

carriers.—
able interest
which he may
ut regard to
the goods.
Co., 98 Mass.
ants' & M.
Cas. 43, 66

und to make
ace of desti-
er with his
gives him an
ait of the fair
The meas-
value of the
here the loss
xchange Ins.
Sow. 1.

e interest in
iage that he
t or his lia-
the goods.
t the whole
for his spe-
plus in trust
ills v. Mer-
Eng. R. Cas.
17, British
S. F. R. Co.,
3 Tex. 475.
1 El. & El.
Q. B. 188.

arehouse
ss company
pt therefor,
lroad com-
lroad com-
the cotton,
y issued to
ornia Ins.
S. 387, 10

pany only

acquires constructive possession by taking up the receipt and giving a bill of lading, while the actual possession remained with the compress company, which enabled it to procure insurance for the benefit of itself and the railroad company. *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. Rep. 365.

3. — of mortgage trustees.—Plaintiffs, second mortgage trustees of the railroad, in possession, insured a freight depot with a condition in the policy that it should become void "if any change shall take place in the title or possession of the property, whether by legal process, judicial decree, or voluntary transfer." Subsequently the trustee in a first mortgage obtained a foreclosure decree, which became final, and he took possession of the road, but appointed plaintiffs his agents to operate it, and the property was soon after conveyed to a new company composed of the first mortgage bondholders, who took possession of the road. Held, that the foreclosure of the first mortgage and the subsequent transfer to the new company terminated the insurance. *Bishop v. Clay F. & M. Ins. Co.*, 45 Conn. 430.

At the time such insurance was effected the plaintiffs had advanced large sums of money, for which they were personally liable, which remained unpaid at the time of the fire destroying the depot, and which by the foreclosure decree was made a first lien on the road and was directed to be discharged out of the first earnings. Held, that the interest that plaintiffs held in the road by virtue of this lien was not sufficient to prevent the policy from becoming void. *Bishop v. Clay F. & M. Ins. Co.*, 45 Conn. 430.

And in such case parol evidence was not admissible to show that the insurance was intended to apply to the interest which plaintiffs held in the property by virtue of such advancements, and the lien on the road to secure the same. *Bishop v. Clay F. & M. Ins. Co.*, 45 Conn. 430.

4. Construction of the policy, generally.—Insurance for the benefit of the carrier upon the goods in his custody, not limited to an insurance of his liability or his interest, is an insurance of the whole value of the goods, and one in which the owner has an interest. And parol evidence is not admissible, in the absence of ambiguity, to show that such insurance was

intended to cover less than the whole value of the goods. *Lancaster Mills v. Merchants' C. & S. Co.*, 45 Am. & Eng. R. Cas. 423, 89 Tenn. 1, 14 S. W. Rep. 317.

Under a condition in a fire policy that goods held in trust are to be insured as such, a carrier covers the whole value of goods sent to it for carriage, and also any interest it may have in them for its lien, by describing them as "goods in trust as carriers." *London & N. W. R. Co. v. Glyn*, 1 El. & El. 652, 5 Jur. N. S. 1004, 28 L. J. Q. B. 188, 7 W. R. 238, 33 L. T. 199.

5. What property is covered by the risk.—A policy against loss by fire on certain cars and locomotives, describing them as "contained in" a certain engine house and car house, is limited to risk during the time that the cars and engines are actually in the houses, and no recovery can be had for an injury occurring elsewhere. *Annapolis & E. R. Co. v. Baltimore F. Ins. Co.*, 32 Md. 37.

A policy to a railroad corporation "on their road furniture, consisting of locomotive engines, cars of all descriptions, and snowplows, on the line of their road and in actual use, but not in machine or repair shops," covers cars left in the ordinary course of the business upon an iron track connected with the railroad, though not owned nor controlled by the corporation. *Fitchburg R. Co. v. Charlestown M. F. Ins. Co.*, 7 Gray (Mass.) 64.

A policy issued to a railroad corporation upon "any property" upon which it "may be liable in freight buildings or yards" of the corporation covers merchandise belonging to other parties for which the corporation is liable as a common carrier, although other common carriers are by contract bound to indemnify the corporation for all loss upon such merchandise. *Com. v. Hide & L. Ins. Co.*, 112 Mass. 136.

A policy which insures "freight cars owned or used" by a railroad corporation covers cars belonging to another corporation, but in the possession of the first corporation and used by them as common carriers. *Com. v. Hide & L. Ins. Co.*, 112 Mass. 136.

A warehouseman's policy covering "all the cotton in bales received by them as agents for the benefit of railroads, transportation lines, or owners," effects insurance of the cotton itself, and, though intended primarily for the carrier, will enure to the

benefit of the owner also. *Lancaster Mills v. Merchants' C. & S. Co.*, 45 Am. & Eng. R. Cas. 423, 89 Tenn. 1, 14 S. W. Rep. 317.

A policy insuring "goods on shore prior to shipment" covers cotton in a warehouse for compression for shipment by a railway carrier. *Lancaster Mills v. Merchants' C. & S. Co.*, 45 Am. & Eng. R. Cas. 423, 89 Tenn. 1, 14 S. W. Rep. 317.

A railroad company obtained a policy against loss or damage by fire upon "all the wood and logs cut and piled along the line of their road" between designated places, and while it was in force, wood which was piled by an individual on land adjoining the company's right of way was burned by the sparks from a locomotive, which the company was compelled to pay for. *Held*, that the contingent interest of the railroad company in such property was not covered by the policy, and it could not recover from the insurance company. *Monadnock R. Co. v. Manufacturers' Ins. Co.*, 113 Mass. 77.

6. What losses are not within the policy.—A fire policy on express goods while on board the cars provided that "no loss is to be paid arising from petroleum or other explosive oils." The train on which the goods were being carried collided with a petroleum train, causing the oil to ignite and burn the goods. *Held*, that the loss was within the condition, and the insurance company was not liable. *Imperial F. Ins. Co. v. American Merchants' Union Exp. Co.*, 95 U. S. 227.

A railroad company procured insurance on all of its property in two designated states, which was described as being the property "on premises owned or occupied" by the company. *Held*, that the insurance was limited to losses occurring on premises owned or occupied by the company at the time the insurance was effected, and did not extend to other places owned or occupied at the time of the loss. *Providence & W. R. Co. v. Yonkers F. Ins. Co.*, 10 R. I. 74, 6 Am. Ry. Rep. 134.

7. Notice, and preliminary proof of loss.—When loss has occurred under a policy taken out by a warehouseman covering goods of his depositors, he becomes trustee for the owners, and must make proofs of loss and institute necessary proceedings for collection. *Lancaster Mills v. Merchants' C. & S. Co.*, 45 Am. & Eng. R. Cas. 423, 89 Tenn. 1, 14 S. W. Rep. 317.

A railroad corporation was insured against

loss or damage by fire, by a policy the written clause in which described the subject insured as "their liability for loss and damage by fire occasioned by sparks from locomotives to property of others situated on lands not owned or occupied by assured"; and by the printed clauses of which it was agreed to make good to them "all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property as above specified during one year" from its date, "the said loss or damage to be estimated according to the actual cash value of the said property at the time the same shall happen, and to be paid within sixty days after due notice and proof thereof made by the insuree" in conformity to the conditions annexed to this policy, unless the property be replaced or the company have given notice of their intention to rebuild or repair the damaged premises." One of the conditions annexed required persons sustaining loss or damage by fire forthwith to give written notice thereof to the company, and within sixty days deliver as particular an account thereof as the nature of the case would admit, verified in a certain manner. *Held*, that the railroad corporation must, within sixty days after a fire, give notice and proof of loss in accordance with this condition. *Eastern R. Co. v. Relief F. Ins. Co.*, 98 Mass. 420.

8. Waiver of proofs of loss.—A general agent of a foreign insurance company, appointed under Mass. Gen. St. ch. 58, §§ 66-78, has authority to waive a provision in a policy held by a railroad company securing it against loss by having to pay damages to persons along the line of the railroad for property destroyed by fire from its engines, providing that in case of such loss the railroad company shall forthwith give notice in writing, and shall give a particular account of the loss within sixty days; and where such agent is informed that such fires have occurred and that the company is investigating them, and the agent answers that the course is satisfactory and that the company could hand in a schedule after it had paid the individuals suffering the loss, this is a waiver of the condition of the policy. *Eastern R. Co. v. Relief F. Ins. Co.*, 105 Mass. 570.

In such case letters from the insurance company to such agent, which had not been communicated to the railroad company, are not admissible for the purpose of showing a

limitation of the agent's authority to waive such condition in the policy. *Eastern R. Co. v. Relief F. Ins. Co.*, 105 Mass. 570.

9. Breach of contract to insure.—A compress company agreed to insure against loss by fire, for benefit of carriers and owners, all cotton delivered at its warehouse for compression and shipment. Cotton worth \$700,000 was thus delivered. Insurance was procured for only \$301,750 by the compress company under its contract. A total loss of the cotton by fire occurred without negligence of the compress company. *Held*, that the compress company was not liable absolutely as insurer, but only for such damages as resulted from breach of its contract to carry insurance. *Deming v. Merchants' C. P. & S. Co.*, 90 Tenn. 306, 17 S. W. Rep. 89.

The compress company, though in default, was not liable in such case for any damages if the owner, declining to rely upon the company's contract, had obtained adequate insurance for himself upon his cotton. *A fortiori*, there could be no liability if the owner had been paid his loss in full by his own insurer. *Deming v. Merchants' C. P. & S. Co.*, 90 Tenn. 306, 17 S. W. Rep. 89.

10. Reformation of policy.—B. and C., trustees under a second railroad mortgage, and who were in possession of and running the road as such trustees, with a lien upon the property in their favor individually for advances made for the road, applied to an agent of an insurance company for insurance upon a depot building belonging to the road. A policy was issued to them as trustees, insuring their interest as such. The building was burned, and a suit on the policy brought by them as trustees was successfully defended against on the ground that before the fire the first mortgage had been foreclosed and the property of the road transferred to a new corporation. B. and C. then brought a bill in equity for the reformation of the policy, alleging that they asked for, and that the agent agreed to give them, a policy insuring their lien as individuals for money advanced for the road; and it was found that they made such a proposition to the agent and that he assented to it. But it further appeared that the policy was drawn by the agent the same day, that the petitioners received it the same day without objection, and after the burning of the building they gave notice to the

insurance company of their loss as trustees, and that they brought the suit upon the policy as trustees. *Held*, that these facts were important as indicative of the understanding of both parties at the time, and that, as there was nothing to break their force except the words which passed between them as recollected by witnesses after more than six years, and after a controversy had arisen, the parol contract claimed was not established with such certainty as would warrant the court in amending the policy in accordance with it. *Bishop v. Clay F. & M. Ins. Co.*, 49 Conn. 167.

II. SUBROGATION.

11. Of insurer, to insured's right of action against carrier.*—Where insured goods are destroyed while in the hands of a carrier, the insurance company, after paying the loss to the owner, may bring suit in the name of the owner and recover against the carrier. *Hall v. Nashville & C. R. Co.*, 13 Wall. (U. S.) 367, 3 Am. Ry. Rep. 409. — QUOTED IN *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 10 Biss. (U. S.) 18; *Rintoul v. New York C. & H. R. R. Co.*, 20 Fed. Rep. 313. REVIEWED IN *Regan v. New York & N. E. R. Co.*, 60 Conn. 124. — *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. Rep. 314. *Deming v. Merchants' C. P. & S. Co.*, 90 Tenn. 306, 17 S. W. Rep. 89. — REFERRED TO IN *Insurance Co.'s v. Carrier Co.'s*, 91 Tenn. 537.

And the owner of the property burned cannot release such action. *Brighthope R. Co. v. Rogers*, 8 Am. & Eng. R. Cas. 710, 76 Va. 443.

Where cotton is insured in two companies and is destroyed while in the hands of a carrier, and the insurance companies pay the loss, any claim that the owner has against the carrier for causing the loss, by subrogation, vests in the insurance companies; and a subsequent assignment by the owner to one of the companies is not valid. *Platt v. Pennsylvania R. Co.*, 11 N. Y. Supp. 632.

In Wisconsin the insurance company may sue in its own name. *Swarthout v. Chicago & N. W. R. Co.*, 49 Wis. 625, 6 N. W. Rep. 314, 21 Am. Ry. Rep. 153.

An insurance company, upon payment of

* Subrogation of insurer to insured's right of action, see note, 42 AM. & ENG. R. CAS. 340. See also FIRES, 138.

a total loss of goods while in the hands of a carrier, is only subrogated to such right of action as the owner had against the carrier. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 6 Sup. Ct. Rep. 750; *affirming* 10 Biss. 18.—REVIEWED IN Insurance Co. of N. A. v. Easton, 37 Am. & Eng. R. Cas. 671, 73 Tex. 167.

In Georgia an insurance company, after having paid insurance money, cannot sue a railroad company for having negligently burned the insured property. The owner of the destroyed property may, however, sue the railroad company for the use and benefit of the insurance company. *Holcombe v. Richmond & D. R. Co.*, 78 Ga. 776, 3 S. E. Rep. 755.

In Louisiana there is no subrogation by operation of law in such a case, and in the absence of a contract between the two companies the insurance company cannot recover from the railway company. *Carroll v. New Orleans, J. & G. N. R. Co.*, 26 La. Ann. 447.

The right of an insurance company insuring a property *in transitu*, to be substituted to the rights of the insured as against the common carrier upon paying a loss, is subject to the owner's contract of carriage with the railroad company, provided there is no fraudulent concealment from the insurer. An insurance company insuring property *in transitu*, and making no provisions in regard to the nature of the contract of carriage, must be held to have insured subject to the actual contract of carriage, so far as it was a lawful contract. *Jackson Co. v. Boylston Mut. Ins. Co.*, 21 Am. & Eng. R. Cas. 117, 139 Mass. 508, 2 N. E. Rep. 103.—DISTINGUISHING *Carstairs v. Mechanics' & T. Ins. Co.*, 18 Fed. Rep. 473. REFERRING TO *Hart v. Western R. Corp.*, 13 Metc. (Mass.) 99.—DISTINGUISHED IN *Fayerweather v. Phoenix Ins. Co.*, 118 N. Y. 324. REVIEWED IN Insurance Co. of N. A. v. Easton, 37 Am. & Eng. R. Cas. 671, 73 Tex. 167.

Where an insurance company pays the insured for a loss by fire occasioned by the negligence of a railroad company, and the insured afterwards receives the amount of his damages from the railroad company, he holds such damages in trust for the insurance company, which may be recovered in a suit in equity. *Monmouth County M. F. Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107. *Weber v. Morris & E. R. Co.*, 35 N. J. L. 409.

But if the railroad company does not pay such damages, or pays them knowing that the insured has received the amount insured from the insurance company, then the railroad company is liable to the insurance company in a suit at law, which may be brought in the name of the insured without his consent; and a release by the insured to the railroad company is no defense. *Monmouth County M. F. Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107.

But these two remedies cannot be pursued in one suit; neither the insured nor the railroad company is a proper or necessary party to a suit against the other, and in no way are they jointly liable so that a decree could be made, or a judgment given against both. *Monmouth County M. F. Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107.

12. — or wrong-doer.—An insurance company which has been compelled to pay for goods destroyed by fire is entitled, by way of subrogation from the assured and in his right only, to recover from the person who wrongfully caused the loss or damages sustained, to the extent of the amount paid. *St. Louis, A. & T. R. Co. v. Fire Assoc. of Phila.*, 55 Ark. 163, 18 S. W. Rep. 43.—DISTINGUISHING *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754.—*Home Mut. Ins. Co. v. Oregon R. & N. Co.*, 20 Oreg. 569, 26 Pac. Rep. 857.

Such an action is founded not upon assignment, but upon the doctrine of subrogation; and the insured need not be joined as a party plaintiff under the provisions of Mansf. Ark. Dig. § 4934, that "where the assignment of a thing in action is not authorized by statute, the assignor must be a party as plaintiff or defendant." *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.*, 43 Am. & Eng. R. Cas. 79, 41 Fed. Rep. 643.

Where plaintiff had insurance upon a building destroyed by fire, and upon payment of the amount of the debt for which he held the property as security by the insurers, he assigned to them the statute claim, with a stipulation on their part that any excess recovered by the insurers beyond the amount paid to him by them should belong to him—*held*, that the insurers might recover, in the name of the plaintiff, for the whole injury. *Bean v. Atlantic & St. L. R. Co.*, 58 Me. 82.

Where the value of the property destroyed exceeds the amount of insurance paid, the insurer paying the loss only ac-

quires thereby to the extent of the payment a joint interest with the owner in the cause of action against the wrong-doer; hence, in prosecuting such cause of action the owner of the property destroyed must be joined with the insurer paying the loss as a co-plaintiff. *Home Mut. Ins. Co. v. Oregon R. & N. Co.*, 20 Oreg. 569, 26 Pac. Rep. 857.—DISTINGUISHING *Connecticut F. Ins. Co. v. Erie R. Co.*, 73 N. Y. 399, 29 Am. Rep. 171; *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.*, 41 Fed. Rep. 645.

A warehouse was erected on a right of way of a railroad company under lease, one of the terms of which released the railroad company from liability for any damage occasioned by fire from its locomotives to property in the warehouse. *Held*, that a failure on the part of the warehousemen to state this fact in obtaining insurance on cotton stored with them is immaterial, where it appears that the insurance companies made no difference in rates with or without the right of subrogation to any claim against the railroad, and where there is no usage or custom among insurance companies making any discrimination in such cases. *Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co.*, 41 Fed. Rep. 271, 19 Ins. L. J. 372.

13. Of carrier, by contract with owner, to latter's rights as against insurer.*—The owner of goods, and a railroad, may contract at the time goods are shipped, and before insurance thereon is effected, that the insurance shall enure to the benefit of the carrier, where there is no fraud or concealment. *Rintoul v. New York C. & H. R. R. Co.*, 20 Fed. Rep. 313.—QUOTING *Hall v. Nashville & C. R. Co.*, 13 Wall. (U. S.) 367.

A common carrier may contract with a shipper of insured goods for the benefit of any insurance thereon, so that a payment by the insurers to the shipper of any loss while in the carrier's hands will not give the insurers a right of action against the carrier. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 10 Biss. (U. S.) 18; *affirmed in* 117 U. S. 312, 6 Sup. Ct. Rep. 750.

The fact that the carrier had no notice of a clause in an insurance policy providing that the insurance should not enure to his

benefit does not render it contrary to public policy to permit the insurance company to rely upon the clause as a warranty, even though the carrier has stipulated that he shall have the benefit of any insurance effected by the shipper. *Insurance Co. of N. A. v. Easton*, 37 Am. & Eng. R. Cas. 671, 73 Tex. 167, 11 S. W. Rep. 180.

14. — by provision in bill of lading.—A condition in a bill of lading providing that the carrier should have the benefit of any insurance on the goods held by the owner is valid as between the parties, though a loss occurs through the negligence of the carrier. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 6 Sup. Ct. Rep. 750; *affirming* 10 Biss. 18.—FOLLOWED IN *Platt v. Richmond, Y. R. & C. R. Co.*, 32 Am. & Eng. R. Cas. 517, 108 N. Y. 358, 11 Cent. Rep. 101, 15 N. E. Rep. 393, 13 N. Y. S. R. 660.—*Rintoul v. New York C. & H. R. R. Co.*, 21 Blatchf. (U. S.) 439, 17 Fed. Rep. 905.—REVIEWED IN *Insurance Co. of N. A. v. Easton*, 37 Am. & Eng. R. Cas. 671, 73 Tex. 167.

Where a bill of lading provides that any insurance on the goods shall be for the benefit of the carrier, payment of the insurance to the shipper discharges the carrier, and prevents the insurance company from maintaining an action against the carrier for causing the loss. *Platt v. Richmond, Y. R. & C. R. Co.*, 32 Am. & Eng. R. Cas. 517, 108 N. Y. 358, 11 Cent. Rep. 101, 15 N. E. Rep. 393, 13 N. Y. S. R. 660; *affirming* 20 J. & S. 496.—FOLLOWING *Connecticut F. Ins. Co. v. Erie R. Co.*, 73 N. Y. 399; *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312.—REVIEWED IN *Insurance Co. of N. A. v. Easton*, 37 Am. & Eng. R. Cas. 671, 73 Tex. 167.

In an action to recover for goods lost in transit, the defendant cannot take advantage of a clause in a bill of lading that in the event of a loss or damage whilst the goods are in course of transportation by any of the contracting companies, "the company incurring such liability shall have the benefit of any insurance" which may have been effected, unless it appears that the owner of the goods wrongfully refused to allow the carrier the benefit of an insurance which he had at the time of the loss, and which could be made available to the carrier, or which, before bringing a suit against the company, the defendant collected without condition. *Inman v. South*

* Subrogation of carrier to rights of insured in goods lost or damaged, see note, 3 L. R. A. 426.

Carolina R. Co., 37 *Am. & Eng. R. Cas.* 663, 129 *U. S.* 128, 9 *Sup. Ct. Rep.* 249.

A policy of insurance issued to a cotton merchant provided that the insurance company should be subrogated to the claim of the insured against the carrier to the extent of any loss or damage, paid or incurred by the insurance company. The cotton merchant shipped a quantity of cotton for carriage by different connecting carriers under a bill of lading which stipulated that any carrier incurring liability for loss or damage should have the benefit of any insurance upon the goods. After a loss had been incurred, the insurance company signed a memorandum by which the face of the insurance was reinstated, proofs of loss waived, and provision made for postponing the question of indemnity until the owner, if the carrier, refused to pay, had used efforts to collect, without prejudice to the owner's claim against the insurance company. *Held*, in an action by the owner against the carrier, that the carrier was not entitled to plead in bar that it had not received the benefit of the insurance. *Inman v. South Carolina R. Co.*, 37 *Am. & Eng. R. Cas.* 663, 129 *U. S.* 128, 9 *Sup. Ct. Rep.* 249.—DISTINGUISHED IN *Fayerweather v. Phenix Ins. Co.*, 118 *N. Y.* 324.

15. When such provision avoids the policy.—A warranty in a policy of insurance which provides that the insurance shall not enure to the benefit of any carrier, is a valid and lawful stipulation, and is not in restraint of trade or contrary to public policy; and a subsequent agreement between the insured and the carrier that the latter shall be subrogated to the right of the insured avoids the policy. *Insurance Co. of N. A. v. Easton*, 37 *Am. & Eng. R. Cas.* 671, 73 *Tex.* 167, 11 *S. W. Rep.* 180.—REVIEWING *British & F. M. Ins. Co. v. Gulf, C. & S. F. R. Co.*, 63 *Tex.* 475; *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 *U. S.* 312; *Rintoul v. New York C. & H. R. R. Co.*, 16 *Am. & Eng. R. Cas.* 144, 17 *Fed. Rep.* 905; *Platt v. Richmond, Y. R. & C. R. Co.*, 32 *Am. & Eng. R. Cas.* 519, 103 *N. Y.* 358; *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 *Mass.* 508.—*Carstairs v. Mechanics' & T. Ins. Co.*, 16 *Am. & Eng. R. Cas.* 142, 18 *Fed. Rep.* 473.—APPROVING *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 10 *Biss. (U. S.)* 18.—DISTINGUISHED IN *Jackson Co. v. Boylston Mut. Ins. Co.*, 21 *Am. & Eng. R. Cas.* 117, 139 *Mass.* 508.—*Fayerweather*

v. Phenix Ins. Co., 42 *Am. & Eng. R. Cas.* 337, 118 *N. Y.* 324, 23 *N. E. Rep.* 192, 28 *N. Y. S. R.* 689; *affirming* 22 *J. & S.* 545.—DISTINGUISHING *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 *Mass.* 508; *Inman v. South Carolina R. Co.*, 129 *U. S.* 128.—*Missouri Pac. R. Co. v. International M. Ins. Co.*, 84 *Tex.* 149, 19 *S. W. Rep.* 459.

In case of such inconsistent stipulations a payment by the insurance company would be merely voluntary. No subrogation would follow from such payment against the carrier. *Missouri Pac. R. Co. v. International M. Ins. Co.*, 84 *Tex.* 149, 19 *S. W. Rep.* 459.

When a bill of lading and an insurance policy covering any loss of the goods named in the former are signed at the same time, but the policy describes the property as having been already shipped by the carrier, the insurance company will be held to be affected with notice of any reservation in the bill of lading, and chargeable with notice of the circumstances of the contract for its transportation, entered into between the shipper and the carrier. *British & F. M. Ins. Co. v. Gulf, C. & S. F. R. Co.*, 21 *Am. & Eng. R. Cas.* 112, 63 *Tex.* 475.—REVIEWED IN *Insurance Co. of N. A. v. Easton*, 37 *Am. & Eng. R. Cas.* 671, 73 *Tex.* 167.

III. ACTIONS.

16. Jurisdiction.—Proper county.

—The New York statute requiring actions to recover for injuries to real property to be tried in the county where the property is situate only applies where the cause of action arises within the state, and does not apply where the action is brought in the state by an insurance company against a railroad company for burning a barn in another state, on which it had paid the insurance. *Home Ins. Co. v. Pennsylvania R. Co.*, 11 *Hun (N. Y.)* 182.

17. Who may sue, generally.—Where an insurance had been effected on goods shipped, the shipper may maintain an action against the carrier for damage done to the goods, notwithstanding the liability of the insurer to him. Such is not like a case of double insurance; the carrier is primarily liable, and may be sued by the shipper, for the benefit of the insurer, even though the insurer has advanced the amount of damage. *Burnside v. Union Steam Boat Co.*, 10 *Rich. (So. Car.)* 113.

Where a carrier insures goods held by it in trust as carrier, it may recover for goods destroyed by fire for the loss of which it was not liable under 11 Geo. IV. & 1 Wm. IV., c. 68. *London & N. W. R. Co. v. Glyn*, 1 El. & El. 652, 5 Jur. N. S. 1004, 28 L. J. Q. B. 188, 7 W. R. 238, 33 L. T. 199.

18. Right of insurer to sue wrong-doer.—The insurer of goods which have been destroyed by the wrongful act of another may, as the real party in interest, maintain an action in his own name against the wrong-doer, under the provision of Mansf. Ark. Dig. § 4933, that "every action must be prosecuted in the name of the real party in interest." *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.*, 43 Am. & Eng. R. Cas. 79, 41 Fed. Rep. 643. — **DISTINGUISHED IN** *Home Mut. Ins. Co. v. Oregon R. & N. Co.*, 20 Oreg. 569.

Where insured property is destroyed through the negligence of a railroad company and the insurance company has paid the owner less than the value of the loss and taken a partial assignment of his right, it cannot sue the railroad company in its own name, either at common law or under the Missouri statutes, but the action must be in the name of the owner. *Aetna Ins. Co. v. Hannibal & St. J. R. Co.*, 3 Dill. (U. S.) 1.

Where the value of property destroyed by fire occasioned by the act of a wrong-doer is in excess of the amount of insurance money paid thereon, and the owner assigns his claim against the wrong-doer to the extent of the insurance money paid, to the insurer, the latter has only a joint interest with the owner in a single cause of action and cannot sue at law thereon alone. *State Ins. Co. v. Oregon R. & N. Co.*, 20 Oreg. 563, 26 Pac. Rep. 838.

A town insurance company, organized under chapter 103, Wis. Laws 1872, which has been compelled to pay a loss caused by a fire started through the negligence of a railroad company, may take an assignment from the assured of the whole claim for damages, exceeding the amount paid by it, and recover the full amount thereof from the railroad company. *Hustisford F. M. Ins. Co. v. Chicago, M. & St. P. R. Co.*, 66 Wis. 58, 28 N. W. Rep. 64. — **DISTINGUISHING** *Dietrich v. Madison Relief Assoc.*, 45 Wis. 79.

19. Matters of defense.—Where grain was insured while in the custody of a rail-

road company, but owned by commission merchants doing business as a firm, and neither the insurance company nor its agents made any inquiry as to who owned the grain, a failure to notify the insurance company of a subsequent dissolution of the firm would not defeat the policy. *Phoenix Ins. Co. v. Hamilton*, 14 Wall. (U. S.) 504.

FIRE LIMITS.

Ordinances forbidding wooden structures within, see **STREETS AND HIGHWAYS, 306.**

FIRE REGISTERS.

Patents for, see **PATENTS FOR INVENTIONS, 37.**

FIREMEN.

As fellow-servants with other employees, see **FELLOW-SERVANTS, 249, 250, 281-284, 376, 386-388, 400, 410.**

— experts, see **WITNESSES, 183.**

Contributory negligence of deceased, in actions for causing death, see **DEATH BY WRONGFUL ACT, 217.**

When may be sued for killing stock, see **ANIMALS, INJURIES TO, 324.**

FIRES.

Action for destruction of wife's property by, see **HUSBAND AND WIFE, 12.**

— spread of, when barred by lapse of time, see **LIMITATIONS OF ACTIONS, 57.**

Constitutionality of statutes imposing liability for injuries caused by, see **STATUTES, 29.**

Costs in actions for causing, see **COSTS, 9.**

Evidence of danger from, on assessment of land damages, see **EMINENT DOMAIN, 613.**

Increased danger from, as an element of land damages, see **EMINENT DOMAIN, 701-704, 1193, 1230.**

Liability of lessor road for, see **LEASES, ETC., 48.**

— warehousemen for loss by, see **EXPRESS COMPANIES, 58; WAREHOUSEMEN, 10.**

Limitation of liability against loss by, see **BILLS OF LADING, 73-80; CARRIAGE OF MERCHANDISE, 684; LIMITATION OF LIABILITY, 18.**

Loss of goods by, liability of carrier for, see **CARRIAGE OF MERCHANDISE, 149.**

Presumption arising from setting out, see **EVIDENCE, 127.**

Priority of mortgage over claims for loss of goods by, see **MORTGAGES, 111.**

Set by independent contractor, liability for, see INDEPENDENT CONTRACTORS, 222.

Statement of cause of action in actions for injuries to property by, see PLEADING, 29.

I. STATUTES CONSTRUED.....	852
II. COMPANY'S NEGLIGENCE.....	857
1. In General.....	857
2. Defective Engines and Appliances.....	863
a. In General.....	863
b. Spark Arresters.....	865
3. Careless Management of Engine.....	867
4. Permitting Combustible Materials on Right of Way.....	869
5. Failure to Extinguish Fires Once Started.....	873
6. Allowing Fire to Spread; Proximate and Remote Cause.....	874
7. Negligence Resulting in Personal Injury or Death; Loss of Cattle.....	883
III. CONTRIBUTORY NEGLIGENCE.....	883
1. In General.....	883
2. Allowing the Accumulation of Combustible Materials.....	890
a. Near the Right of Way.....	890
b. On the Right of Way.....	892
IV. REMEDIES; PROCEDURE.....	893
1. In General.....	893
2. Complaint; Declaration; Bill.....	899
a. In General.....	899
b. Alleging Company's Negligence.....	902
c. Alleging Absence of Negligence on Plaintiff's Part.....	906
3. Defenses.....	907
4. Evidence.....	908
a. Admissibility on Part of Plaintiff, Generally.....	908
b. Admissibility on Part of Company, Generally.....	912
c. Proof of Similar Acts of Negligence on Part of Company; Other Fires.....	914
d. Weight and Sufficiency.....	921
e. Presumptive Evidence; Rebuttal.....	930
f. Burden of Proof.....	938
5. Instructions.....	942
6. Questions of Law and Fact.....	949

a. In General.....	949
b. Company's Negligence.....	950
c. Plaintiff's Contributory Negligence.....	957
7. Damages.....	959
a. In General.....	959
b. Elements and Measure of Damages for Property Destroyed or Injured.....	960
c. Interest.....	964
d. Evidence on Question of Damages.....	964
e. Matters in Mitigation or Reduction.....	966
8. Verdict; Judgment.....	967

I. STATUTES CONSTRUED.*

1. Colorado.—The act of 1874 (Gen. St. 812, § 2798), making railroad corporations liable for all damages by fire set out or caused by operating their roads, is constitutional. *Union Pac. R. Co. v. De Busk*, 38 Am. & Eng. R. Cas. 321, 12 Colo. 294, 20 Pac. Rep. 752, 3 L. R. A. 350.—DISTINGUISHED IN *Denver & R. G. R. Co. v. Outcalt*, 2 Colo. App. 395. FOLLOWED IN *Union Pac. R. Co. v. Arthur*, 2 Colo. App. 159. REVIEWED IN *Wadsworth v. Union Pac. R. Co.*, 18 Colo. 600.—*Union Pac. R. Co. v. Arthur*, 2 Colo. App. 159, 29 Pac. Rep. 1031.—FOLLOWING *Union Pac. R. Co. v. De Busk*, 12 Colo. 296.

Such statutes are not penal, but purely remedial in their nature; they apply to corporations which obtained their charters before as well as since their passage, and they should receive a liberal construction such as will justly promote their object. *Union Pac. R. Co. v. De Busk*, 38 Am. & Eng. R. Cas. 321, 12 Colo. 294, 20 Pac. Rep. 752, 3 L. R. A. 350.

The object of the amendment of the statute (Sess. Laws 1887, p. 368) was to facilitate adjustment of the losses and *prima facie* establish the amount of damages sustained by reason of the fire. *Denver, T. & G. R. Co. v. De Graff*, 2 Colo. App. 42, 29 Pac. Rep. 664.

* Statutory liability of railroad companies for destroying property by fire, see note, 38 AM. DEC. 77.

Constitutionality of statutes imposing liability for fires, see 38 AM. & ENG. R. CAS. 332, *abstr.* Statutes regulating prairie fires, timber fires, and fires from engine, or escaping fires while burning of right of way, see note, 21 L. R. A. 261. See also *post*, 28, 33, 42, 59, 80, 103, 188.

Gen. St. § 2798, as affecting doctrine of contributory negligence, construed. *Union Pac. R. Co. v. Arthur*, 2 Colo. App. 159, 29 Pac. Rep. 1031.

2. Connecticut.—The act of 1881, ch. 92, making railroad companies responsible for injuries to "buildings or other property" by fire communicated by their locomotives, and giving companies an insurable interest in such property, is not unconstitutional, either as denying railroad companies the equal protection of the law, or in taking their property without due process of law; nor as impairing the obligation of their charter contracts allowing them to use fire in operating their engines, especially when applied to a company whose charter makes it subject to all general laws thereafter passed. *Grissell v. Housatonic R. Co.*, 32 Am. & Eng. R. Cas. 349, 54 Conn. 447, 4 N. Eng. Rep. 85, 9 Atl. Rep. 137. —CRITICISING AND DISTINGUISHING *Zeigler v. South & N. Ala. R. Co.*, 58 Ala. 594. DISTINGUISHING *Durkee v. Janesville*, 28 Wis. 464; *Ohio & M. R. Co. v. Lackey*, 78 Ill. 55. QUOTING *Lyman v. Boston & W. R. Corp.*, 4 Cush. (Mass.) 290. REVIEWING *Rodemacher v. Milwaukee & St. P. R. Co.*, 41 Iowa 297.

The words "buildings or other property," used in the above statute, include fences and forest trees. *Grissell v. Housatonic R. Co.*, 32 Am. & Eng. R. Cas. 349, 54 Conn. 447, 4 N. Eng. Rep. 85, 9 Atl. Rep. 137.

The liability of a company, under the above statute, does not depend upon its ability to obtain insurance upon such "buildings or other property." *Grissell v. Housatonic R. Co.*, 32 Am. & Eng. R. Cas. 349, 54 Conn. 447, 4 N. Eng. Rep. 85, 9 Atl. Rep. 137.

Under act of 1881, ch. 92 (Gen. St. § 3581), making railroads liable for injury to property by fire communicated by locomotives, a recovery may be had without showing negligence, if the property owner be free from contributory negligence. *Martin v. New York & N. E. R. Co.*, 56 Am. & Eng. R. Cas. 79, 62 Conn. 331, 25 Atl. Rep. 239.

A statute making railroads liable "when any injury is done to a building or other property" by fire communicated from a locomotive, includes an injury to personal property as well as real estate. The statute is remedial, and should be construed with reference to the evil the legislature intended to suppress. *Martin v. New York & N. E.*

R. Co., 56 Am. & Eng. R. Cas. 79, 62 Conn. 331, 25 Atl. Rep. 239. See also *Simmonds v. New York & N. E. R. Co.*, 23 Am. & Eng. R. Cas. 369, 52 Conn. 264, 52 Am. Rep. 587.

3. Illinois.—Under the act of 1874, § 2, with respect to the duty of companies to keep their rights of way clear of combustible materials, allowing the accumulation of material other than dead grass is not negligence, unless it be dangerous. *Chicago & E. I. R. Co. v. Goyette*, 43 Am. & Eng. R. Cas. 36, 133 Ill. 21, 24 N. E. Rep. 549; affirming 32 Ill. App. 574.

Starr & Curtis St. ch. 114, § 53, respecting the duty of railroad companies to keep their rights of way clear of dead grass, etc., applies to the winter as well as summer time. *Indiana, B. & W. R. Co. v. Nicewander*, 21 Ill. App. 305.

4. Iowa.—Iowa Code, § 1289, rendering companies liable for all damages by fire occasioned by the operation of their roads, is not unconstitutional. *Rodemacher v. Milwaukee & St. P. R. Co.*, 41 Iowa 297. —QUOTING *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140. REVIEWING *Ohio & M. R. Co. v. McClelland*, 25 Ill. 140; *Gorman v. Pacific R. Co.*, 26 Mo. 441. —DISTINGUISHED IN *Bielenberg v. Montana Union R. Co.*, 8 Mont. 271. REVIEWED IN *Grissell v. Housatonic R. Co.*, 32 Am. & Eng. R. Cas. 349, 54 Conn. 447, 4 N. Eng. Rep. 85, 9 Atl. Rep. 137; *Small v. Chicago, R. I. & P. R. Co.*, 50 Iowa 338.

Where fire was communicated from an engine owned by a railroad to an elevator, and thence to plaintiff's mill, proof that the mill was on the company's land is immaterial, since under the code, §§ 1976-1981, where an occupant of land has color of title thereto, and in good faith has made valuable improvements thereon, he is entitled to pay therefor, where it is determined he is not the rightful owner. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 17 Am. Ry. Rep. 309.

Neither would proof of such ownership change the degree of care and prudence the company was bound to exercise to prevent the fire; nor would it tend to show contributory negligence on the part of plaintiff. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 17 Am. Ry. Rep. 309. —QUOTED IN *Georgetown, B. & L. R. Co. v. Eagles*, 9 Colo. 544; *Liming v. Illinois C. R. Co.*, 81 Iowa 246.

5. Kansas.—Where the company has

used proper care and skill in the construction and operation of its locomotive, it is not responsible for a prairie fire, caused without its negligence in other respects, under Kan. Gen. St. 1122, ch. 18. *Missouri, K. & T. R. Co. v. Davidson*, 14 Kan. 349.

Comp. Laws 1885, ch. 118, § 2, does not authorize a recovery against a company for a fire caused by burning dry grass and weeds on its right of way, in the performance of its duty to prevent an accumulation thereof, when there is no negligence or carelessness on the part of the company, and when the damages claimed are the result of unavoidable accident only. *Atchison, T. & S. F. R. Co. v. Dennis*, 32 Am. & Eng. R. Cas. 318, 38 Kan. 424, 17 Pac. Rep. 153.

The act of 1885, ch. 155, entitled "An act relating to the liability of railroads for damages by fire," and making the occurrence of fire, caused by the operation of a railroad, *prima facie* evidence of negligence, is not void for failing to clearly express the subject-matter of the act in the title, nor because it is partial and unequal in its operation. *Missouri Pac. R. Co. v. Merrill*, 40 Kan. 404, 19 Pac. Rep. 793.—QUOTED IN *Ft. Scott, W. & W. R. Co. v. Karracker*, 46 Kan. 511. See also *Missouri Pac. R. Co. v. Cady*, 44 Kan. 633, 24 Pac. Rep. 1088.

In actions for damages caused by fire, under the Comp. Laws 1888, ch. 84, § 101, it is only necessary for the plaintiff to establish the fact that fire was caused by the operation of the defendant's road, and to prove the amount of damages. *Atchison, T. & S. F. R. Co. v. Gibson*, 42 Kan. 34, 21 Pac. Rep. 788.

The statute allowing recovery of attorney's fee, construed. *Ft. Scott, W. & W. R. Co. v. Tubbs*, 49 Am. & Eng. R. Cas. 685, 47 Kan. 630, 28 Pac. Rep. 612. *Ft. Scott, W. & W. R. Co. v. Karracker*, 46 Kan. 511, 26 Pac. Rep. 1027.

6. Kentucky.—The act of January 30, 1874, as to the use of spark arresters, does not require the use of absolutely spark-proof appliances, but only the most effectual known preventives of practical use. *Louisville & N. R. Co. v. Taylor*, 92 Ky. 55, 17 S. W. Rep. 198.

7. Maine.—The act of 1842, ch. 9, § 5, making companies liable for damages to buildings or other property along the route of the road, by sparks from locomotives, and giving companies an insurable interest in

such property, applies to both real and personal property, but is limited to property permanently located near the road; and it would not include posts deposited near the track, but intended to be moved to some other place for use. *Chapman v. Atlantic & St. L. R. Co.*, 37 Me. 92.—DISAPPROVED IN *Ross v. Boston & W. R. Co.*, 6 Allen (Mass.) 87. DISTINGUISHED IN *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579. FOLLOWED IN *Hooksett v. Concord R. Co.*, 38 N. H. 242. REVIEWED IN *Thatcher v. Maine C. R. Co.*, 85 Me. 502.

But the statute is sufficiently broad to comprehend growing trees, as a company may have an insurable interest therein, though they are not extensively insured. *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579.—DISTINGUISHING *Chapman v. Atlantic & St. L. R. Co.*, 37 Me. 92.—DISAPPROVED IN *Ross v. Boston & W. R. Co.*, 6 Allen (Mass.) 87. REVIEWED IN *Thatcher v. Maine C. R. Co.*, 85 Me. 502.

The language of the statute, "along the route," applies to buildings near and adjacent to the railroad so as to be exposed to the danger of fire from the engines. *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579.

A building separated by a street from that upon which the fire from the engine fell, and growing timber three hundred feet from the track, are "along the route," within the purview of the statute. *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579.

A company is not liable under Rev. St. ch. 51, § 64, for damages to a pile of sleepers deposited near its track, caused by fire communicated from one of its locomotives. *Lowney v. New Brunswick R. Co.*, 29 Am. & Eng. R. Cas. 116, 78 Me. 479, 7 Atl. Rep. 381.—REVIEWED IN *Thatcher v. Maine C. R. Co.*, 85 Me. 502.

But it is liable for damage to lumber piled in a permanent lumber yard near its track, caused by fire communicated from its locomotives. *Thatcher v. Maine C. R. Co.*, 85 Me. 502, 27 Atl. Rep. 519.—REVIEWING *Chapman v. Atlantic & St. L. R. Co.*, 37 Me. 92; *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579; *Stearns v. Atlantic & St. L. R. Co.*, 46 Me. 95; *Bean v. Atlantic & St. L. R. Co.*, 63 Me. 294; *Lowney v. New Brunswick R. Co.*, 78 Me. 479.

8. Maryland.—The act of 1837, ch. 309, made a company liable for damages caused by fire communicated from its engine, whether or not there was negligence on the

h real and per-
ed to property
e road; and it
sited near the
moved to some
uan v. Atlantic
DISAPPROVED
Co., 6 Allen
D IN Pratt v.
Me. 579. FOL-
cord R. Co., 38
N Thatcher v.

ently broad to
as a company
terest therein
sively insured.
R. Co., 42 Me.
apman v. At-
le. 92.—DISAP-
& W. R. Co.,
ED IN Thatcher
502.

ite, "along the
near and adja-
be exposed to
engines. Pratt
42 Me. 579.

a street from
om the engine
e hundred feet
e route." with-
Pratt v. At-
579.

under Rev. St.
pile of sleepers
ed by fire com-
s locomotives,
R. Co., 29 Am.
79, 7 Atl. Rep.
er v. Maine C.

o lumber piled
near its track,
d from its loco-
e C. R. Co., 85
—REVIEWING
L. R. Co., 37
St. L. R. Co.,
tic & St. L. R.
antic & St. L.
v. New Bruns-

f 1837, ch. 309,
damages caused
n its engine,
diligence on the

part of the company, and the act of 1838, ch. 244, declared that the company should be responsible, unless it was shown that it was "without any negligence." Held, that the latter act repealed the former in regard to negligence, and restored the common law rules, except that the *onus* of showing the absence of negligence was upon the company; and that the phrase "without any negligence" meant "without any negligence occasioned by the want of reasonable diligence," which reasonable diligence consists in using upon the road engines properly constructed, in good order, and having such means of preventing fires by sparks as are known to be usual and consistent with the production of proper speed, the engines being managed by skilful, prudent, and discreet persons. *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242.—FOLLOWED IN *Baltimore & O. R. Co. v. Lamborn*, 12 Md. 257.—*Baltimore & O. R. Co. v. Shipley*, 39 Md. 251, 11 Am. Ky. Rep. 269.

By the act of 1838, when the fire is proved, the law raises the presumption of negligence, and therefore the charge of negligence in the declaration is proved by showing that the fire was occasioned by the defendant. *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242.

Section 1, art. 77, of the Code of Pub. Gen. Laws, making companies responsible for fires occasioned by their engines upon any of their roads, applies not only to a case where a party had suffered damage by fire communicated by sparks flying from the smoke-stack, or by sparks, coals, or fire dropping from or flying out of the furnace or ash pan of the engine, but also to a case where the fire was communicated from coals or cinders thrown from the engine by the servants of the company having charge of it. *Baltimore & O. R. Co. v. Dorsey*, 27 Md. 19.

9. Massachusetts.—The act of 1840, ch. 85, § 1, with reference to the spread of fire communicated by an engine, allows the owner of a house sixty feet away from the place where the fire originated to recover, where sparks were blown upon it from a building nearer the track which was set on fire by the engine. *Hart v. Western R. Corp.*, 13 Metc. (Mass.) 99.

The act of 1840, ch. 85, applies to railroads established before as well as since its passage; and extends as well to estates a part of which is conveyed by the owner, as to those of which a part is taken by author-

ity of law, for the purposes of a railroad. *Lyman v. Boston & W. R. Corp.*, 4 Cush. (Mass.) 288.—QUOTED IN *Grissell v. Housatonic R. Co.*, 32 Am. & Eng. R. Cas. 349, 54 Conn. 447, 4 N. Eng. Rep. 85, 9 Atl. Rep. 137; *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573. REVIEWED IN *Gorman v. Pacific R. Co.*, 26 Mo. 441.

The act of 1840, ch. 85, extends to such things as tools, patterns, lumber in shop, and fences. *Trask v. Hartford & N. H. R. Co.*, 16 Gray (Mass.) 71.

The act of 1840 extends to personal property, although a railroad corporation had no knowledge or reasonable cause to believe that such property was situated where it might be so injured. *Ross v. Boston & W. R. Co.*, 6 Allen (Mass.) 87.—DISAPPROVING *Chapman v. Atlantic & St. L. R. Co.*, 37 Me. 92; *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579.

The provision of the Gen. St. ch. 63, § 101, by which every railroad corporation is made responsible to any person or corporation whose property or buildings are injured by fire communicated by its engines, is not penal, but remedial, giving all the damages to the party injured. *Daniels v. Hart*, 118 Mass. 543.

Gen. St. ch. 63, § 101, makes the company liable for the destruction of timber half a mile away, where the fire spreads from grass burning near the track in a direct line to such timber. *Perley v. Eastern R. Co.*, 98 Mass. 414.

10. Michigan.—How. St. § 3378, making companies liable for all loss or damage to property by fire originating from engines, unless proof is made to the satisfaction of the jury that the machinery, smoke-stack, or fire-boxes of such engines were in good order and properly managed, contemplates the communication of fire, and consequent loss and damage, notwithstanding the exercise of prudence and care in the selection of appliances and in the management and operation of trains; and it fixes the standard of condition and management, but does not attempt to establish a standard of kind or quality of appliances. *Hagan v. Chicago, D. & C. G. T. J. R. Co.*, 49 Am. & Eng. R. Cas. 670, 86 Mich. 615, 49 N. W. Rep. 509.

11. Mississippi.—Section 1054 of the code of 1880, which provides that a company shall be liable for damages resulting from the negligence or mismanagement of its

agents, engineers, or clerks, is but declaratory of a principle of the common law. *Mobile & O. R. Co. v. Gray*, 23 *Am. & Eng. R. Cas.* 373, 62 *Miss.* 383.

12. Montana.—Laws of 1881, p. 71, § 7, with respect to the duty of companies to keep their tracks free from combustible material, makes it as much the duty of the company to so keep the right of way, as to use means to prevent the emission of sparks; and such statute does not trench upon the chartered rights of a company chartered by act of congress. *Diamond v. Northern Pac. R. Co.*, 29 *Am. & Eng. R. Cas.* 117, 6 *Mont.* 580, 13 *Pac. Rep.* 367.

13. New Hampshire.—Railroads engaged in interstate commerce are not exempt by their federal constitutional rights from the operation of Gen. laws, ch. 162, § 8, which makes the proprietors of every railroad liable as insurers for damage done by fire from a locomotive on their road. *Smith v. Boston & M. R. Co.*, 63 *N. H.* 25.

Rev. St. ch. 142, § 8, respecting the absolute liability of railroad companies for fires set out by any locomotive on the road, interpreted and construed. *Hooksett v. Concord R. Co.*, 38 *N. H.* 242. *Rowell v. Railroad Co.*, 57 *N. H.* 132. See also *Haseltine v. Concord R. Co.*, 35 *Am. & Eng. R. Cas.* 236, 64 *N. H.* 545, 15 *Atl. Rep.* 143.

14. South Carolina.—Under Gen. St. § 1511, the liability of a company for fire communicated by its engines, or having originated within its right of way, attaches without regard to the question of negligence or proximate cause. *Thompson v. Richmond & D. R. Co.*, 24 *So. Car.* 366.

An act of the legislature, making railroad corporations responsible to others for fires caused by sparks from engines, without regard to negligence, is not an exercise of the police power. *McCandless v. Richmond & D. R. Co.*, 38 *So. Car.* 103, 16 *S. E. Rep.* 429.

The provision as to damages from communicated fires along the right of way of a railroad does not abridge the privileges or immunities of the railroad corporation, nor deprive it of property without due process of law, nor deny to it the equal protection of the laws, within the meaning of the fourteenth amendment to the United States constitution. *McCandless v. Richmond & D. R. Co.*, 38 *So. Car.* 103, 16 *S. E. Rep.* 429.—*REVIEWING Danner v. South Carolina R. Co.*, 4 *Rich. (So. Car.)* 329.

Nor is the obligation of any contract im-

paired by such an enactment, nor (the lessee being the corporation of another state) is there any interference with the control of congress over interstate commerce. *McCandless v. Richmond & D. R. Co.*, 38 *So. Car.* 103, 16 *S. E. Rep.* 429.

Nor is it in violation of those provisions of the state constitution which prohibit discriminations and unequal restraints and disqualifications, the dispossession of property otherwise than by the law of the land, and the taking of private property without consent or compensation. *McCandless v. Richmond & D. R. Co.*, 38 *So. Car.* 103, 16 *S. E. Rep.* 429.

15. Utah.—The statute relating to the communication and spread of fire (C. L. § 503) casts the burden on the company to show that the fire was not the result of its negligence. *Anderson v. Wasatch & J. V. R. Co.*, 2 *Utah* 518.

16. Vermont.—Gen. St. ch. 28, §§ 78, 79, making companies liable for damages to any building or other property along the route of a railroad, by sparks communicated from a locomotive, and giving the companies an insurable interest in such property, includes all property in proximity to the railroad, whether such property is outside of the company's right of way or lawfully on the same. *Grand Trunk R. Co. v. Richardson*, 91 *U. S.* 454.—*QUOTED IN Laird v. Connecticut & P. R. R. Co.*, 43 *Am. & Eng. R. Cas.* 63, 62 *N. H.* 254.

And the above statute applies to buildings and property destroyed by a fire spreading from other buildings or property to which it is first communicated. *Grand Trunk R. Co. v. Richardson*, 91 *U. S.* 454.

17. Canadian.—Plaintiff sued defendants for having negligently allowed dry wood and leaves to accumulate on their track, which became ignited by their engine and extended to plaintiff's land, destroying his trees, etc. *Held*, that this was an injury sustained "by reason of the railway" within section 83 of Consol. St. C. c. 66, and that the plaintiff, suing more than six months after such injury, was therefore barred. *McCallum v. Grand Trunk R. Co.*, 30 *U. C. Q. B.* 122.—*QUOTING Hammersmith & C. R. Co. v. Brand*, L. R. 4 *H. L. Cas.* 220. *REVIEWING Browne v. Brockville & O. R. Co.*, 20 *U. C. Q. B.* 202.—*FOLLOWED IN May v. Ontario & Q. R. Co.*, 10 *Ont.* 70. *REVIEWED IN Anderson v. Canadian Pac. R. Co.*, 17 *Ont.* 747.

18. English.—A fire arising from negligence is not a fire "accidentally begun" within the meaning of the act of Anne (6 Anne, ch. 31, § 67), as amended by the act of George III. (14 Geo. III., ch. 78, § 76), providing for exemption of liability for fires accidentally begun. *Wick v. Rome, W. & O. R. Co.*, 49 N. Y. 420, 4 Am. Ry. Rep. 547; *affirming* 3 Lans. 453.

Those statutes are not excluded in all cases where the fire is caused by negligence, but they do not apply where it has been intentionally lighted by defendant. *Jaffrey v. Toronto, G. & B. R. Co.*, 24 U. C. C. P. 271.

II. COMPANY'S NEGLIGENCE.

1. In General.*

19. Right to use fire.—The exercise, employment, and use by the railroad of the dangerous and destructive element of fire, to which it had a right, should be carefully limited with just regard to the rights of others. *Longabaugh v. Virginia City & T. R. Co.*, 9 Nev. 271.

Authority to use a steam engine for the purpose of propelling cars is authority to emit sparks therefrom; and if the most approved means which science and skill have invented are applied to prevent sparks from causing injuries, the railroad company is not liable in case damage is occasioned by a fire communicated in that manner. *Rood v. New York & E. R. Co.*, 18 Barb. (N. Y.) 80.—REVIEWED IN *Gerke v. California Steam Nav. Co.*, 9 Cal. 251; *Small v. Chicago, R. I. & P. R. Co.*, 50 Iowa 338.

Where the legislature has sanctioned and authorized the use of a particular thing, as an engine, and it is used for the purpose for which it was authorized, and every precaution had been observed to prevent the injury, the sanction of the legislature carries with it its consequence that if the damages result from the use of such thing, independently of negligence, the party using it is not responsible. *Houston & T. C. R.*

* Liability of railroad company for fires started from engines, see notes, 2 AM. & ENG. R. CAS. 275; 7 *Id.* 534; 13 *Id.* 487; 29 *Id.* 120; 35 *Id.* 242; 38 AM. DEC. 70; 6 AM. REP. 597; 3 L. R. A. 639; 9 *Id.* 750.

What is negligence as applied to setting out fires, see note, 21 L. R. A. 256.

Liability of company for fires communicated while burning off right of way or from sparks from engine, see note, 11 L. R. A. 506. See also *post*, 170-180, 313-323.

Co. v. McDonough, 1 Tex. App. (Civ. Cas.) 354.

Railroad companies have a right to run steam engines on their roads, but they have no right to scatter fire along the tracks; and when it is found that this is done and the property of others destroyed, with no explanation of the cause, the jury are warranted in inferring that there has been some neglect. *Houston & T. C. R. Co. v. McDonough*, 1 Tex. App. (Civ. Cas.) 354. See also *Burlington & M. R. Co. v. Westover*, 4 Neb. 268.

20. Risks assumed by the adjacent landowner.—If in the necessary use of fire for the production of steam, by the usual and best approved appliances, without negligence, sparks escape from a locomotive engine, and set on fire the premises of adjacent owners of property, such loss must be borne by the owner as one of the incidents of the operation of railroads. *White v. Chicago, M. & St. P. R. Co.*, 1 S. Dak. 326, 47 N. W. Rep. 146. *Burlington & M. R. Co. v. Westover*, 4 Neb. 268. *Philadelphia & R. R. Co. v. Hendrickson*, 80 Pa. St. 182.

Where one conveys a right of way for a railroad, he takes the risk of injuries from fire occasioned without negligence on the part of the company, due to the lawful and legitimate use and operation of its road. *Rood v. New York & E. R. Co.*, 18 Barb. (N. Y.) 80.

Every adjacent owner may lawfully deposit personalty or erect buildings upon his own premises near a track, yet in so doing he takes upon himself the additional risk of danger from fire caused by the operation of the railroad. *Indianapolis & C. R. Co. v. Paramore*, 31 Ind. 143.

21. Rule of liability dependent upon negligence.—The liability of a railroad company for setting fire to a building by sparks from a locomotive, depends upon whether there was negligence, which means some wrongful or unauthorized act, or the omission of some duty. *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218; *reversing* 29 Barb. 226.—FOLLOWING *Holbrook v. Utica & S. R. Co.*, 12 N. Y. 236.—NOT FOLLOWED IN *Koontz v. Oregon R. & N. Co.*, 20 Oreg. 3.—*Macon & W. R. Co. v. McConnell*, 31 Ga. 133. *Ft. Worth & D. C. R. Co. v. Hogsett*, 67 Tex. 685, 4 S. W. Rep. 365.

Companies must take proper precautions to prevent injuries by reason of fires to

lands through which they pass. *Ball v. Grand Trunk R. Co.*, 16 U. C. C. P. 252.

The company cannot, because of the exigencies of its business, inflict loss upon the owners of adjacent property by fire which could have been avoided by the use of care and precaution. *Forest Glen B. & T. Co. v. Chicago, M. & St. P. R. Co.*, 33 Ill. App. 565.

The company cannot impose conditions on others in order to shield itself from its own negligence in the use of fire in the operation of its engines and road. *Burlington & M. R. Co. v. Westover*, 4 Neb. 268.

In order to charge the company when the allegation is that the fire was caused by sparks from the engine, the jury must affirmatively find that this was true, and that the damage was caused by the negligence of the servants or agents of the company. *International & G. N. R. Co. v. Timmermann*, 61 Tex. 660.

Railroad companies are required to make full restitution for property that may be negligently destroyed by fire. *Texas & P. R. Co. v. Hoskins*, 2 Tex. App. (Civ. Cas.) 55.

22. Not liable when free from fault.—A railroad company free from negligence is not liable for damages from fire kindled by the sparks from locomotives. *Newton v. New York & N. E. R. Co.*, 32 Am. & Eng. R. Cas. 347, 56 Conn. 21, 5 N. Eng. Rep. 615, 12 Atl. Rep. 644. *Georgia R. Co. v. Lawrence*, 74 Ga. 534. *Lowney v. New Brunswick R. Co.*, 29 Am. & Eng. R. Cas. 116, 78 Me. 479, 7 Atl. Rep. 381. *Ball v. Grand Trunk R. Co.*, 16 U. C. C. P. 252. —FOLLOWING *Hill v. Ontario, S. & H. R. U. Co.*, 13 U. C. Q. B. 503; *Piggot v. Eastern Counties R. Co.*, 3 C. B. 229; *Vaughan v. Taff Vale R. Co.*, 5 H. & N. 679.

In the absence of negligence on the part of a company or its servants, the company is not responsible for property or buildings burned, which has been deposited or have been erected by the owner on his own premises in close proximity to the track. *Indianapolis & C. R. Co. v. Paramore*, 31 Ind. 143.

Where a landowner conveys a right of way over his land, the grant is subject to all the consequences necessarily attendant upon the use of the same for railroad purposes, and the company is only held to ordinary care and diligence in using its road; and if fire is communicated from an engine

to the grantor's remaining lands, it is *damnum absque injuria*, and the company is not liable unless upon proof of its negligence. *Rood v. New York & E. R. Co.*, 18 Barb. (N. Y.) 80. —REVIEWING *Moshier v. Utica & S. R. Co.*, 8 Barb. 427.

Where the owner of land, who has received damages from a railroad for a right of way, brings an action for injury by sparks from the company's engines, he cannot recover, unless on proof of negligence, unskillfulness, or malice. *Philadelphia & R. R. Co. v. Yeiser*, 8 Pa. St. 366.

A company is not liable for injury resulting from the escape of sparks from its locomotives, unless it has failed to use the appliances required by the statute for preventing the escape of sparks, or has been negligent in their use. *Kentucky C. R. Co. v. Barrow*, 83 Ky. 638, 20 S. W. Rep. 165. *Ball v. Grand Trunk R. Co.*, 16 U. C. C. P. 252. —FOLLOWING *Vaughan v. Taff Vale R. Co.*, 5 H. & N. 679.

A company setting a fire on its own premises for a lawful purpose, and guilty of no negligence in permitting it to escape, is not liable for damages resulting therefrom to the property of an adjacent proprietor. *Pittsburgh, C. & St. L. R. Co. v. Culver*, 60 Ind. 469.

Kan. Gen. St. 1122, ch. 18, does not authorize a recovery against a railroad corporation for a prairie fire caused by a locomotive running on the track of a company, where there is no want of care and skill in the construction of the locomotive, or in operating it. *Missouri, K. & T. R. Co. v. Davidson*, 14 Kan. 349.

There must be some proof of negligence to make a company liable for setting fire to adjoining property by sparks from a passing train; but the amount of care to be exercised depends upon the facts of the case. *Fero v. Buffalo & S. L. R. Co.*, 22 N. Y. 209. —APPLYING *Rood v. New York & E. R. Co.*, 18 Barb. 80. FOLLOWING *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218. QUOTING *Cook v. Champlain Transp. Co.*, 1 Den. 91. —APPLIED IN *Kalbfleisch v. Long Island R. Co.*, 29 Am. & Eng. R. Cas. 179, 102 N. Y. 520, 7 N. E. Rep. 557, 2 N. Y. S. R. 473, 55 Am. Rep. 832; *Diabola v. Manhattan R. Co.*, 29 N. Y. S. R. 149, 8 N. Y. Supp. 334. FOLLOWED IN *Hinds v. Barton*, 25 N. Y. 544. QUOTED IN *Rowell v. Railroad Co.*, 57 N. H. 132. REVIEWED IN *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 32 How. Pr. 61.

nds, it is dam-
pany is not
ts negligence.
18 Barb. (N.
v. Utica & S.

who has re-
ad for a right
jury by sparks
he cannot re-
negligence, un-
delphia & R.

for injury re-
sparks from its
ed to use the
atute for pre-
s, or has been
ucky C. R. Co.
W. Rep. 165.
16 U. C. C. P.
v. Taff Vale R.

e on its own
p, and guilty of
it to escape,
ting therefrom
ent proprietor,
o. v. Culver, 60

, does not au-
a railroad cor-
used by a loco-
of a company,
are and skill in
omotive, or in
& T. R. Co. v.

f of negligence
r setting fire to
from a passing
are to be exer-
ts of the case.
P. Co., 22 N. Y.
w York & E. R.
NG Sheldon v.
Y. 218. QUOT-
sp. Co., 1 Den.
v. Long Island
Cas. 179, 102 N.
N. Y. S. R. 473,
Manhattan R.
Y. Supp. 334.
rton, 25 N. Y.
Railroad Co., 57
rnst v. Hudson
How. Pr. 61.

Companies are held to no greater degree of care to prevent sparks from escaping from their buildings and injuring their neighbors than any other owner of property; and where sparks escape from a company's switch-house and burn a building near by, it is not liable, where it appears that the switch-house was being used for a lawful purpose and in a careful manner. *Briggs v. New York C. & H. R. R. Co.*, 1 *Sheld. (N. Y.)* 402.

23. — as where all due precautions have been taken against fire.—Where it is shown that the company took all due precautions against the spread of fire, in the absence of other negligence it will not be liable. *Kansas Pac. R. Co. v. Butts*, 7 *Kan.* 308, 2 *Am. Ry. Rep.* 477. *Morris & E. R. Co. v. State*, 36 *N. J. L.* 553, 12 *Am. Ry. Rep.* 470.—QUOTING *Vaughan v. Taff Vale R. Co.*, 5 *H. & N.* 679. REVIEWING *Rex v. Pease*, 4 *B. & Ad.* 30.—DISTINGUISHED IN *Elizabeth v. Central R. Co.*, 53 *N. J. L.* 491.

A railroad company is not liable for an accidental fire caused by sparks escaping from its locomotive, where the evidence shows that the locomotive was equipped in the best and most approved manner, and was properly and prudently managed at the time. *Chicago & A. R. Co. v. Smith*, 11 *Ill. App.* 348. *Jefferis v. Philadelphia, W. & B. R. Co.*, 3 *Houst. (Del.)* 447.—DISTINGUISHED IN *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 27 *Fla.* 1.—*Kenney v. Hannibal & St. J. R. Co.*, 80 *Mo.* 573. *White v. Chicago, M. & St. P. R. Co.*, 45 *Am. & Eng. R. Cas.* 565, 1 *S. Dak.* 326, 47 *N. W. Rep.* 146. *Vaughan v. Taff Vale R. Co.*, 5 *H. & N.* 679, 6 *Jur. N. S.* 899, 29 *L. J. Ex.* 247, 8 *W. R.* 594, 2 *L. T.* 394.—APPROVED IN *Hammersmith & C. R. Co. v. Brand*, *L. R.* 4 *H. L. Cas.* 171, 38 *L. J. Q. B.* 265, 21 *L. T.* 238, 18 *W. R.* 12. DISAPPROVED IN *Powell v. Fall*, *L. R.* 5 *Q. B. D.* 597, 49 *L. J. Q. B.* 428; *Reg. v. Essex*, *L. R.* 14 *Q. B. D.* 753, 33 *W. R.* 214, 5 *L. J. Q. B.* 459, 52 *L. T.* 926.—*Hewitt v. Ontario, S. & H. R. U. Co.*, 11 *U. C. Q. B.* 604.—APPROVING *Piggot v. Eastern Counties R. Co.*, 3 *C. B.* 229; *Aldridge v. Great Western R. Co.*, 3 *M. & G.* 515.—*Spence v. Windsor & A. R. Co.*, 10 *Nov. Sc.* 106.

In an action for damages by fire, experts testified that an engine was new, of the best make and with the best appliances, and the spark arrester the best in use. It was also proved that there were no combustible sub-

stances on the right of way, and that the fire did not start thereon, but on adjoining land. *Held*, plaintiff was not entitled to recover. *Bernard v. Richmond, F. & P. R. Co.*, 85 *Va.* 792, 8 *S. E. Rep.* 785.

24. Degree of care demanded of company, generally.—It is the duty of a railroad company, in the use of an engine, to use such precaution as might reasonably prevent damage to others, and failure to do so is negligence. *Lackawanna & B. R. Co. v. Doak*, 52 *Pa. St.* 379.

As a person employing a dangerous agent is obliged to use care in proportion to the danger of such agent, a railroad is required to use a greater amount of care where property near its track is from its nature more likely to be destroyed by fire from its engine. *Longabaugh v. Virginia City & T. R. Co.*, 9 *Nev.* 271.

A railroad company is bound to consider the nature of the surface of the country through which its line runs, the combustible character of the moss and grass, the dryness of the season, the strength of the wind and its liability to drive a fire, once started, over the adjoining country, and to take effectual means to guard against the origin of such a fire on its right of way. *Marvin v. Chicago, M. & St. P. R. Co.*, 79 *Wis.* 140, 47 *N. W. Rep.* 1123.

A person building and operating what is known as a "logging" railroad, where steam is used as a motive power, is required to exercise special caution against injury to the property of others; and the care and caution required must be commensurate with, and in proportion to, the risks assumed. Anything less than this is negligence, and renders the owner liable. *Kendrick v. Toule*, 60 *Mich.* 363, 27 *N. W. Rep.* 567, 1 *Am. St. Rep.* 526.

Proof of the fact that plaintiff was an occupant of land upon which he owned a mill under color of title would not change the degree of care and prudence required of the company to prevent setting out fire, notwithstanding the mill was located upon the company's right of way. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 *U. S.* 469, 17 *Am. Ry. Rep.* 309.

25. Reasonable and ordinary care.—It is the duty of railroad companies to use properly constructed machinery to prevent fire from being communicated, and the engines must be operated with reasonable care and skill for the same purpose. *Indianapolis*

& *C. R. Co. v. Paramore*, 31 Ind. 143.—DISTINGUISHED IN *Wabash, St. L. & P. R. Co. v. Johnson*, 96 Ind. 40. FOLLOWED IN *Indianapolis & C. R. Co. v. Stark*, 31 Ind. 149.—*Tyler v. Ricamore*, 87 Va. 466, 12 S. E. Rep. 799. *Rood v. New York & E. R. Co.*, 18 Barb. (N.Y.) 80.

The fact that a season is unusually dry makes it necessary for a company to use more than ordinary care, proportioned to the increased danger of fire. *Pittsburgh, C. & St. L. R. Co. v. Noel*, 7 Am. & Eng. R. Cas. 524, 77 Ind. 110.

The degree of negligence requisite to render a railroad company liable in damages for fire occasioned by its locomotives to property on the line of the road is that which results from a want of reasonable care and diligence, and not that arising from the absence of the slightest or least care or caution. *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242.

Railroad companies must use reasonable precautions to prevent fire from being carried from their locomotives by such winds as are usual and ordinary at the season and the place, and are only relieved from making provision against extraordinary and unusual winds. *Palmer v. Missouri Pac. R. Co.*, 76 Mo. 217.—FOLLOWED IN *Wise v. Joplin R. Co.*, 85 Mo. 178.

26. Such care as exercised by prudent persons.—A company is only required to use reasonable or ordinary care, such as prudent men, skilled in the business, would ordinarily use in the particular case in question, to protect property on the line of their road from damage by reason of sparks escaping from their locomotives. *Smith v. Old Colony & N. R. Co.*, 10 R. I. 22, 6 Am. Ry. Rep. 144.

Whether a company was negligent in communicating fire from a locomotive to adjoining property is not determined by measuring its conduct with other railroads in the vicinity, but by the degree of care ordinarily exercised by prudent men; but this varies greatly according to the circumstances of the case. During very dry times, or when there is a high wind, greater vigilance is demanded than might otherwise be required. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454.—QUOTED IN *International & G. N. R. Co. v. Kuehn*, 2 Tex. Civ. App. 210.—*Cronk v. Chicago, M. & St. P. R. Co.*, 54 Am. & Eng. R. Cas. 525, 3 S. Dak. 93, 52 N. W. Rep. 420.—QUOTING *Wabash R.*

Co. v. McDaniels, 11 Am. & Eng. R. Cas. 159, 107 U. S. 460. REVIEWING *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185.

27. Utmost care.—A charge that a railroad company is required to exercise the utmost care in running through a town or village where buildings are constructed of wood and situated so near to a railroad as to be exposed to fire that may come in large quantities from the locomotive, and especially so if at the time the wind is blowing in the direction from the engine toward the buildings; and that under such circumstances the company is bound to exercise a greater degree of care than when running trains in the country, where there is no property near the track exposed to fire; and that the degree of care which is required is proportioned to the danger to be apprehended of inflicting injury on the person or property of others—does not prescribe a greater degree of care than the circumstances stated in it call for. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 Am. & Eng. R. Cas. 603, 27 Fla. 1, 9 So. Rep. 661.—APPLYING *Fero v. Buffalo & S. L. R. Co.*, 22 N. Y. 209. EXPLAINING *Frankford & B. Turnpike Co. v. Philadelphia & T. R. Co.*, 54 Pa. St. 345; *Michigan C. R. Co. v. Anderson*, 20 Mich. 244; *Kansas Pac. R. Co. v. Butts*, 7 Kan. 308.

An engine was stopped on a side track in a village, about thirty feet from plaintiff's frame building in process of construction, and, while a strong wind was blowing, emitted large quantities of coals and sparks, which were driven by the wind to the house and caught in the shavings and consumed it. The court instructed the jury that under such circumstances the company was bound to use "the utmost care." Held, under the circumstances of the case, that the instruction was not error. *Fero v. Buffalo & S. L. R. Co.*, 22 N. Y. 209.—APPLYING *Johnson v. Hudson River R. Co.*, 20 N. Y. 65.—APPLIED IN *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 27 Fla. 1.

28. Degree of care as affected by statute.—Under Me. Act of 1842, ch. 9, § 5, making railroad companies liable for damage to buildings or property along the road injured by fire from locomotives, and giving them an insurable interest in such property, the liability of a company does not depend upon the degree of care which was required by the common law; but the degree of care required to protect the railroad is

Eng. R. Cas.
NG Toledo &
185.

charge that a
o exercise the
gh a town or
nstructed of
a railroad as
may come in
omotive, and
wind is blow-
engine toward
such circum-
to exercise a
when running
there is no
d to fire; and
is required is
to be appre-
the person or
t prescribe a
the circum-
Jacksonville,

ular L., T. &
s. 603, 27 Fla.
Fero v. Buffalo
EXPLAINING
v. Philadel-
345; Michi-
20 Mich. 244;
Kan. 308.

side track in
om plaintiff's
construction,
was blowing,
ls and sparks,
to the house
consumed it.
y that under
ny was bound
held, under the
at the instruc-
ffalo & S. L.
ING Johnson
Y. 65.—AP.
W. R. Co. v.
Fla. 1.

affected by
842, ch. 9, § 5,
able for dam-
along the road
ives, and
in such prop-
does not de-
which was re-
ut the degree
the railroad is

such as will prevent all such injury. Less than this makes at least a legal fault, and renders a company liable. *Stearns v. Atlantic & St. L. R. Co.*, 46 Me. 95.

Under the Md. Act of 1838, ch. 244 (code, art. 77, § 1), the company must use reasonable diligence to prevent fires along its line of road. *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242. *Baltimore & O. R. Co. v. Shipley*, 39 Md. 251, 11 Am. Ry. Rep. 269.

29. What acts constitute negligence.—What constitutes negligence upon the part of the company with reference to a fire set out by sparks from its engines depends upon the circumstances of each particular case. *Fero v. Buffalo & S. L. R. Co.*, 22 N. Y. 209.

The mere fact of dropping coals on the track did not constitute negligence, but that fact together with the dryness of the atmosphere, the direction of a strong wind, and permitting an accumulation of rubbish on the right of way, through which the fire burned, would constitute negligence. *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 420, 4 Am. Ry. Rep. 547; affirming 3 Lans. 453. *Bradshaw v. Rome, W. & O. R. Co.*, 17 N. Y. S. R. 307, 49 Hun 605, 1 N. Y. Supp. 691.

Where the servants of a company left, in a house where the oil used by the company was kept, a stove red hot, or so adjusted that it would speedily become red hot, around which was scattered inflammable waste, and upon which was a can of oil, the jury were warranted in finding that the conduct of the defendant's servants was negligent. *Read v. Pennsylvania R. Co.*, 44 N. J. L. 280.

30. — and what do not.—When a company is authorized to operate its line with locomotives propelled by steam, generated by fire, and uses a locomotive provided with all the most approved appliances in use for preventing injuries by the escape and communication of fire therefrom in good order, and operated by competent and careful servants of the company, and owing to a high wind fire escapes, and, spreading, burns the property of another, this is not negligence on the part of the company. *Kansas Pac. R. Co. v. Butts*, 7 Kan. 308, 2 Am. Ry. Rep. 477.—EXPLAINING IN Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co., 27 Fla. 1.—*Burroughs v. Housatonic R. Co.*, 15 Conn. 124.—DISTINGUISHING *Hooker v. New Haven & N. Co.*, 14 Conn. 146.—DISTINGUISHED IN *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504.

FOLLOWED IN *Weber v. Morris & E. R. Co.*, 35 N. J. L. 409.

The company is not bound to provide a watchman for cotton left upon a platform near the track of the railroad upon which the owner intended to ship it, the cotton never having been delivered to the company for transportation. *Brown v. Atlanta & C. A. L. R. Co.*, 13 Am. & Eng. R. Cas. 479, 19 So. Car. 39.

Defendant company ran a boat alongside of its elevator, which was built on a river bank, and, as the plaintiff claimed, allowed sparks to escape from the smoke-stack of the boat and fire the elevator, which in turn caused the plaintiff's mill and lumber yard, some little distance away, to burn. *Held*, that the question of the company's liability depended upon whether the officers of the boat were negligent in its management, and whether there was negligence in not using a spark arrester on the chimney of the boat; but it was not negligence in the company to emit steam through the chimney, nor to leave the spouts of the elevator open, which was not being used at the time, nor to leave the building without a watchman. *Kellogg v. Milwaukee & St. P. R. Co.*, 5 Dill. (U. S.) 537.

In an action against a company for setting fire to a building, the evidence showed that the fire occurred about noon, soon after a train had passed, drawn by an engine in first-class condition. There was no evidence that any one saw sparks emitted, and while it appeared that plaintiff's husband and a hired man were in the building, neither was examined to show that the fire did not originate through any act of theirs, nor that it did not originate through the act of children or others about the house. *Held*, not sufficient to show negligence, and the complaint was properly dismissed. *Wheeler v. New York C. & H. R. R. Co.*, 51 N. Y. S. R. 471, 67 Hun 639, 22 N. Y. Supp. 561.

A wooden bridge over a railroad was situated a short distance from a station. If trains did not stop at the station they could pass the bridge with steam shut off, which lessened the danger of fire from sparks; but if they stopped it was necessary to pass the bridge with steam on. *Held*, in an action for burning the bridge by emitted sparks from the engine, that the company was not liable because of the proximity of the station to the bridge; that in the absence of proof to the contrary, it must be presumed that

the location of the station was made for proper ends and not to do mischief. *Frankford & B. Turnpike Co. v. Philadelphia & T. R. Co.*, 54 Pa. St. 345.

31. Liability for purely accidental fires.—The company is not responsible for an unavoidable accident caused by fire from one of its engines. *Indianapolis & C. R. Co. v. Paramore*, 31 Ind. 143. *Leavenworth, L. & G. R. Co. v. Cook*, 18 Kan. 261, 15 Am. Ry. Rep. 350. *Atchison, T. & S. F. R. Co. v. Riggs*, 15 Am. & Eng. R. Cas. 531, 31 Kan. 622, 3 Pac. Rep. 305. *Atchison, T. & S. F. R. Co. v. Dennis*, 32 Am. & Eng. R. Cas. 318, 38 Kan. 424, 17 Pac. Rep. 153.

An unusually high wind as an element of unavoidable accident. *Kansas Pac. R. Co. v. Butts*, 7 Kan. 308, 2 Am. Ry. Rep. 477.

The ignition of combustible material lying along the track by sparks from an engine is not an unavoidable accident. *Flynn v. San Francisco & S. J. R. Co.*, 40 Cal. 14.

A fire caused by negligence cannot be said to be a fire accidentally begun. *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 420, 4 Am. Ry. Rep. 547; *affirming* 3 Lans. 453.

In taking the land for the right of way, it is to be assumed that the owner was compensated for the enhanced danger from fire caused by the location of the track. This includes the danger of fires accidentally, but not negligently, set out. Therefore, in an action by such owner for the value of property destroyed by fire through the alleged negligence of the defendant, it is proper to refuse to instruct that defendant is required to exercise the utmost care to prevent the escape of fire, and that the care should be determined by the situation and condition of plaintiff's property and the method of conducting his business thereon. *Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co.*, 54 Am. & Eng. R. Cas. 512, 70 Miss. 119, 12 So. Rep. 156.

32. Rule of absolute liability, generally.—A railway company not authorized by its act to use locomotive engines uses them at its peril, and is liable for fires caused by the emission of sparks, although it has taken all reasonable precautions to prevent injury. *Jones v. Festiniog R. Co.*, 9 B. & S. 835, 37 L. J. Q. B. 214, L. R. 3 Q. B. 733, 17 W. R. 28, 18 L. T. 902.

A railway company is liable for damage caused by fire by sparks from its engine, even though the latter is used with proper care and supplied with the best apparatus

and most modern appliances to prevent the escape of sparks. *Leonard v. Canadian Pac. R. Co.*, 15 Quebec L. R. 93.—DISTINGUISHING *New Brunswick R. Co. v. Robinson*, 11 Can. Sup. Ct. 688.—*Grand Trunk R. Co. v. Meegan*, 1 Montr. L. R. 364. *North Shore R. Co. v. McWillie*, 5 Montr. L. R. 122.—FOLLOWING *Grand Trunk R. Co. v. Meegan*, 1 Montr. L. R. 364.

A railway company is bound by a custom acquiesced in by it, under which timber is piled up on its right of way for shipment. If it is destroyed by fire originating from one of the company's trains, and without the contributory negligence of the owner of the timber, the railway company is liable in damages. *Gulf, C. & S. F. R. Co. v. McLean*, 74 Tex. 646, 12 S. W. Rep. 843.

33. Absolute liability under various statutes.—It is not necessary, in an action under section 2798, Colo. Gen. St., to show negligence on the part of the railroad company in causing the fire. *Union Pac. R. Co. v. Arthur*, 2 Colo. App. 159, 29 Pac. Rep. 1031.—REVIEWING *Denver, T. & G. R. Co. v. De Graff*, 2 Colo. App. 42.—*Denver, T. & G. R. Co. v. De Graff*, 2 Colo. App. 42, 29 Pac. Rep. 664.—FOLLOWING *Union Pac. R. Co. v. De Busk*, 12 Colo. 296.—REVIEWED IN *Union Pac. R. Co. v. Arthur*, 2 Colo. App. 159.

N. H. Rev. St. ch. 142, § 8, provides that "every railroad corporation shall be liable for all damages which shall accrue to any person or property within this state by fire or steam from any locomotive or other engine on said road." A statute also provides that every such corporation shall have an insurable interest in all property situated on the line. *Held*, that by these provisions railroad corporations are liable for the destruction of property caused by fire from their locomotives, although not directly and immediately communicated from them. *Hooksett v. Concord R. Co.*, 38 N. H. 242.—FOLLOWING *Hart v. Western R. Corp.*, 13 Metc. (Mass.) 99; *Chapman v. Atlantic & St. L. R. Co.*, 37 Me. 92.—QUOTED IN *Grisself v. Housatonic R. Co.*, 32 Am. & Eng. R. Cas. 349, 54 Conn. 447, 4 N. Eng. Rep. 85, 9 Atl. Rep. 137.

Under that statute the liability imposed is that of insurers, and the doctrine of contributory negligence by the plaintiff does not apply. *Rowell v. Railroad Co.*, 57 N. H. 132.—EXPLAINING *Ross v. Boston & W. R. Co.*, 6 Allen (Mass.) 87. QUOTING *Cook v.*

prevent the
r. *Canadian*
3.—DISTIN-
Co. v. Robin-
and Trunk
364. *North*
Jontr. L. R.
k R. Co. v.

by a custom
ch timber is
or shipment.
nating from
and without
the owner of
y is liable in
Co. v. Mc-
p. 843.

under va-
necessary, in an
lo. Gen. St.,
of the rail-
fire. *Union*
App. 159, 29
Denver, T. &
App. 42.—
Graff, 2 *Colo.*
FOLLOWING
usk, 12 *Colo.*
ac. R. Co. v.

provides that
shall be liable
accrue to any
state by fire
or other en-
also provides
shall have an
erty situated
se provisions
e for the de-
by fire from
not directly
d from them.
8 *N. H.* 242.
rn R. Corp.,
v. *Atlantic &*
OTED IN *Gris-*
Am. & Eng.
Eng. Rep. 85,

ility imposed
ctrine of con-
plaintiff does
Co., 57 *N. H.*
ston & W. R.
TING Cook v.

Champlain Transp. Co., 1 *Den.* (N. Y.) 91;
Fero v. Buffalo & S. L. R. Co., 22 *N. Y.*
215; *Vaughan v. Taff Vale R. Co.*, 3 *H. &*
N. 750; *Blyth v. Birmingham Waterworks*
Co., 11 *Ex.* 781; *Kellogg v. Chicago & N.*
W. R. Co., 26 *Wis.* 223; *Shaw v. Robberds*,
6 *Ad. & El.* 83.—QUOTED IN *Laird v. Con-*
necticut & P. R. R. Co., 43 *Am. & Eng. R.*
Cas. 63, 62 *N. H.* 254. REVIEWED IN *Mur-*
phy v. Chicago & N. W. R. Co., 45 *Wis.*
222.

A railroad corporation is liable under the
statute for the destruction by fire from a
locomotive, of wood, coal, etc., deposited
on land adjoining its line, and there used by
a dealer as his stock in trade. *Haseltine v.*
Concord R. Co., 35 *Am. & Eng. R. Cas.*
236, 64 *N. H.* 545, 15 *Atl. Rep.* 143, 6 *N.*
Eng. Rep. 897.

Under section 1511 of *So. Car. Gen. St.*
a railroad company is liable for property
destroyed by fire beyond its right of way,
communicated by its locomotive engines
or originating within the limits of its right
of way, in consequence of any act of an au-
thorized agent; and this liability attaches
without regard to the question of the com-
pany's negligence, or proximate or remote
cause. *Thompson v. Richmond & D. R.*
Co., 24 *So. Car.* 366.

2. Defective Engines and Appliances.

a. In General.

34. Duty to use properly constructed engines.*—It is the settled law in this
country that railroad companies are liable
for damages caused by fire to adjoining
property owners in consequence of the neg-
ligent construction of their engines. *Spauld-*
ing v. Chicago & N. W. R. Co., 30 *Wis.* 110,
7 *Am. Ry. Rep.* 507.—NOT FOLLOWED IN
Laird v. Connecticut & P. R. R. Co., 43 *Am.*
& Eng. R. Cas. 63, 62 *N. H.* 254.—*Doyscher*
v. Chicago, M. & St. P. R. Co., 43 *Minn.*
427, 45 *N. W. Rep.* 719.

It is ordinarily negligence for a company
to run engines which habitually scatter
fire to such extent as to endanger combusti-
ble property along the line of the road.
Such engines are not deemed of proper con-
struction and repair. *Claveland v. Grand*
Trunk R. Co., 42 *Vt.* 449.—APPROVING
Sheldon v. Hudson River R. Co., 14 *N. Y.*

* Duty of company to equip its engines so as
to prevent escape of sparks, see note, 38 *Am.*
DEC. 72.

218; *Field v. New York C. R. Co.*, 32 *N. Y.*
339; *Frankford & B. Turnpike Co. v. Phila-*
delphia & T. R. Co., 54 *Pa. St.* 345.—FOL-
LOWED IN *Grand Trunk R. Co. v. Richard-*
son, 91 *U. S.* 454.

35. — and proper appliances.*—
A railroad company is liable for damages
resulting from fire communicated from
sparks emitted from a locomotive engine
on its road, occasioned by its failure to use
the safest engines in use, equipped with the
best approved appliances to prevent the
escape of sparks. *St. Louis, A. & T. R. Co.*
v. Fire Assoc. of Phila., 55 *Ark.* 163, 18 *S. W.*
Rep. 43. *Jackson v. Chicago & N. W. R.*
Co., 31 *Iowa* 176. *Longabaugh v. Virginia*
City & T. R. Co., 9 *Nev.* 271. *Tyler v. Rica-*
more, 87 *Va.* 466, 12 *S. E. Rep.* 799.

In order to hold a company liable for in-
jury to property by fire communicated by
sparks from a locomotive, the evidence
must show that the sparks were the cause
of the fire, and that, to all probability, it re-
sulted from the carelessness and negligence
of the company in not using such scientific
contrivances and appliances as to most
effectually arrest the escape of sparks. *Ed-*
drington v. Louisville, N. O. & T. R. Co., 41
La. Ann. 96, 6 *So. Rep.* 19.

Before a company can be made liable by
reason of its failure to adopt other appli-
ances, they must be shown to have been
well and popularly known, and their effi-
ciency must have been demonstrated by
actual use. *Hagan v. Chicago, D. & C.*
G. T. J. R. Co., 49 *Am. & Eng. R. Cas.* 670,
86 *Mich.* 615, 49 *N. W. Rep.* 509.

36. Extent and limits of this duty, generally.—It is not a defense to an ac-
tion for injury caused by fire communicated
from a passing locomotive, that the com-
pany used on its locomotives such machin-
ery as was in common and general use, and
approved by experience, to prevent fire
from being communicated; for though the
law does not require absolute scientific per-
fection in the construction of engines, it
does require the exercise of a high degree
of care and skill to ascertain, as near as may
be, the best plan for their construction; and
it also requires not only that skilled and ex-
perienced workmen shall be employed in
their construction, but that due skill shall
be exercised in the particular instance where

* Liability of company for fires started through
defects in appliances. When should be left to
jury, see 43 *Am. & Eng. R. Cas.* 42, *abstr.*

injury has resulted from the use of a particular engine. *Pittsburg C. & St. L. R. Co. v. Nelson*, 51 Ind. 150.

Though a railroad company must use the best appliances to prevent the scattering of fire, such appliances are not required to the extent of materially impairing the reasonable use of a locomotive engine. *Longbaugh v. Virginia City & T. R. Co.*, 9 Nev. 271.

A court was asked to instruct a jury that so long as a company might reasonably use a single engine with a diamond stack, negligence could not be predicated on the fact that the engine that started the fire was a diamond stack instead of a front-end extension. *Held*, properly refused, as it ignored the fact that such an engine might properly be used at one place or season and not at another. *Metzgar v. Chicago, M. & St. P. R. Co.*, 76 Iowa 387, 41 N. W. Rep. 49.

37. Must adopt new improvements and inventions.—Railway companies in the construction of their engines are bound not only to employ all due care and skill for the prevention of mischief to the property of others by the emission of sparks, but they are also bound to avail themselves of all discoveries which science has put within reach for that purpose, provided they are such that, under the circumstances, it is reasonable to require the companies to adopt them. *Houston & T. C. R. Co. v. McDonough*, 1 Tex. App. (Civ. Cas.) 354. *Spaulding v. Chicago & N. W. R. Co.*, 30 Wis. 110, 7 Am. Ry. Rep. 507.—FOLLOWING *Galpin v. Chicago & N. W. R. Co.*, 19 Wis. 608.—QUOTED IN *Louisville & N. R. Co. v. Reese*, 38 Am. & Eng. R. Cas. 342, 85 Ala. 497, 5 So. Rep. 283, 7 Am. St. Rep. 66; *Burlington & M. R. v. Westover*, 4 Neb. 268.

It is the duty of railroads to use every possible precaution to prevent loss to others through the escape of fire or sparks from their engines, by the highest degree of diligence in ascertaining and adopting the best or most approved mechanical inventions and appliances to prevent the escape of fire. *Chicago & A. R. Co. v. Hunt*, 24 Ill. App. 644.—QUOTING *Toledo, W. & W. R. Co. v. Corn*, 71 Ill. 496.—*Forest Glen B. & T. Co. v. Chicago, M. & St. P. R. Co.*, 33 Ill. App. 565.

A company is not bound to purchase the patent for every invention claimed to be an improvement on machinery, and test it; but

when such an invention has been tested and approved as better than it is using, it is required to adopt and use the better machinery. *Toledo, W. & W. R. Co. v. Corn*, 71 Ill. 493.—QUOTED IN *Chicago & A. R. Co. v. Hunt*, 24 Ill. App. 644.—*Flinn v. New York C. & H. R. R. Co.*, 51 N. Y. S. R. 103, 67 Hun 631, 22 N. Y. Supp. 473.—DIS-
TINGUISHING *Searles v. Manhattan R. Co.*, 101 N. Y. 661; *McDermott v. New York C. & H. R. R. Co.*, 8 Wkly. Dig. 531. QUOTING *Smith v. New York & H. R. Co.*, 19 N. Y. 127; *Field v. New York C. R. Co.*, 32 N. Y. 346.

38. Must use most approved apparatus and safeguards.—A company is bound to employ the most approved safeguards against the escape of fire from locomotives, and the jury may find that the company did not do its full duty in using a certain make of screen or stack. *Wiley v. West Jersey R. Co.*, 44 N. J. L. 247.

It is immaterial that other companies used the same appliances as defendant. *Metzgar v. Chicago, M. & St. P. R. Co.*, 76 Iowa 387, 41 N. W. Rep. 49.

Where a court has charged, at the request of counsel, that a company is not bound to use any other appliances than such as are known in practical use, it is proper for the court to add, "that is, the known and recognized means for preventing the escape of sparks from a locomotive, and such as are best adapted to that purpose." *Bevier v. Delaware & H. Canal Co.*, 13 Hun (N. Y.) 254.—QUOTING *Steinweg v. Erie R. Co.*, 43 N. Y. 126.

The company must use the most approved and best mechanical appliances and safeguards, in the nature of ash pans and spark arresters, such as are generally adopted by and used upon modern railroads in this country; and a failure to do so is negligence, and will render it liable in damages for a fire consequent thereupon. *Brighthope R. Co. v. Rogers*, 8 Am. & Eng. R. Cas. 710, 76 Va. 443.—FOLLOWED IN *Richmond & D. R. Co. v. Medley*, 75 Va. 499.

The evidence showed that a certain device for the prevention of the escape of fire was the best, and defendant asked the following instruction: "If you find that no railroad has yet adopted and is using the said improvement exclusively, then you are warranted in concluding that the defendant is not negligent in failing to have adopted and placed the same in use exclusively upon

its engines." *Held*, that it was properly refused. *Metzgar v. Chicago, M. & St. P. R. Co.*, 76 Iowa 387, 41 N. W. Rep. 49.

The court charged that the company had the right to use steam and would not be liable for unavoidable injuries, but would be responsible for injuries resulting from a defective engine or smoke-stack not coming up to the improvement generally tested and used according to the present state of art, or for the want of all necessary precautions to avoid the mischief; that the engine and smoke-stack must have been good and sufficient according to the present state of the art, and must have been under the charge of skilful and competent employes. *Held*, that this instruction was correct. *Nashville & C. R. Co. v. Tyne*, (Tenn.) 7 Am. & Eng. R. Cas. 515.

39. Not an insurer against fires.—Railroad companies are not insurers against loss of property by fire from the smoke-stack or engine, but all that is required of them is that they shall use the best known spark arresters and keep them in good order, and operate their engines and appliances without negligence. *Rost v. Missouri Pac. R. Co.*, 76 Tex. 168, 12 S. W. Rep. 1131. *Toledo, W. & W. R. Co. v. Larmon*, 67 Ill. 68. *Kentucky C. R. Co. v. Barrow*, 89 Ky. 638, 20 S. W. Rep. 165.

40. Degree of care demanded.—Railroad companies are bound to use all the appliances of science, and the highest degree of diligence, to prevent the destruction of property by fire from their engines. *St. Louis, A. & T. H. R. Co. v. Gilham*, 39 Ill. 455.

The company must use every possible precaution with reference to adopting fit engines and appliances. *Forest Glen B. & T. Co. v. Chicago, M. & St. P. R. Co.*, 33 Ill. App. 565.

It is the duty of companies running their engines close to buildings to use the utmost vigilance and foresight to avoid injury and to control their engines carefully; to adopt every known safeguard, and to avail themselves from time to time of every approved invention to lessen their danger. *Frankford & B. Turnpike Co. v. Philadelphia & T. R. Co.*, 54 Pa. St. 345.

It is error to instruct a jury that it is the duty of a railroad company to use "all the best and most approved mechanical inventions" to prevent the escape of fire or sparks from its locomotives. The "best"

is enough, without their being "approved." *Chicago & A. R. Co. v. Hunt*, 24 Ill. App. 644.

While companies are not bound to use every possible precaution which the highest scientific skill might have suggested to prevent the escape of fire from their locomotives, yet they are required to exercise a degree of care reasonably proportionate to the risks to be apprehended; and in view of the great danger to property from fires communicated from passing locomotives, reasonable care requires that they should avail themselves of the best approved practical appliances for the prevention of such fires. *Hoye v. Chicago, M. & St. P. R. Co.*, 46 Minn. 269, 48 N. W. Rep. 1117.

There is no reason for holding a railroad company to a greater degree of care in furnishing safeguards against the escape of fire to the injury of its patrons, than it should exercise toward the public. *Babcock v. Fitchburgh R. Co.*, 51 N. Y. S. R. 115, 67 Hun 469, 22 N. Y. Supp. 449. See also *Chicago & A. R. Co. v. Hunt*, 24 Ill. App. 644. *Houston & T. C. R. Co. v. McDonough*, 1 Tex. App. (Civ. Cas.) 354.

b. Spark Arresters.

41. Duty to provide and use proper spark arresters.—A charge that railroad companies are required to furnish their locomotives with spark arresters of the best mechanical invention and construction in general use at the time is not erroneous. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 Am. & Eng. R. Cas. 603, 27 Fla. 1, 9 So. Rep. 661.—**DISTINGUISHING** *Frankford & B. Turnpike Co. v. Philadelphia & T. R. Co.*, 54 Pa. St. 345; *Steinweg v. Erie R. Co.*, 43 N. Y. 123; *Jefferis v. Philadelphia, W. & B. R. Co.*, 3 Houst. (Del.) 447.

In a suit against a railroad company for negligently setting fire to fences, etc., adjoining the track, by sparks of fire from a locomotive, it is not error to instruct the jury that the railroad company must use their property so as not to injure others, and if such precaution is used it will not be liable; and to use such precaution, the railroad company must provide proper spark arresters, the best of such as are approved by use. *Toledo, W. & W. R. Co. v. Wand*, 48 Ind. 476. *Louisville, E. & St. L. Con. R. Co. v. Spencer*, 47 Ill. App. 503. *Missouri Pac. R. Co. v. Barlett*, 81 Tex. 42, 16 S.

W. Rep. 638.—**DISTINGUISHED IN** *Martin v. Missouri Pac. R. Co.*, 3 Tex. Civ. App. 133.

It is not negligence *per se* on the part of the company to allow sparks to escape from a moving engine. *Texas & P. R. Co. v. Medaris*, 29 Am. & Eng. R. Cas. 159, 64 Tex. 92.

Where the liability of a company for the escape of fire depends upon the condition of an engine, it is determined by its condition at the time the fire escaped; hence it is error to instruct the jury that the company must show that the engine was supplied with the most approved appliances to prevent the escape of sparks at the time of the fire in question, and also that it was originally so constructed. *Chicago & N. W. R. Co. v. Boller*, 7 Ill. App. 625.

Where the evidence shows that an engine could not be safely used without a screen to prevent the escape of sparks, it is negligence to remove the screen and run the engine without it, though it may not be common to use a screen on such an engine. *Bedell v. Long Island R. Co.*, 44 N. Y. 367.

42. — as affected by statutory provisions.—The Ky. Act of January 30, 1874, as to the use of spark arresters, does not require the use by railroad companies of appliances that will certainly prevent under all circumstances the escape of sparks from the chimneys of locomotives. They are only required to use the most effectual known preventives of practical use. *Louisville & N. R. Co. v. Taylor*, 92 Ky. 55, 17 S. W. Rep. 198.

Although the statute provides that the device used for the purpose of preventing the escape of sparks shall be placed "on or around the top of the chimney," a company is not precluded from attaching the device to any other part of the chimney or machinery that is equally as effectual to prevent the escape of sparks. But as the spark arrester used by defendant, of which complaint is made, was placed around the top of the chimney, the defendant was not prejudiced by an instruction telling the jury that it was defendant's duty to have a spark arrester thus attached. *Louisville & N. R. Co. v. Taylor*, 92 Ky. 55, 17 S. W. Rep. 198.

43. Duty to keep spark arresters in proper condition and repair.—It

* Use of spark arresters which will altogether prevent fire from escaping, see note, 32 AM. & ENG. R. CAS. 317.

is the duty of railroads to use spark arresters of the most approved kind, and to keep them in good repair. *Louisville, E. & St. L. Con. R. Co. v. Spencer*, 47 Ill. App. 503.—**FOLLOWING** *Toledo, W. & W. R. Co. v. Larmon*, 67 Ill. 68; *Chicago & A. R. Co. v. Quaintance*, 58 Ill. 389.—*Ryan v. Gross*, 68 Md. 377, 11 Cent. Rep. 502, 12 Atl. Rep. 115, 16 Atl. Rep. 302.

Although a company may use a proper spark arrester on its locomotive, yet if through negligence or want of skill it fails to have the spark arrester properly adjusted or in proper order, it is responsible for losses by fire resulting from such failure. *Louisville & N. R. Co. v. Taylor*, 92 Ky. 55, 17 S. W. Rep. 198.

Continuing the use of a spark-throwing locomotive, the company having knowledge thereof, near a depot which has been frequently ignited by sparks thrown from such locomotive, is negligence. *Cincinnati, N. O. & T. P. R. Co. v. Barker*, 56 Am. & Eng. R. Cas. 106, 94 Ky. 71, 21 S. W. Rep. 347.

44. Degree of care demanded.—In an action against a railroad for burning a bridge the court charged the jury that "if defendants used ordinary skill in procuring a good and safe spark catcher, such as are most in use in the country, and approved by experienced railroad operators and mechanics," it was sufficient. *Held*, to be the law. *Frankford & B. Turnpike Co. v. Philadelphia & T. R. Co.*, 54 Pa. St. 345.—**QUOTING** *Fremantle v. London & N. W. R. Co.*, 10 C. B. N. S. 95.—**APPROVED IN** *Cleveland v. Grand Trunk R. Co.*, 42 Vt. 449. **DISTINGUISHED AND EXPLAINED IN** *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 27 Fla. 1.—*Eddy v. Lafayette*, 49 Fed. Rep. 807, 4 U. S. App. 247, 1 C. C. A. 441.

45. Effect of use of proper spark arresters upon company's liability.

—If a company use upon its engine a spark arrester of an approved pattern in general use, and which, upon a careful inspection by a skilled mechanic, appeared to be in good condition, such company will not be responsible for damage done by a fire occasioned by sparks escaping through such spark arrester. *Hoff v. West Jersey R. Co.*, 13 Am. & Eng. R. Cas. 476, 45 N. J. L. 201. *Gowen v. Glaser*, (Pa.) 10 Atl. Rep. 417.

If the most approved apparatus which skill and science have invented and made

have been applied to prevent escape of sparks, so as to avoid fire along the line of a railroad, a company is not liable without proof of negligence in some other respect. *Rood v. New York & E. R. Co.*, 18 Barb. (N. Y.) 80. *Houston & T. C. R. Co. v. McDonough*, 1 Tex. App. (Civ. Cas.) 354. *Smyth v. Stockton & C. R. Co.*, (Cal.) 4 Pac. Rep. 505. *Philadelphia & R. R. Co. v. Hendrickson*, 80 Pa. St. 182. *White v. Chicago, M. & St. P. R. Co.*, 1 S. Dak. 326, 47 N. W. Rep. 146.

Where the evidence shows that a company had placed the most approved spark arresters on their engines; that the engines were as well secured and arranged as the engines on any other railroad; and that a sufficient police had been provided for the road, and all needful rules for their guidance had been adopted, it is not liable for the escape of sparks. *Rood v. New York & E. R. Co.*, 18 Barb. (N. Y.) 80.—REVIEWING *Philadelphia & R. R. Co. v. Yeiser*, 8 Pa. St. 466.—APPLIED IN *Fero v. Buffalo & S. L. R. Co.*, 22 N. Y. 209. REVIEWED IN *Re New York C. & H. R. R. Co.*, 15 Hun (N. Y.) 63.

46. Liability for absence of spark arrester on engine of another company.—By a provision in the charter of a railroad company, its road was declared to be a public highway for the use of steam engines, and cars propelled by steam engines only. *Held*, that the company was liable for injuries from fire thrown by the locomotive of another company, which the defendants permitted to be run on the road without any spark arrester on it, its defective condition being known to the defendants' train dispatcher, who exercised no supervision over it. *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 299, 14 Am. Ry. Rep. 226.

3. Careless Management of Engine.

47. Generally.—Where a company is sued for burning cotton by escaping sparks from a locomotive, proof that the company used the most approved machinery to prevent the escape of sparks, and employed competent and careful persons to run their locomotives, is not a complete defense, unless it further appears that the employes were not guilty of negligence at the time of the injury sued for. *Wilson v. Atlanta & C. A. L. R. Co.*, 16 So. Car. 587. *Jackson v. Chicago & N. W. R. Co.*, 31 Iowa 176.

St. Louis, A. & T. R. Co. v. Fire Assoc. of Phila., 55 Ark. 163, 18 S. W. Rep. 43. *Hinds v. Barton*, 25 N. Y. 544.—FOLLOWING *Fero v. Buffalo & S. L. R. Co.*, 22 N. Y. 209.—*Spanlding v. Chicago & N. W. R. Co.*, 30 Wis. 110, 7 Am. Ry. Rep. 507. *Longabaugh v. Virginia City & T. R. Co.*, 9 Nev. 271. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 41 Fed. Rep. 917.—QUOTING *Gulf, C. & S. F. R. Co. v. Benson*, 69 Tex. 407, 5 S. W. Rep. 822.

It is impossible for a railroad company to operate its trains without some danger from fire. *Ohio & M. R. Co. v. Trapp*, 4 Ind. App. 69, 30 N. E. Rep. 812.

The road must be operated and the engines managed in such a way as to cause the least danger to property of adjoining and adjacent owners. *King v. Morris & E. R. Co.*, 18 N. J. Eq. 397.

When a company is chartered with the right to propel its trains by steam engines, the company is liable in damages for fire started by sparks emitted from the engines, only in case in using its engines it fails in the diligence that good specialists are accustomed to exercise. *Houston & T. C. R. Co. v. McDonough*, 1 Tex. App. (Civ. Cas.) 354.

If a railway company are guilty of default in the discharge of the duty of running their locomotives in a proper and reasonable manner, they are responsible for all damage which is the natural consequence of such default, whether such damage is occasioned by fire escaping from the engine coming directly in contact with and consuming the property of third persons, or is caused to the property of such third persons by a fire communicating thereto from the property of the railway company themselves, which had been ignited by fire escaping from the engine coming directly in contact therewith. *Canada Southern R. Co. v. Phelps*, 35 Am. & Eng. R. Cas. 207, 14 Can. Sup. Ct. 132.—REVIEWING *Jones v. Festiniog R. Co.*, L. R. 3 Q. B. 733.

48. Failure to properly equip engine.—Where a company is sued for destroying property by fire from a locomotive, the jury should not find for the defendant unless they find that the engine was properly equipped and operated, and that the employes in charge of the engine were competent and skilful. *Bullis v. Chicago, M. & St. P. R. Co.*, 76 Iowa 680, 39 N. W. Rep. 245.

49. Using dangerous fuel, generally.—A company is not guilty of negligence in using such fuel on its engines as is in ordinary use, unless the fuel is of such a quality as to be dangerous or hazardous. *Collins v. New York C. & H. R. R. Co.*, 5 Hun (N. Y.) 499; affirmed in 71 N. Y. 609.

50. Burning wood instead of coal.*—It is gross negligence in a railroad to use wood in a coal-burning engine in a dry time and on a windy day. *Chicago & A. R. Co. v. Quaintance*, 58 Ill. 389, 12 Am. Ry. Rep. 234.

Where the fact that the use of wood in a coal-burning engine materially increases the danger of setting fire to and burning adjacent property is indisputably established, the court may properly instruct the jury that such use constitutes negligence. *Chicago & E. I. R. Co. v. Ostrander*, 38 Am. & Eng. R. Cas. 346, 116 Ind. 259, 266, 19 N. E. Rep. 110, 15 N. E. Rep. 227.

In an action for the loss of a barn and its contents by fire, caused by sparks from a locomotive, it appeared that the fuel used by the company was wood, and evidence was given to the effect that coal was less apt to throw out sparks. It also appeared that at the place where the fire occurred there was a heavy up-grade, necessitating a full head of steam, and therefore increasing the danger to surrounding property. The jury found that the defendants did not use reasonable care in running the engine, but in what the want of such care consisted did not appear by their finding. *Held*, that the company were under no obligation to use coal for fuel, and the use of wood was not in itself evidence of negligence; that the finding of the jury on the question of negligence was not satisfactory, and that there should be a new trial. *New Brunswick R. Co. v. Robinson*, 29 Am. & Eng. R. Cas. 132, 11 Can. Sup. Ct. 688; reversing 23 New Brun. 323.—**QUOTING** *Collins v. New York C. & H. R. R. Co.*, 5 Hun (N. Y.) 502; *Falconer v. European & N. A. R. Co.*, 14 New Brun. 183.

51. Throwing burning wood from engine.—In an action for starting a fire which extended to plaintiff's woodland, there was evidence tending to show that either the fireman or engineer threw a burning piece of wood from the locomotive, which

fell on dry grass and leaves, and that it was usual or customary for firemen to throw off wood that was found too large for the furnace. *Held*, that the act was within the scope of employment of such employees, and would render the company liable if the jury found that the fire was caused thereby. *Spaulding v. Chicago & N. W. R. Co.*, 33 Wis. 582.

52. Throwing live coals from engine.—The grant of a franchise to operate a railroad does not confer the right to use upon it locomotives so constructed as to throw out burning coals that may set fire to buildings along the line; but the road must be operated with engines so constructed as to cause the least danger. *King v. Morris & E. R. Co.*, 18 N. J. Eq. 397.

53. Failure to empty ash pan.—The evidence showed that the engine had run ninety miles without the ash pan having been emptied; that ignited substances were found upon a manure heap, which were too large to pass through the net of the smoke-stack, and, it was alleged, must therefore have come from the ash pan; that the ash pan was perfectly good and so constructed that it was difficult for ashes to escape from it; and that the possibility of any escape would be prevented by emptying or partly emptying the pan. *Held*, that the jury might have found as legitimate inferences of fact that the fire escaped because the pan was full. *McGibbon v. Northern R. Co.*, 14 Ont. App. 91; reversing 11 Ont. 307.

54. Using excessive amount of steam.—The use of an unnecessary amount of steam on a locomotive, by reason of which an unusual quantity of sparks is emitted, is such negligence as to render the company liable for a fire which results therefrom. *Great Western R. Co. v. Haworth*, 39 Ill. 346.

The excessive use of steam by a company is not negligence *per se*. *So held*, where a company was sued for damages resulting from a fire alleged to have resulted from the management of a locomotive. *McCormick v. Chicago, R. I. & P. R. Co.*, 41 Iowa 193.

55. Running burning cars upon siding.—A company has the right to detach burning cars from the train and run them off on a spur of the track so as to save the train and main track, unless damages to the property of others are apparent, and the probable result; but if in doing so they stop them near the property of another

* Negligence in the use of wood as fuel in engines, see note, 38 AM. & ENG. R. CAS. 348.

and that it was
then to throw off
the charge for the fur-
was within the
h employes, and
liable if the jury
caused thereby.

W. R. Co., 33

als from en-
chise to operate
the right to use
instructed as to
that may set fire
; but the road
engines so con-
stant danger. *King*
V. J. Eq. 397.

ash pan.—The
engine had run
ash pan havi-
g substances were
e, which were too
et of the smoke-
must therefore
an; that the ash
l so constructed
es to escape from
y of any escape
ptying or partly
that the jury
imate inferences
because the pan
erthern R. Co., 14
Ont. 307.

e amount of
necessary amount
y reason of which
arks is emitted,
render the com-
ch results there-
Co. v. Haworth, 39

am by a company
So held, where a
amages resulting
resulted from the
ive. *McCormick*
Co., 41 *Iowa* 193.
ing cars upon
the right to de-
ne train and run
e track so as to
rack, unless dam-
pers are apparent,
ut if in doing so
roperty of another

and it is consumed, they are liable for the injury, in by proper care, under all the circumstances, it could have been avoided. *St. Louis, I. M. & S. R. Co. v. Hecht*, 9 *Am. & Eng. R. Cas.* 222, 38 *Ark.* 357.

56. Running heavily laden train up grade.—Running a train too heavily laden on an up grade, when there was a strong wind, caused an unusual quantity of sparks to escape from the locomotive, whereby the respondents' barn, situated in close proximity to the railway track, was set on fire and destroyed. *Held*, that there was sufficient evidence of negligence to make the company liable for the damage caused by the fire. *North Shore R. Co. v. McWille*, 17 *Can. Sup. Ct.* 511.

57. Degree of care demanded.—In operating its trains and engines the company is required to exercise that degree of prudence which, under like circumstances, reasonably cautious and prudent persons would exercise. *Texas & P. R. Co. v. Medaris*, 29 *Am. & Eng. R. Cas.* 159, 64 *Tex.* 92.

Railway companies, in the management of their engines, are bound only to use the ordinary and regular care and appliances to prevent the escape of sparks. *Hill v. Ontario, S. & H. R. U. Co.*, 13 *U. C. Q. B.* 503. — FOLLOWED IN *Ball v. Grand Trunk R. Co.*, 16 *U. C. C. P.* 252.

Any property so near the track as to be in danger, notwithstanding such precautions, remains there at the owners' risk; and they are not obliged to shut off steam or take extraordinary care in passing it. *Hill v. Ontario, S. & H. R. U. Co.*, 13 *U. C. Q. B.* 503.

4. Permitting Combustible Materials on Right of Way.

58. Duty to keep right of way clear of combustibles.*—It is impossible to operate a railroad without danger from fire; and prudence requires railroad companies to keep the property under their control reasonably clear and free from combustible material, which might serve as a medium to communicate fire to adjoining property. *Ohio & M. R. Co. v. Trapp*, 4

*Negligence of company in leaving combustible matter on right of way, see note, 49 *AM. & ENG. R. CAS.* 684.

Clearing combustible material from right of way; liability for acts of contractors, see note, 45 *AM. & ENG. R. CAS.* 581.

Ind. App. 69, 30 *N. E. Rep.* 812. *Jones v. Michigan C. R. Co.*, 25 *Am. & Eng. R. Cas.* 482, 59 *Mich.* 437, 26 *N. W. Rep.* 662. *Salmon v. Delaware, L. & W. R. Co.*, 38 *N. J. L.* 5, 13 *Am. Ky. Rep.* 14. — REVIEWING *Vaughan v. Taft Vale R. Co.*, 5 *H. & N.* 679; *Smith v. London & S. W. R. Co.*, *L. R.* 5 *C. P.* 98.—*Delaware, L. & W. R. Co. v. Salmon*, 39 *N. J. L.* 299, 14 *Am. Ky. Rep.* 226. *Tyler v. Ricamore*, 87 *Va.* 466, 12 *S. E. Rep.* 799.

A company must be diligent in keeping its track clear of such combustible matter as is liable to be easily ignited, and especially diligent to prevent the escape of fire when in the immediate neighborhood of combustible property. *Longabaugh v. Virginia City & T. R. Co.*, 9 *Nev.* 271.

The company is not bound to move its track and right of way. *Ohio & M. R. Co. v. Shanefelt*, 47 *Ill.* 497.

59. — as affected by statute.—Under *Starr & C. Ill. St. ch.* 114, § 63, it is the duty of railroad companies to keep their right of way clear from dead grass, dry weeds, and other dangerous combustibles at all times; and where a company is sued for a fire in January it is not a sufficient compliance with the statute to constitute a defense, to show that it burned the grass on its right of way in the preceding October. *Indiana, B. & W. R. Co. v. Nicewander*, 21 *Ill. App.* 305.

Under *Ill. Act of 1874*, § 2, making it the duty of all railroad corporations to keep their right of way clear from all dead grass dry weeds, and other dangerous combustible material, a failure to keep the right of way clear of combustible material other than dead grass and dry weeds cannot be held to be negligence *per se*, unless such material is dangerous; but a failure to perform a duty commanded by statute may be properly denominated negligence *per se*. *Chicago & E. I. R. Co. v. Goyette*, 43 *Am. & Eng. R. Cas.* 36, 133 *Ill.* 21, 24 *N. E. Rep.* 549; *affirming* 32 *Ill. App.* 574.

Under *Mont. Laws of 1881*, p. 71, § 7, enacting that roads running through the territory should keep their tracks free from dead grass, weeds, or any dangerous or combustible material, it was as much the duty of the Northern Pacific R. Co. to keep its track in such a condition as it was for it to use proper means to prevent the emission of sparks of fire from its engines; and the said law did not trench upon the chartered

rights of the said company under the act of congress creating it. *Diamond v. Northern Pac. R. Co.*, 29 Am. & Eng. R. Cas. 117, 6 Mont. 580, 13 Pac. Rep. 367.—DISTINGUISHED IN *Bielenberg v. Montana Union R. Co.*, 38 Am. & Eng. R. Cas. 275, 8 Mont. 271.

60. — where company does not own the right of way.—The railroad did not own the ground where a side track was laid, it being laid under a mere license. There was evidence that part of the inflammable material was placed on and about the side track by the railroad employés. Held, that the company was under the same obligation to keep the track clean as if it owned the ground, and that it should have been left to the jury whether such material was negligently left there, and whether the fire might have originated in it. *Kurz & H. Ice Co. v. Milwaukee & N. R. Co.*, 56 Am. & Eng. R. Cas. 94, 84 Wis. 171, 53 N. W. Rep. 850.

61. Degree of care demanded.—The company must use all practical and reasonable precautions to prevent fire by keeping its road and right of way clear of all combustible materials. *Brighthope R. Co. v. Rogers*, 8 Am. & Eng. R. Cas. 710, 76 Va. 443. *Eddy v. Lafayette*, 49 Fed. Rep. 807, 4 U. S. App. 247, 1 C. C. A. 441. *Toledo, W. & W. R. Co. v. Wand*, 48 Ind. 476.

Although it had merely a license to lay its track and has no interest in the land over which it is laid. *Kurz & H. Ice Co. v. Milwaukee & N. R. Co.*, 84 Wis. 171, 53 N. W. Rep. 850.

A company is bound to use the same diligence in removing dry weeds and grass and all other combustible materials from exposure to fire from passing locomotives, that a cautious and prudent man would use in reference to such combustible materials upon his own premises, if exposed to the same hazard from fire. *Illinois C. R. Co. v. Mills*, 42 Ill. 407. — NOT FOLLOWED IN *Gandy v. Chicago & N. W. R. Co.*, 30 Iowa 420.—*Snyder v. Pittsburgh, C. & St. L. R. Co.*, 11 W. Va. 14, 18 Am. Ry. Rep. 154.

A company is held to the same, but no higher, duty to keep their right of way free from grass and weeds that the adjoining landowners and proprietors are to keep the adjoining lands free from grass and weeds. *Illinois C. R. Co. v. Frazier*, 47 Ill. 505.—FOLLOWING *Ohio & M. R. Co. v. Shanefelt*, 47 Ill. 497. NOT FOLLOWING

Bass v. Chicago, B. & Q. R. Co., 28 Ill. 9.—DISAPPROVED IN *Salmon v. Delaware, L. & W. R. Co.*, 38 N. J. L. 5.

62. Liability for allowing accumulation of combustibles on right of way, generally.*—Negligence may be imputed to a railroad company if it allows combustible material to accumulate on its right of way in such quantity, at such places, and at such seasons as render it liable to become ignited and cause damage to adjacent property. *Eddy v. Lafayette*, 49 Fed. Rep. 807, 4 U. S. App. 247, 1 C. C. A. 441. *Indiana, B. & W. R. Co. v. Overman*, 29 Am. & Eng. R. Cas. 161, 110 Ind. 538, 10 N. E. Rep. 575. *Jones v. Michigan C. R. Co.*, 25 Am. & Eng. R. Cas. 482, 59 Mich. 437, 26 N. W. Rep. 662. *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 299, 14 Am. Ry. Rep. 226. *Aycock v. Raleigh & A. A. L. R. Co.*, 89 N. Car. 321. *Ft. Worth & D. C. R. Co. v. Hogsett*, 67 Tex. 685, 4 S. W. Rep. 365.—APPROVING *Troxler v. Richmond & D. R. Co.*, 74 N. Car. 377; *St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. 47; *Flynn v. San Francisco & S. J. R. Co.*, 40 Cal. 14.—*Gulf, C. & S. F. R. Co. v. Kluge*, 4 Tex. App. (Civ. Cas.) 577, 17 S. W. Rep. 944. *Jaffrey v. Toronto, G. & B. R. Co.*, 23 U. C. C. P. 553.—FOLLOWING *Smith v. London & S. W. R. Co.*, L. R. 6 C. P. 14.

The ignition of combustible substances lying along the track of a railroad by sparks dropped by a passing engine is not an unavoidable accident. *Flynn v. San Francisco & S. J. R. Co.*, 40 Cal. 14.—APPROVED IN *Ft. Worth & D. C. R. Co. v. Hogsett*, 67 Tex. 685.

A railroad company may be supplied with the best engines and the most approved apparatus for preventing the emission of sparks, and be operated by the most skillful engineers; it may do all that skill and science can suggest in the management of its locomotives; and still it may be guilty of gross negligence in allowing the accumulation of dangerously combustible matter along its track, easily to be ignited by its furnaces, and thence communicated to the property of adjacent proprietors. *Richmond & D. R. Co. v. Medley*, 7 Am. & Eng. R.

* Negligence of railroad company in leaving combustible material on right of way, see notes, 32 AM. & ENG. R. CAS. 372; 13 Id. 475; 5 L. R. A. 591.

Cas. 493, 75 *Va.* 499. *Gram v. Northern Pac. R. Co.*, 45 *Am. & Eng. R. Cas.* 544, 1 *N. Dak.* 252, 46 *N. W. Rep.* 972. *Toledo, W. & W. R. Co. v. Wand*, 48 *Ind.* 476.

A railroad company, having only acquired a new track a few days, is liable for fire started by sparks from its locomotives in inflammable matter on the right of way, to the same extent as if it had operated the road any length of time. *Lake Erie & W. R. Co. v. Cruzen*, 29 *Ill. App.* 212.—FOLLOWING *Illinois C. R. Co. v. Kanouse*, 39 *Ill.* 272.

63. Rubbish.—It is negligence in a company to place near its track rubbish, such as old, dry ties, which, being fired by sparks from a locomotive, communicate the fire to plaintiff's property. *Troxier v. Richmond & D. R. Co.*, 74 *N. Car.* 377, 13 *Am. Ry. Rep.* 389.—APPROVED IN *Ft. Worth & D. C. R. Co. v. Hogsett*, 67 *Tex.* 685.—*Aycock v. Raleigh & A. A. L. R. Co.*, 89 *N. Car.* 321.

64. Bark.—An instruction to the jury that they must consider whether there was any negligence on the part of the defendant in leaving bark and grass and other combustible material, if there was any such, within its right of way is not open to the objection that the jury must infer that by so leaving bark and grass within the right of way the defendant was guilty of negligence *per se*. *Abbot v. Gore*, 40 *Am. & Eng. R. Cas.* 244, 74 *Wis.* 509, 43 *N. W. Rep.* 365.

65. Dry hedge trimmings.—Where a company leaves dry hedge trimmings along its right of way, which either originate or increase a fire caused by sparks from its locomotive, and cause such fire to spread to a stubble field, the company is guilty of negligence. *Smith v. London & S. W. R. Co.*, *L. R.* 6 *C. P.* 14, 40 *L. J. C. P.* 21, 23 *L. T.* 678, 19 *W. R.* 230; *affirming L. R.* 5 *C. P.* 98, 39 *L. J. C. P.* 68, 21 *L. T.* 668, 18 *W. R.* 343.

66. Dry grass.—It is not negligence *per se* for a railroad to suffer dry grass and weeds to accumulate on its right of way; the fact, however, is proper evidence for the jury, who may find negligence from it. *Ohio & M. R. Co. v. Shanefelt*, 47 *Ill.* 497.—FOLLOWED IN *Illinois C. R. Co. v. Frazier*, 47 *Ill.* 505; *Kesee v. Chicago & N. W. R. Co.*, 30 *Iowa* 78.—*Perry v. Southern Pac. R. Co.*, 50 *Cal.* 578, 12 *Am. Ry. Rep.* 187. *Kesee v. Chicago & N. W. R. Co.*, 30 *Iowa*

78.—FOLLOWING *Ohio & M. R. Co. v. Shanefelt*, 47 *Ill.* 497.—*Kansas Pac. R. Co. v. Butts*, 7 *Kan.* 308, 2 *Am. Ry. Rep.* 477. *White v. Missouri Pac. R. Co.*, 13 *Am. & Eng. R. Cas.* 473, 31 *Kan.* 280, 1 *Pac. Rep.* 611. *Burlington & M. R. Co. v. Westover*, 4 *Neb.* 268. *Gram v. Northern Pac. R. Co.*, 45 *Am. & Eng. R. Cas.* 544, 1 *N. Dak.* 252, 46 *N. W. Rep.* 972.—APPROVING *Delaware, L. & W. R. Co. v. Salmon*, 39 *N. J. L.* 299; *Atchison, T. & S. F. R. Co. v. Stanford*, 12 *Kan.* 354; *Webb v. Rome, W. & O. R. Co.*, 49 *N. Y.* 420; *Cleveland, C. & C. R. Co. v. Crawford*, 24 *Ohio St.* 631.—*Kelsey v. Chicago & N. W. R. Co.*, 43 *Am. & Eng. R. Cas.* 43, 1 *S. Dak.* 80, 45 *N. W. Rep.* 204. *Texas & P. R. Co. v. Medaris*, 29 *Am. & Eng. R. Cas.* 159, 64 *Tex.* 92.

It is negligence in a company to leave grass and other combustible material liable to be ignited by sparks from an engine on its right of way. *Ft. Worth & D. C. R. Co. v. Hogsett*, 67 *Tex.* 685, 4 *S. W. Rep.* 365. *Ft. Worth & D. C. R. Co. v. Ratliffe*, 2 *Tex. App. (Civ. Cas.)* 600.

Where a company sets fire to the dry grass and other combustible materials which it has negligently suffered to accumulate on its track and right of way, and, without fault of the adjoining landowner, permits such fire to escape to his lands and burn his property, the company is liable, whether such fire was started negligently or otherwise. *Indiana, B. & W. R. Co. v. Overman*, 29 *Am. & Eng. R. Cas.* 161, 110 *Ind.* 538, 10 *N. E. Rep.* 575. *Chicago, St. L. & P. R. Co. v. Burger*, 124 *Ind.* 275, 24 *N. E. Rep.* 981. *Louisville, N. A. & C. R. Co. v. Hart*, 119 *Ind.* 273, 21 *N. E. Rep.* 753.

Where a company permits dry grass or leaves or other combustible rubbish to remain near its track, and the same takes fire from ignited sparks emitted from one of its locomotives, which had no spark arrester, and the fire is thereby communicated to plaintiff's adjoining land, destroying timber, etc., the injury results from the negligence of the company. *Aycock v. Raleigh & A. A. L. R. Co.*, 89 *N. Car.* 321.—DISTINGUISHED IN *Emry v. Raleigh & G. R. Co.*, 109 *N. Car.* 589.

A railroad is liable for damages from fire escaping from an engine, caused by a heavy growth of dry grass on the right of way, where it had been left for a considerable time after it might have been burned off, although the company used the best appli-

ances to prevent the escape of sparks. *Illinois C. R. Co. v. Frazier*, 64 Ill. 28.

Where a company is charged with negligence in starting a fire on its right of way, which spreads to plaintiff's adjoining lands, the company's negligence is to be determined from all the circumstances and surroundings, including the dryness of the season, and whether the company permitted such an accumulation of the grass, weeds, or leaves of a combustible nature on its right of way, at the place of the fire, as would not be permitted or done by a cautious and prudent man upon his own premises if exposed to the same hazard from fire. *Snyder v. Pittsburgh, C. & St. L. R. Co.*, 11 W. Va. 14, 18 Am. Ry. Rep. 154.—*QUOTING Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223; *Salmon v. Delaware, L. & W. R. Co.*, 38 N. J. L. 5.

Where a company is sued for starting a fire which spreads to plaintiff's lands, a special finding that the company exercised reasonable care is inconsistent with a general finding for the plaintiff, as such a finding necessarily presupposes negligence on the part of the company. *Manhattan, A. & B. R. Co. v. Keeler*, 32 Kan. 163, 4 Pac. Rep. 143.

A railroad company suffered a heavy growth of dry grass to remain on its right of way through plaintiff's premises, and fire was communicated from the locomotive of a freight train, while laboring to ascend a heavy grade, to the grass and weeds in the right of way, and from thence communicated to the fences and grass of plaintiff, which were destroyed. *Held*, that the company was guilty of negligence, and that the plaintiff was entitled to recover. *Rockford, I. J. & St. L. R. Co. v. Rogers*, 62 Ill. 346.

During a very dry summer, little rain having fallen, and none for some time prior to the fire in question, fires also having been frequent in that section of the country, the defendants allowed brush and long, dry grass which had been growing for two or three years, to remain uncut on the side of the track, adjoining the plaintiff's farm, while they had the day previous to the fire, for the protection of their own property on the other side of the track, burned up the dry grass, etc., there. A spark from defendants' engine having set fire to the dry grass, etc., adjoining the plaintiff's land, the fire extended and destroyed his fences, growing crops, etc. In an action against defendants

therefor, all these circumstances were laid before the jury, who found for the plaintiff. *Held*, that the case having been properly submitted to the jury, their verdict could not be interfered with. *Flannigan v. Canadian Pac. R. Co.*, 38 Am. & Eng. R. Cas. 362, 17 Ont. 6.

67. Prairie grass.—From the fact that a railroad runs through a prairie country, with wild grass growing upon its right of way and adjacent thereto, it cannot be said, as a matter of law, that it is not incumbent upon the railroad company to cut or destroy the wild grass upon its right of way and outside its roadbed. *Sibirud v. Minneapolis & St. L. R. Co.*, 7 Am. & Eng. R. Cas. 499, 29 Minn. 58, 11 N. W. Rep. 146.

68. Dry weeds.—It is negligence on the part of a railroad company to permit dry grass and weeds in considerable quantities to accumulate on its right of way, and it will be liable for starting a fire in such weeds and grass which was communicated to plaintiff's property adjoining. *Gulf, C. & S. F. R. Co. v. Fields*, 2 Tex. App. (Civ. Cas.) 700. *Flynn v. San Francisco & S. J. R. Co.*, 40 Cal. 14. *Pittsburgh, C. & St. L. R. Co. v. Nelson*, 51 Ind. 150. *Kesee v. Chicago & N. W. R. Co.*, 30 Iowa 78. *White v. Missouri Pac. R. Co.*, 13 Am. & Eng. R. Cas. 473, 31 Kan. 280, 1 Pac. Rep. 611. *Kansas Pac. R. Co. v. Butts*, 7 Kan. 308, 2 Am. Ry. Rep. 477. *Ohio & M. R. Co. v. Shanefelt*, 47 Ill. 497.

A railroad company is not negligent in failing to cut down bushes or weeds on the right of way beyond the portion over which it is exercising actual control for corporate purposes, but is required to keep the right of way clear of such growth to the outside of the side ditches on either side of the track. *Ward v. Wilmington & W. R. Co.*, 49 Am. & Eng. R. Cas. 540, 109 N. Car. 358, 13 S. E. Rep. 926.

69. Peat.—A company is guilty of negligence amounting to a positive wrong, if, in a dry season, it starts a fire on a bed of peat on which its track is laid; and if injury results to adjacent property owners, it is liable. *Louisville, N. A. & C. R. Co. v. Nitsche*, 45 Am. & Eng. R. Cas. 532, 126 Ind. 229, 26 N. E. Rep. 51.

70. Wood pile.—A railroad has a right to keep a supply of wood for its engines, and is itself the judge of the amount necessary to have on hand; and it will not be liable for a fire communicated from its wood pile

by reason of the large quantity kept near plaintiff's house, or because of its proximity thereto, provided the company has a right to put the wood at such place. *Macon & W. R. Co. v. McConnell*, 31 Ga. 133.

71. Chips, logs, etc.—Where a railroad is recently built through a forest, and the adjoining lands are still in a state of nature, leaving chips, logs, and dry grass on the right of way is not sufficient negligence to render the company liable for fires set out by passing locomotives. *Jaffrey v. Toronto, G. & B. R. Co.*, 24 U. C. C. P. 271.

72. Inflammable buildings.—Using a shingle roof on a depot is not in itself negligence; but where it has been frequently fired by sparks from passing trains, of which fact the company has knowledge, continuing the use of a spark-throwing locomotive near such depot, thereby firing it, becomes negligence. *Cincinnati, N. O. & T. P. R. Co. v. Barber*, 56 Am. & Eng. R. Cas. 106, 94 Ky. 71, 21 S. W. Rep. 347.

A company constructed a flag shanty of pine boards adjoining plaintiff's building, in which were kept waste and oil, which burned at night, causing plaintiff's building to burn. Held, that the question of the company's negligence was for the jury. *Van Fleet v. New York C. & H. R. R. Co.*, 27 N. Y. S. R. 76, 7 N. Y. Supp. 636.—QUOTING *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 425.

In such case it was sufficiently definite to show that such waste and oil were kept in the shanty, without showing that they were kept there at the time of the fire. *Van Fleet v. New York C. & H. R. R. Co.*, 27 N. Y. S. R. 76, 7 N. Y. Supp. 636.

5. Failure to Extinguish Fires Once Started.

73. Generally.*—Where a fire is started by a passing train in inflammable matter which has negligently been permitted to accumulate on the right of way, which is soon afterward discovered by the company's station agent, the company is liable for his negligence in not extinguishing it before it spreads to plaintiff's premises adjoining. *Eighne v. Rome, W. & O. R. Co.*, 32 N. Y. S. R. 757, 10 N. Y. Supp. 600, 57 Hun 586.—REVIEWING *O'Neill v. New York, O. & W. R. Co.*, 115 N. Y. 579, 26 N. Y. S. R. 269; *Webb v. Rome, W. & O. R. Co.*, 49 N. Y.

420; *Coolidge v. Rome, W. & O. R. Co.*, 23 N. Y. S. R. 459; *Douglass v. Rome, W. & O. R. Co.*, 23 N. Y. S. R. 456; *Tanner v. New York C. & H. R. R. Co.*, 108 N. Y. 623, 13 N. Y. S. R. 501.

Where fire is communicated from an engine to dry grass on the right of way, and thence to an adjoining field, and twenty employees of the company are at hand, knowing the origin of the fire, it is their duty to extinguish it, and the company cannot justify their refusal to do so on the ground that they had no right to enter the premises for such a purpose. *Bass v. Chicago, B. & Q. R. Co.*, 28 Ill. 9.—QUOTED IN *Rolke v. Chicago & N. W. R. Co.*, 26 Wis. 537.

The jury are not at liberty to infer negligence on the part of the defendant from the absence, at the time of the fire, of the hands employed for the purpose of repairs on the section of the road where the fire occurred, and the failure by the company to assist in extinguishing the fire. *Baltimore & O. R. Co. v. Shipley*, 39 Md. 251, 11 Am. Ry. Rep. 269.—REVIEWED IN *Missouri Pac. R. Co. v. Platzer*, 38 Am. & Eng. R. Cas. 366, 73 Tex. 117, 3 L. R. A. 639, 11 S. W. Rep. 160.

74. Degree of care demanded.—Though a company may not be chargeable with negligence in starting a fire, whether on its own land or not, yet it is bound to exercise the care of a prudent man, under the circumstances, to extinguish it before it spreads. *Missouri Pac. R. Co. v. Platzer*, 38 Am. & Eng. R. Cas. 366, 73 Tex. 117, 11 S. W. Rep. 160, 3 L. R. A. 639.—FOLLOWED IN *Missouri Pac. R. Co. v. Donaldson*, 73 Tex. 124, 11 S. W. Rep. 163.

75. Failure to keep watchmen stationed along track.—A company is not under obligations to keep watchmen stationed along its track to protect adjoining property from catching fire, or to extinguish fire kindled by unavoidable accident. *Indianapolis & C. R. Co. v. Paramore*, 31 Ind. 143. *Baltimore & O. R. Co. v. Shipley*, 39 Md. 251, 11 Am. Ry. Rep. 269.

76. Failure to stop train and leave men to put out fire.—A company is under no duty to contiguous owners to stop its train to extinguish fires which, without its fault or negligence, are set out by the locomotive. *Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co.*, 54 Am. & Eng. R. Cas. 512, 70 Miss. 119, 12 So. Rep. 156.—QUOTING *Michigan C. R. Co. v. Anderson*, 20 Mich. 250.

* Negligence of company in not extinguishing a fire, see 38 AM. & ENG. R. CAS. 372, *abstr.*

Where a fire is started by the engine of a gravel train, it is negligence rendering the company liable, to fail to stop the train and have the workmen extinguish the fire before it reaches the adjoining lands; but it might be otherwise in case of a regular passenger train. *Rolke v. Chicago & N. W. R. Co.*, 26 Wis. 537, 3 Am. Ry. Rep. 548. — QUOTING *Bass v. Chicago, B. & Q. R. Co.*, 28 Ill. 9.

A hose was stretched across a railroad track in a city, at night, which was run over by a train and cut in two, causing the buildings to burn. The evidence showed that the fire was some distance from the track, but the light of it could be plainly seen, and that a red lantern was hanging near the track, and as the train approached a fireman waved and called to the engineer to stop; but he did not give reasons why. *Held*, that this did not render the company liable to the owner of the burned buildings, as it was not the duty of the train hands to stop the train upon warning from strangers, without a reason being given. *Mott v. Hudson River R. Co.*, 1 Robt. (N. Y.) 585. But compare *Metallic Compression Casting Co. v. Fitchburg R. Co.*, 109 Mass. 277, 6 Am. Ry. Rep. 264.

77. Failure of section hands to extinguish fire.—Evidence that section hands were absent, and failed to assist in extinguishing fire started by a passing train is not evidence of negligence on the part of the company, as it is not the duty of the company to keep men along the road for that purpose. *Baltimore & O. R. Co. v. Shipley*, 39 Md. 251.

Where a passing train starts a fire on the right of way, the company is not liable for the failure of its section hands who were present to stop the fire before it extends to the adjoining lands, unless the company was negligent in starting the fire. The stopping of fires is not within the line of employment of section hands, and it is no more their duty to extinguish fire than any other person's who might see it. *Kenney v. Hannibal & St. J. R. Co.*, 70 Mo. 252. — OVERRULING ON THIS POINT *Kenney v. Hannibal & St. J. R. Co.*, 63 Mo. 99.

78. Liability notwithstanding care in all other respects.—Although a railway company may not have been guilty of negligence in setting out fire, it is subject to the duty of using such means to extinguish it as the circumstances would indicate to a

prudent man were proper; and for a failure to use such means it is liable to an action for damages. *Missouri Pac. R. Co. v. Platzer*, 38 Am. & Eng. R. Cas. 366, 73 Tex. 117, 3 L. R. A. 639, 11 S. W. Rep. 160. — QUOTING *Huyett v. Philadelphia & R. R. Co.*, 23 Pa. St. 374. REVIEWING *Kenney v. Hannibal & St. J. R. Co.*, 63 Mo. 99; *Baltimore & O. R. Co. v. Shipley*, 39 Md. 254.

Where fire escaped from a locomotive to the company's right of way, where it was seen by their road hands in time to extinguish it, but they negligently failed to do so until it extended to plaintiff's premises and greatly damaged them, he may recover, notwithstanding the locomotive was provided with the most approved safeguards against the escape of fire and the engineer in charge was competent and careful. *Kenney v. Hannibal & St. J. R. Co.*, 63 Mo. 99, 20 Am. Ry. Rep. 275. — REVIEWED IN *Missouri Pac. R. Co. v. Platzer*, 38 Am. & Eng. R. Cas. 366, 73 Tex. 117, 3 L. R. A. 639, 11 S. W. Rep. 160.

6. Allowing Fire to Spread; Proximate and Remote Cause.

79. Generally.*—He who by his negligence or misadventure creates or suffers a fire upon his own premises, which, burning his property, spreads thence onto the adjacent premises of another, and there destroys the property of the latter, is liable to him in an action for the damage sustained. *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 420, 4 Am. Ry. Rep. 547; affirming 3 Lans. 453. — FOLLOWING *Field v. New York C. R. Co.*, 32 N. Y. 339; *Smith v. London & S. W. R. Co.*, L. R. 5 C. P. 98. — APPROVED IN *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469. FOLLOWED IN *O'Neill v. New York, O. & W. R. Co.*, 115 N. Y. 579, 22 N. E. Rep. 217, 26 N. Y. S. R. 269. REVIEWED IN *Billman v. Indianapolis, C. & L. R. Co.*, 6 Am. & Eng. R. Cas. 41, 76 Ind. 166, 40 Am. Rep. 230.

A company has a right to burn off dry grass and weeds from its right of way, and is not responsible for fire which results therefrom, caused by no negligence or carelessness on the part of the company. *Atchison, T. & S. F. R. Co. v. Dennis*, 32 Am. & Eng. R. Cas. 318, 38 Kan. 424, 17 Pac. Rep. 153.

* Liability of company for starting fires which spread to property of others, see note, 21 L. R. A. 255.

80. Liability under certain statutes.

—In an action under the Md. Code for injury done to certain cord-wood and growing timber of the plaintiff, by fire occasioned by the engine of the defendant, the fact that the fire began on the track of the railroad and spread thence to the plaintiff's land adjoining, causing the injury to his property, will not avoid the liability of the company, the evidence showing that the injury was the direct consequence of the fire occasioned by the defendant's engine. *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115, 11 *Am. Ry. Rep.* 210.—APPROVED IN *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141. FOLLOWED IN *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117. QUOTED IN *Pielke v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 349, 5 Dak. 444, 41 N. W. Rep. 669.

Under Mass. Gen. St. ch. 63, § 101, if the sparks from a locomotive start a fire in the grass near the track, and it burns in a direct line, without a break, to plaintiff's lands half a mile distant, the company is responsible for the damage done, though in reaching plaintiff's lands the fire crossed a highway and the lands of several intervening owners. *Perley v. Eastern R. Co.*, 98 Mass. 414.—COMMENTING ON *Ryan v. New York C. R. Co.*, 35 N. Y. 210.—APPROVED IN *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469; *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141. FOLLOWED IN *Safford v. Boston & M. R. Co.*, 103 Mass. 583; *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223. QUOTED IN *Jucker v. Chicago & N. W. R. Co.*, 2 Am. & Eng. R. Cas. 41, 52 Wis. 150. REVIEWED IN *Simmonds v. New York & N. E. R. Co.*, 23 Am. & Eng. R. Cas. 369, 52 Conn. 264, 52 Am. Rep. 587; *Knowlton v. New York & N. E. R. Co.*, 40 Am. & Eng. R. Cas. 237, 147 Mass. 606.

In such case it is competent for the jury to find that back-fires kindled in a vain effort to stop the fire started by the company, but which were swallowed up by the advance of the latter, did not contribute to plaintiff's loss. *Perley v. Eastern R. Co.*, 98 Mass. 414.

Where fire is carried from an engine to weeds and grass, and spreads thence to plaintiff's property, there is a "communication" of the fire within the meaning of the Utah Comp. Laws, § 503, providing that any company constructing or operating railroads shall be liable for all damages to prop-

erty caused "by fire communicated from their locomotives." *Anderson v. Wasatch & J. V. R. Co.*, 2 Utah 518.

81. Application of the rule of proximate cause, generally.*—To render a defendant liable, the injury suffered by the plaintiff must be the natural and probable consequence of defendant's negligence; such a consequence as, under the surrounding circumstances of the case, might or ought to have been foreseen by the wrongdoer as likely to result from his action. *Doggett v. Richmond & D. R. Co.*, 78 N. Car. 305, 16 Am. Ry. Rep. 193.

An act is the proximate cause of an event, when in the natural order of things and under the particular circumstances surrounding it, such act would necessarily produce that event. *Houston & T. C. R. Co. v. McDonough*, 1 Tex. App. (Civ. Cas.) 354.

By proximate cause, as applied to injuries resulting from fires started by engines, is meant that the damage must be the direct and natural consequence of the company's negligence, without any intervening force or power operating as a cause of the injury. *Ryan v. Gross*, 68 Md. 377, 12 Atl. Rep. 115, 16 Atl. Rep. 302, 11 Cent. Rep. 502. *Philadelphia, W. & B. R. Co. v. Constable*, 39 Md. 149, 11 Am. Ry. Rep. 276.—FOLLOWED IN *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117.—*Martin v. New York & N. E. R. Co.*, 62 Conn. 331, 25 Atl. Rep. 239.—APPROVING *Billman v. Indianapolis, C. & L. R. Co.*, 76 Ind. 166. DISAPPROVING *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353; *Ryan v. New York C. R. Co.*, 35 N. Y. 210. FOLLOWING *Simmonds v. New York & N. E. R. Co.*, 52 Conn. 264.

Where a fire originates in the carelessness of a defendant, and is carried directly by a material force, whether it be the wind, the law of gravitation, combustible matter existing in a state of nature, or a running stream, to the plaintiff's property, and destroys it, the defendant is legally answerable for the loss. *Kuhn v. Jewett*, 32 N. J. Eq. 647.

Where plaintiff's woods caught fire from fire started by sparks from the defendant's engine, the burning of plaintiff's woods was the proximate effect of defendant's negligence, although plaintiff's tenant may not have used due diligence to extinguish the

*What is and what is not proximate cause, see notes, 8 AM. & ENG. R. CAS. 62; 38 AM. DEC. 77; 35 AM. REP. 643.

fire, and so it spread to the woods. *Wiley v. West Jersey R. Co.*, 44 N. J. L. 247. Compare *Reed v. Missouri Pac. R. Co.*, 50 Mo. App. 504.

Train employes ran an engine over a hose across the track for the purpose of extinguishing a fire in a burning building, and by cutting it in two shut off the only water supply accessible, and by reason thereof the building burned. The train hands had notice that the hose was across the track, and they might have stopped the train, so it could have been temporarily removed. *Held*, that the severing of the hose was the proximate cause of the destruction of the building, and rendered the company liable; and it was immaterial that the hose belonged to a volunteer company of another town, as they had a common law right to stretch it across the railroad. *Metallic Compression Casting Co. v. Fitchburg R. Co.*, 109 Mass. 277, 6 Am. Ry. Rep. 264.—REVIEWED IN *Bosch v. Burlington & M. R. Co.*, 44 Iowa 402; *Hall v. Brown*, 45 N. H. 495.—But compare *Mott v. Hudson River R. Co.*, 1 Robt. (N. Y.) 585.

But in such case the fact that defendant's track crossed another track a few hundred feet away, where by law approaching trains are bound to stop, would not affect the company's liability. *Metallic Compression Casting Co. v. Fitchburg R. Co.*, 109 Mass. 277, 6 Am. Ry. Rep. 264.

82. Remote cause.*—The safe rule as to the liability of railroad companies for damages by fire occasioned by their engines or carriages, is that when their liability arises, it extends to all the near and natural consequences of their wrongful act, and not to those which are remote, incidental, or exceptional. *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115, 11 Am. Ry. Rep. 210.—DISTINGUISHING *Ryan v. New York C. R. Co.*, 35 N. Y. 210; *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353. REVIEWING *Baltimore & O. R. Co. v. Dorsey*, 37 Md. 19.—FOLLOWED IN *Philadelphia, W. & B. R. Co. v. Constable*, 39 Md. 149; *Baltimore & O. R. Co. v. Shipley*, 39 Md. 251.

Where one, by negligence or misconduct, occasions a fire on his own premises or the premises of a third person, which spreads from thence to the plaintiff's property, and causes an injury, the injury is not, as a legal

proposition, too far removed from his negligent act to involve him in legal liability. *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 299, 14 Am. Ry. Rep. 226.—DISAPPROVING *Ryan v. New York C. R. Co.*, 35 N. Y. 210; *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353.

Where a fire is negligently kindled and by reason of some intervening cause is carried or driven to objects which it would not otherwise have reached, the destruction of such objects is a remote consequence of the negligence. *Doggett v. Richmond & D. R. Co.*, 78 N. Car. 305, 16 Am. Ry. Rep. 193.

The fact that the plaintiff's property was some 65 to 100 rods distant from defendant's road, and that the fire reached it only by passing through intervening fields, does not render the damage remote, or prevent a recovery, where the fire burned without interruption. *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223, 2 Am. Ry. Rep. 483.

A car was loaded with oil and then negligently permitted to run down a grade, and in doing so collided with a locomotive, which set the oil on fire, the burning of which caused a neighboring house to burn. *Held*, that the cause of the burning of the house was not too remote to relieve the company from liability. *Oil Creek & A. R. R. Co. v. Keighron*, 74 Pa. St. 316, 6 Am. Ry. Rep. 192.

Where it appeared that the fire caught between 10 and 11 A.M., but had been extinguished in the opinion of those contending with it, who had left it, and thereafter it broke out afresh and was carried to plaintiff's premises—*held*, that the injury was remote, and that plaintiff cannot recover. *Doggett v. Richmond & D. R. Co.*, 78 N. Car. 305, 16 Am. Ry. Rep. 193.

83. Spread of fire from right of way, generally.—In an action for the destruction of plaintiff's property by fire from the engines of defendant, the fact that the fire began on the roadbed of defendant, and thence spread to the property of plaintiff, is no bar to the right of plaintiff to recover, the destruction of his property being the natural and necessary consequence of the fire kindled on the roadbed of defendant. *Baltimore & O. R. Co. v. Shipley*, 39 Md. 251, 11 Am. Ry. Rep. 269.—FOLLOWING *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115.—*Missouri Pac. R. Co. v. Cady*, 44 Kan. 633, 24 Pac. Rep. 1088.—FOLLOWING *Missouri Pac. R. Co. v. Merrill*, 40 Kan. 404.—

* Remote fires caused by the spreading of fire started by a negligent act, see note, 22 AM. & ENG. R. CAS. 637.

Toledo, W. & W. R. Co. v. Wand, 48 Ind. 476.

While there may be no negligence in a railway company dropping fire from its locomotives on the track, yet if it knowingly and negligently permits it to kindle there and spread to the adjoining property, the company will be liable for the damage. *Ball v. Grand Trunk R. Co.*, 16 U. C. C. P. 252.

A company is not liable for the spread of a fire which section hands build on the right of way to warm their coffee and negligently leave, where there is no evidence that the company boarded their men or was under any duty to prepare their meals, or that it knew of or authorized the kindling of the fire. *Morier v. St. Paul, M. & M. R. Co.*, 15 Am. & Eng. R. Cas. 135, 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. Rep. 952.—DISTINGUISHING *Chapman v. New York C. R. Co.*, 33 N. Y. 369.—RECONCILED IN *Pittsburgh, C. & St. L. R. Co. v. Kirk*, 102 Ind. 399, 52 Am. Rep. 675.

A fire was started at the side of a track and burned three miles and consumed plaintiff's hay stacks, which had been plowed around, as was usual. The evidence showed that a high wind was blowing at the time toward plaintiff's premises, with dry grass and stubble all the way from the track to the hay stacks. Held, that such a result might have reasonably been anticipated by starting a fire at such a time, and a special finding by the jury that it could not have been anticipated was against the evidence. *Manhattan, A. & B. R. Co. v. Keeler*, 32 Kan. 163, 4 Pac. Rep. 143.

84. Spread from burning grass, etc., on right of way.*—A company has the right to set fire to and burn the dry grass and other combustible material on its right of way; but it is bound at its peril to keep such fire within its own limits. *Indiana, B. & W. R. Co. v. Overman*, 29 Am. & Eng. R. Cas. 161, 110 Ind. 538, 10 N. E. Rep. 575. Kansas Act of 1885, ch. 118, § 2, does not authorize a recovery against a company for a fire caused by burning grass and weeds on its right of way, when there is no negligence or carelessness on its part, and when the fire is the result of unavoidable accident. *Atchison, T. & S. F. R. Co. v. Den-*

nis, 32 Am. & Eng. R. Cas. 318, 38 Kan. 424, 17 Pac. Rep. 153.

Where fire is negligently permitted to escape from a locomotive engine, and is communicated from dry material on the right of way of the company to plaintiff's fence, and destroys the same, in consequence of which plaintiff's crops are destroyed by stock ranging near his lands, notwithstanding reasonable efforts to keep them out, the railroad company is liable for the destruction of both the fence and the crops. It is sufficient, in such case, that the injury is the natural, though not necessary or inevitable, result of the negligent fault. *Miller v. St. Louis, I. M. & S. R. Co.*, 29 Am. & Eng. R. Cas. 254, 90 Mo. 389, 2 S. W. Rep. 439.—REVIEWING *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223.

Where evidence shows that a company's locomotive negligently dropped fire, which kindled in a tie during a very dry time, when a strong wind was blowing toward plaintiff's land, and burned thence through rubbish on the right of way to plaintiff's fence, and thence to his woodland, the damages to plaintiff's land are not too remote to be recovered against the company. *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 420, 4 Am. Ry. Rep. 547; affirming 3 Lans. 453.

Fire was set to stubble and grass near the track by sparks and coals from a locomotive, and passed over plaintiff's land, destroying his property thirty rods distant. Held, that the damage was not too remote to constitute a right of recovery against the company. *St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. 47.—APPROVED IN *Ft. Worth & D. C. R. Co. v. Hogsett*, 67 Tex. 685.

Where grass and herbage on the right of way of a railroad were set burning by fire from an engine, the fire spreading rapidly and burning continuously until it reached the farm of plaintiff, situated a half mile from the railroad track, destroying straw, timber, etc.—held, that the damage was not too remote to be recovered. *Burlington & M. R. Co. v. Westover*, 4 Neb. 268.

A locomotive started a fire on the right of way where the grass was very rank and dry, when there was a high wind. The fire extended about three miles before night and continued to burn all night, but slowly, there being but little wind; but the following morning the wind blew with great violence and soon carried the fire five miles farther to plaintiff's farm, and after crossing

* Liability of railroads in Kansas for allowing fire to escape while burning off right of way, see 45 AM. & ENG. R. CAS. 577, *abstr.*

sixteen feet of plowed ground burned the plaintiff's property. The evidence showed that such winds were not unfrequent. *Held*, that the wind could not be regarded as the intervention of a new agency, so as to relieve the company from liability, as it might reasonably have been anticipated by a prudent man. *Poeppers v. Missouri, K. & T. R. Co.*, 67 Mo. 715.—FOLLOWED IN *Hightower v. Missouri, K. & T. R. Co.*, 67 Mo. 726.

85. — on adjacent lands.—In an action against a railroad company the defendant proved that a fire, for which damages were claimed, began on a lot owned by one H., immediately adjoining the railroad, and covered with broom-sedge and dried grass; that the fire burned across this lot, about one hundred and fifty yards, to the lands of the plaintiffs, where it encountered a fence and dry grass, and, spreading from these destroyed certain young timber and fences and fence rails on said land. *Held*, that the fact that the fire was first communicated to the material on the land of the adjacent proprietor, H., did not affect defendant's responsibility to plaintiffs. *Philadelphia, W. & B. R. Co. v. Constable*, 39 Md. 149, 11 Am. Ry. Rep. 276.—FOLLOWING *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115.

86. Spread from peat beds.—Where a railroad company, in a season of great drouth, sets out fire on the right of way, which extends over beds of turf or peat, the same material forming the surface of the body of adjoining lands, it is guilty of a positive wrong, and not of mere passive negligence, and is liable for loss resulting to adjacent owners. *Louisville, N. A. & C. R. Co. v. Nitsche*, 126 Ind. 229, 26 N. E. Rep. 51.

By Conn. Sess. Laws 1881, ch. 92, railroad companies are made liable for damage done to property along their roads by fire communicated from their locomotives, where there is no contributory negligence on the part of the owner. A fire caught from the sparks of the locomotive on the land of D. The track foreman and his men came upon the ground and were putting out the fire, which they could easily have done, when D. requested them to let it burn, as he wished to burn up the bogs. They accordingly left it burning. The fire, however, penetrated to some peat beneath the surface, and thus extended to the adjoining land of S. and did damage there. *Held*, that the rail-

road company was liable to S. for this damage. S. could not be affected by any arrangement between the agent of the railroad company and D., to which he did not give his assent. The intervention of D. in the matter was not the intervention of an independent power operating to produce the result. He merely requested the track foreman to leave the fire burning, and the latter voluntarily did so. *Simmonds v. New York & N. E. R. Co.*, 23 Am. & Eng. R. Cas. 369, 52 Conn. 264, 52 Am. Rep. 587.—REVIEWING *Perley v. Eastern R. Co.*, 98 Mass. 414.—FOLLOWED IN *Martin v. New York & N. E. R. Co.*, 62 Conn. 331.

87. — burning brush and old ties.—Sparks from a locomotive started a fire in brush and old ties near the track during a very dry time, and a strong wind carried it thence for a mile over the adjoining lands, across a river ninety-seven feet wide, along whose banks timber grew, and to the plaintiff's lands 2400 feet beyond. *Held*, that the company was liable, as the injury to plaintiff's property was the natural and direct effect of starting the fire. *Martin v. New York, O. & W. R. Co.*, 41 N. Y. S. R. 217, 62 Hun 181, 16 N. Y. Supp. 499.—DISTINGUISHING *Ryan v. New York C. R. Co.*, 35 N. Y. 210. REVIEWING *O'Neill v. New York, O. & W. R. Co.*, 115 N. Y. 535, 26 N. Y. S. R. 269.

88. — pile of burning sills.—Although there was an intervening fence between a pile of burning sills and the plaintiff's fence, to which it was joined, which intervening fence caught and was burned, and from which the plaintiff's fence was directly fired, still, if the burning of the sills was the cause of the intervening fence catching fire, and the same was directly set on fire by the engine itself, the plaintiff is entitled to recover. *Troxler v. Richmond & D. R. Co.*, 74 N. Car. 377, 13 Am. Ry. Rep. 389.

89. Spread from burning buildings.—A railroad station was set on fire by sparks from a locomotive, and heat and sparks from the burning building set fire to the plaintiff's property near by, and it was destroyed. *Held*, that the railroad company was liable under Conn. Gen. St. § 358. *Martin v. New York & N. E. R. Co.*, 62 Conn. 331, 25 Atl. Rep. 239.

The liability of a company in such a case is a statutory liability, and does not depend on the existence of negligence. *Martin v.*

New York & N. E. R. Co., 62 Conn. 331, 25 Atl. Rep. 239.

A company built a flag shanty so close to the plaintiff's building that a person could not pass between them, which burned and caused plaintiff's building to burn. *Held*, that the burning of the shanty was the direct and proximate cause of the burning of plaintiff's building. *Van Fleet v. New York C. & H. R. R. Co.*, 27 N. Y. S. R. 76, 7 N. Y. Supp. 636.

90. — buildings of third persons.

—In cases where fire is negligently started, but is not immediately communicated to the property destroyed, but is communicated from one building to another until it reaches the property destroyed, causal connection will only cease when, between the negligence and the damage, an object is interposed which would have prevented the damage if due care had been taken. *Kuhn v. Jewett*, 32 N. J. Eq. 647.

In an action against a railroad to recover for the loss of plaintiff's house by fire, it appeared that a locomotive, in passing through a village, threw out great quantities of unusually large cinders, and set on fire two buildings and a lumber yard. The weather at the time was very dry, and the wind blowing freely. One of the buildings ignited was a warehouse. The flames from this structure set on fire the building of plaintiff, situated about two hundred feet from the warehouse, and destroyed it. *Held*, that the company was not exonerated from liability merely because plaintiff's house was set on fire, not immediately by cinders thrown from the locomotive, but by the burning of another house, the liability of the company depending upon whether the second house was so near the first that, in the then state of the wind and weather, its destruction was a natural consequence of the burning of the first. *Fent v. Toledo, P. & W. R. Co.*, 59 Ill. 349, 11 Am. Ry. Rep. 167. —DISAPPROVING *Ryan v. New York C. R. Co.*, 35 N. Y. 214; *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353. **DISTINGUISHING** *Marble v. Worcester*, 4 Gray (Mass.) 395. —**DISTINGUISHED IN** *Lewis v. Flint & P. M. R. Co.*, 54 Mich. 55. **FOLLOWED IN** *Jacksonville, T. & K. W. R. Co. v. Peninsular L. T. & M. Co.*, 27 Fla. 1. **REVIEWED IN** *Pennsylvania Co. v. Whitlock*, 22 Am. & Eng. R. Cas. 629, 99 Ind. 16.

The negligent burning of a house, and the spreading of the fire to a neighboring

house, and the burning thereof, do not give the owner of the last house a cause of action against the owner of the house in which the fire originated. The damages are too remote. *Ryan v. New York C. R. Co.*, 35 N. Y. 210. —**DISTINGUISHING** *Lynch v. Nurdin*, 1 Q. B. 29; *Illidge v. Goodwin*, 5 C. & P. 190.

An engine on a railroad negligently set fire to a house, and the fire from the house communicated to another at some distance from it, which was consumed with all its contents. *Held*, that the railroad company was not liable for damages for the last building and its contents. *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353. —**RECONCILING** *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. (U. S.) 45. **REVIEWING** *Piggott v. Eastern Counties R. Co.*, 3 C. B. 229, 54 Eng. C. L. 228; *Smith v. London & S. W. R. Co.*, L. R. 5 C. P. 98. —**CRITICISED IN** *Louisville, N. A. & C. R. Co. v. Nitsche*, 126 Ind. 229. **DISAPPROVED IN** *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Martin v. New York & N. E. R. Co.*, 62 Conn. 331; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469; *Billman v. Indianapolis, C. & L. R. Co.*, 6 Am. & Eng. R. Cas. 41, 76 Ind. 166, 40 Am. Rep. 230; *Pennsylvania Co. v. Whitlock*, 22 Am. & Eng. R. Cas. 629, 99 Ind. 16; *Clemens v. Hannibal & St. J. R. Co.*, 53 Mo. 366; *Kuhn v. Jewett*, 32 N. J. Eq. 647; *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 399; *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223; *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141. **DISTINGUISHED IN** *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115; *Lowery v. Manhattan R. Co.*, 23 Am. & Eng. R. Cas. 276, 99 N. Y. 158, 1 N. E. Rep. 608, 52 Am. Rep. 12; *Pennsylvania R. Co. v. Hope*, 80 Pa. St. 373. **DOUBTED AND DISTINGUISHED IN** *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354. **EXPLAINED IN** *Pielke v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 349, 5 Dak. 444, 41 N. W. Rep. 669; *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 420; *Lehigh Valley R. Co. v. McKeen*, 90 Pa. St. 122.

91. — depot or station house.—

If a railroad negligently permits sparks from its locomotive to set fire to its depot, whence it spreads to plaintiff's building, the company is liable. The cause of the burning is sufficiently proximate. *Cincinnati, N. O. & T. P. R. Co. v. Barker*, 56 Am. & Eng. R. Cas. 106, 94 Ky. 71, 21 S. W. Rep. 347.

Where fire is communicated from a railroad engine to the company's depot, and burns continuously without any intervening cause, to plaintiff's property, the injury is directly traceable to the first fire, and the company is liable. *Martin v. New York & N. E. R. Co.*, 56 Am. & Eng. R. Cas. 79, 62 Conn. 331, 25 Atl. Rep. 239.

A fire, set by sparks from a locomotive engine to wood piled against a freight house in a village, consumed the freight house, and spread to and injured the station house, which was thirty feet distant from the freight house. A dwelling house about sixteen hundred feet distant from the station house, and seven hundred and forty feet from the railroad track, caught fire from sparks wafted through the air by the wind to its roof, from this conflagration, and was injured. *Held*, that the railroad corporation was liable for the injury, under Mass. Gen. St. ch. 63, § 101. *Safford v. Boston & M. R. Co.*, 103 Mass. 583.—FOLLOWING *Hart v. Western R. Corp.*, 13 Metc. (Mass.) 99; *Perley v. Eastern R. Co.*, 98 Mass. 414.

92. — shed.—The defendant, by the negligent manner of conducting an engine, or by the defective condition of the engine, set fire to a quantity of wood in one of its sheds. The fire consumed the woodshed, and spread to and consumed the house of plaintiff, situated about one hundred and thirty feet distant from the shed. *Held*, that no cause of action existed in favor of the plaintiff against the railroad company by reason of such loss. *Ryan v. New York C. R. Co.*, 35 N. Y. 210.—CRITICISING *Scott v. Shepherd*, 2 W. Bl. 893, 3 Wils. 403. DISTINGUISHING *Guille v. Swan*, 19 Johns. (N. Y.) 381. EXPLAINING *Vandenburgh v. Truax*, 4 Den. (N. Y.) 464.—APPLIED IN *Williams v. Delaware, L. & W. R. Co.*, 39 Hun (N. Y.) 430; *Mars v. Delaware & H. Canal Co.*, 54 Hun 625. CRITICISED IN *Louisville, N. A. & C. R. Co. v. Nitsche*, 126 Ind. 229; *O'Neill v. New York, O. & W. R. Co.*, 115 N. Y. 579, 22 N. E. Rep. 217, 26 N. Y. S. R. 269; *Nary v. New York, O. & W. R. Co.*, 9 N. Y. Supp. 153. DISAPPROVED IN *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Martin v. New York & N. E. R. Co.*, 62 Conn. 331; *Fent v. Toledo, P. & W. R. Co.*, 59 Ill. 349; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *Billman v. Indianapolis, C. & L. R. Co.*, 6 Am. & Eng. R. Cas. 41, 76 Ind. 166,

40 Am. Rep. 230; *Terre Haute & I. R. Co. v. Buck*, 18 Am. & Eng. R. Cas. 234, 96 Ind. 346, 49 Am. Rep. 168; *Pennsylvania Co. v. Whitlock*, 22 Am. & Eng. R. Cas. 629, 99 Ind. 16; *Clemens v. Hannibal & St. J. R. Co.*, 53 Mo. 366; *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 299; *Kuhn v. Jewett*, 32 N. J. Eq. 647; *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223; *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141. DISTINGUISHED IN *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115; *Lowery v. Manhattan R. Co.*, 23 Am. & Eng. R. Cas. 276, 99 N. Y. 158, 1 N. E. Rep. 608, 52 Am. Rep. 12; *Munger v. Baker*, 65 Barb. (N. Y.) 539; *Nary v. New York, O. & W. R. Co.*, 29 N. Y. S. R. 630; *Martin v. New York, O. & W. R. Co.*, 41 N. Y. S. R. 217, 62 Hun 181, 16 N. Y. Supp. 499. DOUBTED AND DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354. EXPLAINED IN *Pielke v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 349, 5 Dak. 444, 41 N. W. Rep. 669; *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 420. REVIEWED IN *Henry v. Southern Pac. R. Co.*, 50 Cal. 176.

93. — shop.—A shop adjoining a railroad track was destroyed by fire communicated by a locomotive, and while the shop was burning, the wind wafted sparks from it across a street sixty feet upon a house and set it on fire, whereby it was injured. *Held*, that the owner of the house was entitled to recover of the railroad corporation the damages caused by the fire, under Mass. Act of 1840, ch. 82, § 1, which provides that when any injury is done to the building of any person "by fire communicated" by a locomotive engine of a railroad corporation, the said corporation shall be responsible in damages to the person so injured. *Hart v. Western R. Corp.*, 13 Metc. (Mass.) 99.—FOLLOWED IN *Safford v. Boston & M. R. Co.*, 103 Mass. 583; *Hooksett v. Concord R. Co.*, 38 N. H. 242. QUOTED IN *Pierce v. Worcester & N. R. Co.*, 105 Mass. 199. REFERRED TO IN *Jackson Co. v. Boylston Mut. Ins. Co.*, 21 Am. & Eng. R. Cas. 117, 139 Mass. 508.

94. Spread from burning bridge.—Where a train fires a bridge in passing over it, and the fire is communicated thence to plaintiff's mill and property near by, the burning of the bridge is the proximate cause of the destruction of plaintiff's property. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454.—DISAPPROVING *Ryan v. New York C.*

& I. R. Co.
234, 96 Ind.
vania Co. v.
Cas. 629, 99
& St. J. R.
& W. R. Co.
n v. Jewett,
Chicago & N.
on v. Good-
DISTIN-
R. Co. v.
Manhattan
276, 99 N. Y.
Rep. 12;
(.) 539; Nary
29 N. Y. S.
O. & W. R.
181, 16 N. Y.
TINGUISHED
v. Stanford,
ielke v. Chi-
n. & Eng. R.
7, Rep. 669;
Co., 49 N. Y.
outhern Pac.

adjoining a
by fire com-
nd while the
afted sparks
feet upon a
by it was in-
of the house
railroad cor-
by the fire,
2, § 1, which
s done to the
e communi-
of a railroad
ion shall be
person so in-
p., 13 Metc.
fford v. Bos-
3; Hooksett
2. QUOTED
R. Co., 105
Jackson Co.
Am. & Eng.

g bridge.—
passing over
thence to
near by, the
ximate cause
f's property.
son, 91 U. S.
New York C.

R. Co., 35 N. Y. 210; Pennsylvania R. Co.
v. Kerr, 62 Pa. St. 353.

The plaintiffs' bridge was situated three and a half rods from a bridge of the defendants. The latter was burned by fire communicated from the defendants' engine, and while burning the fire therefrom communicated to the plaintiffs' bridge and it was thereby destroyed. *Held*, that under the statute the railroad corporation was liable for the damages caused by the destruction of the plaintiffs' bridge. *Hooksett v. Concord R. Co.*, 38 N. H. 242.

95. Spread from burning oil in a running stream.—When the burning matter is oil, a running stream may form a natural link in the chain of causation. *Kuhn v. Jewett*, 32 N. J. Eq. 647.—DISAPPROVING *Hoag v. Lake Shore & M. S. R. Co.*, 85 Pa. St. 293; *Ryan v. New York C. R. Co.*, 35 N. Y. 210; *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353. FOLLOWING *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 308.

96. Spread from premises of third persons.*—A landowner is not prevented from recovering damages for a fire started by sparks from a locomotive by the fact that it has burned across intervening lands before reaching plaintiff's, if the injury is the direct consequence of original negligence of the company in starting the fire; and whether it is, is a question for the jury. *Henry v. Southern Pac. R. Co.*, 50 Cal. 176, 12 Am. Ry. Rep. 168.—REVIEWING *Ryan v. New York C. R. Co.*, 35 N. Y. 210.—*Henry v. Southern Pac. R. Co.*, 50 Cal. 176, 12 Am. Ry. Rep. 168.—QUOTED IN *Billman v. Indianapolis, C. & L. R. Co.*, 6 Am. & Eng. R. Cas. 41, 76 Ind. 166, 40 Am. Rep. 230.—*Louisville, N. A. & C. R. Co. v. Nitsche*, 45 Am. & Eng. R. Cas. 532, 126 Ind. 229, 26 N. E. Rep. 51.—DISTINGUISHING *Pennsylvania Co. v. Whitlock*, 22 Am. & Eng. R. Cas. 629, 99 Ind. 16.—*Chicago, St. L. & P. R. Co. v. Williams*, 131 Ind. 30, 30 N. E. Rep. 696.—DISAPPROVING *Pennsylvania Co. v. Whitlock*, 99 Ind. 16. FOLLOWING *Louisville, N. A. & C. R. Co. v. Nitsche*, 126 Ind. 229.—*Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579.

Although the land of a third party intervened between the lands of plaintiff which

* General liability for setting out fires, including liability where intervening property is first burned. Effect of distance, see note, 21 L. R. A. 260.

were damaged by fire, and the defendant's road, the injury to plaintiff's land is not too remote to warrant a recovery if it can be shown that the result might have been anticipated from the dropping of fire on defendant's premises, and that the destruction which happened to plaintiff's property was the natural and direct effect of the first fire. *O'Neill v. New York, O. & W. R. Co.*, 40 Am. & Eng. R. Cas. 240, 115 N. Y. 579, 22 N. E. Rep. 217, 26 N. Y. S. R. 269; *affirming* 10 N. Y. S. R. 147, 45 Hun 458.—CRITICISING *Ryan v. New York C. R. Co.*, 35 N. Y. 210. FOLLOWING *Vandenburgh v. Truax*, 4 Den. (N. Y.) 464; *Pollett v. Long*, 56 N. Y. 200; *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 420.—REVIEWED IN *Martin v. New York, O. & W. R. Co.*, 41 N. Y. S. R. 217, 62 Hun 181, 16 N. Y. Supp. 499.

Where two fires are caused by sparks emitted from one of the defendant's engines, and neither of said fires is kindled on the land of the plaintiff, but each is kindled on the land of a different owner, and these two fires spread, finally uniting, and then pass over the property of several landed proprietors, and finally reach the plaintiff's property three and a half to four miles distant from where the fires were first kindled, and there do the damage of which the plaintiff complains—*held*, that the damage is not too remote to be recovered. *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354, 8 Am. Ry. Rep. 230.—DOUBTING AND DISTINGUISHING *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353; *Ryan v. New York C. R. Co.*, 35 N. Y. 210; *Macon & W. R. Co. v. McConnell*, 27 Ga. 481.—FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Bales*, 16 Kan. 252. QUOTED IN *Wright v. Chicago & N. W. R. Co.*, 27 Ill. App. 200.

The fire was first set to the property of one N., thence to a neighboring barn, and thence to the property of plaintiff, about sixty feet from the point where the fire was first set. *Held*: (1) that the injury was not remote, as a matter of law; (2) that the negligence of N. in leaving combustible matter exposed to the danger of fire from the railroad was not an intervening cause interrupting the legal relation of cause and effect, as between the negligence of the defendant and the burning of plaintiff's property, but rather that N.'s negligence was concurrent with that of the defendant, either one of the wrong-doers being answerable for the consequences. *Johnson v. Chi-*

ago, M. & St. P. R. Co., 13 *Am. & Eng. R. Cas.* 460, 31 *Minn.* 57, 16 *N. W. Rep.* 488.

97. Wind, when deemed an intervening cause.*—Where A. negligently, but accidentally, sets his own building on fire, and while it is burning the fire is, by force of the wind, carried to B.'s building, which is thereby destroyed, A. is not liable to B., the wind being an independent intervening cause, and therefore A.'s negligence is not the proximate cause of the injury. *Pennsylvania Co. v. Whitlock*, 22 *Am. & Eng. R. Cas.* 629, 99 *Ind.* 16.—DISAPPROVING *Ryan v. New York C. R. Co.*, 35 *N. Y.* 210; *Pennsylvania R. Co. v. Kerr*, 62 *Pa. St.* 353, 1 *Am. Rep.* 431. DISTINGUISHING *Louisiana Mut. Ins. Co. v. Tweed*, 7 *Wall. (U. S.)* 44. REVIEWING *Milwaukee & St. P. R. Co. v. Kellogg*, 94 *U. S.* 469; *Fent v. Toledo, P. & W. R. Co.*, 59 *Ill.* 349, 14 *Am. Rep.* 13; *Billman v. Indianapolis, C. & L. R. Co.*, 76 *Ind.* 166, 40 *Am. Rep.* 230.—DISAPPROVED IN *Chicago, St. L. & P. R. Co. v. Williams*, 131 *Ind.* 30. DISTINGUISHED IN *Louisville, N. A. & C. R. Co. v. Nitsche*, 126 *Ind.* 229.

The rise of a heavy wind after fire was started, whereby a brand of fire was carried across an intervening ridge of land, and plaintiff's property thereby destroyed, releases the defendant from liability, such wind constituting an independent intervening cause. *Marvin v. Chicago, M. & St. P. R. Co.*, 45 *Am. & Eng. R. Cas.* 540, 79 *Wis.* 140, 47 *N. W. Rep.* 1123.

A warehouse standing near the railroad track was set on fire by the sparks escaping from an engine at a time when there was a strong wind blowing in the direction of plaintiff's stable, which was situated 100 rods from the warehouse. There was no combustible material intervening, but the high wind carried brands from the burning warehouse to the stable of plaintiff, which caused it to take fire and burn up. *Held*, that the burning of the stable was not the natural and proximate consequence of the burning of the warehouse, and that the company was not liable for the burning of the stable. *Toledo, W. & W. R. Co. v. Muthersbaugh*, 71 *Ill.* 572.—DISTINGUISHED IN *Atkinson v. Goodrich Transp. Co.*, 60 *Wis.* 141.

* Wind as an intervening cause in spreading fire started by sparks from an engine. Proximate and remote cause, see 45 *AM. & ENG. R. CAS.* 539, *abstr.*

FOLLOWED IN *Pullman Palace Car Co. v. Laack*, 143 *Ill.* 242. QUOTED AND DISTINGUISHED IN *Wright v. Chicago & N. W. R. Co.*, 27 *Ill. App.* 200.

Extraordinary and unusual wind, when considered as an element of unavoidable accident, see *Palmer v. Missouri Pac. R. Co.*, 76 *Mo.* 217.

98. — and when not.—Where a company negligently allows the accumulation of combustible material on its right of way, which it fires by sparks from a locomotive, which spreads and burns adjoining property, the fact that the fire would not have spread unless the weather had been very dry and the wind strong does not affect the company's liability. *Kellogg v. Chicago & N. W. R. Co.*, 26 *Wis.* 223, 2 *Am. Ry. Rep.* 483.

A high wind, unless shown to be extraordinary, would not be considered as an intervening cause. *East Tenn., V. & G. R. Co. v. Hesters*, 90 *Ga.* 11, 15 *S. E. Rep.* 828.—FOLLOWED IN *East Tenn., V. & G. R. Co. v. Hall*, 90 *Ga.* 17.—*Louisiana Mut. Ins. Co. v. Tweed*, 7 *Wall. (U. S.)* 44.—DISTINGUISHED IN *Pennsylvania Co. v. Whitlock*, 22 *Am. & Eng. R. Cas.* 629, 99 *Ind.* 16. QUOTED IN *Selleck v. Lake Shore & M. S. R. Co.*, 93 *Mich.* 375. RECONCILED IN *Pennsylvania R. Co. v. Kerr*, 62 *Pa. St.* 353.—*Tyler v. Ricamore*, 87 *Va.* 466, 12 *S. E. Rep.* 799. *Smith v. London & S. W. R. Co.*, *L. R.* 6 *C. P.* 14, 40 *L. J. C. P.* 21, 23 *L. T.* 678, 19 *W. R.* 230; *affirming L. R.* 5 *C. P.* 98, 39 *L. J. C. P.* 68, 21 *L. T.* 668, 18 *W. R.* 343.

Where the fire set out, although the blaze and flames were extinguished, remained smoldering in the turf, and, kindled again into flames by an ordinary wind, spread to the land of an adjoining owner, thence to that of his neighbor, and, still smoldering in the turf, was carried by an ordinarily strong wind to the land of another, the company is liable for the loss suffered by such person. *Louisville, N. A. & C. R. Co. v. Nitsche*, 126 *Ind.* 229, 26 *N. E. Rep.* 51.—APPROVING *Milwaukee & St. P. R. Co. v. Kellogg*, 94 *U. S.* 469. CRITICISING *Ryan v. New York C. R. Co.*, 35 *N. Y.* 210; *Pennsylvania R. Co. v. Kerr*, 62 *Pa. St.* 353. DISTINGUISHING *Pennsylvania Co. v. Whitlock*, 99 *Ind.* 16.—FOLLOWED IN *Chicago, St. L. & P. R. Co. v. Williams*, 131 *Ind.* 30.

A change in the direction of the wind after such a fire had been set, without a change in its intensity, is not such an inter-

vening cause as to affect the liability of the railroad. *Northern Pac. R. Co. v. Lewis*, 56 *Am. & Eng. R. Cas.* 86, 7 *U. S. App.* 254, 51 *Fed. Rep.* 658, 2 *C. C. A.* 446.

7. Negligence Resulting in Personal Injury or Death; Loss of Cattle.

99. Personal injuries.*—Where the complaint charges a company with negligence, in allowing sparks to enter his house and there start a fire, there can be no recovery for injuries caused by plaintiff burning his hands in an effort to stop the fire, as such damages are too remote. *Hinchy v. Manhattan R. Co.*, 17 *J. & S. (N. Y.)* 406.

One of the defendant's engines having set fire to grass and weeds on its right of way opposite the premises of O., with whom the plaintiff resided, the plaintiff and O. sought to extinguish the flames, but were unsuccessful; and a high wind having carried the fire toward O.'s barn, which contained some horses owned by the latter, the plaintiff entered the barn to save some property, but before returning therefrom the fire had encompassed the doorway of the barn, and the plaintiff, in making his escape therefrom, was badly burned, and his health and sight seriously impaired. *Held*, upon demurrer to plaintiff's petition, which alleged the above facts, and further, that the fire was caused by defendant's negligence, and that the plaintiff was free from negligence; that the negligence of the defendant was the proximate cause of the injury to the plaintiff. *Liming v. Illinois C. R. Co.*, 45 *Am. & Eng. R. Cas.* 581, 81 *Iowa* 246, 47 *N. W. Rep.* 66.—**EXPLAINING** *Seale v. Gulf, C. & S. F. R. Co.*, 65 *Tex.* 274, 57 *Am. Rep.* 602. **QUOTING** *Milwaukee & St. P. R. Co. v. Kellogg*, 94 *U. S.* 469.

100. Death.—If a company negligently allows sparks to escape from a locomotive and set fire to a house, it is liable for any loss of life which results from the same cause. *Rajnowski v. Detroit, B. C. & A. R. Co.*, 78 *Mich.* 681, 44 *N. W. Rep.* 335; *adhering to* 74 *Mich.* 20, 41 *N. W. Rep.* 847.

An engine was hauling a heavy train up a grade near a powder mill, and immediately

* Personal injuries resulting from fires, liability of company for, see note, 45 *AM. & ENG. R. CAS.* 585.

Proximate and remote cause. Company not liable for one who is burned while attempting to put out a fire it has negligently started, see note, 25 *AM. & ENG. R. CAS.* 333.

after it passed an explosion occurred, killing plaintiff's intestate, who was employed in the mill. The evidence showed that a heavy smoke settled over the mill, and tended to show that the explosion was caused by sparks from the locomotive. There was a conflict of evidence as to whether the stack used on the engine was of the most approved type. *Held*, that the question of the company's liability should have been left to the jury, and it was error to dismiss the complaint. *Babcock v. Fitchburg R. Co.*, 46 *N. Y. S. R.* 796, 64 *Hun* 636, 19 *N. Y. Supp.* 774.—**QUOTING** *Steinweg v. Erie R. Co.*, 43 *N. Y.* 123.

101. Loss of live stock.—Where fire is negligently permitted to escape from the right of way, and it spreads over the land of an adjacent owner, and his cattle pasturing thereon wander into the fire, the company is liable for the resulting injury. In such case the escape of the fire is the proximate cause of the injury. *Chicago, St. L. & P. R. Co. v. Barnes*, 2 *Ind. App.* 213, 28 *N. E. Rep.* 328.—**QUOTING** *Baltimore & P. R. Co. v. Reaney*, 42 *Md.* 117.

It should be presumed that the owner of a pasture would use it for all purposes to which such inclosure is adapted. A railway company by negligence burning a pasture fence would be liable for the value of horses escaping from the pasture from such destruction of the fence and lost to the owner; nor would the liability be lessened or avoided by its ignorance of the fact that the horses had been brought recently from a distance and were likely to stray off. *St. Louis, A. & T. R. Co. v. McKinsey*, 78 *Tex.* 298, 14 *S. W. Rep.* 645.

III. CONTRIBUTORY NEGLIGENCE.

1. In General.

102. Plaintiff's negligence as a defense.*—The property owner must be free from contributory negligence. *Martin v. New York & N. E. R. Co.*, 56 *Am. & Eng. R. Cas.* 79, 62 *Conn.* 331, 25 *Atl. Rep.* 239.

The fact that a person's property is exposed to the reach of sparks of a locomotive engine is no defense to an action for an injury occasioned by the railroad company's

* Contributory negligence as a defense, where company is sued for destroying property by fire, see note, 38 *AM. DEC.* 74. See also 35 *AM. & ENG. R. CAS.* 245, *abstr.*

Contributory negligence in failing to protect property, see note, 49 *AM. & ENG. R. CAS.* 691.

negligence in setting out fire. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 *Am. & Eng. R. Cas.* 603, 27 *Fla.* 1, 9 *So. Rep.* 661. *Philadelphia & R. R. Co. v. Hendrickson*, 80 *Pa. St.* 182.

103. — under certain statutes.—In an action under Colo. Gen. St. § 2798 the doctrine of contributory negligence cannot be invoked by the defendant. *Union Pac. R. Co. v. Arthur*, 2 *Colo. App.* 159, 29 *Pac. Rep.* 1031.

Under Iowa Code, § 1289, a railroad company cannot escape liability for negligently setting out a fire on its right of way, whereby an adjoining owner sustains damage, by showing that the plaintiff was guilty of contributory negligence in exposing his property. *West v. Chicago & N. W. R. Co.*, 38 *Am. & Eng. R. Cas.* 340, 77 *Iowa* 654, 35 *N. W. Rep.* 479, 42 *N. W. Rep.* 512.—**RECONCILING** *Small v. Chicago, R. I. & P. R. Co.*, 50 *Iowa* 338.—**REFERRED TO IN** *Miller v. Chicago, M. & St. P. R. Co.*, 76 *Iowa* 318, 41 *N. W. Rep.* 28.—*Johnson v. Chicago & N. W. R. Co.*, 77 *Iowa* 666, 42 *N. W. Rep.* 512.

In an action to recover for an injury caused by a fire set out by a locomotive the court instructed as follows: "If plaintiff's own negligence directly and proximately contributed to his own injuries, then he cannot recover; but in order to defeat his right of recovery, there must be such contributory negligence on his part as directly and proximately contributed to produce the injuries, and without which his loss would not have been sustained." *Held*, that while the last clause of the instruction may not express the rule as settled by the holdings of this court, it could not have prejudiced defendant, since it was held in *West v. Railway Co.* (77 *Iowa* 654), that under section 1289 of the code, the right of recovery in a case of this kind would not be defeated by the mere contributory negligence of the injured party. *Engle v. Chicago, M. & St. P. R. Co.*, 77 *Iowa* 661, 37 *N. W. Rep.* 6, 42 *N. W. Rep.* 512.—**RECONCILED IN** *McKelvy v. Burlington, C. R. & N. R. Co.*, 84 *Iowa* 455.

The Vermont statute, which provides that "when any injury is done to a building or other property by fire communicated by a locomotive engine of any railroad corporation, the said corporation shall be responsible in damages for such injury, unless they shall show that they have used all due caution and diligence, and employed suitable

expedients to prevent such injury," imposes a more stringent liability than the common law; and in an action brought in New Hampshire to recover damages for injury caused to personal property by fire from a railroad locomotive in Vermont, the liability of the railroad is determined by the law of Vermont, and the doctrine of contributory negligence does not apply. *Laird v. Connecticut & P. R. R. Co.*, 43 *Am. & Eng. R. Cas.* 63, 62 *N. H.* 254, 13 *Am. St. Rep.* 564.—**DISTINGUISHING** *White v. Concord R. Co.*, 30 *N. H.* 188; *Smith v. Eastern R. Co.*, 35 *N. H.* 356. **NOT FOLLOWING** *Clemens v. Hannibal & St. J. R. Co.*, 53 *Mo.* 366; *Burke v. Louisville & N. R. Co.*, 7 *Heisk. (Tenn.)* 451; *Atchison, T. & S. F. R. Co. v. Stanford*, 12 *Kan.* 354; *Spaulding v. Chicago & N. W. R. Co.*, 30 *Wis.* 110. **QUOTING** *Grand Trunk R. Co. v. Richardson*, 91 *U. S.* 454. **REVIEWING** *Cleaveland v. Grand Trunk R. Co.*, 42 *Vt.* 449.

104. Plaintiff's duty to guard against fires, generally.—No obligation rests upon the owners of property along a track to keep it in a condition to be always safe from fires thrown from passing engines. *Richmond & D. R. Co. v. Medley*, 7 *Am. & Eng. R. Cas.* 493, 75 *Va.* 499. *Delaware, L. & W. R. Co. v. Salmon*, 39 *N. J. L.* 299, 14 *Am. Ry. Rep.* 226.

Farmers may cultivate and use their farms and improvements as is customary among farmers, and are not bound to exercise unusual means to guard against fires by railroad companies. *Philadelphia & R. R. Co. v. Hendrickson*, 80 *Pa. St.* 182.

105. Degree of care required of him.—One who builds a hotel near a railroad track assumes the hazards connected with the use of the railroad, and must use a higher degree of care in providing means to protect his property from fire than a person in a less exposed position. *Chicago & A. R. Co. v. Pennell*, 94 *Ill.* 448.

Where property is situate near a railroad track so as to be constantly exposed to fire from passing trains, the owner must use such care for its protection as prudence would dictate under the circumstances. *Collins v. New York C. & H. R. R. Co.*, 5 *Hun (N. Y.)* 499; *affirmed in* 71 *N. Y.* 609.—**QUOTED IN** *New Brunswick R. Co. v. Robinson*, 11 *Can. Sup. Ct.* 688.

A person maintaining a warehouse near a railroad track is only bound to exercise ordinary care and prudence under the circum-

stances to avoid fire; hence it is error to instruct the jury that he must keep the warehouse in such condition as very prudent and cautious men would generally keep their own property under like circumstances. *Ward v. Milwaukee & St. P. R. Co.*, 29 Wis. 144, 12 Am. Ry. Rep. 193.—MODIFYING *Potter v. Chicago & N. W. R. Co.*, 21 Wis. 372; *Dreher v. Fitchburg*, 22 Wis. 675.—QUOTED IN *Murphy v. Chicago & N. W. R. Co.*, 45 Wis. 222.

It is error to refuse to instruct that a person owning property contiguous to a railroad has a right to continue to use the property after the railroad has been built, in the same manner as before, if he takes reasonable care to prevent or extinguish fires. *Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co.*, 54 Am. & Eng. R. Cas. 512, 70 Miss. 119, 12 So. Rep. 156.

A plaintiff is only bound to use ordinary care to extinguish or prevent the spread of a fire started by a railroad company, and he is not bound to use extraordinary means to do so. *Bevier v. Delaware & H. Canal Co.*, 13 Hun (N. Y.) 254.—APPLIED IN *Hogle v. New York C. & H. R. R. Co.*, 28 Hun 363.

A landowner near a railroad track is only chargeable with contributory negligence where the danger of fire from locomotives is seen—that is, where a fire has already been started—and he fails to do what prudence requires to stop the fire, or what is some act inconsistent with the preservation of his property; but he is not chargeable with contributory negligence for a danger that is unseen, but which might be anticipated, in which case he is not bound to provide against probable fires, or refrain from using his property in the ordinary way, if that be prudent. *Snyder v. Pittsburgh, C. & St. L. R. Co.*, 11 W. Va. 14. *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223, 2 Am. Ry. Rep. 483.—APPROVED IN *Pullman Palace Car Co. v. Laack*, 143 Ill. 242.

106. Contributory negligence must have been proximate cause.—In order to hold a landowner for contributory negligence where injury is done to his property by fire from an engine, he must have done some act or omitted some duty which is the proximate cause of the injury, concurring with the negligence of the company. *Philadelphia & R. R. Co. v. Hendrickson*, 80 Pa. St. 182.

Where the direct cause of a loss is the negligence of the company in starting a

fire, the owner is not prevented from recovering by remote contributory negligence on his part, such as leaving dry grass along the fence way, which may aid in spreading the fire. *Fitch v. Pacific R. Co.*, 45 Mo. 322.—QUOTING *Morrissey v. Wiggins Ferry Co.*, 43 Mo. 380. REVIEWING *Huelsenkamp v. Citizens' R. Co.*, 37 Mo. 537.—FOLLOWED IN *Patton v. St. Louis & S. F. R. Co.*, 23 Am. & Eng. R. Cas. 364, 87 Mo. 117.

Where, in an action for the destruction of plaintiff's fence by fire, it appeared that the plaintiff's fence was three fourths of a mile from the fence which was first ignited by sparks emitted from an engine of defendant, but was connected with it by a continuous line of fence joined together by intermediate landowners, and that the owner of the fence which originally caught on fire was guilty of contributory negligence—held, that the negligence of plaintiff in connecting with such fence was remote, and did not affect his right to maintain the action. *Doggett v. Richmond & D. R. Co.*, 78 N. Car. 305, 16 Am. Ry. Rep. 193.—APPLIED IN *Pielke v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 349, 5 Dak. 444, 41 N. W. Rep. 669. QUOTED IN *Gunter v. Wicker*, 85 N. Car. 310; *Cornwall v. Charlotte, C. & A. R. Co.*, 97 N. Car. 11, 2 S. E. Rep. 659.

107. What acts constitute contributory negligence, generally.*—If the plaintiff was in a position to have prevented any damage from fire to his property without incurring unusual danger, and made no effort to do so, it was negligence on his part, and precludes his right of recovery. *Eaton v. Oregon R. & N. Co.*, 43 Am. & Eng. R. Cas. 57, 19 Oreg. 391, 24 Pac. Rep. 415.

The owners of a warehouse owned a railroad track running on their own premises near it, and employed a railroad company to send an engine to draw cars over it for their accommodation. The engine threw off sparks badly, and this they observed and complained of, but nevertheless continued to make use of it for a long time. At last the warehouse was set on fire and burned by sparks emitted by it. Held, that the owners had no redress against the railroad company for the burning. *Marquette*,

*What is and what is not contributory negligence, as applied to fires started by sparks from locomotive, see note, 32 AM. REP. 98.

H. & O. R. Co. v. Spear, 7 *Am. & Eng. R. Cas.* 486, 44 *Mich.* 169, 6 *N. W. Rep.* 202.

It is immaterial that the railroad company, on repeated applications made that it should repair the engine, had promised to do so "some time," the use continuing thereafter with the knowledge of plaintiffs, and on their own application. *Marquette, H. & O. R. Co. v. Spear*, 7 *Am. & Eng. R. Cas.* 486, 44 *Mich.* 169, 6 *N. W. Rep.* 202.

108. — and what do not.—Where a company negligently runs its train at an unlawful speed, causing an unusual emission of sparks, the fact that a pane of glass was out of the window in plaintiff's house, which allowed such sparks to enter, will not relieve the company of liability. *Martin v. Western Union R. Co.*, 23 *Wis.* 437.—QUOTED IN *Murphy v. Chicago & N. W. R. Co.*, 45 *Wis.* 222.

109. Failure to anticipate and guard against the company's negligence.—A person having property adjacent to a railroad is not bound to keep his property in such a condition as to guard against the negligence of the railroad company, but every person has the right to enjoy his property in the ordinary manner; and while one is charged with the duty of saving his property when he can do so, he is under no obligation to stand guard over it, continually watching it, to protect it from the negligence of a railroad company. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 *Am. & Eng. R. Cas.* 603, 27 *Fla.* 1, 9 *So. Rep.* 661.—DISTINGUISHING *Coates v. Missouri, K. & T. R. Co.*, 61 *Mo.* 38; *Ohio & M. R. Co. v. Shanefelt*, 47 *Ill.* 497; *Chicago & N. W. R. Co. v. Simonson*, 54 *Ill.* 504; *Murphy v. Chicago & N. W. R. Co.*, 45 *Wis.* 222; *Kesee v. Chicago & N. W. R. Co.*, 30 *Iowa* 78; *Kansas Pac. R. Co. v. Brady*, 17 *Kan.* 380.—*Ft. Scott, W. & W. R. Co. v. Tubbs*, 49 *Am. & Eng. R. Cas.* 685, 47 *Kan.* 630, 28 *Pac. Rep.* 612. *Lindsay v. Winona & St. P. R. Co.*, 7 *Am. & Eng. R. Cas.* 488, 29 *Minn.* 411, 43 *Am. Rep.* 228, 13 *N. W. Rep.* 191.—DISTINGUISHED IN *Carner v. Chicago, St. P., M. & O. R. Co.*, 43 *Minn.* 375.—*Clarke v. Chicago, St. P., M. & O. R. Co.*, 33 *Minn.* 359, 23 *N. W. Rep.* 536. *Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co.*, 54 *Am. & Eng. R. Cas.* 512, 70 *Miss.* 119, 12 *So. Rep.* 156.—QUOTING *Salmon v. Delaware, L. & W. R. Co.*, 38 *N. J. L.* 5.

Under *Ill. Starr & C. St. ch. 114*, par.

104, the owner of property is not chargeable with contributory negligence because he uses the same in the manner he would if no railroad passed through or near it. *Lake Erie & W. R. Co. v. Kirts*, 29 *Ill. App.* 175.

110. Making no attempt to extinguish fire.—A property owner cannot recover for a loss by fire where he could have prevented the injury, yet made no effort to do so; but a failure to make the attempt is not contributory negligence where the evidence shows that an attempt to suppress the fire would have been fruitless. *Tilley v. St. Louis & S. F. R. Co.*, 32 *Am. & Eng. R. Cas.* 324, 49 *Ark.* 535, 6 *S. W. Rep.* 8.

If it be in the power of a plaintiff by reasonable efforts to prevent the increase of a fire, he should use that power; otherwise he cannot recover, the origin of the fire being unintentional. *Hogle v. New York C. & H. R. R. Co.*, 28 *Hun (N. Y.)* 363.—APPLYING *Bevier v. Delaware & H. Canal Co.*, 13 *Hun* 254; *Milton v. Hudson River Steamboat Co.*, 37 *N. Y.* 214.

If there was any intervening negligence in the effort to extinguish the fire, either by the intermediate landowners or their neighbors who assembled for that purpose, when their endeavors properly executed might have been successful, the plaintiff cannot recover. *Doggett v. Richmond & D. R. Co.*, 78 *N. Car.* 305, 16 *Am. Ry. Rep.* 193.

A plaintiff cannot recover for a loss by fire started by a passing train, where the evidence shows that his son, who at the time was in his service, saw the fire and was in a position to have prevented it, but made no effort to do so. *Illinois C. R. Co. v. McClelland*, 42 *Ill.* 355.—REVIEWED IN *St. Louis, I. M. & S. R. Co. v. Hecht*, 9 *Am. & Eng. R. Cas.* 222, 38 *Ark.* 357.

The owner of growing crops destroyed by fire negligently communicated from a locomotive cannot recover of the company if his servant, intrusted with the care of the premises, was able, when he discovered the fire, to extinguish it or prevent its spreading, and willfully or negligently failed to do either. *Illinois C. R. Co. v. McKay*, 69 *Miss.* 139, 12 *So. Rep.* 447.

In an action to recover the value of a mill destroyed by fire alleged to have been negligently set out by a locomotive, where it is shown that the employes of the mill were charged with the duty of extinguishing fires, it is not error to instruct that if,

not chargeable because he would if not hear it. *Lake Ill. App.* 175. **Attempt to extinguish.**—Where owner cannot make the negligence where attempt to suppress fruitless. *R. Co., 32 Am. 535, 6 S. W.*

plaintiff by reason of increase of a fire otherwise he the fire being *York C. & 363.*—APPLY *Canal Co., 13 River Steam-*

ing negligence fire, either by or their neighbor, where the executed might plaintiff cannot *and D. R. y. Rep.* 193.

for a loss by , where the , who at the e fire and was d it, but made *R. Co. v. Mc- EWED IN St. echt, 9 Am. &*

ps destroyed eated from a e company e care of the iscovered the at its spread- y failed to do . *McKay, 69*

after discovering the fire, they could have extinguished it, but failed to use ordinary diligence in doing so, the plaintiff cannot recover. *Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co., 54 Am. & Eng. R. Cas. 512, 70 Miss. 119, 12 So. Rep. 156.*

Where a landowner is working in his field, the fact that he knew that a fire had been burning on the company's right of way, and was still smouldering in old stumps and logs, does not make him guilty of contributory negligence, as a matter of law, in failing to leave his work and extinguish the fire. *Clune v. Milwaukee & N. R. Co., 75 Wis. 532, 44 N. W. Rep. 843.*

Though a burning railroad car which is run off on a switch to save the train and main track is negligently stopped so near another's property as to ignite and consume it, the company is not liable for the injury, if the owner of the property, or his agents or employes having charge of it, are present and can save it, but refuse to do so; or if they arrive after the property is on fire they must save what they can, or that omitted to be saved will go in mitigation of the damages; but agents or employes of the owner in other business not connected with the property are under no legal obligation to protect it, and their omission to do so is not contributory negligence on the part of the owner. *St. Louis, I. M. & S. R. Co. v. Hecht, 9 Am. & Eng. R. Cas. 222, 38 Ark. 357.*—REVIEWING *Illinois C. R. Co. v. McClelland, 42 Ill. 356.*—DISTINGUISHED IN *Northern Pac. R. Co. v. Lewis, 51 Fed. Rep. 658, 7 U. S. App. 254, 2 C. C. A. 446.*

111. Delay in attempting to put out fire.—An unnecessary delay of ten or fifteen minutes by a landowner in attempting to extinguish a fire set by a passing locomotive, and which destroyed his property, will not defeat a recovery if he could not have prevented the injury even if he had acted with the utmost promptness. *Mills v. Chicago, M. & St. P. R. Co., 76 Wis. 422, 45 N. W. Rep. 225.*

112. Failure to plow around property.—Where hay is cut from lands adjoining a railroad, but stacked 250 yards away, the owner is not bound to plow around it or make other guards to prevent its burning from fires started by locomotives; neither is it contributory negligence to

leave the land between the track and the hay stacks in its natural condition as it was mowed over. *Gulf, C. & S. F. R. Co. v. Johnson, 54 Fed. Rep. 474, 10 U. S. App. 629, 4 C. C. A. 447.*

Whether the failure of a landowner to protect his stacks of wheat by plowing around them is contributory negligence is largely a question for the jury. *Slossen v. Burlington, C. R. & N. R. Co., 11 Am. & Eng. R. Cas. 67, 60 Iowa 215, 14 N. W. Rep. 244.* *Karsen v. Milwaukee & St. P. R. Co., 7 Am. & Eng. R. Cas. 501, 29 Minn. 12, 11 N. W. Rep. 122.*

A person who stacks his hay on the open prairie near a railroad track, with dry grass all around the hay and dry grass intervening all the way from the stack to the railroad track, without taking any means for the protection of his hay from fire, may be guilty of negligence in not taking better care of his property so as to protect the same from fire. *Kansas Pac. R. Co. v. Brady, 17 Kan. 380.*—DISTINGUISHED IN *Behrens v. Kansas Pac. R. Co., 8 Am. & Eng. R. Cas. 184, 5 Colo. 400; Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co., 27 Fla. 1.*—*Kesee v. Chicago & N. W. R. Co., 30 Iowa 78.*—DISTINGUISHED IN *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co., 27 Fla. 1; Ormond v. Central Iowa R. Co., 58 Iowa 742.* EXPLAINED IN *Garrett v. Chicago & N. W. R. Co., 36 Iowa 121.* REVIEWED IN *Small v. Chicago, R. I. & P. R. Co., 50 Iowa 338.*

A plaintiff is not necessarily guilty of contributory negligence in not having fire breaks plowed around his straw, timber, etc. *Burlington & M. R. Co. v. Westover, 4 Neb. 268.*

Where fire is communicated to plaintiff's lands through combustible matter on the company's right of way, it is not error to refuse to submit to the jury the question of plaintiff's contributory negligence in failing to plow a strip along the right of way, and in allowing dry stubble and grass to remain on his land. *Kellogg v. Chicago & N. W. R. Co., 26 Wis. 223, 2 Am. Ry. Rep. 483.*

113. Failure to remove movable property.—Where fire is communicated to a building through the negligence of a railroad, the owner cannot recover for the loss of such of the property as he could easily and without danger have saved from destruction. *Toledo, P. & W. R. Co. v.*

* Contributory negligence in unnecessary delay in extinguishing fires, see 43 AM. & ENG. R. CAS. 61, *abstr.*

Pindar, 53 Ill. 447. *Chicago & A. R. Co. v. Pennell*, 94 Ill. 448.

114. Erecting building in an exposed place or position.—A person has the right to construct buildings on any part of his property, and to enjoy the same, without rendering himself liable to the negligence of a railroad company. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 Am. & Eng. R. 603, 27 Fla. 1, 9 So. Rep. 661.

A person who, after the construction of a railroad, builds in an exposed position, is not thereby precluded from recovering for the destruction of his premises through the want of proper caution on the part of the railroad company. *Burke v. Louisville & N. R. Co.*, 7 Heisk. (Tenn.) 451, 12 Am. Ry. Rep. 497.

115. — in close proximity to the track.—One is not guilty of negligence in building a house near a railroad track, so as to prevent a recovery if burned through the negligence of the company, though he knew that the danger of fire was thereby increased. *Cincinnati, N. O. & T. P. R. Co. v. Barker*, 56 Am. & Eng. R. Cas. 106, 94 Ky. 71, 21 S. W. Rep. 347.

Whilst a party who erects his buildings on or near a railroad track is presumed to know the dangers incident to the use of steam as a motive power, and assumes some of the hazards to which his property is exposed, yet where a party erects his building at a reasonably safe distance from the railroad track, he cannot be held guilty of negligence because his building is so situated as to be liable to be set on fire by another subsequently erected in dangerous proximity to the track. *Toledo, W. & W. R. Co. v. Maxfield*, 72 Ill. 95.

A person who builds in proximity to the wood yard of a railroad must do so with reference to the right of the company to pile their wood, when necessary, in all portions of such yard, and will not be liable by reason of so doing, for a fire communicated to the plaintiff's property from the wood. *Macon & W. R. Co. v. McConnell*, 27 Ga. 481.—DOUBTED AND DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354.

Proof that the owner of a mill located upon the company's right of way was the occupant of the land under color of title, does not show contributory negligence on the part of the plaintiff. *Milwaukee & St. P.*

R. Co. v. Kellogg, 94 U. S. 469, 17 Am. Ry. Rep. 309.

Where the plaintiff's barn was burned by the negligence of the defendants, a railroad corporation, although the plaintiff was guilty of negligence in constructing his barn in such a way that hay in it would be exposed to sparks blown against or falling upon the barn, that will not disentitle him to recover if the defendants might, by the exercise of ordinary care and caution on their part, have avoided the consequences of plaintiff's carelessness or neglect. *Robinson v. New Brunswick R. Co.*, 23 New Brun. 323.—*APPROVING Tuff v. Warman*, 2 C. B. N. S. 740; *Radley v. London & N. W. R. Co.*, L. R. 1 App. Cas. 754.

116. Not removing building after road built.—Where a railroad is constructed one hundred feet from a building, it is not likely to be fired by sparks from locomotives that are properly constructed and managed, and it is not contributory negligence on the part of the owner to fail to move such building farther from the track. *Castwell v. Chicago & N. W. R. Co.*, 42 Wis. 193, 15 Am. Ry. Rep. 162.

In such case it is not competent for the company to show by parol evidence that in condemning a right of way over the land, the cost of removing the building was assessed as a part of the damages. *Castwell v. Chicago & N. W. R. Co.*, 42 Wis. 193, 15 Am. Ry. Rep. 162.

Where a railroad is condemning a right of way over the lands of a minor, and there is assessed and paid a sum of money to the minor's guardian to remove a barn out of the danger of fire from passing locomotives, the fact that the barn is not removed is not such contributory negligence as will bar the owner's right to recover for the subsequent destruction of the barn through the negligence of the company in starting a fire. *Jefferis v. Philadelphia, W. & B. R. Co.*, 3 Houst. (Del.) 447.

And the fact that the owner of the barn suffered the shingle roof thereon to become decayed and peculiarly liable to take fire, is not such contributory negligence as would bar a recovery, but may be considered by the jury in assessing the damages. *Jefferis v. Philadelphia, W. & B. R. Co.*, 3 Houst. (Del.) 447.

117. Allowing building to remain in highly inflammable condition.—Where a barn quite near the track was

17 *Am. Ry.*

s burned by
ants, a rail-
plaintiff was
ing his barn
d be exposed
ng upon the
m to recover
e exercise of
their part,
of plaintiff's
son v. New
Brun. 323.—
C. B. N. S.
W. R. Co., L.

ding after
oad is con-
in a building,
sparks from
constructed
contributory
owner to fail
er from the
W. R. Co.,
62.

etent for the
ence that in
ver the land,
building was
res. *Caswell*
2 *Wis.* 193,

ning a right
or, and there
money to the
barn out of
locomotives,
moved is not
will bar the
e subsequent
gh the negli-
gting a fire.
B. R. Co.,

r of the barn
n to become
to take fire,
nce as would
onsidered by
images. *Jef-*
B. R. Co., 3

to remain
ndition.—
e track was

negligently burned by sparks from a locomotive—*held*, not evidence of contributory negligence that the owner suffered the roof to be in such a condition that it was more liable to take fire than if it had a secure and safe roof. *Philadelphia & R. R. Co. v. Hendrickson*, 80 Pa. St. 182.—FOLLOWED IN *Lehigh Valley R. Co. v. McKeen*, 90 Pa. St. 122.

In an action to recover for buildings adjoining the railroad, burned by defendant's negligence, the contributory negligence of plaintiff in the manner of constructing such buildings, and the manner of using them after construction, may be set up in defense. If the jury find that the fire would not have occurred if the plaintiff had used such care in the construction and use of his property as a man of ordinary prudence would have used under like circumstances, the plaintiff cannot recover. Thus, where there is evidence that the plaintiff permitted an accumulation of hay and shavings under the buildings destroyed, and with the side next the railroad left open below the sills, the question of contributory negligence should be submitted to the jury. *Murphy v. Chicago & N. W. R. Co.*, 45 *Wis.* 222, 18 *Am. Ry. Rep.* 17.—DISTINGUISHING *Kellogg v. Chicago & N. W. R. Co.*, 26 *Wis.* 223; *Erd v. Chicago & N. W. R. Co.*, 41 *Wis.* 65. QUOTING *Ingersoll v. Stockbridge & P. R. Co.*, 8 *Allen (Mass.)* 438; *Vaughan v. Taff Vale R. Co.*, 3 *H. & N.* 743; *Curry v. Chicago & N. W. R. Co.*, 43 *Wis.* 665; *Ward v. Milwaukee & St. P. R. Co.*, 29 *Wis.* 144; *Martin v. Western Union R. Co.*, 23 *Wis.* 437; *Lawrence v. Milwaukee, L. S. & W. R. Co.*, 42 *Wis.* 322. REVIEWING *Cook v. Champlain Transp. Co.*, 1 *Den. (N. Y.)* 91; *Rowell v. Railroad Co.*, 57 *N. H.* 132; *Fero v. Buffalo & S. L. R. Co.*, 22 *N. Y.* 214; *Salmon v. Delaware, L. & W. R. Co.*, 38 *N. J. L.* 5; *Jones v. Sheboygan & F. du L. R. Co.*, 42 *Wis.* 306; *Ross v. Boston & W. R. Co.*, 6 *Allen* 87.—DISTINGUISHED IN *Gibbons v. Wisconsin Valley R. Co.*, 25 *Am. & Eng. R. Cas.* 479, 66 *Wis.* 161; *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 27 *Fla.* 1. EXPLAINED IN *Gram v. Northern Pac. R. Co.*, 1 *N. Dak.* 252.

118. Negligence of bailee imputed to owner.—The contributory negligence of a bailee of cotton, whereby it was consumed by fire proceeding from an engine, is imputable to the owner thereof. If, in a suit against a railway company, in which a

judgment is obtained against it, in such case, a charge embodying the above doctrine is refused, it will constitute cause for reversal, unless it clearly appear that the company was not injured by the refusal to give the charge. *Texas & P. R. Co. v. Tankersley*, 63 *Tex.* 57.

119. Negligence of owner of other building not imputed to plaintiff.—In an action to recover the value of an elevator, alleged to have been burned by fire communicated to it from the building of another which was set on fire by sparks from a locomotive on defendant's railroad—*held*, that the contributory negligence of the owner of the building first burned would not constitute a defense. *Small v. Chicago, R. I. & P. R. Co.*, 55 *Iowa* 582, 8 *N. W. Rep.* 437.—REFERRED TO IN *Ormond v. Central Iowa R. Co.*, 58 *Iowa* 742.

120. Comparative negligence—Illinois doctrine.*—Where fire is ignited on the right of way by reason of dry grass and weeds thereon, and communicated to the adjoining fields by the negligence of the owner in not keeping them free from combustible materials, the owner cannot recover, unless the negligence of the company is greater than his own. But where the adjoining land is woodland, that fact should be considered as abating the degree of diligence required of the landowner, on account of the greater difficulty of keeping such land clear of inflammable matter. *Chicago & N. W. R. Co. v. Simonson*, 54 *Ill.* 504.—DISTINGUISHED IN *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 27 *Fla.* 1.

The following instructions—*held*, correct: If the jury believed from the evidence that plaintiffs had been guilty of negligence in leaving their property in an exposed condition, in a warehouse near to the railroad, with combustible matter in it likely to take fire from sparks emitted from the engine of the defendant, and in carelessly leaving the building in such a condition that the sparks might enter and come in contact with the combustible matter, then they should find for the defendant, unless the further proof showed that the defendant was guilty of gross negligence in not having used the precaution in applying to its engine the best known means of preventing the escape of

* Illinois doctrine of comparative negligence in actions for destroying property by fire, see note, 38 *AM. DEC.* 76.

fire, or in the manner of running its engine. *Great Western R. Co. v. Haworth*, 39 Ill. 346. *Ohio & M. R. Co. v. Shanefelt*, 47 Ill. 497.—DISAPPROVED IN *Salmon v. Delaware, L. & W. R. Co.*, 38 N. J. L. 5. DISTINGUISHED IN *Jacksonville, T. & K. W. R. Co. v. Peninsular L. T. & M. Co.*, 27 Fla. 1.

2. *Allowing the Accumulation of Combustible Materials.*

a. Near the Right of Way.

121. Generally.*—A landowner is not guilty of contributory negligence where he fails to keep his adjoining land and right of way free from combustible materials, as it is not his duty to do so. *Pittsburgh, C. & St. L. R. Co. v. Jones*, 11 Am. & Eng. R. Cas. 76, 86 Ind. 496, 44 Am. Rep. 334. *Richmond & D. R. Co. v. Medley*, 7 Am. & Eng. R. Cas. 493, 75 Va. 499. *Erd v. Chicago & N. W. R. Co.*, 41 Wis. 65.—FOLLOWING *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223.—APPROVED IN *Gram v. Northern Pac. R. Co.*, 1 N. Dak. 252. DISTINGUISHED IN *Murphy v. Chicago & N. W. R. Co.*, 45 Wis. 222.

He may cultivate, build upon, and use his lands, or leave them in a state of nature, as he may see proper, and will take upon himself no other risks than such as are incident to the operation of the road with proper care by the company, and will, nevertheless, be entitled to damages for injuries by fires arising from the negligence of the company in the construction or management of its locomotives, or in the condition in which its track is suffered to remain. *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 299, 14 Am. Ry. Rep. 226.

Acquisition of land for the purposes of a railroad does not embarrass the right of the owner of adjoining lands not taken, in the freest use of them in any lawful business, nor expose him to be charged with contributory negligence if his property of an inflammable nature, necessarily and carefully used in the course of such business, is set afire by sparks from a defective or unskillfully managed locomotive. *Kalbfleisch v. Long Island R. Co.*, 29 Am. & Eng. R. Cas. 179, 102 N. Y. 520, 7 N. E. Rep. 557, 2 N. Y. S. R. 473, 55 Am. Rep. 832.—APPLYING *Fero v. Buffalo & S. L. R. Co.*, 22 N. Y. 209.

*Stacking hay near track is not contributory negligence, see note, 23 AM. & ENG. R. CAS. 369.

Plaintiff is not bound to clear the ground around his wood pile, of combustible material. *Northern Pac. R. Co. v. Lewis*, 51 Fed. Rep. 658, 7 U. S. App. 254, 2 C. C. A. 446.

The duty of a company is only to run its trains with reference to property along its line providently used by the owners thereof. It is not bound to shut off steam, or to otherwise increase precautions while running, because the adjacent property owner carelessly exposes his property to fire. *Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co.*, 54 Am. & Eng. R. Cas. 512, 70 Miss. 119, 12 So. Rep. 156.

122. Brushwood, fallen timber, etc.—It is not necessarily contributory negligence, as a matter of law, for the plaintiff to allow dry limbs, brush, grass, and other combustible matter to accumulate on his premises adjacent to a railroad, so as to bar him of a recovery if such accumulation contributes to a fire started by the company; but whether it is contributory negligence is a question for the jury. *Bevier v. Delaware & H. Canal Co.*, 13 Hun (N. Y.) 254. *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 8 Am. & Eng. R. Cas. 717, 79 Ind. 111. *Philadelphia & R. R. Co. v. Schultz*, 2 Am. & Eng. R. Cas. 271, 93 Pa. St. 341. *Jaffrey v. Toronto, G. & B. R. Co.*, 23 U. C. C. P. 553.

In an action against a railway company for negligently allowing their land adjoining the track to remain covered with brushwood, etc., whereby cinders from the locomotive fell thereon and caused a fire, which extended to the plaintiff's land, it was shown that the railway fence in which the fire originated was a brush fence, the line having been recently built through a new country. The plaintiff had been employed by the defendants to cut down the trees on his own land within 100 feet of the centre of the track, under the C. S. C. c. 66, § 4, and he had felled them lengthwise with the track and left them there. *Held*, that under the circumstances the plaintiff was not guilty of contributory negligence in having left the trees felled by him on his own land. *Holmes v. Midland R. Co.*, 35 U. C. Q. B. 253.—QUOTING *Vaughan v. Taff Vale R. Co.*, 3 H. & N. 743.

123. Cotton.—In an action to recover damages for cotton destroyed by fire from a railway engine, the cotton being in plaintiff's cotton yard near the railway, a charge to the effect that "plaintiffs had a right to place their cotton upon their cotton yard,

and in so doing they would not, on that account alone, be guilty of negligence, although the cotton yard was in close proximity to defendant's roadbed," was error, it being a question for the jury. *Texas & P. R. Co. v. Levi*, 13 *Am. & Eng. R. Cas.* 464, 59 *Tex.* 674.—FOLLOWED IN *Martin v. Missouri Pac. R. Co.*, 3 *Tex. Civ. App.* 133.

124. Dry grass.—The owner of land through which a railroad runs is not under any obligation to keep the grass cut on the right of way, nor to remove dry grass and other combustibles from the right of way or from his adjoining land. *Pittsburgh, C. & St. L. R. Co. v. Jones*, 11 *Am. & Eng. R. Cas.* 76, 86 *Ind.* 496, 44 *Am. Rep.* 334. *Patton v. St. Louis & S. F. R. Co.*, 23 *Am. & Eng. R. Cas.* 364, 87 *Mo.* 117.—APPROVING *Lester v. Kansas City, St. J. & C. B. R. Co.*, 60 *Mo.* 265; *Coates v. Missouri, K. & T. R. Co.*, 61 *Mo.* 38; *Flynn v. San Francisco & S. J. R. Co.*, 40 *Cal.* 14; *Vaughan v. Taff Vale R. Co.*, 3 *H. & N.* 743; *Salmon v. Delaware, L. & W. R. Co.*, 38 *N. J. L.* 5, 39 *N. J. L.* 299. FOLLOWING *Fitch v. Pacific R. Co.*, 45 *Mo.* 322. QUOTING *Smith v. Hannibal & St. J. R. Co.*, 37 *Mo.* 287. RECONCILING *Palmer v. Missouri Pac. R. Co.*, 76 *Mo.* 217.—*Houston & T. C. R. Co. v. McDonough*, 1 *Tex. App. (Civ. Cas.)* 354.

Where a landowner stacks hay near a railroad track it is not contributory negligence for him to fail to burn the grass from the land between the hay and the track. *Louisville, N. A. & C. R. Co. v. Hart*, 119 *Ind.* 273, 21 *N. E. Rep.* 753.

Where a fire is started on a company's right of way, and is driven by a high wind across an intervening farm before it reaches plaintiff's, he is not prevented from recovering by having suffered dry grass and other combustible matter to remain on his land. *Palmer v. Missouri Pac. R. Co.*, 76 *Mo.* 217.—RECONCILED IN *Patton v. St. Louis & S. F. R. Co.*, 23 *Am. & Eng. R. Cas.* 364, 87 *Mo.* 117.

Persons occupying farms along railroads are entitled to cultivate and use them in the manner customary among farmers, and may recover for damages caused by fire resulting from the negligence of a railway company, although they have not plowed the dry grown grass, or taken other like unusual means to guard against such negligence. *Snyder v. Pittsburgh, C. & St. L. R. Co.*, 11 *W. Va.* 14, 18 *Am. Ry. Rep.* 154.—QUOTING

Vaughan v. Taff Vale R. Co., 3 *H. & N.* 679; *Kellogg v. Chicago & N. W. R. Co.*, 26 *Wis.* 223.

The abutting landowner has an equal duty with the company to keep combustibles, such as dry grass, etc., cleared away from his lands adjoining a right of way. *Ohio & M. R. Co. v. Shanefelt*, 47 *Ill.* 497. *Coates v. Missouri, K. & T. R. Co.*, 61 *Mo.* 38, 8 *Am. Ry. Rep.* 60.—FOLLOWING *Fitch v. Pacific R. Co.*, 45 *Mo.* 324.—APPROVED IN *Patton v. St. Louis & S. F. R. Co.*, 23 *Am. & Eng. R. Cas.* 364, 87 *Mo.* 117; *Louisville & N. R. Co. v. Reese*, 38 *Am. & Eng. R. Cas.* 342, 85 *Ala.* 497, 5 *So. Rep.* 283, 7 *Am. St. Rep.* 66. CRITICISED IN *Atchison, T. & S. F. R. Co. v. Bales*, 16 *Kan.* 252. DISTINGUISHED IN *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 27 *Fla.* 1.

125. — and stubble.—To permit dry grass and stubble to accumulate on plaintiff's land, or on land between his and a railroad, is not negligence *per se*. *Louisville, N. A. & C. R. Co. v. Kriming*, 87 *Ind.* 351. *Chicago, St. L. & P. R. Co. v. Burger*, 124 *Ind.* 275, 24 *N. E. Rep.* 981. *Flynn v. San Francisco & S. J. R. Co.*, 40 *Cal.* 14.—APPROVED IN *Patton v. St. Louis & S. F. R. Co.*, 23 *Am. & Eng. R. Cas.* 364, 87 *Mo.* 117.

Persons occupying farms along a railroad may cultivate and use them in the manner customary among farmers, and may recover for damages by fire resulting from the negligence of the railway company, although they have not plowed up stubble or taken other like unusual means to guard against the negligence of the company. *Houston & T. C. R. Co. v. McDonough*, 1 *Tex. App. (Civ. Cas.)* 354. *Kellogg v. Chicago & N. W. R. Co.*, 26 *Wis.* 223, 2 *Am. Ry. Rep.* 483.—QUOTED IN *Snyder v. Pittsburgh, C. & St. L. R. Co.*, 11 *W. Va.* 14.

126. Fallen leaves.—A person owning land contiguous to a railroad is not obliged to keep the leaves falling from his trees from being carried by the wind to such railroad, nor to keep his lands clear of leaves and combustible matter; nor, on failure to perform such acts, does he become contributory to the production of a fire originating in the carelessness, on its own land, of the railroad company. *Salmon v. Delaware, L. & W. R. Co.*, 38 *N. J. L.* 5, 39 *N. J. L.* 299, 13 *Am. Ry. Rep.* 14.—DISAPPROVING *Ohio & M. R. Co. v. Shanefelt*, 47 *Ill.* 497; *Illinois C. R. Co. v. Frazier*, 47 *Ill.*

505; *Illinois C. R. Co. v. Nunn*, 51 Ill. 78.—APPROVED IN *Patton v. St. Louis & S. F. R. Co.*, 23 Am. & Eng. R. Cas. 364, 87 Mo. 117; *Gram v. Northern Pac. R. Co.*, 1 N. Dak. 252; *Boss v. Northern Pac. R. Co.*, 2 N. Dak. 128. FOLLOWED IN *Kuhn v. Jewett*, 32 N. J. Eq. 647; *Snyder v. Pittsburgh, C. & St. L. R. Co.*, 11 W. Va. 14. QUOTED IN *Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co.*, 70 Miss. 119. REVIEWED IN *Murphy v. Chicago & N. W. R. Co.*, 45 Wis. 222.—*Snyder v. Pittsburgh, C. & St. L. R. Co.*, 11 W. Va. 14, 18 Am. Ry. Rep. 154.

127. Refuse matter from mill.—The fact that plaintiff allowed refuse combustible material to accumulate around his saw mill in near proximity to a logging railroad is not contributory negligence. He had a right to use such material to fill up waste and low places about the mill, just as he was accustomed to do before the railroad was built. *Kendrick v. Towle*, 60 Mich. 363, 1 Am. St. Rep. 526, 27 N. W. Rep. 567.

128. Stable bedding and manure.—Plaintiff stabled his horses very near the line of a company's right of way, and threw out the bedding and manure, during a hot and dry season from spring till late in July, near the track, where it caught fire. *Held*, sufficient evidence of contributory negligence to require a submission of the question to the jury. *Collins v. New York C. & H. R. R. Co.*, 5 Hun (N. Y.) 499; *affirmed in* 71 N. Y. 609.—QUOTING *Ross v. Boston & W. R. Co.*, 6 Allen (Mass.) 92. REVIEWING *Smith v. Hannibal & St. J. R. Co.*, 37 Mo. 287.

129. Stacks of oats.—The owner of land adjacent to a railroad track having stacks of straw and oats upon his premises is not guilty of contributory negligence because he permits grass to grow up around the stacks, which may, when dry, communicate fire. *Gulf, C. & S. F. R. Co. v. Fields*, 2 Tex. App. (Civ. Cas.) 700.

130. — or wheat.—A farmer is not guilty of negligence in stacking wheat in a field abutting on a railroad, and leaving the stubble on the ground, where it is destroyed by fire, communicated from a passing engine to dry grass on the right of way, and thence through the stubble to the wheat. *Bass v. Chicago, B. & Q. R. Co.*, 28 Ill. 9.—NOT FOLLOWED IN *Illinois C. R. Co. v. Frazier*, 47 Ill. 505.

131. Wood.—Plaintiff piled his wood

near a railroad, and cleared the brush and other combustible material away between his wood and the track. Sparks from a locomotive set fire to dead grass along the track, and burned beyond plaintiff's wood, and then back to it through underbrush. *Held*, that the plaintiff was not guilty of contributory negligence in not clearing the grounds back of the wood. *Northern Pac. R. Co. v. Lewis*, 56 Am. & Eng. R. Cas. 86, 7 U. S. App. 254, 51 Fed. Rep. 658, 2 C. C. A. 446.

b. On the Right of Way.

132. Cord-wood.—It is not contributory negligence, where one has a contract to sell wood to a railroad company, to haul it in and pile it along the track, with the consent of the company, preparatory to measurement, and to receiving the pay therefor. *Pittsburgh, C. & St. L. R. Co. v. Noel*, 7 Am. & Eng. R. Cas. 524, 77 Ind. 110.—DISTINGUISHED IN *Indiana, B. & W. R. Co. v. Greene*, 25 Am. & Eng. R. Cas. 322, 106 Ind. 279, 55 Am. Rep. 736.—*Pittsburgh, C. & St. L. R. Co. v. Nelson*, 51 Ind. 150.—DISTINGUISHED IN *Wabash, St. L. & P. R. Co. v. Johnson*, 96 Ind. 40.

133. Cotton.—It is contributory negligence for one to haul cotton in bales and place it on a platform, preparatory to shipment, so near the track as to incur the danger of being burned by sparks from passing locomotives. *Missouri Pac. R. Co. v. Bartlett*, 32 Am. & Eng. R. Cas. 343, 69 Tex. 79, 6 S. W. Rep. 549. *Allibone v. Texas & P. R. Co.*, 2 Tex. App. (Civ. Cas.) 52.—QUOTING *Texas & P. R. Co. v. Levi*, 59 Tex. 674.

134. Lumber.—It is contributory negligence for one to haul lumber and stack it up partly on and partly adjoining the company's right of way, with full knowledge of the danger, for his own convenience for storage until ready to ship it, and to let it dry out; and he cannot recover from the company for its destruction by fire, though the company was guilty of negligence in starting the fire. *Post v. Buffalo, P. & W. R. Co.*, 108 Pa. St. 585.

The burning of lumber placed on the property of a railway company close to their track, without any permission, express or implied, gives the owner no right of action against the company. *Goodhue v. Grand Trunk R. Co.*, 3 Montr. L. R. 114.

135. Wheat stubble.—Sowing wheat on a company's right of way, and failing to

remove the stubble therefrom after harvesting, is not contributory negligence *per se*. *Slossen v. Burlington, C. R. & N. R. Co., (Iowa) 7 Am. & Eng. R. Cas. 509, 10 N. W. Rep. 860.*

IV. REMEDIES; PROCEDURE.

1. In General.

136. Jurisdictional matters.—An action against a company to recover for the burning of fences and growing pasture is an action for an injury to real estate, within the meaning of Ind. Rev. St. 1881, § 307, and is properly brought in the county where the real estate is situate, though the company may have no office or agent in the county; and the joining of a claim for damage to personal property will not oust the jurisdiction. *Indiana, B. & W. R. Co. v. Foster, 107 Ind. 430, 8 N. E. Rep. 264.*

A New York court has no jurisdiction of an action against a company for negligently setting fire to and burning and damaging trees and plants growing on lands in New Jersey. *Huermund v. Erie R. Co., 48 How. Pr. (N. Y.) 55.*

Where a justice of the peace in Carroll county, Tenn., issued a civil warrant charging the defendant, a railroad corporation, with "wilfully and negligently burning three hundred pannels of rail fence, fifty apple trees, twenty-five acres of timber and forest trees, and two acres of corn in a field," and the defendant pleaded in abatement that the land on which the rails were built, and the trees, timber, and corn were growing, was wholly in Benton county—*held*, by a majority of the court, that a demurrer to the plea was properly sustained. *Nashville, C. & St. L. R. Co. v. Weeks, 13 Lea (Tenn.) 148.*

Where a railroad is sued for setting out fires which destroyed plaintiff's house, in a court having no jurisdiction to try matters where the title to real estate is in dispute, the court will not be deprived of jurisdiction by a plea under which the company may introduce evidence to show that plaintiff did not have title to the premises, without putting in the evidence or tendering it. *Ball v. Grand Trunk R. Co., 16 U. C. C. P. 252.*

137. Right of action, generally.—A party injured by fires set out by the operating of a line of railroad has an action for his damages, and is not required to avail

himself of the provision of Colo. Act of March 31, 1887, providing for appraisalment of the damages in such cases. *Denver, T. & G. R. Co. v. De Graff, 2 Colo. App. 42, 29 Pac. Rep. 664.*

Under Me. Act of 1842, ch. 9, § 5, making railroad corporations liable for property that has been injured by fire from locomotives, a party may have his right of action though the statute does not provide a remedy or prescribe a form of action. The party may declare specially on his own case. *Stearns v. Atlantic & St. L. R. Co., 46 Me. 95.*—REVIEWED IN *Thatcher v. Maine C. R. Co., 85 Me. 502.*

138. Where the property was insured—Subrogation.*—A's house, which was insured, was injured by a fire communicated by a locomotive, and the underwriters paid to A. the amount of his loss, for which the railroad corporation was also by law responsible to him. *Held*, that such payment did not bar A.'s right to recover also of the railroad corporation, and that A., by receiving payment of the underwriters, became trustee for them, and, by necessary implication, made an equitable assignment to them of his right to recover of the railroad corporation; and that the underwriters, on indemnifying A., might bring an action in his name for their own benefit against the railroad corporation, and that A. could not legally release such action. *Hart v. Western R. Corp., 13 Metc. (Mass.) 99.*—APPROVED IN *Regan v. New York & N. E. R. Co., 60 Conn. 124.* QUOTED IN *Phoenix Ins. Co. v. Erie & W. Transp. Co., 10 Biss. (U. S.) 18.*—*Chicago, B. & Q. R. Co. v. Emmons, 42 Ill. App. 138.*

Plaintiff insurance company insured buildings in the sum of \$1500, worth more than double that sum, which were afterward destroyed through the negligence of a railroad company, and the railroad company paid the owner \$1800 damages. The owner executed a release, containing a statement that the settlement was not intended to discharge the insurance company from any claim he had against it, but as a full settlement and discharge of the railroad company. The insurance company afterward paid the amount of the insurance, and sued the railroad company to recover the amount paid. *Held*, that the clause in the release was in the nature of a proviso limiting the

* See also FIRE INSURANCE, 11, 12.

effect to a release of the balance, retaining the claim against the insurance company; and therefore its right of subrogation was not affected by the release. *Connecticut F. Ins. Co. v. Erie R. Co.*, 73 N. Y. 399, 29 Am. Rep. 171; reversing 10 Hun 59.—DIS-
TINGUISHED IN *Home Mut. Ins. Co. v. Oregon R. & N. Co.*, 20 Oreg. 569. FOL-
LOWED IN *Platt v. Richmond, Y. R. & C. R. Co.*, 32 Am. & Eng. R. Cas. 517, 108 N. Y. 358, 11 Cent. Rep. 601, 15 N. E. Rep. 393, 13 N. Y. S. R. 660.

139. Limitation of time within which to sue.*—Conn. Act 1881, ch. 92, making companies liable for fire communicated by their locomotives, is not a penal statute, so as to limit an action thereon to one year. *Newton v. New York & N. E. R. Co.*, 32 Am. & Eng. R. Cas. 347, 56 Conn. 21, 12 Atl. Rep. 644, 5 N. Eng. Rep. 614.

An action on the case is the proper remedy at common law for an injury, under the above statute, which would require the action to be brought within six years; and the same rule would follow under Conn. Prac. Act, providing, among other things, that the statute of limitations available in common law forms of action should be available in a complaint founded on the same subject-matter under the act. *Newton v. New York & N. E. R. Co.*, 32 Am. & Eng. R. Cas. 347, 56 Conn. 21, 12 Atl. Rep. 644, 5 N. Eng. Rep. 614.

In an action under section 83 of the Consolidated Statutes of Canada, c. 66, for damages caused by fire through the negligence of allowing dry weeds and leaves to accumulate on the company's track, the plaintiff must sue within six months after the injury. *McCallum v. Grand Trunk R. Co.*, 30 U. C. Q. B. 122.

The damage referred to in section 27 of c. 109, R. S. C., and section 287 of 51 Vict. c. 29, is "damage" done by the railway itself, and not by reason of the default or neglect of the company running the railway, or of a company having running powers over it; and therefore the prescription of six months referred to in said sections is not available in an action for damage caused by fire from a locomotive. *North Shore R. Co. v. McWillie*, 17 Can. Sup. Ct. 511.

140. Form of action.—At common law an action on the case, and not trespass,

is the proper remedy against a railroad company for negligently burning property by sparks from a locomotive. *Newton v. New York & N. E. R. Co.*, 32 Am. & Eng. R. Cas. 347, 56 Conn. 21, 12 Atl. Rep. 644, 5 N. Eng. Rep. 614.

Where trees, either growing or mature, are destroyed by the wrongful act of another, the owner may bring his action either for the value of the trees so destroyed or for the injury to the real estate or his interest in it. *Bailey v. Chicago, M. & St. P. R. Co.*, 3 S. Dak. 531, 54 N. W. Rep. 596. *Uhe v. Chicago, M. & St. P. R. Co.*, 3 S. Dak. 563, 54 N. W. Rep. 601.

141. Splitting causes of action.—Where the owner of two lots brings a suit against a company to recover damages thereto by fire set by one of the defendant's locomotives, and recovers a judgment therein, he cannot, if in such action he claims damages for the injury to both lots, bring a subsequent suit for the injury to one of the lots, on the ground that the recovery in the first action was in fact limited to the other lot. *Knowlton v. New York & N. E. R. Co.*, 40 Am. & Eng. R. Cas. 237, 147 Mass. 606, 18 N. E. Rep. 580.—FOLLOWING *Trask v. Hartford & N. H. R. Co.*, 2 Allen (Mass.) 331. REVIEWING *Perley v. Eastern R. Co.*, 98 Mass. 414.

142. Notice and demand.—The service of a written notice is not necessary to the validity of a claim for damages for losses by fire. *Rodemacher v. Milwaukee & St. P. R. Co.*, 41 Iowa 297.

Neither prior notice nor demand is necessary before bringing suit under the Me. Act of 1842, ch. 9, § 5, making railroad companies liable for injuries to property by fire communicated by their locomotives. *Stearns v. Atlantic & St. L. R. Co.*, 46 Me. 95.

143. Parties plaintiff—Who may sue, generally.*—A person without title to unoccupied lands and without the owner's consent, who had intended to use the land for grazing, cannot recover the value of the grass thereon against the railroad that negligently destroys it by fire. *Texas & P. R. Co. v. Torrey*, 4 Tex. App. (Civ. Cas.) 445, 16 S. W. Rep. 547.—QUOTING *International & G. N. R. Co. v. Ragsdale*, 67 Tex. 28, 2 S. W. Rep. 515.

After a suit had been brought against a

* Title to property destroyed which will enable party to maintain suit, see 35 AM. & ENG. R. CAS. 237, *abstr.*

* See also LIMITATIONS OF ACTIONS, 57.

company in a justice's court for destroying a fence and crops by fire, and appealed to the county court, the owner of the land filed a complaint alleging that the plaintiff was her tenant, that she had a joint interest in the crops destroyed, and asked to be made a co-plaintiff. *Held*, that such petitioner was a necessary party, that she ought to have been joined as a co-plaintiff before the justice, but could not be joined in the county court. *Gulf, C. & S. F. R. Co. v. Ford*, 3 *Tex. App. (Civ. Cas.)* 187.

144. Joint owners.—Where hay is harvested by the occupant of land under a contract with another, whereby he agrees to advance the requisite funds and receive one third of the proceeds, the two may maintain a joint action for its loss by fire from a locomotive. *Eddy v. Lafayette*, 49 *Fed. Rep.* 807, 4 *U. S. App.* 247, 1 *C. C. A.* 441.

One of two joint owners cannot maintain an action against a railroad company to recover for property destroyed by fire. *Houston & T. C. R. Co. v. Hollingsworth*, 2 *Tex. App. (Civ. Cas.)* 149.

When, by agreement between tenants in common, one has the exclusive use and possession of a part of the common property, while the other has like use of other lands thus owned, either may recover for an injury done to the property to which he has right of such exclusive use or occupation. *So held*, where an action was brought to recover for injuries to pasture by fire from an engine. *Gulf, C. & S. F. R. Co. v. Wheat*, 68 *Tex.* 133, 3 *S. W. Rep.* 455.

A widow and four children, all of full age, sued a railroad company for burning certain hay stacks, charging in the complaint a joint ownership therein in plaintiffs. The evidence showed that the land on which the hay had grown had descended to the plaintiffs, as widow and children, from the former owner, who had died intestate. *Held*, that this did not necessarily show a variance between the allegations of the complaint and the proofs, as they might be joint owners in the hay and not in the land. *Toledo, St. L. & K. C. R. Co. v. Harnsberger*, 41 *Ill. App.* 494.

145. Person in possession of personality.—One who cuts wood from public lands of the United States without permission, for his own benefit, may recover its full value if negligently destroyed by fire from a

locomotive while he is in actual possession. *Northern Pac. R. Co. v. Lewis*, 51 *Fed. Rep.* 658, 7 *U. S. App.* 254, 2 *C. C. A.* 446.—**DIS- TINGUISHING** *Turley v. Tucker*, 6 Mo. 583; *Murphy v. Sioux City & P. R. Co.*, 55 Iowa 473, 8 N. W. Rep. 320; *St. Louis, I. M. & S. R. Co. v. Hecht*, 38 Ark. 357.

The owner of a saw mill may maintain an action against a railroad for his interest in lumber burned by the negligence of the company while in his possession, which had been sawed under an agreement with one furnishing logs, that the mill owner should have part of the lumber for sawing, but title to the whole to remain in the owner of the logs until divided. *Haverly v. State Line & S. R. Co.*, 125 *Pa. St.* 116, 17 *Atl. Rep.* 224.

146. — assignee subsequent to fire.—Even if plaintiff did not own the property burned, at the time of the fire, a subsequent assignment thereof by the owner to him transferred to him the claim of the owner, and the assignment not having been objected to on the ground of a defect in the complaint, in that plaintiff had not brought his action thereon, but only as owner, the complaint must be considered sufficient on appeal. *Ridell v. New York C. & H. R. R. Co.*, 73 N. Y. 618.

147. — mortgagor in possession of chattel.—A mortgagor in the possession of the mortgaged property can recover its value if it be destroyed by fire through the negligence of a railway company. And this is true as to personality which is subject to a chattel mortgage, the condition of which was broken at the time of the destruction of the property. *Logan v. Wabash Western R. Co.*, 43 Mo. App. 71.

148. Occupant of the premises.—The person who is in actual possession and occupancy of land may recover for damages to the land itself, and such things as growing crops, fences, etc., without proof of paper title, unless the defendant shows an outstanding adverse title to the land higher than a mere possessory one. *McNarra v. Chicago & N. W. R. Co.*, 41 Wis. 69.

The owner of a mill located upon the company's right of way is a proper party plaintiff in an action for damages occasioned by fire communicated from an engine to an elevator and thence to the mill, where he was the occupant of the land under color

of title (§§ 1976-1981, Iowa Code). *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 17 Am. Ry. Rep. 309.

149. — under contract of purchase.—One who is in the possession of land under a contract to purchase it from the owner of the fee has an equitable interest therein, and may maintain an action against a company for negligently setting fire to his fences and woodland. *Rood v. New York & E. R. Co.*, 18 Barb. (N. Y.) 80.

150. — under a contract with Indian owner.—Occupancy and possession are sufficient to enable one to maintain an action against a company for negligently burning the crops on land; therefore one occupying lands in the Indian Territory, under a contract with a member of the Chickasaw Nation to hold for eight years, may maintain such action, notwithstanding a law of the nation prohibits the granting of land for more than one year. *Gulf, C. & S. F. R. Co. v. Johnson*, 54 Fed. Rep. 474, 10 U. S. App. 629, 4 C. C. A. 447.

151. — under a parol license.—One who enters upon land under a mere parol license and expends labor in making hay thereon is not a trespasser, and may recover against a company for the destruction of the hay by fire. *Bulliss v. Chicago, M. & St. P. R. Co.*, 76 Iowa 680, 39 N. W. Rep. 245. But compare *Murphy v. Sioux City & P. R. Co.*, 55 Iowa 473.

152. Widow occupying homestead.—A widow in possession of land as head of a family, which she has a right to occupy for life as a homestead, under the Texas statute, may maintain an action against a company to recover damages for her own benefit for the destruction of her grass or timber by fire. *International & G. N. R. Co. v. Timmermann*, 61 Tex. 660.—RECONCILING *May v. Slade*, 24 Tex. 205; *Miller v. Brownson*, 50 Tex. 592.

But she cannot recover where she alleges that the property injured was hers at the time of the fire, if the proofs show that at the time of the fire it was occupied by her and her husband as a homestead, the husband having since died, leaving surviving him plaintiff and two children, who still occupy the land as a homestead. *Missouri Pac. R. Co. v. Teague*, 2 Tex. App. (Civ. Cas.) 685.

153. One holding title with covenant to reconvey.—Where, in an action under Me. Rev. St. ch. 51, § 31, to recover for property injured by fire caught from a loco-

motive, the plaintiff has an absolute title to the whole property destroyed, he may recover for the whole injury, although he held the title as security for a debt, and had agreed that upon payment of the debt he would reconvey. *Bean v. Atlantic & St. L. R. Co.*, 58 Me. 82.

154. Mortgagor in possession of the land.—Where cord-wood and growing timber have been destroyed by fire communicated from an engine, the owner of the land where the fire occurred, being in possession at the time, is entitled under Md. Code, art. 77, § 2, to sue the railroad company for the injury done his property by the fire, although at the time of its occurrence the land was encumbered with a mortgage. *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115, 11 Am. Ry. Rep. 210.

155. Landlord.—If the fire resulted from the negligence of the company, it would be liable to the owner of the land for any damage done to the fences by its negligence, although the lessee is under obligation to make repairs. Such obligation does not require the tenant to replace improvements which have been destroyed by the act of a stranger without fault of the tenant. *Gulf, C. & S. F. R. Co. v. Smith*, 3 Tex. Civ. App. 483, 23 S. W. Rep. 89.

The lessor cannot sue for the destruction of grass on the leased land, caused by the escape of sparks from passing locomotives. The person who is rightfully in the actual and exclusive possession of the land is alone authorized to sue for trespasses upon his possession. *Gulf, C. & S. F. R. Co. v. Smith*, 3 Tex. Civ. App. 483, 23 S. W. Rep. 89.

156. Tenant.—A tenant at will or by sufferance is not liable to his landlord for waste committed by a stranger, and will have no action against a railroad for fires communicated by sparks from one of its engines. *Coale v. Hannibal & St. J. R. Co.*, 60 Mo. 227, 9 Am. Ry. Rep. 210.

In an action for damages to oats by fire from an engine, evidence that the plaintiff raised the oats on rented land on shares, was admissible to show the ownership of the grain destroyed. The plaintiff should not recover the value of all the grain if he did not own it all. *Ormond v. Central Iowa R. Co.*, 58 Iowa 742, 13 N. W. Rep. 54.

In an action for injury to premises by fire from an engine, where the land on which hay was growing, and on which fences were

located, was land left by the plaintiff's intestate husband, and occupied by her under a parol agreement with her children, one being a minor, that she should have a life lease therein, she is entitled to recover for the entire loss of the hay crop averred in the complaint, as one in actual possession of real estate may sue a wrong-doer for an injury thereto; and this right cannot be defeated by proof that the title is in another. The agreement between the plaintiff and her children, though within the statute of frauds, is not absolutely void, and a stipulation therein that she should keep up the improvements is binding upon her. The destruction of the fences is an injury to her primarily and individually, for which she can recover without uniting the children with her as co-plaintiffs. *Ohio & M. R. Co. v. Trapp*, 4 *Ind. App.* 69, 30 *N. E. Rep.* 812.

157. Trespasser on the premises.—

One who goes upon the public lands of the United States and cuts wood therefrom without permission, and for his own benefit, may recover its value from a railroad that negligently permits fire to escape from its locomotive to dry grass along its track, and thence to the wood. *Northern Pac. R. Co. v. Lewis*, 56 *Am. & Eng. R. Cas.* 86, 7 *U. S. App.* 254, 51 *Fed. Rep.* 658, 2 *C. C. A.* 446.

One who cuts and stacks hay on unclosed prairie owned by others, without authority, acquires no property in such hay, and, having neither ownership nor possession, cannot maintain an action for its destruction. *Murphy v. Sioux City & P. R. Co.*, 55 *Iowa* 473, 39 *Am. Rep.* 175, 8 *N. W. Rep.* 320.—DISTINGUISHED IN *Northern Pac. R. Co. v. Lewis*, 51 *Fed. Rep.* 658, 7 *U. S. App.* 254, 2 *C. C. A.* 446; *Welch v. Jenks*, 58 *Iowa* 694; *Comes v. Chicago, M. & St. P. R. Co.*, 78 *Iowa* 391. FOLLOWED IN *Lewis v. Chicago, M. & St. P. R. Co.*, 57 *Iowa* 127; *Bulliss v. Chicago, M. & St. P. R. Co.*, 76 *Iowa* 680, 39 *N. W. Rep.* 245.

158. Parties defendant—Who may be sued, generally.—A contract for grading a railroad provided that the work should be done subject to the approval of the chief engineer and under the direction of an assistant engineer; that the contractor should increase his force, and should discharge negligent, unskilful, and disorderly employes when required by the engineer; that the company might complete the

work at the contractor's expense in case he failed to do so within the contract time; and that the contractor should be responsible for all damages as between himself and the company. *Held*, that the contractor was not an "agent or employé" of the company within the meaning of a statute subjecting railroad companies to liability for fires set by "agents or employes," but that he was an independent contractor, and the company was not liable under the statute.* *Rogers v. Florence R. Co.*, 39 *Am. & Eng. R. Cas.* 348, 31 *So. Car.* 378, 9 *S. E. Rep.* 1059.—REVIEWING *New Orleans, M. & C. R. Co. v. Hanning*, 15 *Wall. (U. S.)* 649.

159. Lessor company.—A company owning a railroad is not relieved from liability imposed by Me. Act of 1842, ch. 9, § 5, for injuring property by fire communicated by its locomotives, by reason of having leased its road to another company which is in possession and operating the road and which furnished the engine starting the fire complained of. *Stearns v. Atlantic & St. L. R. Co.*, 46 *Me.* 95.—FOLLOWED IN *Bean v. Atlantic & St. L. R. Co.*, 63 *Me.* 293. QUOTED IN *McCoy v. Kansas City, St. J. & C. B. R. Co.*, 36 *Mo. App.* 445. REVIEWED IN *Mahoney v. Atlantic & St. L. R. Co.*, 63 *Me.* 68.—*Bean v. Atlantic & St. L. R. Co.*, 63 *Me.* 293.—FOLLOWING *Stearns v. Atlantic & St. L. R. Co.*, 46 *Me.* 95.—REVIEWED IN *Thatcher v. Maine C. R. Co.*, 85 *Me.* 502.

And the same rule follows under Me. Act of 1853, ch. 150, authorizing a lease of the road, but expressly providing that nothing in the lease should exonerate the lessor company from any duty or liability imposed by its charter or the general law of the state; and the verbal change made in the statute by the revision of 1857 does not change the signification. *Bean v. Atlantic & St. L. R. Co.*, 63 *Me.* 293.

Under the statutes of Massachusetts a railroad company which has leased its railroad to another company, with stipulations that the whole transportation of passengers and freight upon the railroad shall be done by the lessees, is responsible in damages for buildings upon its route, which are destroyed by fire communicated by a locomotive engine owned and used upon the railroad by the latter company. And it is

* Liability for fires caused by contractors, see note, 39 *AM. & ENG. R. CAS.* 354.

immaterial that one of the buildings was destroyed by the spreading of the fire from other buildings, and that by consent of the railroad company it stood partly within the location of the railroad. *Ingersoll v. Stockbridge & P. R. Co.*, 8 Allen (Mass.) 438.—QUOTED IN *Murphy v. Chicago & N. W. R. Co.*, 45 Wis. 222.

A railroad company without express authority in its charter cannot make a lease of any portion of its grounds in such a manner as to protect itself from liability from fires kindled negligently by its engines, as by leasing a portion of its grounds for the purpose of erecting platforms thereon from which to receive and discharge freights. *Texas & P. R. Co. v. Hoskins*, 2 Tex. App. (Civ. Cas.) 55.

A company whose road is leased to and under the complete control of the lessees, is not liable for damages resulting from a fire set out by sparks from the lessees' engine, which is operated by the latter's employes, and a complete defense can be made under the plea of not guilty. *McCallum v. Buffalo & L. H. R. Co.*, 19 U. C. C. P. 117.—DISTINGUISHING *Cayley v. Cobourg, P. & M. R. & M. Co.*, 14 Grant's Ch. (U. C.) 571.

Because defendants were to receive a portion of the net profits, they were not to be considered partners and liable as such. *McCallum v. Buffalo & L. H. R. Co.*, 19 U. C. C. P. 117.

160. Lessee company.—Under Ill. Railroad and Warehouse Act, a company in possession of a road, and operating it as lessee or otherwise, is required to keep its right of way clear of dead grass, weeds, or other dangerous combustibles, and is liable to persons who may be injured by its failure to do so. *Pittsburgh, C. & St. L. R. Co. v. Campbell*, 86 Ill. 443.

The lessee of a railroad, in possession and operating the same, is liable for fires kindled by its engines the same as if it owned the road. *Slossen v. Burlington, C. R. & N. R. Co.*, (Iowa) 7 Am. & Eng. R. Cas. 509, 10 N. W. Rep. 860. *Davis v. Providence & W. R. Co.*, 121 Mass. 134. *Canton v. Eastern R. Co.*, 45 Minn. 481, 48 N. W. Rep. 22.

Where one railroad corporation operates and controls the railroad of another corporation under a lease or a contract which is equivalent to a lease, the lessee corporation becomes the "proprietor" of the leased

railroad, by virtue of N. H. Gen. St. ch. 145, § 1, and is liable under Gen. St. ch. 148, § 8, for damage accruing by fire or steam from a locomotive run by said lessee corporation upon the track of the leased railroad. *Pierce v. Concord R. Co.*, 51 N. H. 590.—QUOTING *Murch v. Concord R. Co.*, 29 N. H. 35. REVIEWING *Linfield v. Old Colony R. Co.*, 10 Cush. (Mass.) 562; *Webb v. Portland & K. R. Co.*, 57 Me. 128; *McCluer v. Manchester & L. R. Co.*, 13 Gray (Mass.) 124.—APPROVED IN *Mahoney v. Atlantic & St. L. R. Co.*, 63 Me. 68. NOT FOLLOWED IN *Nugent v. Boston, C. & M. R. Co.*, 38 Am. & Eng. R. Cas. 52, 80 Me. 62, 12 Atl. Rep. 797. REVIEWED IN *Turner v. Cross*, 83 Tex. 218.

161. Company operating road.—A company is responsible for any act of negligence committed by it on the right of way which it was in possession of, and actually using for right of way purposes, whether it was or was not at the time seised of the title of such right of way, or whether it had or had not the right to possession thereof. *Gram v. Northern Pac. R. Co.*, 45 Am. & Eng. R. Cas. 544, 1 N. Dak. 252, 46 N. W. Rep. 972.

162. Receiver.—A claim for property destroyed by fire from defective locomotives, occurring after a receiver has been appointed in foreclosure proceedings, but subsequent to a default of the mortgage debt, cannot be allowed, as such a claim does not come under the head of "operating expenses" to be paid from the earnings of the road in the hands of the receiver. *Hiles v. Case*, 9 Biss. (U. S.) 549, 14 Fed. Rep. 141.

163. Trustees in possession.—Trustees operating a railroad for bondholders cannot be made personally liable in an action at law for a fire occurring during their possession, nor can the corporation afterwards organized in the stead of a former corporation. *Stratton v. European & N. A. R. Co.*, 74 Me. 422.

Where trustees of the bondholders are in possession and operating a railroad, under a mortgage for the security of bondholders, they are liable, in equity, to the extent of funds received by them in operating the road, to keep the road, buildings, and equipments in repair, furnish such new rolling stock as is necessary, pay the running expenses, and apply the balance to the payment of any damages arising from misfeasance in the management of the road, and

after that to the mortgage, as the rights of the parties may require. A claim for damage to the property by fire, communicated by a locomotive while passing along its track at a time when the road was in the possession of and operated by such trustees, does not depend upon proof of malfeasance or negligence, but is an incident to the running of the road, and may be considered a part of the running expenses, and is therefore an equitable lien upon the funds liable in the hands of the trustees. *Stratton v. European & N. A. R. Co.*, 17 *Am. & Eng. R. Cas.* 277, 76 *Me.* 269.

Where such trustees have paid and conveyed to a new corporation, formed by the bondholders, any such funds upon which there was such a lien, to that extent the new corporation would be liable in equity to the person suffering the damage. *Stratton v. European & N. A. R. Co.*, 17 *Am. & Eng. R. Cas.* 277, 76 *Me.* 269.

Mortgage trustees in possession of a railroad for the benefit of the bondholders, are liable under Mass. Gen. St. ch. 63, § 101, for injuries to land, caused by sparks from a locomotive belonging to another company, but running upon the road by agreement with the trustees. *Daniels v. Hart*, 118 *Mass.* 543.

2. Complaint; Declaration; Bill.

a. In General.

164. Interpretation.—Where plaintiff sues for the destruction by fire of wheat and oats unthreshed and in the stack, and corn upon the stalk, the petition covers not only the grain, but the straw and stalks. *Patton v. St. Louis & S. F. R. Co.*, 23 *Am. & Eng. R. Cas.* 364, 87 *Mo.* 117.

A plaintiff alleged the negligence as follows: "The servants, agents, and employes of said defendant, in operating and running its engine over said line of road near the premises of plaintiff, in said county, negligently and carelessly permitted said engine to cast out sparks and coals of fire therefrom into the dry grass, and other combustible material on defendant's right of way, and set fire thereto, which spread onto and over the said land of plaintiff." The defendant filed a motion to require the plaintiff to make his petition more definite and certain, which motion was overruled by the court. *Held*, that the foregoing allegations of negligence cannot be construed as

including an allegation that the railway company's engine was defective. *St. Louis & S. F. R. Co. v. Fudge*, 35 *Am. & Eng. R. Cas.* 246, 39 *Kan.* 543, 18 *Pac. Rep.* 720.

For the interpretation of a complaint for personal injuries occasioned by one in his efforts to extinguish fire negligently allowed to be started by a railroad company, see *Hinchey v. Manhattan R. Co.*, 17 *J. & S. (N. Y.)* 406. See also *Liming v. Illinois C. R. Co.*, 45 *Am. & Eng. R. Cas.* 581, 81 *Iowa* 246, 47 *N. W. Rep.* 66.

165. Averment of ownership of burned property.—The complaint described the land on which the property was situated, and alleged that the plaintiff was the owner thereof, together with "all the improvements thereon and appurtenances thereto"; that defendant in operating its "railroad in the vicinity of said land, negligently scattered fire on its right of way, which ignited and burned rubbish, grass, etc., and said fire was by defendant negligently permitted to spread to and burn and destroy plaintiff's said property." *Held*, that the averments of ownership of the property destroyed, and that the fire reached and destroyed the property by continuous burning, were sufficient. *Chicago, St. L. & P. R. Co. v. Williams*, 131 *Ind.* 30, 30 *N. E. Rep.* 696.

166. Averring that engine was operated by defendant or its lessee.—In an action against a company owning a railroad, to recover for a building burned by fire communicated from an engine running on the road, it is necessary to allege that the engine causing the fire was in the use either of the defendant company or of its lessees. *Frye v. Atlantic & St. L. R. Co.*, 47 *Me.* 523.

167. Demanding attorney's fee.—Under Kan. Laws of 1885, ch. 155, where a plaintiff desires to recover a reasonable attorney's fee, in an action for damages by fire caused by the operation of the railroad, it is necessary that he should demand such attorney's fee in his petition, and then submit the question to the court or jury trying the case upon its merits. *Fl. Scott, W. & W. R. Co. v. Karracker*, 46 *Kan.* 511, 26 *Pac. Rep.* 1027.—*QUOTING Missouri Pac. R. Co. v. Merrill*, 40 *Kan.* 404.—*Fl. Scott, W. & W. R. Co. v. Tubbs*, 49 *Am. & Eng. R. Cas.* 685, 47 *Kan.* 630, 28 *Pac. Rep.* 612.

168. Surplusage.—An action against a railroad for burning buildings by careless use of engines will not be defeated by the

statement in the declaration of a contract of insurance and payment of the loss by the insurer, although such statement is unnecessary, and may be rejected as surplusage. *Weber v. Morris & E. R. Co.*, 35 N. J. L. 409.

169. Must conclude "to the damage of the plaintiff."—The declaration should conclude to the damage of the plaintiff, and not to the damage of an insurance company which had insured the property. If it concludes to the damage of the latter, it must be treated as a declaration without the conclusion *ad damnum*, and nominal damages only can be recovered. *Weber v. Morris & E. R. Co.*, 35 N. J. L. 409.

170. Amendments.—Where the action is under Me. Act of 1842, ch. 9, § 5, for the loss of property by fire communicated from a locomotive, if an allegation that the injury resulted from the fault or negligence of the company be necessary, it is matter of amendment on motion. But it seems that a declaration is sufficient after verdict without such averment. *Stearns v. Atlantic & St. L. R. Co.*, 46 Me. 95.

A declaration is insufficient on demurrer, unless it states that the engine causing the fire was in the use of the defendant company or its lessees; but such insufficiency may be supplied by an amended count on payment of costs. *Frye v. Atlantic & St. L. R. Co.*, 47 Me. 523.

Under Tex. Rev. St. art. 1192, providing that pleadings may be amended before trial and not afterwards, it is error to allow a plaintiff who sues for damage to his crops by fire, where it has developed after the evidence closes that only a portion of the crop belongs to plaintiff, to amend his pleadings so as to show that before suit he had bought the portion that did not belong to him at the time of the fire. *Missouri Pac. R. Co. v. Howe*, 4 Tex. App. (Civ. Cas.) 296, 15 S. W. Rep. 198.

171. Specifying particular train, etc.—Where the language is that "an engine" of the defendant company at the time and place specified, etc., by reason of negligence, caused the destruction of plaintiff's property, the allegation does not identify the particular engine which caused the mischief. It is the duty of the plaintiff to state as definitely as possible what train caused the injury, and the time, so that the company may be able to identify the engine

and investigate what its condition was, and the conduct of its agents and servants at that time. *Koontz v. Oregon R. & N. Co.*, 43 Am. & Eng. R. Cas. 11, 20 Oreg. 3, 23 Pac. Rep. 820.—QUOTED IN *Henderson v. Philadelphia & R. R. Co.*, 144 Pa. St. 461. —*Missouri Pac. R. Co. v. Merrill*, 40 Kan. 404, 19 Pac. Rep. 793.

172. Evidence admissible under the pleadings, generally.—(1) *Admissible.*—Where the declaration is amended so as to show the loss of a shed instead of a barn, and the amendment is properly made, it will be competent for plaintiff to support his amendment by proof of the loss as alleged. *Chicago & E. I. R. Co. v. Goyette*, 43 Am. & Eng. R. Cas. 36, 133 Ill. 21, 24 N. E. Rep. 549; *affirming* 32 Ill. App. 574.

The petition need only aver the substantive facts that the fire was negligently permitted to escape and burn the plaintiff's property. Under such averments the plaintiff can show the negligence of the railroad in providing safe engines and also in operating them. *Wise v. Joplin R. Co.*, 29 Am. & Eng. R. Cas. 164, 85 Mo. 178.—FOLLOWING *Palmer v. Missouri Pac. R. Co.*, 76 Mo. 217.

Although the petition in an action for the burning of grass contains no averment as to the particular manner in which the plaintiff desired to use the grass, the jury may consider its market value for pasturage or hay purposes, if there is evidence as to the value for either purpose. *Ft. Worth & N. O. R. Co. v. Wallace*, 40 Am. & Eng. R. Cas. 248, 74 Tex. 581, 12 S. W. Rep. 227.

A complaint which alleges that the company negligently allowed dry grass, rubbish, and other combustible material to accumulate on its right of way, and that the fire originated there from a spark that escaped from its locomotive, and ran across the intervening country some two and one half miles to the plaintiff's cranberry marsh, and destroyed the vines growing thereon, states the circumstances attending the fire with sufficient particularity to render admissible evidence of the strength and direction of the wind, the dryness of the season, and the connection of the various marshes with that of the plaintiff, in order to show that the burning of the latter was the natural and probable result of such fire. *Marvin v. Chicago, M. & St. P. R. Co.*, 79 Wis. 140, 47 N. W. Rep. 1123.

(2) *Inadmissible.*—The plaintiff claiming

tion was, and
servants at
R. & N. Co.,
Oreg. 3, 23
Henderson v.
4 Pa. St. 461.
Wyrill, 40 Kan.

ible under

—(1) *Admissi-*
s amended so
instead of a
properly made,
tiff to support
of the loss as
Co. v. Goyette,
133 Ill. 21, 24
Ill. App. 574.
r the substan-
negligently per-
the plaintiff's
ents the plain-
of the railroad
also in oper-
R. Co., 29 Am.
78.—FOLLOW-
R. Co., 76 Mo.

an action for
no averment
in which the
grass, the jury
e for pasture
evidence as to
Fl. Worth
Am. & Eng.
W. Rep. 227.
that the com-
grass, rubbish,
al to accumu-
l that the fire
t that escaped
across the in-
and one half
erry marsh, and
thereon, states
the fire with
der admissible
l direction of
season, and the
rshes with that
show that the
e natural and
Marvin v.
79 Wis. 140.

intiff claiming

damages caused by fire emitted by a loco-
motive, for the destruction of rails, wood,
and growing timber, the number and amount
of which he specifies, will be confined in his
proof to the specific items alleged, and will
not be permitted to prove general damages.
Stewart v. Baltimore & O. R. Co., 33 W.
Va. 88, 10 S. E. Rep. 26.—QUOTING *Whit-*
beck v. New York C. R. Co., 36 Barb. (N.
Y.) 644.

In an action for burning a house, it was
alleged that the fire was communicated by
engine No. 458, which was not in a proper
condition. *Held*, that the condition of that
engine, and its management, were all that
were to be considered. If that engine was
properly constructed, the company would
not be liable, although the burning was oc-
casioned by a fire accidentally issuing from
it. Evidence to prove defects in other en-
gines was irrelevant. *Erie R. Co. v. Decker*,
78 Pa. St. 293.—FOLLOWED IN *Jennings v.*
Pennsylvania R. Co., 93 Pa. St. 337; *Albert*
v. Northern C. R. Co., 98 Pa. St. 316.

173. Material variances.—Where a
plaintiff avers negligence of one kind, as in
the negligent management of a train, it is
error to permit him to introduce evidence
as to negligence of a different kind, as that
the company allowed combustible matter to
accumulate on its right of way. *Carter v.*
Kansas City, St. J. & C. B. R. Co., 65 Iowa
287, 21 N. W. Rep. 607.—FOLLOWED IN *Miller*
v. Chicago & N. W. R. Co., 66 Iowa 364.

When a declaration, in a suit for burning
wheat stacks, alleges that the stacks were
set on fire by sparks from a locomotive
belonging to the company, evidence that
the stacks were destroyed by a fire which
originated in another field, even though
such fire was occasioned by sparks from
the defendant's engine, will not sustain the
averment in the declaration. *Toledo, W.*
& W. R. Co. v. Morgan, 72 Ill. 155.

A party cannot depart from the issues, in
introducing evidence in rebuttal, in order
to overcome evidence introduced by the
other party pertinent to the issues. And
so, where the petition alleged that the fire
complained of was set out "solely through
the negligence of the defendant in operating
its said railway," it was error to permit
plaintiff, in rebuttal, to show that there was
dry grass upon the right of way, nearly up to
the track. *Miller v. Chicago & N. W. R.*
Co., 66 Iowa 364, 23 N. W. Rep. 756.—FOL-

LOWING *Carter v. Kansas City, St. J. & C.*
B. R. Co., 65 Iowa 287.

An allegation that defendant permitted
the engine to be out of repair and to be care-
lessly and negligently used will not allow
the submission to the jury of the issue as to
the competency and skill of the engineer
and fireman. *Babcock v. Chicago & N. W.*
R. Co., 72 Iowa 197, 28 N. W. Rep. 644, 33
N. W. Rep. 628.—DISTINGUISHED IN *Bulliss*
v. Chicago, M. & St. P. R. Co., 76 Iowa 680,
39 N. W. Rep. 245.

The alleged acts of negligence being fail-
ure to provide proper appliances, etc., for
preventing escape of sparks, etc., from the
smoke-stack and furnace, the inefficiency of
the employes operating the train, and the
negligence of the company in permitting
the accumulation of dry grass, weeds, and
decayed ties along the track—*held*, that it
was not relevant to prove, nor was it proper
to submit as a ground of liability, that the
employes of the company failed to extin-
guish the fire. *Rost v. Missouri Pac. R.*
Co., 76 Tex. 168, 12 S. W. Rep. 1131.

174. Immaterial variances.—Where
the complaint alleges that the fire from the
defendant's locomotive "was suffered to es-
cape, and did escape, and by reason thereof
came upon the land of the plaintiff," proof
that such fire originated on land adjoining
that of the plaintiff is not a fatal variance.
Butcher v. Vaca Valley & C. L. R. Co.,
(Cal.) 22 Am. & Eng. R. Cas. 644, 5 Pac.
Rep. 359. *Butcher v. Vaca Valley & C. L.*
R. Co., 23 Am. & Eng. R. Cas. 356, 67 Cal.
518, 8 Pac. Rep. 174.

A plaintiff is only required to make a case
by proof to substantially fit that made by
the pleadings. So where the gravamen of
the action is a loss by fire through the negli-
gence of the defendant, the plaintiff is not
confined to proof of the precise place where
the fire originated, or whether the fire com-
menced on the right of way in the first in-
stance and then spread to plaintiff's land, as
such matters are immaterial. *Illinois C. R.*
Co. v. McClelland, 42 Ill. 355.

Where the petition charges a company with
carelessly permitting fire to escape from its
locomotive, proof that fire was thrown out,
would amount only to a variance which, at
most, would require an amendment of plain-
tiff's petition. *Lester v. Kansas City, St. J.*
& C. B. R. Co., 60 Mo. 265, 9 Am. Ry. Rep.
219.

175. Bill in equity against trustees.—The bill should contain averments that at the time of the alleged injury and demand for payment, the trustees had in their hands or under their control funds for current expenses, or that they subsequently conveyed any such funds to the new corporation. *Stratton v. European & N. A. R. Co.*, 17 Am. & Eng. R. Cas. 277, 76 Me. 269.

b. Alleging Company's Negligence.

176. Necessity of alleging negligence, generally.—A complaint alleging that the defendant, without license from the plaintiff, had unlawfully burned up personal property belonging to the plaintiff, is sufficient. Negligence in starting a fire need not be averred; but where the damage is done by the spreading of the fire negligence as to that must be alleged and proved. *Pittsburgh, C. & St. L. R. Co. v. Culver*, 60 Ind. 469.—QUOTED IN *Indiana, B. & W. R. Co. v. McBroom*, 13 Am. & Eng. R. Cas. 458, 91 Ind. 111.

177. — particular acts of negligence.—Where a complaint is otherwise sufficient it is not defective for failing to state how near plaintiff's land is to the railroad; in what particular the engine causing the fire was defective; what the negligent acts on the part of the company were; or that the injury was the natural and proximate result of the negligent acts of the company. If the complaint is not specific enough in these particulars, the way to reach it is by motion to have it made more specific, and not by demurrer. *Louisville, N. A. & C. R. Co. v. Kriming*, 87 Ind. 351.—DISTINGUISHED IN *Indiana, B. & W. R. Co. v. Adamson*, 13 Am. & Eng. R. Cas. 456, 90 Ind. 60; *Wabash, St. L. & P. R. Co. v. Johnson*, 96 Ind. 40. FOLLOWED IN *Louisville, N. A. & C. R. Co. v. Hanmann*, 87 Ind. 422; *Louisville, N. A. & C. R. Co. v. Hagen*, 87 Ind. 602.

178. Sufficiency of allegations of negligence, generally.—A charge in a complaint in general terms that plaintiff's property was destroyed by fire which escaped from defendant's locomotive through its neglect and carelessness is sufficient on demurrer. *Ohio & M. R. Co. v. McCartney*, 121 Ind. 385, 23 N. E. Rep. 258.

A complaint sufficiently charges an injury to have been caused by the negligence of a railroad company, which alleges that the

plaintiff placed cord-wood on the right of way and line of the railroad under a contract of the company to purchase it; that the agents of the company unreasonably delayed measuring and accepting the wood; that the company negligently permitted an accumulation of grass, weeds, and other combustible material along the railroad track and the right of way; that coals of fire were negligently dropped, and sparks emitted, from the locomotive of the company, which set fire to said accumulation of grass, etc., and the fire was thereby communicated to the wood, and destroyed it. *Pittsburgh, C. & St. L. R. Co. v. Nelson*, 51 Ind. 150.—DISTINGUISHED IN *Pennsylvania Co. v. Gallentine*, 7 Am. & Eng. R. Cas. 517, 77 Ind. 322. FOLLOWED IN *Indianapolis, B. & W. R. Co. v. Clem*, 51 Ind. 591.

A complaint charging that defendant's locomotive emitted sparks which communicated with plaintiff's wood while near the track, and destroyed it "through the carelessness of the defendant and its agents and employes, without the fault of the plaintiff," is a sufficient allegation of negligence after verdict. *Pittsburgh, C. & St. L. R. Co. v. Noel*, 7 Am. & Eng. R. Cas. 524, 77 Ind. 110.

An allegation, "that by reason and in consequence of the unsafeness, defectiveness, and insecurity of said locomotive, and the reckless, negligent, careless, and unskillful running, operating, and management of said locomotive by said Smith as such engineer, as aforesaid, the smoke-stack of said locomotive became and then and there was choked, clogged, and stopped up, and by reason thereof the fire, smoke, and steam in said locomotive were violently and in great quantities forced and thrown into the cab of the said locomotive," is sufficiently definite. *Orth v. St. Paul, M. & M. R. Co.*, 43 Minn. 208, 45 N. W. Rep. 151.

179. Necessity of alleging defects in engine and appliances.—Negligence in suffering combustible matter to accumulate on its right of way, so as to make it dangerous to adjoining property to run its locomotives through it, will make the company liable for injuries from fires originating in such combustible matter from coals dropped or thrown from its locomotives, and carried thereby to adjoining property, though there be no allegation that the engine from which the coals were dropped or thrown was improperly constructed or driven.

the right of
under a con-
chase it; that
reasonably de-
g the wood;
permitted an
s, and other
the railroad
that coals of
, and sparks
of the com-
cumulation of
thereby com-
destroyed it.
v. *Nelson*, 51
Pennsylvania
g. R. Cas. 517,
Indianapolis,
d. 591.
t defendant's
ich communi-
hile near the
ugh the care-
ts agents and
the plaintiff."
gligence after
L. R. Co. v.
524, 77 Ind.

reason and in
ess, defective-
omotive, and
s, and unskil-
management of
h as such en-
-stack of said
and there was
d up, and by
and steam in
and in great
into the cab of
ently definite.
Co., 43 Minn.

ing defects
—Negligence
er to accumu-
as to make it
erty to run its
ake the com-
es originating
from coals
locomotives,
ing property,
n that the en-
re dropped or
ucted or driv-

en. *Delaware, L. & W. R. Co. v. Sal-
mon*, 39 N. J. L. 299, 14 Am. Ry. Rep. 226.
—QUOTING Kellogg v. Chicago & N. W. R.
Co., 26 Wis. 223.

**180. — and sufficiency of the al-
legations.**—A complaint averring that the
engine in question had no spark arrester;
that the sparks emitted from the smoke-
stack were carried therefrom "into the ad-
joining fields of the plaintiff, and by which
the same became ignited," is a sufficient
avermment of negligence on the part of the
defendant in permitting the fire to escape.
Louisville, N. A. & C. R. Co. v. Parks, 97
Ind. 307.

An allegation that the defendant's engine
"was so negligently, carelessly, and insuf-
ficiently constructed and equipped" as to
emit and throw out large sparks of fire,
properly included the condition of such en-
gine for arresting sparks, whether its defects
in that respect resulted from its original
construction or from defects caused by
use, wear, or injury to its parts. *Smith v.
Chicago, M. & St. P. R. Co.*, 4 S. Dak. 71, 55
N. W. Rep. 717.

**181. Sufficiency of allegation of
negligence in management of en-
gine.**—An averment that it was the duty
of defendant to keep its right of way free
from dry grass and weeds, and to so con-
struct and operate its locomotives as to
prevent the escape of fire, is substantially
an averment that it was the duty of the
company to provide its locomotives with
the best appliances to prevent the escape
of fire, and to so use them that it would
not be liable to escape; and the perform-
ance of this duty is sufficiently negated
by an averment that the engine was so ne-
gligently used that fire did, by reason of such
negligence, escape and produce the injury
complained of. *Toledo, W. & W. R. Co.
v. Corn*, 71 Ill. 493.

An averment that "the defendants so
carelessly, negligently, improperly, and un-
skilfully managed, directed, and controlled
said locomotive engines, and the fire therein
contained, that by and through the care-
lessness, recklessness, and improper man-
agement and conduct of the defendants,
sparks of fire and igneous matter flew out of
said engines into and upon the plaintiff's
house, and caused the same to be con-
sumed," expresses with reasonable certainty
the tortious acts which are the gravamen of
the suit. *Weber v. Morris & E. R. Co.* 25

N. J. L. 409.—DISTINGUISHING *Stephens &
C. Transp. Co. v. Central R. Co.*, 33 N. J. L.
229. FOLLOWING *Burroughs v. Housaton-
ic R. Co.*, 15 Conn. 124.

S. alleged in his declaration that the de-
fendants, while using their locomotive en-
gine and other rolling stock on their road, so
carelessly and negligently managed the same
that his cotton mill was set on fire by sparks
from said locomotive engine. *Held*, that
the injury complained of, although, if caused
by careless management at all, it was caused
by the careless management, not of the en-
gine, but of the fire in the engine, was
stated with sufficient accuracy in the decla-
ration, the management of an engine con-
sisting in part of the management of the fire
which generates the motive force thereof.
Smith v. Old Colony & N. R. Co., 10 R. I.
22, 6 Am. Ry. Rep. 144.

A complaint alleging that the defendant
company so carelessly and negligently man-
aged its engines as to set fire to dry grass
on land adjoining its right of way, which
without negligence on plaintiff's part spread
and caused damage complained of, charges
actionable negligence against the company.
Haugen v. Chicago, M. & St. P. R. Co., 3 S.
Dak. 394, 53 N. W. Rep. 769.

Where the declaration averred that the
plaintiff conveyed a strip of land to the
railroad company, describing it, and setting
forth the conditions in the deed, one of
which was that the plaintiff assumed no
risk of fires happening by reason of the rail-
road passing through said land, and averring
that the railroad company accepted the deed,
and thereby assumed responsibility for fires,
and built and operated the road, and by
carelessly managing their engines, etc., the
plaintiff's timber land was set on fire, etc.—
held, sufficient on special demurrer. *Sar-
gent v. Birchard*, 43 Vt. 570.

**182. — in allowing combustibles
on the right of way.**—A. filed a com-
plaint averring that defendant carelessly
and negligently permitted long and dry
grass to accumulate upon the right of way
adjoining plaintiff's land, which grass was
very combustible, and that defendant per-
mitted sparks to escape from its engine,
which communicated to the grass on plain-
tiff's land and burned the same, which said
fire and injury were not caused by any fault
or neglect of plaintiff, but solely by the ne-
glect and carelessness of defendant. *Held*,
that the negligence of the defendant was

sufficiently averred, and that a demurrer to the complaint was properly overruled. *Pittsburgh, C. & St. L. R. Co. v. Jones*, 11 Am. & Eng. R. Cas. 76, 86 Ind. 496, 44 Am. Rep. 334.

A declaration that defendants were possessed of a strip of land, being the bank and side of the railway separating their track from plaintiff's land; that they negligently, and contrary to their duty, allowed dry wood, leaves, etc., to accumulate there, on which red-hot ashes, etc., fell from the engine, and there was in consequence great danger, as they knew that the leaves, etc., would be ignited and the fire extend to plaintiff's land, unless the leaves, etc., were removed or care taken to prevent any fire so occasioned from extending; but that they so negligently kept such strip of land that in consequence the leaves, etc., took fire from their engine, and thereby, and by want of due precaution by them to prevent such fire extending, the fire spread to plaintiff's land and burned his trees, etc., disclosed a good cause of action, and it was for an injury sustained "by reason of the railway" within the Consol. St. C. c. 66, § 83; and the plaintiff, therefore, suing more than six months after such injury, was barred. *McCallum v. Grand Trunk R. Co.*, 31 U. C. Q. B. 527.—DISTINGUISHING *Prendergast v. Grand Trunk R. Co.*, 25 U. C. Q. B. 193.—REVIEWED IN *Zimmer v. Grand Trunk R. Co.*, 19 Ont. App. 693.

183. Necessity of alleging negligence in allowing fire to spread.—

In an action for permitting a fire caused by the sparks of engines to escape into the land of an adjacent proprietor, it is necessary that the complaint should aver that the company has negligently permitted the fire started on its own right of way to extend to the plaintiff's land. The negligent permitting of the fire to escape constitutes the gist of the action. It is not sufficient in such cases to aver negligence in causing the first fire. *Louisville, N. A. & C. R. Co. v. Ehlert*, 11 Am. & Eng. R. Cas. 61, 87 Ind. 339.—APPLIED IN *Indiana, B. & W. R. Co. v. McBroom*, 13 Am. & Eng. R. Cas. 458, 91 Ind. 111. FOLLOWED IN *Louisville, N. A. & C. R. Co. v. Spenn*, 11 Am. & Eng. R. Cas. 60, 87 Ind. 322.—*Pittsburgh, C. & St. L. R. Co. v. Hixon*, 8 Am. & Eng. R. Cas. 717, 79 Ind. 111.—APPLIED IN *Indiana, B. & W. R. Co. v. McBroom*, 13 Am. & Eng. R. Cas. 458, 91 Ind. 111. CRITICISED IN *Chicago & E.*

I. R. Co. v. Ostrander, 32 Am. & Eng. R. Cas. 361, 116 Ind. 259, 12 West. Rep. 718, 15 N. E. Rep. 227. QUOTED AND CRITICISED IN *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 32 Am. & Eng. R. Cas. 374, 110 Ind. 225.—*Pittsburgh, C. & St. L. R. Co. v. Culver*, 60 Ind. 469. *Louisville, N. A. & C. R. Co. v. Spenn*, 11 Am. & Eng. R. Cas. 60, 87 Ind. 322.—FOLLOWING *Louisville, N. A. & C. R. Co. v. Ehlert*, 87 Ind. 339.—*Indiana, B. & W. R. Co. v. Adamson*, 13 Am. & Eng. R. Cas. 456, 90 Ind. 60.—DISTINGUISHING *Louisville, N. A. & C. R. Co. v. Krimming*, 87 Ind. 351; *Louisville, N. A. & C. R. Co. v. Hanmann*, 87 Ind. 422.—*Indiana, B. & W. R. Co. v. McBroom*, 13 Am. & Eng. R. Cas. 458, 91 Ind. 111.—APPLYING *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 79 Ind. 111; *Louisville, N. A. & C. R. Co. v. Ehlert*, 87 Ind. 339. QUOTING *Pittsburgh, C. & St. L. R. Co. v. Culver*, 60 Ind. 469.—*Louisville, N. A. & C. R. Co. v. Parks*, 97 Ind. 307.

In a suit against a railroad company for injury caused by fire, where the complaint alleges negligence in managing an engine, whereby combustibles on its right of way and on lands adjacent were set on fire, from which the fire, without negligence of the plaintiff or the intervening owner, spread to the plaintiff's lands, whereby the plaintiff's property was destroyed, and that the fire was wholly the result of the negligence of the defendant, it is not necessary to aver negligence of the defendant in permitting the fire to escape from its right of way. *Louisville, N. A. & C. R. Co. v. Hanmann*, 87 Ind. 422.—FOLLOWING *Louisville, N. A. & C. R. Co. v. Stevens*, 87 Ind. 198; *Louisville, N. A. & C. R. Co. v. Krimming*, 87 Ind. 351.—DISTINGUISHED IN *Indiana, B. & W. R. Co. v. Adamson*, 13 Am. & Eng. R. Cas. 456, 90 Ind. 60.—*Haugen v. Chicago, M. & St. P. R. Co.*, 3 S. Dak. 394, 53 N. W. Rep. 769.

184. — and sufficiency of the allegations.—

A complaint alleging that coals negligently dropped and sparks emitted from the engine of the defendant set fire to an accumulation of dry grass, weeds, rubbish, and other combustibles negligently suffered to gather beside the defendant's track, and on its right of way, which fire, through the medium of said combustibles, was negligently allowed by the defendant to escape from its right of way and communicate to plaintiff's land and to the roots

Eng. R. Cas.
718, 15 N.
CRITICISED IN
Hixon, 32
Ind. 225.—
Culver, 60
R. Co. v.
60, 87 Ind.
A. & C.
Indiana, B.
n. & Eng.
DISTINGUISHING
Cunning, 87
R. Co. v.
B. & W.
Eng. R.
ING Pitts-
n, 79 Ind.
v. Ehler, t,
rgh, C. &
9.—Louis-
s, 97 Ind.

company for
complaint
an engine,
ht of way
n fire, from
nce of the
ner, spread
the plain-
d that the
negligence
try to aver
permitting
t of way.
Haumann,
ille, N. A.
8; Louis-
ng, 87 Ind.
t, B. & W.
g. R. Cas.
go, M. &
7. W. Rep.

the alle-
that coals
s emitted
t set fire
ss, weeds,
negligently
defendant's
which fire,
combustibles,
defendant
and com-
the roots

of growing grass and to the hay in his field, thereby burning and consuming it, is sufficient to show that the fire was permitted to escape by the negligence of the defendant. *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 32 Am. & Eng. R. Cas. 374, 110 Ind. 225, 11 N. E. Rep. 285.—QUOTING *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 79 Ind. 111.—CRITICISED IN *Chicago & E. I. R. Co. v. Ostrander*, 32 Am. & Eng. R. Cas. 361, 116 Ind. 259, 12 West. Rep. 718, 15 N. E. Rep. 227.

A complaint against a railroad company alleged that coals and sparks from the defendant's locomotive engine set fire to combustible materials negligently allowed to accumulate on its right of way; that such fire was negligently permitted by the defendant to escape and communicate to the plaintiff's land, and burn his growing grass and his fences, and, without fault or negligence on the part of the plaintiff, said fire, by the negligence of the defendant suffered to escape from its premises to the plaintiff's land, did burn and destroy his barn, etc. *Held*, that the complaint shows, with sufficient certainty to withstand a demurrer, that the escape of the fire from the right of way and the destruction of the plaintiff's property both occurred through the negligence of the defendant and without the fault of the plaintiff. *Indiana, B. & W. R. Co. v. Overman*, 29 Am. & Eng. R. Cas. 161, 110 Ind. 538, 10 N. E. Rep. 575.—DISTINGUISHING *Wabash, St. L. & P. R. Co. v. Johnson*, 96 Ind. 40.

185. Must allege that negligence was proximate cause.—Plaintiff filed a complaint averring that he had contracted to deliver wood to the defendant, and that he had delivered it at a point on defendant's track, and that the same had been set on fire by passing trains, negligently run and operated on said road by defendant. *Held*, that the complaint was demurrable because (1) it did not allege that the wood had been placed on the track by the permission of the defendant; and (2) it did not distinctly allege that the negligence of the defendant in running its trains had caused the fire. *Pennsylvania Co. v. Gallentine*, 7 Am. & Eng. R. Cas. 517, 77 Ind. 322.

Plaintiff alleged that he had contracted with defendant to deliver said wood on defendant's track, and that he had delivered it there accordingly; that the defendant had cut down the grass and inflammable materials near that spot, and allowed the same

to accumulate until they became very dry; that said accumulation was set on fire by the passing trains, negligently run and operated on defendant's road by defendant, and that said fire was communicated to said wood, burning the same. *Held*, that the complaint was demurrable because (1) it did not aver when the grass and other inflammable material had been cut and allowed to accumulate, whether before or after the delivery of the wood; and (2) it did not distinctly allege that the negligence of the defendant was the cause of the fire. *Pennsylvania Co. v. Gallentine*, 7 Am. & Eng. R. Cas. 517, 77 Ind. 322.

Had the grass, etc., been cut and allowed to accumulate prior to the delivery of the wood, the company defendant would not have been liable for the loss of such wood. *Pennsylvania Co. v. Gallentine*, 7 Am. & Eng. R. Cas. 517, 77 Ind. 322.

186. Sufficiency of allegations as against motion to make more specific.—A complaint which states "that defendant, in the said month of May, through its agents and servants negligently permitted fire to escape from defendant's engines upon said road, whereby fire was communicated to plaintiff's fence," etc., is too indefinite as to time, and upon motion should be made more specific in that particular. *Melvin v. St. Louis & S. F. R. Co.*, 89 Mo. 106, 1 S. W. Rep. 286.

Where the company alleged that defendant negligently permitted combustible material to accumulate on its right of way, that in operating its locomotives the rubbish was ignited, and that defendant negligently permitted the fire to escape without any fault of plaintiff and to enter on plaintiff's land, where it injured and killed a large number of trees, a motion requiring the plaintiff to state more specifically the acts of negligence and the number of trees injured and destroyed, etc., was properly overruled. *Ohio & M. R. Co. v. Wrape*, 4 Ind. App. 100, 30 N. E. Rep. 428.—FOLLOWING *Chicago, St. L. & P. R. Co. v. Barnes*, 2 Ind. App. 213.—*Ohio & M. R. Co. v. Trapp*, 4 Ind. App. 69, 30 N. E. Rep. 812.

187. — to support special finding of negligence not directly alleged.—Where the plaintiff alleged in his petition that the negligence of defendant consisted in the omission to keep its roadway clean, and that it negligently allowed dry grass to accumulate and remain on the line of its

right of way, and the jury returned a special finding that the fire was caused by a defective engine, in allowing coals of fire to drop from the fire box and ignite the dry grass on the right of way, the special finding and general verdict of the jury were in accord with the allegations of the petition, notwithstanding the fact that the petition contained no statement charging that the engine was defective. *Ft. Scott, W. & W. R. Co. v. Tubbs*, 49 *Am. & Eng. R. Cas.* 685, 47 *Kan.* 630, 28 *Pac. Rep.* 612.—DISTINGUISHING *St. Louis & S. F. R. Co. v. Fudge*, 39 *Kan.* 543.

188. Necessity of alleging negligence as affected by statute.—Where the action is under Iowa Code, § 1289, negligence is presumed from proof that damage was done to plaintiff's property by fire from defendant's locomotive; and it is not necessary to allege that the company was negligent. *Rose v. Chicago & N. W. R. Co.*, 72 *Iowa* 625, 34 *N. W. Rep.* 450.—FOLLOWING *Small v. Chicago, R. I. & P. R. Co.*, 50 *Iowa* 341.—*Seska v. Chicago, M. & St. P. R. Co.*, 77 *Iowa* 137, 41 *N. W. Rep.* 596.

Under par. 1321, *Kan. Gen. St.* 1889, it is only necessary to allege and prove that the fire complained of was caused by the operation of the defendant's railway to make out a *prima facie* case. *Ft. Scott, W. & W. R. Co. v. Tubbs*, 49 *Am. & Eng. R. Cas.* 685, 47 *Kan.* 630, 28 *Pac. Rep.* 612. *St. Louis & S. F. R. Co. v. Snavely*, 47 *Kan.* 637, 28 *Pac. Rep.* 615.

189. Sufficiency of declaration in action for causing death.—The count in plaintiff's declaration to the effect "that it was the duty of the defendant to keep his locomotives in such condition that they would not permit sparks to escape from them and burn up and injure the property of the plaintiff and said intestate, or destroy the life of said plaintiff or said intestate, or cause the death of either of them; yet the defendant, not regarding its said duty, did not keep its said locomotives in such condition and repair that sparks would not escape therefrom, but negligently suffered one of its locomotives to be so out of repair, etc., by means whereof sparks were thrown from a locomotive engine, etc., then and there igniting the said dwelling house in which the said plaintiff and the said Thomas Rajnowski were living, and the said dwelling house was entirely consumed

by fire; and when said house was so consumed the intestate was sleeping in said dwelling house, and was consumed, etc., causing his instant death; and the death of said intestate was so caused without any negligence done by him or said plaintiff, etc."—states a sufficient cause of action. *Rajnowski v. Detroit, B. C. & A. R. Co.*, 74 *Mich.* 20, 41 *N. W. Rep.* 847.

c. Alleging Absence of Negligence on Plaintiff's Part.

190. Indiana—Necessity of the allegation.—In an action by an adjoining proprietor for damages to plaintiff's property caused by fire escaping from the defendant's locomotives, the complaint should not only allege negligence on the part of the defendant, but also that the plaintiff was without negligence. *Wabash, St. L. & P. R. Co. v. Johnson*, 96 *Ind.* 44.

A complaint charging that defendant negligently and without fault of the plaintiff allowed fire to escape from its locomotive, whereby plaintiff's property was burned, is bad on demurrer, because it does not show that the plaintiff's negligence did not contribute to the burning, though it does show that it did not contribute to the escape of the fire. *Wabash, St. L. & P. R. Co. v. Johnson*, 96 *Ind.* 62.

191. — and its sufficiency.—In a suit to recover for property destroyed by fire, the complaint must show by direct averment that there was no negligence by the plaintiff contributing to the injury, and the allegation that the fire was suffered to escape without the fault of the plaintiff is not sufficient. *Wabash, St. L. & P. R. Co. v. Johnson*, 96 *Ind.* 40.—DISTINGUISHING *Louisville, N. A. & C. R. Co. v. Kinning*, 87 *Ind.* 351; *Indianapolis & C. R. Co. v. Paramore*, 31 *Ind.* 143; *Pittsburgh, C. & St. L. R. Co. v. Nelson*, 51 *Ind.* 150.—DISTINGUISHED IN *Indiana, B. & W. R. Co. v. Overman*, 29 *Am. & Eng. R. Cas.* 161, 110 *Ind.* 538.—*Louisville, N. A. & C. R. Co. v. Lockridge*, 22 *Am. & Eng. R. Cas.* 649, 93 *Ind.* 191.

An averment in the complaint that the fire and damage were not caused by any negligence on the part of the plaintiff sufficiently negatives contributory negligence. *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 32 *Am. & Eng. R. Cas.* 374, 110 *Ind.* 225, 11 *N. E. Rep.* 285.

In an action against a railroad company for injuries occasioned by its negligently permitting fire to escape from its right of way to plaintiff's land, the complaint need not allege what precaution was taken by the plaintiff to avoid the injuries, but it is sufficient to aver that the plaintiff was without fault. *Chicago, St. L. & P. R. Co. v. Barnes*, 2 Ind. App. 213, 28 N. E. Rep. 328. —FOLLOWED IN OHIO & M. R. Co. v. Wrape, 4 Ind. App. 100.

192. Need not be alleged in North Dakota.—In an action for damages caused by fire set out by defendant's engine, the want of contributory negligence on plaintiff's part need not be alleged and proved by him to make out his case. *Gram v. Northern Pac. R. Co.*, 45 Am. & Eng. R. Cas. 544, 1 N. Dak. 252, 46 N. W. Rep. 972. —APPROVING *Washington & G. R. Co. v. Gladmon*, 15 Wall. (U. S.) 401; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291; *Wilson v. Northern Pac. R. Co.*, 26 Minn. 278, 3 N. W. Rep. 333; *Robinson v. Western Pac. R. Co.*, 48 Cal. 409; *Potter v. Chicago & N. W. R. Co.*, 20 Wis. 533; *Mares v. Northern Pac. R. Co.*, 3 Dak. 336, 21 N. W. Rep. 5; *Hickman v. Kansas City, M. & B. R. Co.*, 66 Miss. 154, 5 So. Rep. 225; *Thompson v. North Mo. R. Co.*, 51 Mo. 190.

193. —nor in West Virginia.—It is not necessary for plaintiffs to aver in the declaration that they were not guilty of negligence which contributed to the burning of their property—or in other words, that they were not guilty of contributory negligence. *Snyder v. Pittsburgh, C. & St. L. R. Co.*, 11 W. Va. 14. —FOLLOWED IN *Unfried v. Baltimore & O. R. Co.*, 34 W. Va. 260.

3. Defenses.*

194. Generally.—Persons who have authorized the use of a locomotive on their premises, and have known of its use and acquiesced in it, have no right of action for damage done to their property by fire set by sparks from such locomotive. *Spear v. Marquette, H. & O. R. Co.*, 8 Am. & Eng. R. Cas. 722, 49 Mich. 246, 13 N. W. Rep. 610.

Where a married woman and another sue jointly for the destruction of hay grown and cut on the married woman's land, the

company cannot defend on the ground that the contract between the two plaintiffs was invalid because one was a married woman. *Eddy v. Lafayette*, 49 Fed. Rep. 807, 4 U. S. App. 247, 1 C. C. A. 441.

The defense being that the fire was set out by a contractor not under the control of the defendant, and this question having been, on sufficient evidence, under proper instructions, submitted to the jury and found against the defendant, the judgment should be affirmed. *De Lissa v. Missouri Pac. R. Co.*, 36 Mo. App. 706.

195. Insurance of the property.—Where, by the actionable negligence of a company, fire from its locomotive is communicated to adjoining property, which is thereby consumed, the owner of such property can recover his entire loss from such company without regard to any insurance thereon. In such case, the fact that such property at the time of its destruction was insured, and that the insurance companies had since paid the owner the amount of the insurance, is not available to the railroad company as a defense. *Cunningham v. Evansville & T. H. R. Co.*, 23 Am. & Eng. R. Cas. 347, 102 Ind. 478, 52 Am. Rep. 683, 1 N. E. Rep. 800. —REVIEWING *Sherlock v. Alling*, 44 Ind. 184; *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 317. —*Nichols v. Chicago, St. P., M. & O. R. Co.*, 29 Am. & Eng. R. Cas. 175, 36 Minn. 452, 32 N. W. Rep. 176. *Robinson v. New Brunswick R. Co.*, 23 New Brun. 323. —FOLLOWING *Bradburn v. Great Western R. Co.*, L. R. 10 Ex. 1.

196. Negligence of another company.—Where two companies use the same track one cannot escape liability on the ground that the accumulation of grass and rubbish causing the fire was the result of carelessness of the other, where it appears there would have been no fire but for its own negligence, which was, therefore, the primary cause. *Genung v. New York & N. E. R. Co.*, 50 N. Y. S. R. 511, 66 Hun 632, 21 N. Y. Supp. 97. *Slossen v. Burlington, C. R. & N. R. Co.*, 11 Am. & Eng. R. Cas. 67, 60 Iowa 215, 14 N. W. Rep. 244.

197. Prohibited by owner from extinguishing fire.—In making railroad corporations insurers against the consequences of fire communicated by engines, the law implies the right and duty on their

* For contributory negligence as a defense, see ante, 102-135.

* See also ante, 138; post, 301; FIRE INSURANCE, 11, 12.

part to put it out when communicated. How they would be affected by a prohibition from the owner to enter upon the land for the purpose, *quære*. *Simmonds v. New York & N. E. R. Co.*, 23 *Am. & Eng. R. Cas.* 369, 52 *Conn.* 264, 52 *Am. Rep.* 587.

198. Settlement with part owner of property.—Where the landowner and plaintiff, the owner of a saw mill, were jointly interested in logs cut and sawed by plaintiff, and which were burned by defendant's negligence, a settlement between the landowner and the railroad did not bar plaintiff's suit to recover for his interest, and parol evidence was admissible to show that a settlement receipt was only for the interest of the landowner. *Haverly v. State Line & S. R. Co.*, 125 *Pa. St.* 116, 17 *Atl. Rep.* 224.

199. Violation of law by plaintiff.—When stacks of grain, etc., placed within the prohibited distance of a railroad right of way are destroyed by fire resulting from the negligence of the railroad, it cannot, in an action against it, grounded on such negligence, be permitted to plead such unlawful act as a defense. *Reed v. Missouri Pac. R. Co.*, 50 *Mo. App.* 504.—REVIEWING *Sutton v. Wauwatosa*, 29 *Wis.* 21.

200. Contract exempting company from liability.—A contract which exempts a company from liability for damages by reason of fire communicated to buildings placed on the company's right of way with its consent, is not void as against public policy. *Griswold v. Illinois C. R. Co.*, (Iowa) 57 *Am. & Eng. R. Cas.* 59, 57 *N. W. Rep.* 844; *reversing* 56 *Am. & Eng. R. Cas.* 100, 53 *N. W. Rep.* 295.

Section 1289 of the Code of Iowa, making companies absolutely liable for negligently setting out fires, does not affect the validity of a contract between the company and one who places buildings upon its right of way, exempting the company from liability for damages by reason of fires negligently or otherwise communicated to such buildings. *Griswold v. Illinois C. R. Co.*, (Iowa) 57 *Am. & Eng. R. Cas.* 59, 57 *N. W. Rep.* 844; *reversing* 56 *Am. & Eng. R. Cas.* 100, 53 *N. W. Rep.* 295.

4. Evidence.

a. Admissibility on Part of Plaintiff, Generally.

201. To show plaintiff's title or ownership.—Where two persons sue for

the burning of a mill, one of the plaintiffs may testify that the building belonged to himself and his co-plaintiff, instead of introducing the deed or other evidence of title. Where no issue is made as to plaintiff's title, it is not necessary to prove the same by the best evidence. *Chicago, St. P., M. & O. R. Co. v. Gilbert*, 52 *Fed. Rep.* 711, 10 *U. S. App.* 375, 3 *C. C. A.* 264.

In an action for the destruction of a house by the culpable negligence of an employé of defendant it was competent to prove ownership by parol, by showing exclusive possession of the premises. *Pacific Exp. Co. v. Dunn*, 81 *Tex.* 85, 16 *S. W. Rep.* 792.—APPLIED IN *Dallas, P. & S. E. R. Co. v. Day*, 3 *Tex. Civ. App.* 353.

In an action for destroying hay cut on another's land, it was proper to allow plaintiffs to show that the hay was cut on land which they leased of E., and to show by E.'s own testimony that he had controlled and had paid taxes on the land, as agent of the owner, for about fifteen years; that he had leased it for the owner, and that he had sold the hay on it to one of the plaintiffs. This was relevant and competent to show their title to the hay. *Melgar v. Chicago, M. & St. P. R. Co.*, 76 *Iowa* 387, 41 *N. W. Rep.* 49.

In an action to recover damages for injuries to land caused by fire, the evidence showed that plaintiff's husband bought the land and received a deed therefor; that part of the purchase money was paid before her husband's death, and the balance by her afterwards; that by the husband's will, duly probated, whatever title he had passed to her, and that she or her husband had been in the exclusive possession and control of the land for about eleven years. *Held*, that the evidence, if un rebutted, was sufficient to establish the plaintiff's right to maintain the action. *Ft. Worth & N. O. R. Co. v. Wallace*, 40 *Am. & Eng. R. Cas.* 248, 74 *Tex.* 581, 12 *S. W. Rep.* 227.

202. To show absence of contributory negligence.—In an action for burning a building which was within the lines of the right of way, evidence is admissible to show that it was so erected by the consent of the company for convenience in handling freights. *Grand Trunk R. Co. v. Richardson*, 91 *U. S.* 454.

Where a company is sued for burning an elevator situate near the track, it is proper to admit evidence on behalf of plaintiff to

show that the company had offered to haul lumber at half rates to build another elevator on the site of the one burned, as it tends to show that both the company and plaintiff regarded the place as reasonably suitable and safe. *Toledo, St. L. & K. C. R. Co. v. Oswald*, 41 Ill. App. 590.

A plaintiff is not chargeable with contributory negligence for not doing an act which, if done, would have afforded no protection. So where the action is to recover for hay burned in stacks, some of which were plowed around and others not, it is competent for him to prove that plowing would not stop the progress of such a fire. *Lewis v. Chicago, M. & St. P. R. Co.*, 57 Iowa 127, 10 N. W. Rep. 336. — DISTINGUISHED IN *Comes v. Chicago, M. & St. P. R. Co.*, 78 Iowa 391. REFERRED TO IN *Ormond v. Central Iowa R. Co.*, 58 Iowa 742.

But in such a case, evidence that it was the custom of the neighborhood not to plow around the stacks is not competent for the purpose of showing a want of contributory negligence. Plaintiff was bound to exercise ordinary care, regardless of what others did. *Ormond v. Central Iowa R. Co.*, 58 Iowa 742, 13 N. W. Rep. 54. — DISTINGUISHING *Kesee v. Chicago & N. W. R. Co.*, 30 Iowa 78. REFERRING TO *Small v. Chicago, R. I. & P. R. Co.*, 55 Iowa 582; *Lewis v. Chicago, M. & St. P. R. Co.*, 57 Iowa 127.

203. To show company's negligence.—It is competent for a plaintiff to prove by a witness who was on the track fifteen minutes after a train passed, that he noticed coals on and near the track as big as his thumb; that the wind was from the west, and that he saw coals fifty feet east of the track, and that he saw several stumps on fire several feet from the track, and that these were not more than forty to sixty rods from plaintiff's building, which was burned. *Brusberg v. Milwaukee, L. S. & W. R. Co.*, 7 Am. & Eng. R. Cas. 505, 55 Wis. 106, 12 N. W. Rep. 416. — RECONCILED IN *Gibbons v. Wisconsin Valley R. Co.*, 13 Am. & Eng. R. Cas. 469, 58 Wis. 335. REVIEWED IN *Cummings v. National Furnace Co.*, 60 Wis. 603.

In an action for firing plaintiff's woods,

* Admissibility of evidence of negligence, where property is destroyed by fire, see note, 38 AM. DEC. 73.

proof that defendant did not give notice to every person living within a mile of the place intended to be fired is not competent if plaintiff was notified. *Saussey v. South Fla. R. Co.*, 22 Fla. 327.

The plaintiff exhibited to the jury an old worn and torn spark arrester as one of the defendant's. The evidence showed that it was found on defendant's road a month before the fire complained of took place, and could not have been in use at the time of the fire. *Held*, that its admission could have served no purpose but to inflame and prejudice the minds of the jury, and was therefore error. *Kenney v. Hannibal & St. J. R. Co.*, 70 Mo. 243. — FOLLOWED IN *Huff v. Missouri Pac. R. Co.*, 17 Mo. App. 356.

204. To show negligence in respect to the construction of the engine.—Proof of the defective condition of the grate attached to the smoke-stack of the engine as a spark arrester, by a witness who was on the engine at the time the fire happened, and who shortly afterwards saw the grate, but did not see it either before or on the day of the fire, although not conclusive as to the condition of the grate at the time of the fire, was evidence, and proper to go to the jury. *Ryan v. Gross*, 68 Md. 377, 11 Cent. Rep. 502, 12 Atl. Rep. 115, 16 Atl. Rep. 302.

When the fire is shown to have been caused, or in the nature of the case could only have been caused, by sparks from an engine which is known and identified, the evidence should be confined to the condition, management, and practical operation of that engine; and testimony tending to prove defects in other engines of the company is irrelevant and inadmissible. *Henderson v. Philadelphia & R. R. Co.*, 48 Am. & Eng. R. Cas. 16, 144 Pa. St. 461, 22 Atl. Rep. 851.

205. To show habitual negligence in use of defective engines.—When a fire is started by a locomotive which cannot be identified, the plaintiff may introduce evidence showing the habitual use by the company of improper spark arresters. *Gowen v. Glaser, (Pa.)* 10 Atl. Rep. 417.

But the evidence is properly confined to such as tends to show the prevalence of such "habit" at or about the time of the fire complained of. *Davidson v. St. Paul, M. & M. R. Co.*, 23 Am. & Eng. R. Cas. 352, 34 Minn. 51, 24 N. W. Rep. 324.

The court admitted evidence that defendant was in the habit of refusing to adopt certain appliances to modify the discharge of smoke from its locomotives, on account of the cost, until after the patents on them had expired. *Held*, that such evidence could not explain whether the spark arresters used by defendant were up to the standard required, and was error, as tending to create a prejudice against defendant. *Pennsylvania R. Co. v. Page*, (Pa.) 32 Am. & Eng. R. Cas. 386, 12 Atl. Rep. 662.

206. To show negligence in the management of engine.—Evidence is admissible that defendant habitually burned wood in coal-burning engines, and that burning wood increases the chances of setting out fires. *St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. 47.

The use of an excessive amount of steam, or other facts connected with the operation of a train, are competent evidence in an action for damages for fires alleged to have been set by a locomotive, to determine whether or not the company has failed to exercise due diligence in the operation of its train. *McCormick v. Chicago, R. I. & P. R. Co.*, 41 Iowa 193.

Where plaintiff offers to prove that other engines had frequently passed the same place under similar conditions of wind and weather without causing fires, it is not necessary that all the conditions of wind, weather, and everything else connected with the passage of each of the engines previously passing shall be exactly like all the conditions of wind, weather, and everything else connected with the passage of the engine which caused the fire in order that said proof may be admitted in evidence. *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354, 8 Am. Ry. Rep. 230.

207. To show negligence in permitting combustibles on right of way.—If a company permits dry grass to remain standing between the railroad track and the fence, in such quantities as to show negligence, evidence of the fact is admissible. *Henry v. Southern Pac. R. Co.*, 50 Cal. 176, 12 Am. Ry. Rep. 168. *Toledo, W. & W. R. Co. v. Wand*, 48 Ind. 476.—**FOLLOWED IN** Indianapolis, B. & W. R. Co. v. Clem, 51 Ind. 591.

Such evidence is admissible as bearing upon the degree of care necessary in operating the locomotives. *Cantlon v. Eastern R. Co.*, 45 Minn. 481, 48 N. W. Rep. 22.

Such evidence is admissible in a statutory action without proving where the exterior lines of the location are. *Thatcher v. Maine C. R. Co.*, 85 Me. 502, 27 Atl. Rep. 519.

Where a company is charged with gross negligence in burning plaintiff's warehouse, and there is evidence that the trainmen took burning packing from a hot box and left it a foot or two from a raised platform that extended to the warehouse at the time a strong wind was blowing in the direction of the house, further evidence is admissible to show that there were combustible materials under the platform near where the burning packing was left. *Whiting v. Chicago, M. & St. P. R. Co.*, 5 Dak. 90, 37 N. W. Rep. 222.

208. To show proximate cause of fire.—In an action to recover for loss by fire of certain household goods situated in a house located four hundred and twenty-one feet from defendant's right of way, after proof that shortly before the fire one of the defendant's engines had passed along its road, that a pile of lumber on its right of way had been set on fire, and that a hard wind was blowing at the time from the lumber pile toward the plaintiff's house, the plaintiff introduced evidence, against defendant's objection, that charred shingles, after the fire and on the same day, were found a quarter of a mile beyond plaintiff's house, and in the direction the wind was blowing. *Held*, that the evidence was admissible as tending to show the source of the fire whereby plaintiff's property was destroyed, and that an instruction, asked by the defendant, that from the facts proven no inference could be drawn as to the source of the fire, was rightly rejected. *Knight v. Chicago, R. I. & P. R. Co.*, 81 Iowa 310, 46 N. W. Rep. 1112.

209. Letters of president admitting liability.—Letters from the president of a railroad company, written after the destruction of goods by fire, admitting the liability of his company therefor, are not evidence against the corporation in an action brought to recover for such loss. *Piedmont Mfg. Co. v. Columbia & G. R. Co.*, 16 Am. & Eng. R. Cas. 194, 19 So. Car. 353.

210. Books of company—Depositions of employees.—The locomotive superintendent and locomotive foreman of a company are "officers of the corporation" who may be examined as provided in R. S. O. (1877), c. 50, § 136 (1), and the evidence

of such officers as to the conditions of the respective engines and the difference as to danger from fire between a wood-burning and a coal-burning engine, taken under said section, was properly admitted on the trial. And certain books of the company containing statements of repairs required, on these engines among others, were also properly admitted in evidence without calling the persons by whom the entries were made. *Canada Atl. R. Co. v. Moxley*, 15 Can. Sup. Ct. 145; *affirming* 14 Ont. App. 309.

211. Company's subsequent acts as admissions of liability.—In an action under So. Car. Gen. St. § 1511, to recover damages for personal property destroyed by fire beyond defendant's right of way, testimony is inadmissible to prove that defendant had paid for cotton burned at the same time, which had been received by the company for carriage. *Thompson v. Richmond & D. R. Co.*, 24 So. Car. 366.

212. Increased precautions of company after the fire.*—Where a company is sued for burning plaintiff's property by sparks from a locomotive, it is proper to admit evidence that the company employed more men along the track after the fire, as tending to show negligence in not employing enough men before the fire. *Westfall v. Erie R. Co.*, 5 Hun (N. Y.) 75.—**DISTINGUISHING** *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1. **REVIEWING** *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218; *Field v. New York C. R. Co.*, 32 N. Y. 339.

213. Circumstantial evidence.—In an action for the burning of plaintiff's barn by sparks emitted from an engine, proof of the burning may be made by circumstantial evidence, and where the evidence is conflicting it is the province of the jury to pass upon the conflict. *Gulf, C. & S. F. R. Co. v. Holt*, 11 Am. & Eng. R. Cas. 72, 1 Tex. App. (Civ. Cas.) 477.

Evidence that smoke was seen along defendant's railroad just after a train passed is not objectionable on the ground that it is not the best evidence of a fire; that proof of the fire itself should have been introduced, where there is no evidence that any witnesses saw the fire itself. *Lake Erie & W. R. Co. v. Helmerick*, 29 Ill. App. 270.

The complaint alleged that the fire was first communicated to rubbish negligently permitted to accumulate on defendant's

right of way, two and a half miles from plaintiff's land. *Held*, that evidence of the dryness of the season, the strength and direction of the wind, and the character of the intervening country, was admissible on behalf of plaintiff. *Marvin v. Chicago, M. & St. P. R. Co.*, 45 Am. & Eng. R. Cas. 540, 79 Wis. 140, 47 N. W. Rep. 1123. *Jones v. Michigan C. R. Co.*, 25 Am. & Eng. R. Cas. 482, 59 Mich. 437, 26 N. W. Rep. 662.

214. Opinion evidence.—In an action to recover for damage by fire to grass and a grove, plaintiff, after stating that he had examined them since the fire, was permitted to testify how he found them, and what effect the fire had upon them. *Held*, not vulnerable to the objection that the witness did not state facts, but only his opinion. *Brooks v. Chicago, M. & St. P. R. Co.*, 32 Am. & Eng. R. Cas. 383, 73 Iowa 179, 34 N. W. Rep. 805.

Where it becomes material to prove in what part of a building a fire originated, it is error to permit a witness, who did not see the beginning of the fire, to state in what part it originated, basing his conclusion upon circumstances and appearances when he first saw the fire. *Wood v. Chicago, M. & St. P. R. Co.*, 40 Wis. 582.

215. Violation of ordinance by company.—Where a railroad company's switch house burns, which causes plaintiff's ice house near by to burn, a municipal ordinance prohibiting the putting up of any stovepipe, unless conducted into a brick or stone chimney, is proper as affecting the company's negligence, where the evidence shows that a stovepipe in the switch house was not put up in conformity with the ordinance. *Briggs v. New York C. & H. R. R. Co.*, 72 N. Y. 26.—**FOLLOWED IN** *Oldenburg v. New York C. & H. R. R. Co.*, 29 N. Y. S. R. 836.

But violation of the ordinance is not evidence of negligence which would of itself render the company liable, where it appears that it did not contribute to the injury, or where it could not reasonably be inferred that it did. *Briggs v. New York C. & H. R. R. Co.*, 72 N. Y. 26.

216. Width of right of way as used by company.—Where the answer admits that the defendant at the time in question owned and operated the road in question, and where the only question at issue was as to the width of the right of way of such railroad—*held*, that evidence was properly

*See also EVIDENCE, 84-88.

introduced by plaintiff to show the width of the strip of land upon each side of the track which defendant was occupying and using for right of way purposes, at or just prior to the date of the fire in question. *Gram v. Northern Pac. R. Co.*, 45 Am. & Eng. R. Cas. 544, 1 N. Dak. 252, 46 N. W. Rep. 972.

217. In rebuttal.—The defendant company having introduced evidence to show that the fire started outside of its right of way, it was competent for plaintiff, in rebuttal, to show the contrary. *Lanning v. Chicago, B. & Q. R. Co.*, 25 Am. & Eng. R. Cas. 493, 68 Iowa 502, 27 N. W. Rep. 478.

After evidence by defendant of a proper equipment and careful management of the engine causing the fire, it was error to permit proof, in rebuttal, of other fires produced by sparks escaping from other engines of defendant. The sufficiency of the equipment and management of the engine occasioning the fire was the only matter then in issue. *Lester v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 265, 9 Am. Ry. Rep. 219.—FOLLOWING *Coale v. Hannibal & St. J. R. Co.*, 60 Mo. 227.—APPROVED IN *Patton v. St. Louis & S. F. R. Co.*, 23 Am. & Eng. R. Cas. 364, 87 Mo. 117.—*Allard v. Chicago & N. W. R. Co.*, 73 Wis. 165, 40 N. W. Rep. 685.

218. Erroneous admission, when harmless error.—In an action under Mass. Gen. St. ch. 63, § 101, for fire kindled from a locomotive, no exception lies to proof by plaintiff of the direction of the wind at a point five miles distant, unless the jury were misled as to the direction at the time and place of the fire. *Pierce v. Worcester & N. R. Co.*, 105 Mass. 199, 3 Am. Ry. Rep. 557.—QUOTING *Hart v. Western R. Corp.*, 13 Metc. (Mass.) 99.

Testimony for plaintiff to the effect that it was the custom to break trains at that point and haul them up an ascending grade in sections, which was not done with the train in question, is, even if erroneously admitted, immaterial, where the jury find that the engine was properly managed and operated. *Abbot v. Gore*, 40 Am. & Eng. R. Cas. 244, 74 Wis. 509, 43 N. W. Rep. 365.

Where the company attempted to show its diligence as to the condition of the particular locomotive, by evidence tending to prove that all its locomotives run over its

road were kept in substantially the same condition, and that such condition was good, this evidence might be rebutted by evidence that on previous occasions and at different places the company's locomotives had emitted sparks which caused, or were capable of causing, similar fires. Admitting the rebutting evidence as a part of the plaintiff's evidence in chief, the company afterwards having adduced evidence which would have made the plaintiff's evidence admissible in rebuttal, was only an irregularity, and not reversible error. *East Tenn., V. & G. R. Co. v. Hesters*, 90 Ga. 11, 15 S. E. Rep. 828.—FOLLOWED IN *East Tenn., V. & G. R. Co. v. Holt*, 90 Ga. 17.

b. Admissibility on Part of Company, Generally.

219. To show that fire was of incendiary origin.—Where the origin of the fire is problematical, and depends upon inferences to be drawn from facts proved, it is competent for the defendant to introduce testimony having a tendency to prove that the fire was of incendiary origin. *Ireland v. Cincinnati, W. & M. R. Co.*, 79 Mich. 163, 44 N. W. Rep. 426.

220. — or caused by smoke-stack of neighboring factory.—Where the question whether a fire was communicated to plaintiff's factory by defendant's engine was sought to be established from inferences drawn from the facts and circumstances introduced in evidence tending to prove it, the defendant, for the purpose of placing all of such facts and circumstances before the jury, may show that a stationary boiler, with a smoke-stack having no spark arresters, was located within a short distance of the factory, and was in use at the time of the fire; and to show that live sparks were emitted from this smoke-stack, a witness may testify that some time after the fire a spark from this smoke-stack fell upon and burned the witness's clothing. *Ireland v. Cincinnati, W. & M. R. Co.*, 79 Mich. 163, 44 N. W. Rep. 426.

221. To disprove plaintiff's ownership—Record of judgment.—In an action for the destruction of the plaintiff's house by fire, where the defense is that the plaintiff does not own the house, evidence is admissible to show that the house stood upon the land granted by congress to the railroad company, and plaintiff could have

ly the same
dition was
rebutted by
sions and at
locomotives
sed, or were
res. Admit-
a part of the
he company
dence which
il's evidence
ly an irregu-
East Tenn.,
Ga. 11, 15 S.
ast Tenn., V.

company, Gen-

was of in-
the origin of
depends upon
acts proved, it
to introduce
o prove that
gin. Ireland
Co., 79 Mich.

smoke-stack
Where the
communicated
tant's engine
l from infer-
and circum-
tending to
e purpose of
circumstances
at a stationary
ing no spark
a short dis-
in use at the
ow that live
smoke-stack,
ne time after
oke-stack fell
ss's clothing.
M. R. Co., 79

ntiff's own-
ment.—In an
the plaintiff's
se is that the
use, evidence
e house stood
ngress to the
ff could have

no interest in the house, as a house built by one person upon the land of another without any authority or agreement in respect thereto becomes a part of the realty, and the property in the building rests in the owner of the soil. *Prescott & A. C. R. Co. v. Rees, (Ariz.)* 28 Pac. Rep. 1134.

Defendant may, in order to contradict the allegations of ownership, put in evidence the record of the judgment recovered by another party against an insurance company for the loss. This is some evidence, though not strong or important, that plaintiff was not the owner. *Albert v. Northern C. R. Co.*, 98 Pa. St. 316.

222. To disprove negligence — Custom not to employ watchmen.—Some time after a train passed over a bridge the bridge was found burning. It was a dry time, with a strong wind blowing, and the fire soon spread to plaintiff's property near by. It was claimed that if the company had kept a watchman at the bridge the fire could have been extinguished. *Held*, that evidence on behalf of the company that it was not usual for roads in that section of the country to employ watchmen, was inadmissible. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454.

223. To show proper construction, condition, and management of particular engine.—Where defendant was charged with negligence in the construction and use of a locomotive, whereby damage by fire resulted to plaintiff, it should be allowed to show why a netting finer than the one actually used by it to prevent the escape of sparks could not be used without interfering with the working capacity of the locomotive. *Carter v. Kansas City, St. J. & C. B. R. Co.*, 65 Iowa 287, 21 N. W. Rep. 607.

Evidence that the company's employes in charge of a train were careful and skilful is not sufficient in itself to rebut a presumption of negligence, but it is competent to go to the jury, with other facts, to aid the jury in determining whether or not they were negligent in the management of the engine at the time of the fire sued for. *Kenney v. Hannibal & St. J. R. Co.*, 70 Mo. 243.

In an action for negligently suffering the right of way to become covered with dry grass, etc., and negligently permitting fire to escape from passing locomotives, which fire was communicated to plaintiff's premises, and his property thereby destroyed, 5 D. R. D.—58.

after plaintiff has offered evidence tending to support the allegations of the petition, it is permissible for the defendant to offer testimony going to show that the engineer and fireman were competent and careful, and that the locomotive was of a new and approved make, was supplied with a good spark arrester, and had been properly inspected. *Patton v. St. Louis & S. F. R. Co.*, 23 Am. & Eng. R. Cas. 364, 87 Mo. 117.—**RECONCILING** *Kenney v. Hannibal & St. J. R. Co.*, 70 Mo. 244.

Where it appeared that the company's negligence consisted in the accumulation of combustible materials negligently along its right of way, the court may properly exclude testimony tending to show what kind of stack, fire box, or ash pan was in use on the engine at the time. *Indiana, B. & W. R. Co. v. Overman*, 29 Am. & Eng. R. Cas. 161, 110 Ind. 538, 10 N. E. Rep. 575.

224. To show equipment and inspection of other engines—Custom.—In an action for a loss caused by sparks from an engine, the evidence of the master mechanic of the company, showing the custom of inspecting engines, was admissible as tending to show that the engine was provided with proper fire escapes when it left the place of inspection. *Chicago & A. R. Co. v. Quaintance*, 58 Ill. 389, 12 Am. Ry. Rep. 234.

Where a company is charged with burning property by sparks from a locomotive, but plaintiff's evidence fails to show that the sparks were emitted from any particular engine, it is competent for the company to show that all its engines that passed on the day of the fire were provided with the most approved apparatus for the prevention of the escape of sparks, and that they were in good condition. *Haley v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 614.—**DISTINGUISHED** IN *Redmond v. Chicago, R. I. & P. R. Co.*, 76 Mo. 550.—*Biering v. Gulf, C. & S. F. R. Co.*, 79 Tex. 584, 15 S. W. Rep. 576.

In an action for injury done by fire from its engines, evidence as to the usage of the defendant in regard to the construction and condition of its engines is inadmissible; the defendant must prove that its engines were properly constructed and in good condition, but such proof is not to be restricted to their condition on the day of the fire. *Baltimore & O. R. Co. v. Shipley*, 39 Md. 251, 11 Am. Ry. Rep. 269.

Evidence to show that other companies

used the same appliances as were used by the defendant is properly excluded from the consideration of the jury. *Metzgar v. Chicago, M. & St. P. R. Co.*, 76 Iowa 387, 41 N. W. Rep. 49.

Evidence offered by defendants to show what kind of fuel was used on other railways in the province is irrelevant. *Robinson v. New Brunswick R. Co.*, 23 New Brun. 323.

225. To show negligence on part of plaintiff.—Where an adjoining landowner sues for the destruction of his property by fire, evidence that he had built his fence on the company's right of way is admissible as tending to show contributory negligence, where the evidence tends to show that the position of the fence caused or contributed to the loss. *Philadelphia & R. R. Co. v. Yeiser*, 8 Pa. St. 366.

In an action for negligently setting fire to tan-bark, etc., by sparks from the engine, evidence of a custom of farmers in the vicinity to set fire to leaves and underbrush, in order to improve pasturage, is not admissible on the part of the defendant. *Green Ridge R. Co. v. Brinkman*, 23 Am. & Eng. R. Cas. 342, 64 Md. 52, 20 Atl. Rep. 1024, 54 Am. Rep. 755.

226. Expert testimony.—Fire from an engine was communicated to a tall elevator belonging to the railroad company, and thence to plaintiff's mill, situate a considerable distance away. Held, that the company could not prove by expert fire insurance men that, owing to the distance between the elevator and the mill, the elevator would not be considered as an exposure to the mill. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 17 Am. Ry. Rep. 309.

In an action for damages caused by fires communicated by engines, the testimony of the road master, as an expert, was not admissible to prove that the section man who had charge of the section where the fire originated was "a careful, prudent, and attentive man" in the discharge of his duties. *Bryant v. Central Vt. R. Co.*, 56 Vt. 710.

Nor is evidence admissible in such a case as to the manner of cutting and management of the weeds and vegetable growth on the margin of the road in other years, and as to the proper time for burning the same. *Bryant v. Central Vt. R. Co.*, 56 Vt. 710.

c. Proof of Similar Acts of Negligence on Part of Company; Other Fires.

227. Generally.—When the statute of the state requires railroads to keep their right of way clear of dead grass and other combustibles, it is competent to prove that the right of way at other points in the neighborhood was not so cleared. Such evidence is also competent as tending to show contributory negligence where it appears that the same engine started a second fire a half mile away, and plaintiff's servant ceased fighting the former and went to the second, which allowed the fire doing the injury to spread. *Northern Pac. R. Co. v. Lewis*, 56 Am. & Eng. R. Cas. 86, 7 U. S. App. 254, 51 Fed. Rep. 658, 2 C. C. A. 446.

Where all the engines belonging to the defendant are coal burners, and where it can be shown that it is more dangerous to burn wood in a coal burner than to burn coal therein, it is competent for the plaintiff (a stranger to the company) to show that the defendant was burning wood in all its engines in general, without showing more particularly that wood was burned in the particular engine which caused the fire; for such evidence would clearly tend to show that the defendant was burning wood in this particular engine. *St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. 47.

228. Sparks emitted at other times, generally.—Evidence that at other times sparks and fire had been thrown from locomotives to a greater distance from the track than the building destroyed, such as were liable to set fire to objects, is admissible. *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218; reversing 29 Barb. 226.—APPROVED IN *Piggott v. Eastern Counties R. Co.*, 10 Jur. 571; *Aldridge v. Great Western R. Co.*, 3 M. & G. 515.—APPLIED IN *Home Ins. Co. v. Pennsylvania R. Co.*, 11 Hun (N. Y.) 182; *McNaier v. Manhattan R. Co.*, 46 Hun 502, 12 N. Y. S. R. 562. APPROVED IN *Cleaveland v. Grand Trunk R. Co.*, 42 Vt. 449. DISTINGUISHED IN *Esckridge v. Cincinnati, N. O. & T. P. R. Co.*, 89 Ky. 367. FOLLOWED IN *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Kentucky C. R. Co. v. Barrow*, 89 Ky. 638; *Fero v. Buffalo & S. L. R. Co.*, 22 N. Y. 209; *Field v. New York C. R. Co.*, 32 N. Y. 339. NOT FOLLOWED IN *Savannah, F. & W. R. Co. v. Flannagan*, 39 Am. & Eng. R. Cas. 661, 82 Ga. 579, 9 S. E. Rep. 471. QUOTED IN *Longabaugh v. Vir-*

negligence on
Fires.

the statute of
keep their
pass and other
to prove that
points in the
eared. Such
s tending to
where it ap-
erted a second
stiff's servant
d went to the
doing the in-
ac. R. Co. v.
p. 86, 7 U. S.
C. A. 446.
aging to the
where it can
ous to burn
o burn coal
e plaintiff (a
ow that the
in all its en-
ing more par-
d in the par-
the fire; for
end to show
ing wood in
eph & D. C.

thertimes,
t other times
own from lo-
ce from the
oyed, such as
s, is admissi-
R. Co., 14 N.
6.—APPROV-
es R. Co., 10
estern R. Co.,
ome Ins. Co.
(N. Y.) 182;
46 Hun 502,
d in Cleave-
42 Vt. 449.
v. Cincinnati,
p. 367. FOL-
v. Richard-
C. R. Co. v.
uffalo & S. L.
New York C.
OLLOWED IN
lannagan, 39
a. 579, 9 S. E.
ough v. Vir-

ginia City & T. R. Co., 9 Nev. 271; Hender-
son v. Philadelphia & R. R. Co., 144 Pa. St.
461. REVIEWED IN Atchison, T. & S. F. R.
Co. v. Stanford, 12 Kan. 354; Westfall v.
Erie R. Co., 5 Hun 75.

Where the action is for burning property
by sparks from a locomotive, proof need not
be confined to the fire that was scattered at
the particular time when the injury was
done, nor to defects in a single engine.

Westfall v. Erie R. Co., 5 Hun (N. Y.) 75.

220. Sparks emitted by the same engine.—If in an action against a railroad
corporation to recover damages for the de-
struction of property by fire communicated
by a locomotive engine, it is relied upon as
a ground of defense that no burning sparks
could reach so far as to set fire to the prop-
erty, evidence is competent to show that the
same engine, using similar fuel, has emitted
burning sparks which have fallen at as great
a distance; and if evidence has been intro-
duced in defense to show that other similar
engines upon other roads did not emit
sparks that would set fire to buildings, evi-
dence is competent in reply to show that
such engines upon one of said roads have
emitted sparks which set fire to objects.
Ross v. Boston & W. R. Co., 6 Allen (Mass.)
87.—REVIEWED IN *Gibbons v. Wisconsin*
Valley R. Co., 13 Am. & Eng. R. Cas. 469, 58
Wis. 335.—*Koontz v. Oregon R. & N. Co.*,
43 Am. & Eng. R. Cas. 11, 20 *Orig.* 3, 23
Pac. Rep. 820.

230. — formerly.—Where there is
no dispute as to the identity of the loco-
motive from which fire escaped and was
communicated to plaintiff's premises, it is
competent to show that fire escaped from
the same locomotive earlier on the same
trip, setting out other fires in its passage, as
raising an inference of some weight that
there was something unsuitable in its con-
struction or management. *Patton v. St.*
Louis & S. F. R. Co., 23 Am. & Eng. R.
Cas. 364, 87 *Mo.* 117. *Slossen v. Burling-*
ton, C. R. & N. R. Co., 11 Am. & Eng. R.
Cas. 67, 60 *Iowa* 215, 14 *N. W. Rep.* 244.

231. — subsequently.—It is com-
petent for plaintiff to prove that two weeks
after the fire the same engine was seen to
emit such sparks at the point where the fire
occurred as would have been sufficient to
occasion it. *Nashville & C. R. Co. v. Tyne*,
(Tenn.) 7 Am. & Eng. R. Cas. 515.

To render evidence admissible that an
engine emitted large sparks some consider-

able time after the fire complained of, it is
necessary to show that sparks of that size
could be emitted only through fault of con-
struction, or that the engine was in the
same condition as when the fire occurred.
Collins v. New York C. & H. R. R. Co., 32
Am. & Eng. R. Cas. 366, 109 *N. Y.* 243, 16
N. E. Rep. 50, 14 *N. Y. S. R.* 783, 12 *Cent.*
Rep. 196; reversing 39 *Hun* 651, *mem.*

**232. Sparks emitted by other en-
gines.***—Evidence of emission of sparks
by defendants' engines, both prior and sub-
sequent to the time of the fire sued for, is
admissible. *Home Ins. Co. v. Pennsylvania*
R. Co., 11 *Hun* (N. Y.) 182.—APPLYING
Sheldon v. Hudson River R. Co., 14 *N. Y.*
218; *Field v. New York C. R. Co.*, 32 *N.*
Y. 339; *Webb v. Rome, W. & O. R. Co.*, 49
N. Y. 420.—*Piggot v. Eastern Counties R.*
Co., 3 *C. B.* 229, 10 *Jur.* 571, 15 *L. J. C. P.*
225.

Without showing they were under the
charge of the same engineer or of the same
construction as the engine causing the fire.
Diamond v. Northern Pac. R. Co., 29 *Am.*
& Eng. R. Cas. 117, 6 *Mont.* 580, 13 *Pac.*
Rep. 367.—QUOTING *Longabaugh v. Virginia*
City & T. R. Co., 9 Nev. 271; *Atchison, T.*
& S. F. R. Co. v. Stanford, 12 Kan. 354.
REVIEWING *Grand Trunk R. Co. v. Richard-*
son, 91 *U. S.* 454.

It is proper to prove that the company's
engines had, about the time of the fire in
question, and at other places, some as much
as twenty miles distant, emitted sparks, the
proof being proper both for the purpose of
showing negligence and for the purpose of
showing that the fire in question originated
from the company's engine. *Texas & P.*
R. Co. v. Land, 3 *Tex. App. (Civ. Cas.)* 74.
Gulf, C. & S. F. R. Co. v. Holt, 11 *Am. &*
Eng. R. Cas. 72, 1 *Tex. App. (Civ. Cas.)* 477.

Where a company has given evidence
tending to show that its engines were pro-
vided with the most approved apparatus for
the arrest of sparks, it is competent for the
plaintiff to show in rebuttal that some of
its engines had, about the same time as the
fire complained of, thrown sparks a hundred
feet from the track. *Illinois C. R. Co. v.*
McClelland, 42 *Ill.* 355.

In an action to recover for buildings de-
stroyed by coals from defendant's engine,
after testimony has been given tending to

* Evidence of escape of sparks from other
engines, and of other fires, see 56 AM. & ENG.
R. CAS. 91, *abstr.*

exclude the probability that the fire originated from another source, evidence that defendant's engines passing on other occasions emitted sparks and coals, which fell further from the track than the building destroyed, is proper. *Crist v. Erie R. Co.*, 58 N. Y. 638, *mem.*; *affirming* 1 T. & C. 435.

Upon the question whether fire was communicated to a building by sparks from particular engines running at a particular time, evidence that sparks were thrown from other engines running upon the same road on other occasions will be competent, *if it be conceded* that those other engines were of the same construction, used in the same manner, and in the same state of repair. *Boyce v. Cheshire R. Co.*, 43 N. H. 627. *Boyce v. Cheshire R. Co.*, 42 N. H. 97.

Whether the same evidence would not be equally competent if those other engines which threw sparks on other occasions *were proved* to have been of the same construction, used in the same manner, and in the same state of repair, *quere*. *Boyce v. Cheshire R. Co.*, 43 N. H. 627. *Coale v. Hannibal & St. J. R. Co.*, 60 Mo. 227, 9 Am. Ry. Rep. 210. — DISTINGUISHED IN *Chicago, St. P., M. & O. R. Co. v. Gilbert*, 52 Fed. Rep. 711, 10 U. S. App. 375, 3 C. C. A. 264. FOLLOWED IN *Lester v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 265.

It being alleged that the burning was caused by sparks which escaped from one of two engines described in the declaration, by reason of the defective condition of the engine and the negligent manner in which it was operated, the refusal of the court to admit evidence that other engines of the defendant besides these two, and not shown to be of like construction, had at other times emitted sparks at or near the same place is not ground for a new trial. *Inman v. Elberton Air Line R. Co.*, 90 Ga. 663, 16 S. E. Rep. 958. — DISTINGUISHING *East Tenn., V. & G. R. Co. v. Hesters*, 90 Ga. 11.

If the particular engine which is supposed to have caused the fire is known, no evidence respecting the condition of any other should be received. *Glaser v. Lewis*, 17 Phila. (Pa.) 345.

If, however, the offending engine is not clearly or satisfactorily identified, it is competent for the plaintiff to prove, in support of the allegation that the fire was caused by defendant's negligence, that the defendant's locomotives generally, or many of them, at or about the time of the occurrence, threw

sparks of unusual size, causing numerous fires on that part of the road. *Henderson v. Philadelphia & R. R. Co.*, 48 Am. & Eng. R. Cas. 16, 144 Pa. St. 461, 22 Atl. Rep. 851. — EXPLAINING *Pennsylvania R. Co. v. Page*, 21 W. N. C. 52. FOLLOWING *Pennsylvania R. Co. v. Stranahan*, 79 Pa. St. 405; *Gowen v. Glaser*, (Pa.) 3 Cent. Rep. 109, 10 Atl. Rep. 417. QUOTING *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218; *Koontz v. Oregon R. & N. Co.*, 43 Am. & Eng. R. Cas. 11, 20 Oreg. 3, 23 Pac. Rep. 820; *Field v. New York C. R. Co.*, 32 N. Y. 339. — APPROVED IN *Thatcher v. Maine C. R. Co.*, 85 Me. 502.

This class of testimony is exceptional in character at the best, and is admissible only because direct evidence is impracticable; the examination, therefore, should be confined to the negligent operation of the engines at and about the time of the fire, with such reasonable latitude, before and after the occurrence, as is sufficient to make such proofs practicable. *Henderson v. Philadelphia & R. R. Co.*, 48 Am. & Eng. R. Cas. 16, 144 Pa. St. 461, 22 Atl. Rep. 851.

Wherefore, it was error in this case to admit an offer to show the repeated emission of sparks of unusual size by defendant's engines during a period of six months preceding the fire, and also a similar offer, unlimited as to time, under which testimony was received covering periods of two, three, and six months, and other testimony not indicating the time to which it referred. *Henderson v. Philadelphia & R. R. Co.*, 48 Am. & Eng. R. Cas. 16, 144 Pa. St. 461, 22 Atl. Rep. 851.

233. — on former occasions.—Evidence that defendant's locomotives had scattered fire when passing plaintiff's property at various times during the same summer before the fire occurred is admissible as tending to show negligence, and that the fire was communicated from a locomotive. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454. — FOLLOWING *Piggot v. Eastern Counties R. Co.*, 3 C. B. 229, 54 Eng. C. L. 228; *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218; *Field v. New York C. R. Co.*, 32 N. Y. 339; *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 430; *Cleveland v. Grand Trunk R. Co.*, 42 Vt. 449; *Chicago & N. W. R. Co. v. Williams*, 44 Ill. 176; *Smith v. Old Colony & N. R. Co.*, 10 R. I. 22; *Longabaugh v. Virginia City & T. R. Co.*, 9 Nev. 271. — FOLLOWED IN

g numerous
Henderson
48 Am. &
461, 22 Atl.
sylvania R.
FOLLOWING
an, 79 Pa. St.
Cent. Rep.
TING Grand
1 U. S. 454;
Co., 14 N. Y.
Co., 43 Am.
23 Pac. Rep.
Co., 32 N.
er v. Maine

ceptional in
missible only
practicable;
ould be con-
n of the en-
the fire, with
re and after
b make such
v. Philadick
Eng. R. Cas.
851.

this case to
peated emis-
by defend-
f six months
imilar offer,
ch testimony
of two, three,
stimony not
it referred.
R. R. Co., 48
a. St. 461, 22

ions.—Evi-
motives had
intiff's prop-
e same sum-
s admissible
and that the
locomotive.
son, 91 U. S.
stern Coun-
g. C. L. 228;
Co., 14 N. Y.
Co., 32 N. Y.
R. Co., 49 N.
runk R. Co.,
Co. v. Will-
Colony & N.
v. Virginia
FOLLOWED IN

Thatcher v. Maine C. R. Co., 85 Me. 502;
Chicago, St. P., M. & O. R. Co. v. Gilbert, 52
Fed. Rep. 711, 10 U. S. App. 375, 3 C. C. A.
264; Gulf, C. & S. F. R. Co. v. Johnson, 54
Fed. Rep. 474, 10 U. S. App. 629, 4 C. C. A.
447. QUOTED IN Henderson v. Philadelphia
& R. R. Co., 144 Pa. St. 461. REVIEWED IN
Brighthope R. Co. v. Rogers, 8 Am. & Eng.
R. Cas. 710, 76 Va. 443; Gibbons v. Wiscon-
sin Valley R. Co., 13 Am. & Eng. R. Cas.
469, 58 Wis. 335; Diamond v. Northern
Pac. R. Co., 6 Mont. 580.—Chicago, St. P.,
M. & O. R. Co. v. Gilbert, 52 Fed. Rep. 711,
10 U. S. App. 375, 3 C. C. A. 264.—DISTIN-
GUISHING Gibbons v. Wisconsin Valley R.
Co., 58 Wis. 335, 17 N. W. Rep. 132; Penn-
sylvania R. Co. v. Stranahan, 79 Pa. St.
405; Allard v. Chicago & N. W. R. Co., 73
Wis. 165, 40 N. W. Rep. 685; Ireland v.
Cincinnati, W. & M. R. Co., 79 Mich. 163, 44
N. W. Rep. 426; Coale v. Hannibal & St. J.
R. Co., 60 Mo. 227. FOLLOWING Grand
Trunk R. Co. v. Richardson, 91 U. S. 454.
—FOLLOWED IN Gulf, C. & S. F. R. Co. v.
Johnson, 54 Fed. Rep. 474, 10 U. S. App.
629, 4 C. C. A. 447.

The plaintiff, for the purpose of proving
that the fire in question was occasioned by
the defendant's engine, and as tending to
prove negligence on the part of the defend-
ant in the construction and management of
its engines, may show that within a week be-
fore the fire in question the engines of the
defendant in passing had scattered large
sparks which were capable of setting fire to
combustible articles along the road, and
that frequent fires occasioned by such
sparks had been put out within that time.
Annapolis & E. R. Co. v. Gantt, 39 Md.
115, 11 Am. Ry. Rep. 210. — APPROVING
Piggot v. Eastern Counties R. Co., 3 C. B.
229, 54 Eng. C. L. 228.—FOLLOWED IN
Green Ridge R. Co. v. Brinkman, 23 Am. &
Eng. R. Cas. 342, 64 Md. 52, 54 Am. Rep.
755. REVIEWED IN Ryan v. Gross, 68 Md.
377.

Where the engine that caused the fire
cannot be fully identified, evidence that
the defendant's engines frequently emitted
sparks on former occasions near the time of
the fire in question is generally held relevant
and competent to show habitual negligence,
and to make it probable that plaintiff's in-
jury proceeded from the same quarter; but
when the engine is identified the same rea-
son does not operate, and evidence as to the
condition of other engines and of their

causing fires is clearly irrelevant. *Inman*
v. *Elberton Air Line R. Co.*, 90 Ga. 663, 16 S.
E. Rep. 958.—REVIEWING *Gibbons v. Wis-*
consin Valley R. Co., 13 Am. & Eng. R. Cas.
469, 58 Wis. 335.—*Albert v. Northern C. R.*
Co., 98 Pa. St. 316.—FOLLOWING *Erie R.*
Co. v. *Decker*, 78 Pa. St. 293; *Huyett v.*
Philadelphia & R. R. Co., 23 Pa. St. 373;
Lehigh Valley R. Co. v. McKeen, 90 Pa. St.
123.

Evidence of the distance to which sparks
had been borne on previous occasions was
admissible to show the force with which
engines expel sparks, thereby illustrating
the character and degree of the danger to
be guarded against. *Burke v. Louisville &*
N. R. Co., 7 Heisk. (Tenn.) 451, 12 Am. Ry.
Rep. 497.—FOLLOWED IN *Nashville & C. R.*
Co. v. *Tyne*, (Tenn.) 7 Am. & Eng. R. Cas.
515.

234. — after the fire in question.
—It was competent to show the manner in
which the defendant's engines emitted fire
shortly after the time of the fire in ques-
tion. *Pittsburgh, C. & St. L. R. Co. v.*
Noel, 7 Am. & Eng. R. Cas. 524, 77 Ind. 110.

235. Coals dropped at other times.
—In an action for damages occasioned by a
fire apparently originating from coals on
the track of the road over which defendant's
locomotives had been passing just previous-
ly to the fire, it is competent to prove that
its locomotives, in passing over said road,
have on former occasions dropped coals at
or near such place. *Field v. New York C.*
R. Co., 32 N. Y. 339; affirming 29 Barb.
176.—FOLLOWING *Sheldon v. Hudson River*
R. Co., 14 N. Y. 218.—APPLIED IN *Home*
Ins. Co. v. Pennsylvania R. Co., 11 Hun
(N. Y.) 182. FOLLOWED IN *Grand Trunk*
R. Co. v. Richardson, 91 U. S. 454; *Webb v.*
Rome, W. & O. R. Co., 49 N. Y. 420; *O'Neill*
v. New York, O. & W. R. Co., 115 N. Y.
579, 22 N. E. Rep. 217, 26 N. Y. S. R. 269;
McCoun v. New York C. & H. R. R. Co.,
66 Barb. 338. QUOTED IN *Henderson v.*
Philadelphia & R. R. Co., 144 Pa. St. 461.
REVIEWED IN *Coolidge v. Rome, W. & O.*
R. Co., 23 N. Y. S. R. 459; *Westfall v. Erie*
R. Co., 5 Hun 75.—*Webb v. Rome, W. & O.*
R. Co., 49 N. Y. 420, 4 Am. Ry. Rep. 547;
affirming 3 Lans. 453.

In such a case proof of dropping coals and
scattering sparks is not confined to the oc-
casion when the injury was done, nor to the
defects of a single engine of the company.
Westfall v. Erie R. Co., 5 Hun (N. Y.) 75.

Evidence tending to show how coals emitted from the engine at the time of the fire in question, compared with coals emitted by other engines of the same company on the same road at other times is admissible. *Brusberg v. Milwaukee, L. S. & W. R. Co.*, 7 *Am. & Eng. R. Cas.* 505, 55 *Wis.* 106, 12 *N. W. Rep.* 416.

230. Other fires, generally.—In consequence of the difficulty in identifying a passing engine, so as to make direct proof of negligence, and for the reason that the business of running railroads supposes a unity of management and a similarity in construction of the engines, the admission of evidence as to other and distinct fires from the one alleged, is permitted. *Koontz v. Oregon R. & N. Co.*, 43 *Am. & Eng. R. Cas.* 11, 20 *Orig.* 3, 23 *Pac. Rep.* 820.

Where it appeared that the fire did not have its origin in sparks from defendant's locomotive, it was not prejudicial error to exclude evidence that cotton similarly stored had previously caught fire from such sparks. *Martin v. St. Louis, I. M. & S. R. Co.*, 56 *Am. & Eng. R. Cas.* 112, 55 *Ark.* 510, 19 *S. W. Rep.* 314.

In an action for negligence in setting fire to cord-wood, the fact of a fire having occurred in the wood yard previous to the building of the railroad was entirely irrelevant. *Longabaugh v. Virginia City & T. R. Co.*, 9 *Nev.* 271.

A witness was asked if he knew of any other fires prior to the one sued for, to which the company objected on the ground that it was irrelevant and immaterial and too remote. *Held*, that the objection was not good, because the witness answered that he knew of another fire about two years before. If the question was objectionable, the objection should have been made specific that it did not limit the time to a recent period. *Steele v. Pacific Coast R. Co.*, 32 *Am. & Eng. R. Cas.* 333, 74 *Cal.* 323, 15 *Pac. Rep.* 851.

A complaint charged that the company negligently set fire, by sparks and coals from its locomotive, to the depot, which was dangerously combustible, as was known to the company, and that the fire extended to and consumed plaintiff's storehouse. The court struck out the charge that the depot was dangerously combustible as was known to the company. *Held*, nevertheless, that evidence that the depot had a shingle roof and open eaves where the birds built nests

of straw, and that it had often been fired before, was admissible. *Cincinnati, N. O. & T. P. R. Co. v. Barker*, 56 *Am. & Eng. R. Cas.* 106, 94 *Ky.* 71, 21 *S. W. Rep.* 347.

237. Other fires caused by same engine.—Where the particular engine is known and designated, it is not competent to show generally that the defendant's engines have caused fires, at other times and places, but such particular engine may be shown to have done so, by means of escaping sparks, to show its defective construction. *Ireland v. Cincinnati, W. & M. R. Co.*, 79 *Mich.* 163, 44 *N. W. Rep.* 426. — **DISTINGUISHED** IN *Chicago, St. P., M. & O. R. Co. v. Gilbert*, 52 *Fed. Rep.* 711, 10 *U. S. App.* 375, 3 *C. C. A.* 264. — *Henry v. Southern Pac. R. Co.*, 50 *Cal.* 176, 12 *Am. Ry. Rep.* 168. — **NOT FOLLOWED** IN *Savannah, F. & W. R. Co. v. Flannagan*, 39 *Am. & Eng. R. Cas.* 661, 82 *Ga.* 579, 9 *S. E. Rep.* 471. — *Jacksonville, T. & K. W. R. Co. v. Peninsular L. & T. M. Co.*, 49 *Am. & Eng. R. Cas.* 603, 27 *Fla.* 1, 9 *So. Rep.* 661. *Nelson v. Chicago, M. & St. P. R. Co.*, 35 *Minn.* 170, 28 *N. W. Rep.* 215. *Lester v. Kansas City, St. J. & C. B. R. Co.*, 60 *Mo.* 265, 9 *Am. Ry. Rep.* 219. *Haseltine v. Concord R. Corp.*, 35 *Am. & Eng. R. Cas.* 236, 64 *N. H.* 545, 15 *Atl. Rep.* 143, 6 *N. Eng. Rep.* 897.

Whether or not evidence tending to prove the setting of two other fires about the same time by the engine that caused the destruction of plaintiff's property is admissible as tending to prove negligence on the part of the defendant, is a matter of law for the court; and an instruction by the court to the jury that such evidence was admissible for the purpose stated is proper; and the fact that this instruction is repeated in an instruction given upon the request of plaintiff's counsel, does not constitute error. *Smith v. Chicago, M. & St. P. R. Co.*, 4 *S. Dak.* 71, 55 *N. W. Rep.* 717.

238. — prior to the date of the fire in question.—With a view to showing that engine No. 5 was defectively constructed, evidence was given that on previous occasions, when it was in the same or an improved condition, it had thrown out sparks causing fires. (Per *Spragge, C. J. O.*, and *Hagarty, C. J.*, such evidence was properly receivable.) *Canada C. R. Co. v. McLaren*, 8 *Ont. App.* 564; *dismissing appeal from 32 U. C. C. P.* 324.

A plaintiff is entitled to give evidence of the distance at which sparks emitted by the

engine had kindled fires. *Hinds v. Barton*, 25 N. Y. 544.

Proof that a locomotive did, on October 12, 1871, cause two or more fires by the emission of sparks, and that other engines of the same company passed over the same road at the same place all that fall, prior to the said day, under like conditions of wind, weather, etc., without causing any fire at or near the place, is some proof of negligence on the part of the railroad company with regard to the particular engine which caused the fires—either that it was not in good condition, or that it was not properly managed. *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354, 8 Am. Ry. Rep. 230.—DIS- TINGUISHING *Gandy v. Chicago & N. W. R. Co.*, 30 Iowa 420; *Smith v. Hannibal & St. J. R. Co.*, 37 Mo. 287. REVIEWING *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218; *Field v. New York C. R. Co.*, 32 N. Y. 339; *Huyett v. Philadelphia & R. R. Co.*, 23 Pa. St. 373.—APPROVED IN *Gram v. Northern Pac. R. Co.*, 1 N. Dak. 232. NOT FOLLOWED IN *Laird v. Connecticut & P. R. R. Co.*, 43 Am. & Eng. R. Cas. 63, 62 N. H. 254. QUOTED IN *Diamond v. Northern Pac. R. Co.*, 6 Mont. 580.

It is not competent for a plaintiff to show that before the occurrence of the fires on his farm, given in evidence, fire had been communicated to the property of other persons on the road by the company's engine, either to establish the fact that defendants' engine caused the fire in controversy or to rebut the defendants' proof of care and diligence. *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242.—NOT FOLLOWED IN *Longabaugh v. Virginia City & T. R. Co.*, 9 Nev. 271.

230. — after the occurrence of the fire in question.—Where a defendant company has introduced evidence that its engine was provided with ordinary appliances for the prevention of the escape of sparks, which were examined the day before the fire on the return trip and found to be in good condition, as well as the engine, and that the same kind of fuel was used as on the outward trip, it is competent for plaintiff to show in rebuttal that the engine on the return trip threw out sparks which set fire to other property in the neighborhood of plaintiff's. *Loring v. Worcester & N. R. Co.*, 131 Mass. 469.—FOLLOWED IN *Thatcher v. Maine C. R. Co.*, 85 Me. 502.

240. Other fires caused by other engines, generally.—Where the plaintiff

sues to recover for property destroyed by fires started by sparks, without designating any particular locomotive, evidence that the fire originated from one of two locomotives, and that these and other locomotives had set other fires, both before and after the injury complained of, in the same vicinity, is admissible, as tending to prove possibility, and consequent probability, that some locomotive caused the fire, and that there was negligence in the management of trains. *Northern Pac. R. Co. v. Lewis*, 56 Am. & Eng. R. Cas. 86, 7 U. S. App. 254, 51 Fed. Rep. 658, 2 C. C. A. 446. *Gulf, C. & S. F. R. Co. v. Johnson*, 54 Fed. Rep. 474, 10 U. S. App. 629, 4 C. C. A. 447.—FOLLOWING *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Chicago, St. P., M. & O. R. Co. v. Gilbert*, 52 Fed. Rep. 711.—*Thatcher v. Maine C. R. Co.*, 85 Me. 502, 27 Atl. Rep. 519.—APPROVING *Henderson v. Philadelphia & R. R. Co.*, 144 Pa. St. 461. FOLLOWING *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Crocker v. McGregor*, 76 Me. 284; *Loring v. Worcester & N. R. Co.*, 131 Mass. 469.—*Smith v. Boston & M. R. Co.*, 63 N. H. 255. *Robinson v. New Brunswick R. Co.*, 23 New Brun. 323.

Such evidence would clearly tend to prove that the defendant's engines were not in a proper condition for arresting sparks; either that they were not properly constructed, or that they were out of repair. *St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. 47.

In considering defendant's negligence in starting fires, it is competent for the jury to consider evidence that its engines had dropped fire at other times before or after the fire sued for, but near the same time and place; but a general objection to an instruction that does not confine the jury to approximately the same time and place is not good. *Steele v. Pacific Coast R. Co.*, 32 Am. & Eng. R. Cas. 333, 74 Cal. 323, 15 Pac. Rep. 851.

It was competent for plaintiff to prove, in the absence of direct evidence as to the condition of the particular locomotive, that trains frequently set fire to fences and grass along the line of that road, in the vicinity of plaintiff, and that trains usually passed with the screen or fender laid back. *Kentucky C. R. Co. v. Barrow*, 89 Ky. 638, 20 S. W. Rep. 165.—FOLLOWING *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218.

Evidence that witnesses saw other fires

after engines passed is not admissible, unless it be shown that they resulted from sparks which escaped from defendant's engines. *Missouri Pac. R. Co. v. Donaldson*, 73 Tex. 124, 11 S. W. Rep. 163.

Where it appears that the fire must have been caused by one or the other of two locomotives, evidence of other fires kindled by different locomotives before and after the fire complained of is not admissible. *Gibbons v. Wisconsin Valley R. Co.*, 13 Am. & Eng. R. Cas. 469, 58 Wis. 335, 17 N. W. Rep. 132.—QUOTING *Pennsylvania R. Co. v. Stranahan*, 79 Pa. St. 405. RECONCILING *Brusberg v. Milwaukee, L. S. & W. R. Co.*, 55 Wis. 106. REVIEWING *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Ross v. Boston & W. R. Co.*, 6 Allen (Mass.) 87.—DISTINGUISHED IN *Chicago, St. P., M. & O. R. Co. v. Gilbert*, 52 Fed. Rep. 711, 10 U. S. App. 375, 3 C. C. A. 264. REVIEWED IN *Inman v. Elberton Air Line R. Co.*, 90 Ga. 663.

In an action for the negligent burning of a building alleged to have been fired by sparks from a locomotive, the testimony of defendant's inspector that the screen on the engine was the same as on the defendant's other engines does not entitle the plaintiff to show in rebuttal that other fires had been set by the other engines. *Allard v. Chicago & N. W. R. Co.*, 73 Wis. 165, 40 N. W. Rep. 685.—DISTINGUISHED IN *Chicago, St. P., M. & O. R. Co. v. Gilbert*, 52 Fed. Rep. 711, 10 U. S. App. 375, 3 C. C. A. 264.

In an action for burning a barn by sparks from a locomotive, there was evidence that the fire commenced at or near the railroad track, and that engines had passed shortly before the barn was fired, raising the presumption that it was fired by sparks from an engine, the particular one not being known. *Held*, that evidence by a witness living nineteen miles from the barn that it was a common occurrence for engines about where he lived to set fire for rods from the track, was admissible. *Pennsylvania R. Co. v. Stranahan*, 79 Pa. St. 405.—DISTINGUISHED IN *Chicago, St. P., M. & O. R. Co. v. Gilbert*, 52 Fed. Rep. 711, 10 U. S. App. 375, 3 C. C. A. 264. FOLLOWED IN *Henderson v. Philadelphia & R. R. Co.*, 144 Pa. St. 461. QUOTED IN *Gibbons v. Wisconsin Valley R. Co.*, 13 Am. & Eng. R. Cas. 469, 58 Wis. 335.

241. Former fires caused by other engines.—Where a railroad is sued for

setting fire by sparks from a passing engine, and the proof of the origin of the fire is not direct, but it is discovered a few minutes after a train has passed, which was throwing out large sparks, it is competent to prove that former fires were started by the negligent manner in which the company's trains were run. *Hoover v. Missouri Pac. R. Co.*, (Mo.) 16 S. W. Rep. 480.—OVERRULING *Coale v. Hannibal & St. J. R. Co.*, 60 Mo. 227; *Lester v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 265.

In a suit for damages occasioned by setting fire to cord wood by a locomotive, testimony of previous fires in the same place caused by coals dropped from defendant's locomotives, and also of the emission at the same place of sparks of sufficient size to set fire to cord-wood, is admissible. *Longabaugh v. Virginia City & T. R. Co.*, 9 Nev. 271.—NOT FOLLOWING *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242. QUOTING *Sheldon v. Hudson River R. Co.*, 14 N. Y. 221. REVIEWING *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 424.—FOLLOWED IN *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454. QUOTED IN *Diamond v. Northern Pac. R. Co.*, 6 Mont. 580.—*Brighthope R. Co. v. Rogers*, 8 Am. & Eng. R. Cas. 710, 76 Va. 443.—REVIEWING *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454.

In an action for loss by fire set by a locomotive, the fact that other fires had caught on the right of way of defendant will not justify the inference that the fire in question was communicated from that point, and the admission of such evidence is erroneous. *Babcock v. Chicago & N. W. R. Co.*, 11 Am. & Eng. R. Cas. 63, 62 Iowa 593, 13 N. W. Rep. 740, 17 N. W. Rep. 909.—DISTINGUISHED IN *Lanning v. Chicago, B. & Q. R. Co.*, 68 Iowa 502.—*Bell v. Chicago, B. & Q. R. Co.*, 64 Iowa 321, 20 N. W. Rep. 456.—DISTINGUISHED IN *Lanning v. Chicago, B. & Q. R. Co.*, 68 Iowa 502.

242. Later fires caused by other engines.—Evidence that a fire occurred in the same place shortly after the fire complained of, and immediately subsequent to the passage of one of the defendant's trains, is admissible. *Butcher v. Vaca Valley & C. L. R. Co.*, (Cal.) 22 Am. & Eng. R. Cas. 644, 5 Pac. Rep. 359. *Longabaugh v. Virginia City & T. R. Co.*, 9 Nev. 271.

Evidence that fires on the line have originated from sparks escaping from defendant's locomotives, before the occurrence of

the one in question, is admissible to enable the jury to judge whether the defendants, in view of the previous occurrence of such fires, exercised reasonable care at the time this one happened; but evidence of fires occurring from this cause subsequently to the one in question is inadmissible, unless the possibility of communicating fire by sparks from a locomotive is disputed by the defendants, in which case it is admissible solely for the purpose of proving such possibility. *Smith v. Old Colony & N. R. Co.*, 10 R. I. 22, 6 Am. Ry. Rep. 144.—FOLLOWED IN *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454.

d. Weight and Sufficiency.*

243. To show title or ownership of property by plaintiff.—In an action to recover for the burning of hay made on leased land, plaintiff's title to the hay is shown, *prima facie*, when he has shown that he leased the land and made the hay, and was in possession of it at the time it was destroyed. He is not required, in the absence of an adverse claim to the hay, to prove the title of his landlord. *Johnson v. Chicago & N. W. R. Co.*, 77 Iowa 666, 42 N. W. Rep. 512.

So proof that plaintiff had been in the possession of the premises burned (woodland) for a number of years next before and at the time of the injury was sufficient evidence of title *prima facie*. *Burlington & M. R. Co. v. Beebe*, 14 Neb. 463, 16 N. W. Rep. 747.

Plaintiff proved that he had built the house, and that at the time it was destroyed by fire two rooms were occupied by his tenants, two were vacant, and another occupied by himself as an office. Held, that this was sufficient evidence of exclusive possession. *Pacific Exp. Co. v. Dunn*, 81 Tex. 85, 16 S. W. Rep. 792.

A quitclaim deed under which plaintiff held, coupled with oral proof, unobjected to, of ownership, shows a *prima facie* title upon which he can maintain an action for an injury by fire. *Reed v. Chicago, M. & St. P. R. Co.*, 32 Am. & Eng. R. Cas. 320, 71 Wis. 399, 37 N. W. Rep. 225.

Evidence that plaintiff was in the quiet and peaceable possession of all the lands for

the injury to which the action was brought, using them in various ways in connection with the raising of cranberries thereon, was sufficient *prima facie* evidence of his title as against the defendant not claiming title. *Moore v. Chicago, M. & St. P. R. Co.*, 78 Wis. 120, 47 N. W. Rep. 273.

Where a plaintiff sues for the burning of stacks of hay, and the evidence is conflicting as to whether he is the sole owner of it, it is the duty of the jury to determine the conflict and render a verdict, though there might be some doubt about it; and an instruction that plaintiff could not recover if the evidence left the question of ownership in doubt, is properly refused. *West v. Chicago & N. W. R. Co.*, 38 Am. & Eng. R. Cas. 340, 77 Iowa 654, 35 N. W. Rep. 479, 42 N. W. Rep. 512.—RECONCILED IN *McKelvy v. Burlington, C. R. & N. R. Co.*, 84 Iowa 455.—*Bulliss v. Chicago, M. & St. P. R. Co.*, 76 Iowa 680, 39 N. W. Rep. 245.

244. To show ownership or operation of road by defendant.—Where a company denies it was operating the railroad at the place of the fire, the uncontroverted evidence of a station agent that the company ran its trains over the road at the place of the fire, though not coming down clearly to the date of the fire, and that soon after the fire the company sent him to see plaintiff about it, and to report to the company concerning it, is sufficient to establish the fact that the defendant was operating the road. *Union Pac. R. Co. v. Jones*, 9 Colo. 379, 12 Pac. Rep. 516.

The company exercising the rights and franchises of a corporation is ordinarily presumed to be the owner; and where a company has been operating a railroad for years it will be presumed that it is the owner, so as to sustain an averment in a complaint charging it with setting out fire, as the owner. *Illinois C. R. Co. v. Mills*, 42 Ill. 407.

245. Need not show joint liability in action against two companies.—In a joint action against two railroads to recover for damage caused by fire from an engine, it is not necessary that the proofs show a joint liability. *Indianapolis & St. L. R. Co. v. Hackethal*, 72 Ill. 612.

246. To show company's negligence, generally.*—To warrant a recovery

* As to amount of proof necessary to recover for property destroyed by sparks from engine, see 35 AM. & ENG. R. CAS. 244, *abstr.*

* Sufficiency of evidence of negligence to support a verdict against company for damages caused by fires, see 43 AM. & ENG. R. CAS. 35, *abstr.*

ery against a company for fires occasioned in the operation of its road, causing damage to property in the neighborhood of its track, plaintiff must show negligence on the part of the company. *Philadelphia & R. R. Co. v. Yeiser*, 8 Pa. St. 366. *Fero v. Buffalo & S. L. R. Co.*, 22 N. Y. 209. *Lowney v. New Brunswick R. Co.*, 29 Am. & Eng. R. Cas. 116, 78 Me. 479, 7 Atl. Rep. 381. *Kentucky C. R. Co. v. Barrow*, 89 Ky. 638, 20 S. W. Rep. 165. *Bull v. Grand Trunk R. Co.*, 16 U. C. C. P. 252. *Rood v. New York & E. R. Co.*, 18 Barb. (N. Y.) 80.

There is no necessity for showing negligence on the part of a company under the Conn. Act of 1881, ch. 92 (Gen. St. § 3581). *Martin v. New York & N. E. R. Co.*, 56 Am. & Eng. R. Cas. 79, 62 Conn. 331, 25 Atl. Rep. 239.

So also in England. *Gibson v. South-Eastern R. Co.*, 1 F. & F. 23.

The origin and cause of the fire may be proved by circumstantial evidence of negligence, which, if not rebutted, and satisfactory to the jury, will sustain the verdict. *Wolff v. Chicago, M. & St. P. R. Co.*, 34 Minn. 215, 25 N. W. Rep. 63. *Nelson v. Chicago, M. & St. P. R. Co.*, 35 Minn. 170, 28 N. W. Rep. 215. *Hayes v. Chicago, M. & St. P. R. Co.*, 45 Minn. 17, 47 N. W. Rep. 260.

Where the evidence plainly shows that fires were started by defendant's servants, acting within the scope of their employment, and under such circumstances as to be culpable negligence, a verdict for plaintiff will not be disturbed. *Gould v. Northern Pac. R. Co.*, 50 Minn. 516, 52 N. W. Rep. 924.

Where a complaint charges a company with negligence in starting a fire, both in running the train at an unlawful speed and by opening the engine grates and flues so as to allow sparks and cinders to escape, proof of negligence in either of the matters charged is sufficient to authorize a recovery. *Martin v. Western Union R. Co.*, 23 Wis. 437.—DISTINGUISHED IN *Brusberg v. Milwaukee, L. S. & W. R. Co.*, 2 Am. & Eng. R. Cas. 264, 50 Wis. 231. FOLLOWED IN *Haas v. Chicago & N. W. R. Co.*, 41 Wis. 44.

247. To show negligence in the construction and condition of engines, etc.—Evidence that the locomotive at the time the fire originated was emitting an unusual volume of sparks is sufficient to overcome direct evidence that the locomotive

was in good repair. *Chicago & N. W. R. Co. v. McCahill*, 56 Ill. 28, 4 Am. Ry. Rep. 561. *Wabash R. Co. v. Smith*, 42 Ill. App. 527. *Louisville & N. R. Co. v. Taylor*, 92 Ky. 55, 17 S. W. Rep. 198. *Pennsylvania Co. v. Watson*, 81 Pa. St. 293. *Canada C. R. Co. v. McLaren*, 8 Ont. App. 564; *dismissing appeal from* 32 U. C. C. P. 324. *Lanning v. Chicago, B. & Q. R. Co.*, 25 Am. & Eng. R. Cas. 493, 68 Iowa 502, 27 N. W. Rep. 478. DISTINGUISHING *Bell v. Chicago, B. & Q. R. Co.*, 64 Iowa 321; *Babcock v. Chicago & N. W. R. Co.*, 62 Iowa 593.—*Ryan v. Gross*, 68 Md. 377, 11 Cent. Rep. 502, 12 Atl. Rep. 115, 16 Atl. Rep. 302.

Where it is in evidence that engines properly constructed and in good order will not drop coals upon the track, the dropping of coals from defendants' engines upon the track is of itself evidence of negligence sufficient to charge the defendants. *Field v. New York C. R. Co.*, 32 N. Y. 339; *affirming* 29 Barb. 176.—APPLIED IN *McNaier v. Manhattan R. Co.*, 46 Hun 502, 12 N. Y. S. R. 562. APPROVED IN *Cleaveland v. Grand Trunk R. Co.*, 42 Vt. 449. QUOTED IN *Ruppel v. Manhattan R. Co.*, 13 Daly (N. Y.) 11; *Flinn v. New York C. & H. R. Co.*, 51 N. Y. S. R. 103. REVIEWED IN *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354.

When one of defendant's witnesses testified that an engine in good repair could not throw fire the distance from the track to the place the fire caught in the grass, and the fires could have originated from no other source, the jury were warranted in finding that the engines which passed just before the fire were out of repair. *Johnson v. Chicago & N. W. R. Co.*, 77 Iowa 666, 42 N. W. Rep. 512.

Evidence admitted without objection, to show that the grass on the right of way was set on fire by sparks from the engines, and that from this the fences of the plaintiff were burned, tends to show negligence on the part of the railroad. *Georgia R. Co. v. Lawrence*, 74 Ga. 534.

Where a company is charged with negligence in the manner of running its train so that sparks escaped; that the engine was not in proper condition, and that the fire was started on the company's right of way, and negligently permitted to spread, a general verdict for the plaintiff will not be disturbed because there is no evidence that the engine was out of order. *Louisville, N.*

A. & C. R. Co. v. Stevens, 87 Ind. 198.—
FOLLOWED IN Louisville, N. A. & C. R. Co.
v. Hanmann, 87 Ind. 422.

Evidence of a witness who was on an engine at the time of a fire, and who shortly afterwards saw the spark arrester, attached to the smoke-stack, that it was full of "big holes," and that "it was in fact worn out," is not conclusive as to the condition of the engine at the time of the fire, but is sufficient to justify a finding that the company was negligent. *Ryan v. Gross*, 68 Md. 377, 11 Cent. Rep. 502, 12 Atl. Rep. 115, 16 Atl. Rep. 302.—REVIEWING *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115.

If a plaintiff cannot identify the engine that set the fire, by name, number, or other designation, he must show either by the manner in which it was operated, or by the extent to which it scattered fire, that it was so far out of repair as to charge the company with negligence. *Bevier v. Delaware & H. Canal Co.*, 13 Hun (N. Y.) 254.

Evidence tending to prove that a locomotive which caused a fire also set two other fires about the same time is not necessarily overcome by evidence that the engine was properly equipped with the best known appliances for arresting sparks, was in good condition, and managed by a competent and trustworthy engineer, as a matter of law. Such evidence tends to raise a conflict in the evidence as to the negligence of the defendant, which must be determined by the jury; and this court cannot say that the jury, from such evidence, were not justified in finding that the engine was not in good condition. *Smith v. Chicago, M. & St. P. R. Co.*, 4 S. Dak. 71, 55 N. W. Rep. 717.

Evidence that a short time before a fire was discovered several of defendant's engines passed, and that the grass within a few feet of the track was burning, does not justify a verdict against the company when they prove that at the time of the fire the country was very dry, that a furious gale was blowing, and that their engines were equipped with the best and latest spark arresters and at the place where the fire occurred were propelled by the force of gravity, steam having been shut off. *Missouri Pac. R. Co. v. Cullers*, 81 Tex. 382, 17 S. W. Rep. 19.

It was error in such a case to instruct the jury that if plaintiff's house was burned by prairie fires, which having previously burned

had gone out, and were revived by the strong wind, it is immaterial whether such fires were caused by defendant's engines. *Missouri Pac. R. Co. v. Cullers*, 81 Tex. 382, 17 S. W. Rep. 19.

The evidence showed that large cinders of the size of a hickory nut were thrown from the smoke-stack of defendant's engine, and that the spark arrester of such engine to permit the escape of such cinders must have been out of repair. *Held*, that the evidence warranted the inference that defendant's employes who operated the engine had knowledge that the spark arrester was out of repair, and that such knowledge would support a finding that the defendant was negligent. *Knight v. Chicago, R. I. & P. R. Co.*, 81 Iowa 310, 46 N. W. Rep. 1112.

Proof that an engine threw off a piece of burning coal, at least as large as a half-dollar silver piece, and which may have been six inches in diameter, judging from the ashes that were afterward found around it, which started a fire in plaintiff's field, and that the conductor telegraphed to the proper authorities that the engine was setting the country on fire, is sufficient to sustain a verdict against the company, though the company introduced evidence that a strong wind was blowing at the time, and that witnesses testified to having examined the engine soon after the fire, and found it supplied with the best of appliances, in good order, and operated by a competent and careful engineer. *Atchison, T. & S. F. R. Co. v. Campbell*, 16 Kan. 200.

The fact that large cinders were found on defendant's track and on plaintiff's premises, twenty-five paces therefrom, at or about the time of the fire, does not show that the engine was not in good repair, when it is not proven that they came therefrom. *Wheeler v. New York C. & H. R. R. Co.*, 51 N. Y. S. R. 471, 67 Hun 639, 22 N. Y. Supp. 561.

On the question of the safety of an engine, and the employment of the most approved appliances to prevent the escape of fire from the smoke-stack, the testimony of a master mechanic who examined the same directly after a loss by fire, as to its safe and sound condition, whose testimony is not impeached, cannot be overcome by evidence of rumors among the employes of the road that the engine was worn out and not safe. *Chicago & A. R. Co. v. Pennell*, 94 Ill. 448.

Where the weight of evidence clearly shows that the engines were properly constructed to prevent the escape of sparks, a verdict against the company, based upon negligence by allowing sparks to escape, should be set aside. *Spence v. Windsor & A. R. Co.*, 10 Nov. St. 106. See also *Hewitt v. Ontario, S. & H. R. U. Co.*, 11 U. C. Q. B. 604.

Proof that engines were properly constructed, and were carefully inspected by a competent person as often as once in two days, and found to be in proper order, is sufficient, although there is no evidence that at the very time of the fire there was no defect in the engine. *Spaulding v. Chicago & N. W. R. Co.*, 30 Wis. 110, 7 Am. Ry. Rep. 507.—DISTINGUISHED IN *Brusberg v. Milwaukee, L. S. & W. R. Co.*, 7 Am. & Eng. R. Cas. 505, 55 Wis. 106; *Kurtz & H. Ice Co. v. Milwaukee & N. R. Co.*, 84 Wis. 171.

248. To show negligence in the management of engines.*—Evidence of negligence, to render the company liable for burning a house by fire escaping from its engine, must show the absence of such care as was sufficient under the circumstances to have avoided the accident. *Pennsylvania Co. v. Watson*, 81* Pa. St. 293.

The mere fact of a company emitting sparks from its engine is not negligence unless it is proved that the sparks were negligently emitted. *Houston & T. C. R. Co. v. McDonough*, 1 Tex. App. (Civ. Cas.) 354.

Where all the evidence points to the fact that a fire originated from escaping sparks or coals from a certain engine, and is strong enough to make it reasonably certain that there was negligence in the operation of the engine, evidence for the defense that the engine was examined on the morning of the day that the fire occurred, and again four days afterward, and everything found in good condition, does not render a verdict for the plaintiff error, where it further appears that the engine had traveled 190 miles after the examination. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 31 Fed. Rep. 526.

Proof that fire was communicated from defendant's engine to plaintiff's property, and destroyed it, and that this result was not

probable from the ordinary working of the engine, is sufficient evidence of negligence to sustain a verdict. *Hull v. Sacramento Valley R. Co.*, 14 Cal. 387.—QUOTING *Ellis v. Portsmouth & R. R. Co.*, 2 Ired. (N. Car.) 140; *Herring v. Wilmington & R. R. Co.*, 10 Ired. 402. REVIEWING *Piggott v. Eastern Counties R. Co.*, 3 C. B. 229, 54 Eng. C. L. 233; *Huyett v. Philadelphia & R. R. Co.*, 23 Pa. St. 373.—NOT FOLLOWED IN *Gandy v. Chicago & N. W. R. Co.*, 30 Iowa 420. REVIEWED IN *Smith v. Hannibal & St. J. R. Co.*, 37 Mo. 287.

Where the same evidence which showed the fire to have caught from the engine tends also to show the negligence alleged, it is unnecessary for plaintiff to show affirmatively, by direct evidence, any defect in the construction or condition, or any negligence in the management, of the engine. *Woodson v. Milwaukee & St. P. R. Co.*, 21 Minn. 60, 19 Am. Ry. Rep. 293.

The unexplained fact that an unusual number of sparks were thrown from an engine, whereby fire was set to adjoining property, is evidence of negligence, not rebutted by the statement of the engineer that he "handled the engine very carefully, * * * not any differently from what I generally did." *Johnson v. Chicago, M. & St. P. R. Co.*, 13 Am. & Eng. R. Cas. 460, 31 Minn. 57, 16 N. W. Rep. 488.

The defective construction or improper management of a locomotive, owing to which it emits sparks, may, in the absence of other evidence, be inferred by a jury from evidence to show the fire originated from one of defendant's engines, and evidence given by the defendant in respect to another engine which leads to the inference that proper precautions in construction and management would prevent the emission of sparks. *Tanner v. New York C. & H. R. R. Co.*, 32 Am. & Eng. R. Cas. 380, 108 N. Y. 623, 1 Silv. App. 569, 15 N. E. Rep. 379, 13 N. Y. S. R. 501.—REVIEWED IN *Eighme v. Rome, W. & O. R. Co.*, 32 N. Y. S. R. 757, 10 N. Y. Supp. 600, 57 Hun 586.

Testimony having been produced of proper care as to all the engines passing on the two days during which the fire occurred, it tended to prove proper care as to the particular engine or engines from which the fire escaped. The effect of the testimony was for the jury. *Biering v. Gulf, C. & S. F. R. Co.*, 79 Tex. 584, 15 S. W. Rep. 576.

* As to what evidence of negligence of an engineer and a fireman will support a finding against a company for destroying property by fire, see 45 AM. & ENG. R. CAS. 575, *abstr.*

Evidence showing, among other things, that at the time and place of the setting of the fire, one of the defendants' engines was passing along their railroad track, at a speed of from forty-five to fifty miles an hour; that it was an exceedingly dry time, and sparks and cinders which kindled other fires along the track were issuing from such engine—*held*, to support a verdict that the fire was set through the negligence of defendants' employes in running such engine. *Stertz v. Stewart*, 74 Wis. 160, 42 N. W. Rep. 214.

While evidence of the single fire may not be sufficient to warrant a finding of negligence against the company, yet when it appears that at or about the same time several fires are by the same engine thus caused, and that only at or about that time were any fires caused by such engine, although used continuously for months; and also that an engine in good order and properly managed does not ordinarily cause fires—*held*, that a jury are justified in finding negligence, and this notwithstanding they are unable to point out specifically where in the negligence consists. *Missouri Pac. R. Co. v. Kincaid*, 11 Am. & Eng. R. Cas. 83, 29 Kan. 654.

240. To show negligence in allowing combustibles on right of way.—Negligence may be imputed to a company from evidence that combustible materials have been allowed to accumulate and remain upon its land, liable to be ignited by sparks from its engines, and to communicate fire to adjoining lands. *Clarke v. Chicago, St. P., M. & O. R. Co.*, 33 Minn. 359, 23 N. W. Rep. 536.

Evidence tending to show that defendant had permitted refuse and inflammable materials to accumulate on its right of way and to remain there for years, and that fires had previously been set therein by passing locomotives, is sufficient to warrant the jury in finding that the defendant was guilty of negligence. *Moore v. Chicago, M. & St. P. R. Co.*, 78 Wis. 120, 47 N. W. Rep. 273.

The appellate court will not reverse their judgment in such a case unless there is a plain deviation from the evidence, or it is palpable the jury have not drawn a correct inference from the facts. *Richmond & D. R. Co. v. Medley*, 7 Am. & Eng. R. Cas. 493, 75 Va. 499.—**FOLLOWING** *Brighthope R. Co. v. Rogers*, 76 Va. 442. **QUOTING** *Carrington v. Ficklin*, 32 Gratt. (Va.) 670.

Where a shanty was burned, due to the keeping of oil and waste and other inflammable materials therein, whence the fire spread and burned plaintiff's house, testimony that oil, etc., were kept in the shanty is sufficiently definite as to the time, especially where there is no evidence to show that it was not so kept at the time of the fire. *Perry v. Southern Pac. R. Co.*, 50 Cal. 578, 12 Am. Ry. Rep. 187. *Van Fleet v. New York C. & H. R. R. Co.*, 27 N. Y. S. R. 76, 7 N. Y. Supp. 636.

Proof that a fire occurred in April where large quantities of brush, weeds, and bushes two feet high from the year before, and clippings of dry pine were on the right of way, is sufficient to authorize the jury to find that defendant negligently permitted an accumulation of combustible material which caused the fire, and that it was liable. *Billings v. Fitchburg R. Co.*, 34 N. Y. S. R. 382, 58 Hun 605, *mem.*, 11 N. Y. Supp. 837; *affirmed* (?) 128 N. Y. 644, *mem.*, 40 N. Y. S. R. 978.

The evidence tended to show that on the defendant's right of way, at the point where it was claimed the fire started, dry grass and weeds, both standing and cut, lying in swaths, extended up close to the line of the rails; that passing locomotives frequently dropped coals of fire which sometimes set fire to the ties; that the weather was dry, and the wind was blowing in a direction which would carry fire toward the plaintiff's land, and that a line of fire extended from that point to plaintiff's land. *Held*, sufficient to sustain a verdict for plaintiff. *Chicago, St. L. & P. R. Co. v. Williams*, 131 Ind. 30, 30 N. E. Rep. 696.

If the place where the fire started, and from whence it spread, was a place where fire had often caught from sparks from locomotives in their ordinary use in running, it tends to show a negligent habit on the part of defendant in suffering combustible material to accumulate on its land at that place, instead of amounting to a reason why the plaintiffs should not recover, although the plaintiffs knew of such fires. *Snyder v. Pittsburgh, C. & St. L. R. Co.*, 11 W. Va. 14, 18 Am. Ry. Rep. 154.

Immediately after the passage of a train smoke was seen rising from places on the land of the company close to the track. By the side of the track cut brush and leaves and old ties were piled up. There was evidence tending to show that sparks

were seen coming from the locomotive. There was no evidence that the engine which was said to have caused the fire was out of repair or improperly constructed, or that the spark arrester was not sufficient. *Held*, that the evidence showing that refuse material had been allowed to remain on the track was sufficient to justify a verdict finding the company guilty of negligence in causing the fire. *O'Neill v. New York, O. & W. R. Co.*, 40 *Am. & Eng. R. Cas.* 240, 115 *N. Y.* 579, 23 *N. E. Rep.* 217, 26 *N. Y. S. R.* 269; *affirming* 10 *N. Y. S. R.* 147, 45 *Hun* 458, *mem.*—FOLLOWING *Field v. New York C. R. Co.*, 32 *N. Y.* 346.—REVIEWED IN *Eighme v. Rome, W. & O. R. Co.*, 32 *N. Y. S. R.* 757, 10 *N. Y. Supp.* 600, 57 *Hun* 586.

250. To show negligence in allowing fire to spread.—To recover against the company for destroying a fence and grass by fire plaintiff must prove not only that the fire originated from the company's engine, but that its escape by spreading to his property was the result of negligence. *Gulf, C. & S. F. R. Co. v. Johnson*, 3 *Tex. App. (Civ. Cas.)* 151. *Fitch v. Pacific R. Co.*, 45 *Mo.* 322.

To avoid liability for damages occasioned by fire which spread from the right of way where combustible materials were ignited by sparks from a passing engine, it is not sufficient alone to show that the best machinery to prevent the escape of fire was used, but it must be shown that the company fully exercised all due care to avoid causing injury by fire. *Gulf, C. & S. F. R. Co. v. Witte*, 68 *Tex.* 295, 4 *S. W. Rep.* 490.

251. To show company's negligence was proximate cause.—It is not necessary for the plaintiff to show that his premises were first ignited; it is sufficient if combustible material on the railroad track was first ignited, the natural tendency of which was to conduct the fire to the adjoining premises of the plaintiff. *Toledo, W. & W. R. Co. v. Wand*, 48 *Ind.* 476.

Where a company, through negligence, by the escape of fire from its locomotive sets fire to a depot, from which a hotel in the vicinity is destroyed, to make the company liable it is not necessary that the burning of the hotel should be so certain to result from the burning of the depot that a reasonable person could have foreseen that the hotel would burn, or that it probably would. It is enough if it be a consequence

so natural and direct that a reasonable person might, and naturally would, see that it was liable to result from the burning of the depot. (Craig, J., dissenting.) *Chicago & A. R. Co. v. Pennell*, 110 *Ill.* 435.

Sparks from a locomotive fired a large wooden barn full of combustibles, and through it a wooden hotel thirty-nine feet distant burned. *Held*, that the jury were justified in finding that the burning of the barn was the proximate and natural cause of the burning of the hotel. *Fraze v. New York, L. E. & W. R. Co.*, 52 *N. Y. S. R.* 102, 22 *N. Y. Supp.* 958.

Where the property burned (a cranberry marsh) is a long way from the track, evidence is necessary to clearly connect the negligent acts of the company and the fire originating on the right of way with the fire which caused the injury to plaintiff, as being the proximate cause thereof, especially where back fires were in the mean time set upon different parts of adjoining marshes. *Marvin v. Chicago, M. & St. P. R. Co.*, 45 *Am. & Eng. R. Cas.* 540, 79 *Wis.* 140, 47 *N. W. Rep.* 1123.—QUOTING *Kellogg v. Chicago & N. W. R. Co.*, 26 *Wis.* 258.

252. Circumstantial evidence to show company's negligence, generally.—To entitle a plaintiff to recover of a company damages on account of fire resulting from sparks emitted from one of its engines, the negligence of the company in the premises must be shown, either directly or by circumstances tending to establish it—such as the absence or imperfect condition of a spark arrester, the use of an excessive amount of steam, an unlawful rate of speed, or the like. *Gandy v. Chicago & N. W. R. Co.*, 30 *Iowa* 420.—NOT FOLLOWING *Hull v. Sacramento Valley R. Co.*, 14 *Cal.* 387; *Illinois C. R. Co. v. Mills*, 42 *Ill.* 407; *Bass v. Chicago, B. & Q. R. Co.*, 28 *Ill.* 9; *Ellis v. Portsmouth & R. R. Co.*, 2 *Ired. (N. Car.)* 138; *Piggot v. Eastern Counties R. Co.*, 3 *C. B.* 229, 54 *Eng. C. L.* 228.—APPLIED IN *Babcock v. Chicago & N. W. R. Co.*, 11 *Am. & Eng. R. Cas.* 63, 62 *Iowa* 593. DISAPPROVED IN *Louisville & N. R. Co. v. Reese*, 38 *Am. & Eng. R. Cas.* 342, 85 *Ala.* 497. DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Stanford*, 12 *Kan.* 354. FOLLOWED IN *McCummons v. Chicago & N. W. R. Co.*, 33 *Iowa* 187; *Garrett v. Chicago & N. W. R. Co.*, 36 *Iowa* 121.

Negligence of a company in setting out a fire may be shown by circumstantial evi-

dence; direct proof of a particular act of negligence is not required. *Gulf, C. & S. F. R. Co. v. Holt*, 11 *Am. & Eng. R. Cas.* 72, 1 *Tex. App. (Civ. Cas.)* 477.

Both the loss by fire and the negligence of the company may be established by circumstantial evidence. *Fl. Worth & D. C. R. Co. v. Ratcliffe*, 2 *Tex. App. (Civ. Cas.)* 600.—FOLLOWING *International & G. N. R. Co. v. Timmermann*, 61 *Tex.* 660.

As defects in an engine and negligence in its management are matters peculiarly within the knowledge of the company, it is not reasonable to expect of a stranger direct evidence of the specific defects or negligence, and it is not error to charge the jury to that effect. *Missouri Pac. R. Co. v. Kincaid*, 11 *Am. & Eng. R. Cas.* 83, 29 *Kan.* 654.—FOLLOWING *Atchison, T. & S. F. R. Co. v. Stanford*, 12 *Kan.* 354.

An inference of negligence is warranted upon proof that the company left in the house where oil used by the company was kept, a red-hot stove, around which was inflammable waste material, etc. *Read v. Pennsylvania R. Co.*, 44 *N. J. L.* 280.

The jury are warranted in inferring negligence on the part of the company where it is shown that fire had been scattered along the track. *Houston & T. C. R. Co. v. McDonough*, 1 *Tex. App. (Civ. Cas.)* 354.

The doctrine that the fact of negligence on the part of a company in setting out a fire by sparks from an engine may be established by circumstantial evidence will apply as well where the testimony is offered by way of rebuttal as where it is produced in making out the case in chief. *Babcock v. Chicago & N. W. R. Co.*, 11 *Am. & Eng. R. Cas.* 63, 62 *Iowa* 593, 13 *N. W. Rep.* 740, 17 *N. W. Rep.* 904.—APPLYING *Gandy v. Chicago & N. W. R. Co.*, 30 *Iowa* 420.

Negligence cannot be inferred from the fact alone that fire was communicated to adjacent property by sparks from an engine. *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 32 *Am. & Eng. R. Cas.* 374, 110 *Ind.* 225, 11 *N. E. Rep.* 285.

The mere fact of the escape of burning coal from the engine is not sufficient evidence of the company's negligence, but in connection with other circumstances may tend to show such negligence. *Bradshaw v. Rome, W. & O. R. Co.*, 17 *N. Y. S. R.* 307, 49 *Hun* 605, 1 *N. Y. Supp.* 691.

Proof of the setting out of fire to wood upon several occasions is not of itself suf-

ficient evidence from which to infer negligence on the company's part. *Philadelphia & R. R. Co. v. Yeiser*, 8 *Pa. St.* 366.

The fact that on a dry, windy day fire is discovered in a field upon the line of a railroad shortly after the passage of a train is not of itself evidence of negligence on the part of the company. *Reading & C. R. Co. v. Latshaw*, 2 *Am. & Eng. R. Cas.* 267, 93 *Pa. St.* 449.

253. To show how the fire originated.*—Juries should not be allowed to infer or presume, for want of positive proof to the contrary, that a fire was communicated by the operating of a railroad. The proof required upon this point must be sufficient to exclude the probability of a fire having been caused by some other means. *Denver, T. & G. R. Co. v. De Graff*, 2 *Colo. App.* 42, 29 *Pac. Rep.* 664.

But it is not required that plaintiff's preliminary evidence should exclude all possibility of another origin, or that it be undisputed. It is sufficient if it presents a question for the jury. *Crist v. Erie R. Co.*, 58 *N. Y.* 638, *mem.*; *affirming* 1 *T. & C.* 435.

That a railroad company aided in putting out a fire burning along its track does not tend to establish the fact that it caused the fire. *Denver & R. G. R. Co. v. Morton*, 3 *Colo. App.* 155, 32 *Pac. Rep.* 345.

In an action for burning a barn during a very dry time, evidence that a very strong wind was blowing from defendant's tracks toward the barn about thirty feet away; that the fire caught on the side of the barn next to the track; that a streak had been burned in the dry grass from the track to the barn; that passing engines had deposited live coals and cinders on the track shortly before the fire—is sufficient to sustain a verdict for plaintiff, where no other cause for the fire is shown. *Beggs v. Chicago, W. & M. R. Co.*, 75 *Wis.* 444, 44 *N. W. Rep.* 633.

The evidence showed that soon after a freight train passed, a large shop that stood near the track was on fire (the fire having started in the upper story inside, near a window in which a part of a pane of glass was broken, being the only opening in the building), as plaintiff claimed, by a spark from the engine. The engine was in good

*Sufficiency of evidence to show origin of fires to prove negligence on part of company, see 49 *AM. & ENG. R. CAS.* 677, *abstr.*

condition and there was no proof of negligence in its management. There were no fires burning in the building at the time, and no other theory was set up as to the origin of the fire. *Held*: (1) that the evidence was too uncertain to justify a finding for plaintiff; (2) that even if it was sufficient to justify a finding that the fire started from sparks from the locomotive, the company could not be held liable without proof of negligence. *Muskelwhite v. Atlantic, M. & O. R. Co.*, 4 *Hughes (U. S.)* 166.

It was charged that the fire was communicated first to dry grass, etc., on the right of way, and from thence to plaintiff's premises; and in another count, that the fire communicated from the locomotive to the plaintiff's premises. The proof showed clearly that the fire originated in one or the other of these ways, but left it in doubt, there being evidence supporting each count. *Held*, that the jury were justified in returning a verdict for the plaintiff, without determining decisively whether the fire originated in one or the other of these places. In such case it is immaterial whether the fire started on the right of way or on the plaintiff's land. *Chicago & E. I. R. Co. v. Goyette*, 43 *Am. & Eng. R. Cas.* 36, 133 *Ill.* 21, 24 *N. E. Rep.* 549; *affirming* 32 *Ill. App.* 574.

In an action for destroying property by two fires, one caused by sparks from a company's engine upon plaintiff's premises, the other upon combustibles on the right of way, it was shown that soon after a train passed smoke was seen in plaintiff's orchard; that the fire started on the line between plaintiff and defendant and was going from the track, and that engines on that road sometimes threw sparks forty feet beyond the right of way. *Held*, that the evidence warranted the finding that each fire originated as laid in the declaration. *Norfolk & W. R. Co. v. Bohannon*, 85 *Va.* 293, 7 *S. E. Rep.* 236.

Where no attempt was made to ascertain the loss until after the second fire, and to examine witnesses as to the amount of each separate loss—*held*, that it was proper to refuse to instruct the jury to find each loss separately; and it was proper to instruct them to consider all the evidence and assess the damages as a whole, whether the fire originated from sparks cast upon plaintiff's premises, or upon combustibles on defendant's right of way. *Norfolk & W. R. Co. v. Bohannon*, 85 *Va.* 293, 7 *S. E. Rep.* 236.

254. — that it was caused by the particular engine.—The fact that the fire was caused by the company's engine can be proved by circumstantial evidence. *Gulf, C. & S. F. R. Co. v. Holt*, 11 *Am. & Eng. R. Cas.* 72, 1 *Tex. App. (Civ. Cas.)* 477.

Evidence tending to show that a fire started in grass near a track a few moments after an engine passed, and that no other person or other fire than that on the engine was in the vicinity at the time, is sufficient to justify the jury in finding that the fire was caused by the engine. *Karsen v. Milwaukee & St. P. R. Co.*, 7 *Am. & Eng. R. Cas.* 501, 29 *Minn.* 12, 11 *N. W. Rep.* 122. *Johnson v. Chicago & N. W. R. Co.*, 77 *Iowa* 666, 42 *N. W. Rep.* 512. *Gram v. Northern Pac. R. Co.*, 45 *Am. & Eng. R. Cas.* 544, 1 *N. Dak.* 252, 46 *N. W. Rep.* 972. —APPROVING *Karsen v. Milwaukee & St. P. R. Co.*, 29 *Minn.* 12, 11 *N. W. Rep.* 122. —FOLLOWED IN *Johnson v. Northern Pac. R. Co.*, 1 *N. Dak.* 354.—*Dean v. Chicago, M. & St. P. R. Co.*, 39 *Minn.* 413, 40 *N. W. Rep.* 270. *Smith v. London & S. W. R. Co.*, *L. R.* 6 *C. P.* 14, 40 *L. J. C. P.* 21, 23 *L. T.* 678, 19 *W. R.* 230; *affirming* *L. R.* 5 *C. P.* 98, 39 *L. J. C. P.* 68, 21 *L. T.* 668, 18 *W. R.* 343.

This probability may be strengthened by the facts that a strong wind was blowing from the north, and the fire was first discovered south of where the locomotive had just passed, and that such locomotive was lighter and had shorter flues than some of defendant's engines, and for these reasons would be more liable to emit fire than heavier engines with longer flues. But the foregoing circumstances, under which the fire was kindled, would not, in the absence of any other evidence, justify a finding that the engine was not of approved construction and properly managed, and an instruction that assumes the contrary is erroneous. *Butcher v. Vaca Valley & C. L. R. Co.*, (Cal.) 22 *Am. & Eng. R. Cas.* 644, 5 *Pac. Rep.* 359. *McGibbon v. Northern R. Co.*, 14 *Ont. App.* 91; *reversing* 11 *Ont.* 307.

But such evidence, notwithstanding the absence of all evidence as to the extent and course of the wind at the time of the fire is sufficient to sustain the finding that the fire was set by the defendant's engine. *Greenfield v. Chicago & N. W. R. Co.*, 83 *Iowa* 270, 49 *N. W. Rep.* 95.

Evidence that the engine passed a short time before the fire was discovered tends to

ed by the
t that the
y's engine
evidence.
11 Am. &
v. Cas.) 477.
that a fire
w moments
at no other
the engine
is sufficient
at the fire
sen v. Mil-
& Eng. R.
Rep. 122.
R. Co., 77
Gram v.
& Eng. R.
Rep. 972.
akee & St.
Rep. 122.
thern Pac.
v. Chicago,
3, 40 N. W.
W. R. Co.,
1, 23 L. T.
R. 5 C. P.
3, 18 W. R.

ngthened by
as blowing
as first dis-
motive had
motive was
an some of
ese reasons
e fire than
a. But the
which the
he absence
inding that
l construc-
an instruc-
erroneous.
L. R. Co.,
544, 5 Pac.
R. Co., 14
307.
anding the
extent and
of the fire
g that the
e's engine.
R. Co., 83

sed a short
ed tends to

show, in the absence of proof of any other cause, that the engine set the fire, notwithstanding it was in good order and properly managed; and an instruction that the fact that the fire was so discovered after the passing of an engine in safe and proper condition and properly managed is not evidence that such engine set the fire, is properly refused. *Abbot v. Gore*, 40 Am. & Eng. R. Cas. 244, 74 Wis. 509, 43 N. W. Rep. 365.

A verdict against a railroad will not be disturbed on appeal, where there was no direct evidence as to the cause of the fire, but the evidence showed that the fire was discovered soon after the train had passed; that the company permitted combustible matter to accumulate on its right of way at and near the place of the fire, and that at the time of the fire and for some time before it was common for the company's engines to throw sparks and coals of fire. *Missouri Pac. R. Co. v. Ayers*, (Tex.) 8 S. W. Rep. 538.

Another road paralleled the defendant's through plaintiff's farm, about four rods distant. The evidence showed that an engine passed on the other road, but there was no indication of sparks or fire escaping therefrom, and in a few minutes defendant's engine passed, which was shown to have emitted large coals or sparks to a great height, and shortly after the plaintiff's barn and straw stacks were on fire. *Held*, sufficient to sustain a verdict that the fire was caused by defendant's locomotive. *Collins v. New York C. & H. R. R. Co.*, 33 N. Y. S. R. 569, 58 Hun 601, *mem.*, 11 N. Y. Supp. 308; *affirmed in* 132 N. Y. 603, *mem.*, 44 N. Y. S. R. 934, *mem.*

In an action for burning lumber while near the track, there was no one present when the fire originated, but it was a short time after a passenger train had passed. The plaintiff claimed, and supported the claim by some evidence, that the fire started in ties near the track and extended through dry debris and thence to his lumber. *Held*, sufficient to justify a finding that it was set by the locomotive, in the absence of any evidence to show that the fire originated in some other way. *Gibbons v. Wisconsin Valley R. Co.*, 25 Am. & Eng. R. Cas. 479, 66 Wis. 161, 28 N. W. Rep. 170.

255. — that it was caused by any engine.—The plaintiff is not required to prove which one of the defendant's engines set the fire complained of.

Bevier v. Delaware & H. Canal Co., 13 Hun (N. Y.) 254. *Pittsburgh, C. & St. L. R. Co. v. Noel*, 7 Am. & Eng. R. R. Cas. 524, 77 Ind. 110.

It will be sufficient if it is proved that the fire was set by any engine passing over the defendant's railway; and the evidence may be wholly circumstantial—as, first, that it was possible for fire to reach the plaintiff's property from the defendant's engines, and second, facts tending to show that it probably originated from that cause and no other. *Union Pac. R. Co. v. Keller*, 36 Neb. 189, 54 N. W. Rep. 420. *Henderson v. Philadelphia & R. R. Co.*, 48 Am. & Eng. R. Cas. 16, 144 Pa. St. 451, 22 Atl. Rep. 851.

256. Preponderance of proof.—In an action for the destruction of plaintiff's property by sparks emitted from engines of defendant, to entitle plaintiff to recover, he is not required to prove that the fire by which his property was destroyed could not have occurred in any other way than from sparks of fire emitted from the defendant's engines; while bound to prove to the satisfaction of the jury that the fire was occasioned by the negligence of the defendant, he is not bound to prove this beyond a reasonable doubt, as applied to the trial of criminal causes. *Baltimore & O. R. Co. v. Shipley*, 39 Md. 251, 11 Am. Ry. Rep. 269. *White v. Chicago, M. & St. P. R. Co.*, 45 Am. & Eng. R. Cas. 565, 1 S. Dak. 326, 47 N. W. Rep. 146.—APPROVED IN *Johnson v. Northern Pac. R. Co.*, 1 N. Dak. 354.

Defendant cannot be made liable on a mere probability that the fire was caused by its engines, but only on the preponderance of proof that it was so caused, and on proof of negligence on the part of defendant or its servants, the probability must amount to proof. *Brown v. Atlanta & C. A. L. R. Co.*, 13 Am. & Eng. R. Cas. 479, 19 So. Car. 39. *Union Pac. R. Co. v. Keller*, 36 Neb. 189, 54 N. W. Rep. 420.

Where there is barely evidence enough as to the origin of a fire to establish a *prima facie* case, a verdict in favor of the plaintiff cannot be supported where there is strong rebutting evidence that the fire was not communicated from an engine, but was started by a negro who was seen at the very spot only a few minutes before the fire broke out, apparently striking a match to light his pipe, and that the engine was moving on a down grade with the steam

shut off, leaving no chance for the escape of fire. *East Line & R. R. Co. v. Hart*, 2 *Tex. App. (Civ. Cas.)* 370.

The defendant must show by a preponderance of evidence that the plaintiff was guilty of contributory negligence. *Northern Pac. R. Co. v. Lewis*, 51 *Fed. Rep.* 658, 7 *U. S. App.* 254, 2 *C. C. A.* 446.

c. Presumptive Evidence; Rebuttal.

257. Generally.—In the absence of evidence to the contrary, the location of a station must be presumed to have been made for the proper needs of the company, and not to do mischief. *Frankford & B. Turnpike Co. v. Philadelphia & T. R. Co.*, 54 *Pa. St.* 345.

Where the action is for burning hay which was cut from lands in the Indian Territory, and one of the plaintiffs is an Indian, on whose lands the hay was cut, in the absence of evidence to the contrary, it will be presumed that the harvesting of the hay was lawful, instead of in violation of a statute prohibiting the cutting of hay on the common grounds of the Creek Nation. *Eddy v. Lafayette*, 49 *Fed. Rep.* 807, 4 *U. S. App.* 247, 1 *C. C. A.* 441.

258. That negligent person was employe of company.—A burning brand was thrown from a locomotive on the company's own land, where it started a fire in the grass which spread to plaintiff's lands adjoining. The evidence did not show that the person who threw off the brand was an employe of the company, but it did show that he was on the engine with his coat off, and apparently engaged in work there. *Held*, in the absence of evidence to the contrary, sufficient to raise a presumption that he was an employe of the company. *McCoun v. New York C. & H. R. R. Co.*, 66 *Barb. (N. Y.)* 338.

In such case, in the absence of evidence to the contrary, it must be presumed that the person throwing off the burning brand was in the performance of his usual duties, and did not do it wilfully. *McCoun v. New York C. & H. R. R. Co.*, 66 *Barb. (N. Y.)* 338.

259. That company will not permit fire to escape.—There is no legal presumption that a railroad company, while in the exercise of its lawful right to run its locomotives and trains over its road, and to use fire in so doing, will not permit fire to escape from them. *Palmer v. Missouri Pac. R. Co.*, 76 *Mo.* 217. *Crews v. Kansas City*,

St. J. & C. B. R. Co., 19 *Mo. App.* 302. *Huff v. Missouri Pac. R. Co.*, 17 *Mo. App.* 356.

260. That fire was originated by company's engine.—That a fire broke out and burned along the line of a railway is not evidence that it was caused by the railroad company. *Denver & R. G. R. Co. v. Morton*, 3 *Colo. App.* 155, 32 *Pac. Rep.* 345.

Where a railroad company is authorized to propel its trains and operate its road by the use of steam locomotives, no inference of negligence arises from the mere fact that an injury to adjacent property was caused by sparks emitted from such locomotives. *Kuffner v. Cincinnati, H. & D. R. Co.*, 34 *Ohio St.* 96, 21 *Am. Ky. Rep.* 1.—REVIEWED IN *Pittsburgh, C. & St. L. R. Co. v. McMillan*, 37 *Ohio St.* 554.

Evidence that a fire sprang up immediately on the passing of a train, and that there was no fire on the premises before, and no other apparent cause for the fire, is sufficient to warrant the inference that the fire was caused by the train. *Union Pac. R. Co. v. De Busk*, 38 *Am. & Eng. R. Cas.* 321, 12 *Colo.* 294, 20 *Pac. Rep.* 752, 3 *L. R. A.* 350.—FOLLOWED IN *Denver, T. & G. R. Co. v. De Graff*, 2 *Colo. App.* 42.

If one or more of the locomotives of a railroad company drop coals or emit sparks just prior to or soon after property on the line of its track has been destroyed by fire, without any other known cause or circumstance of suspicion, it raises the presumption that the company's engines were the cause of it. *Longabaugh v. Virginia City & T. R. Co.*, 9 *Nev.* 271.

Evidence that a fire might have been caused by a spark from a locomotive, and that two other fires had started on the same day a few minutes after trains had passed, will warrant a conclusion that a spark did escape, especially where the evidence tends to disprove the presence of any other cause. *Wiley v. West Jersey R. Co.*, 44 *N. J. L.* 247.

Where defendant company used the track of another road, proof that a fire was burning on the right of way soon after a train passed, which spread to plaintiff's lands, justifies an inference that the fire was caused by defendant's engine, where there is no evidence that any trains of the other company had been on the road for some time. *Genung v. New York & N. E. R. Co.*, 50 *N. Y. S. R.* 511, 66 *Hun* 632, 21 *N. Y. Supp.* 97.

261. Presumptive evidence of company's negligence, generally.*—

Proof that a fire broke out in dry grass and weeds on the company's right of way immediately after a train passed is sufficient to raise a presumption of negligence. *Chicago, B. & Q. R. Co. v. Emmons*, 42 Ill. App. 138. *Karsen v. Milwaukee & St. P. R. Co.*, 7 Am. & Eng. R. Cas. 501, 29 Minn. 12, 11 N. W. Rep. 122.—APPROVED IN *Louisville & N. R. Co. v. Reese*, 38 Am. & Eng. R. Cas. 342, 85 Ala. 497, 5 So. Rep. 283, 7 Am. St. Rep. 66; *Gram v. Northern Pac. R. Co.*, 1 N. Dak. 252.—FOLLOWED IN *Sibirud v. Minneapolis & St. L. R. Co.*, 7 Am. & Eng. R. Cas. 499, 29 Minn. 58.—*Sappington v. Missouri Pac. R. Co.*, 14 Mo. App. 86.

Proof that a locomotive habitually scatters sparks so as to endanger combustible material along the line of the road is sufficient to warrant a jury in inferring negligence against the company. *Green Ridge R. Co. v. Brinkman*, 23 Am. & Eng. R. Cas. 342, 64 Md. 52, 54 Am. Rep. 755.—FOLLOWING *Annapolis & E. R. Co. v. Gantt*, 39 Md. 135.—*Aycock v. Raleigh & A. A. L. R. Co.*, 89 N. Car. 321.

The evidence of a witness that a locomotive emitted a volume of live sparks unusual in quantity and so brilliant in color as to be very noticeable at mid-day, is sufficient to warrant a finding of negligence. *Ruppel v. Manhattan R. Co.*, 13 Daly (N. Y.) 11.—QUOTING *Field v. New York C. R. Co.*, 32 N. Y. 349; *Bedell v. Long Island R. Co.*, 44 N. Y. 369; *McCaig v. Erie R. Co.*, 8 Hun (N. Y.) 599.—APPLIED IN *Wiedmer v. New York El. R. Co.*, 38 Am. & Eng. R. Cas. 481, 114 N. Y. 462, 21 N. E. Rep. 1041, 23 N. Y. S. R. 859.

It being shown that the fire was communicated from an engine of the defendant to combustible matter on its right of way, and thence to plaintiff's property adjacent thereto, the statute (Minn. Gen. St. 1878, ch. 34, § 60) raises a presumption of negligence on the part of defendant. *Sibirud v. Minneapolis & St. L. R. Co.*, 7 Am. & Eng. R. Cas. 499, 29 Minn. 58, 11 N. W. Rep. 146.—FOLLOWING *Karsen v. Milwaukee & St. P. R. Co.*, 29 Minn. 12.

Where the plaintiff shows that the burn-

ing was produced by an engineer or fireman on one of defendant's running trains throwing a burning piece of wood from the engine on a part of the company's right of way covered with inflammable grass, whence the fire spread rapidly to and destroyed plaintiff's property, though third persons attempted to extinguish it, this establishes a *prima facie* case of negligence on the part of the defendant, independently of section 1059 of Miss. Code of 1880. *Mobile & O. R. Co. v. Gray*, 23 Am. & Eng. R. Cas. 373, 62 Miss. 383.

262. Mere proof of the starting of the fire.*—Proof of fire under the Md. St. of 1838, ch. 244, raises the presumption of negligence against the company. *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242.

When the actionable negligence is alleged to consist in the use of defective appliances or in the careless handling of a locomotive, a *prima facie* case is made by the fact of the fire, because the fact of the fire starts a presumption of negligence. *Cronk v. Chicago, M. & St. P. R. Co.*, 54 Am. & Eng. R. Cas. 525, 3 S. Dak. 93, 52 N. W. Rep. 420.

Negligence on the part of the company will not be presumed from the mere fact of the injury by fire. *McCummins v. Chicago & N. W. R. Co.*, 33 Iowa 187.

Negligence cannot be inferred from the fact of causing the fire alone. *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218; reversing 29 Barb. 226.

263. Mere proof of fire caused by the operation of the railroad.—Iowa Code, § 1289, providing that railway companies "shall be liable for all damages by fire that is set out or caused by the operation" of their roads, makes the fact of an injury so occurring only *prima facie* evidence of negligence. *Small v. Chicago, R. I. & P. R. Co.*, 50 Iowa 338.—REVIEWING *Rodemacher v. Milwaukee & St. P. R. Co.*, 41 Iowa 297; *Webber v. Eastern R. Co.*, 2 Metc. (Mass.) 149; *Snyder v. Western Union R. Co.*, 25 Wis. 60; *Kucheman v. Chicago, C. & D. R. Co.*, 46 Iowa 366; *Rood v. New York & E. R. Co.*, 18 Barb. (N. Y.) 80; *Kesee v. Chicago & N. W. R. Co.*, 30 Iowa 78.—FOLLOWED IN *Babcock v. Chicago & N. W. R. Co.*, 11 Am. & Eng. R. Cas. 63.

* Presumption of negligence in actions for the destruction of property by fire, see note, 45 AM. & ENG. R. CAS. 563.

* Proof of fire raises a presumption of negligence on part of company, see 35 AM. & ENG. R. CAS. 243, *abstr.*; 43 *Id.* 27, *abstr.*; 54 *Id.* 535, *abstr.*

62 Iowa 593; *Slosson v. Burlington*, C. R. & N. R. Co., 51 Iowa 294; *Libby v. Chicago*, R. I. & P. R. Co., 52 Iowa 92; *Brentner v. Chicago*, M. & St. P. R. Co., 68 Iowa 530; *Rose v. Chicago & N. W. R. Co.*, 72 Iowa 625, 34 N. W. Rep. 450. RECONCILED IN *West v. Chicago & N. W. R. Co.*, 38 Am. & Eng. R. Cas. 340, 77 Iowa 654, 35 N. W. Rep. 479. REVIEWED IN *Greenfield v. Chicago & N. W. R. Co.*, 83 Iowa 270.—*Seska v. Chicago, M. & St. P. R. Co.*, 77 Iowa 137, 41 N. W. Rep. 596. *Engle v. Chicago, M. & St. P. R. Co.*, 77 Iowa 661, 37 N. W. Rep. 6, 42 N. W. Rep. 512.

The rule prescribed by Kan. Laws 1885, ch. 155, that the occurrence of a fire caused by the operation of a railroad is *prima facie* evidence of negligence on the part of the railroad company, applies to all cases where the fire results from any step in the operation of the road; and the coupling of a charge of negligence in allowing combustible material to accumulate on the roadway, with one that the fire was negligently permitted to escape from a passing locomotive, will not take the case outside of the application of the statute. *Missouri Pac. R. Co. v. Merrill*, 40 Kan. 404, 19 Pac. Rep. 793.—FOLLOWED IN *Missouri Pac. R. Co. v. Cady*, 44 Kan. 633.—*Leroy & W. R. Co. v. Ross*, 36 Am. & Eng. R. Cas. 653, 40 Kan. 598, 2 L. R. A. 217, 20 Pac. Rep. 197. *Ft. Scott, W. & W. R. Co. v. Karracker*, 46 Kan. 511, 26 Pac. Rep. 1027.

The destruction of property by fire communicated by a train is an injury "inflicted by the running of the locomotives or cars," within Miss. Code, § 1058, which declares that proof of injury so inflicted shall be *prima facie* evidence of negligence on the part of the company. *Vicksburg & M. R. Co. v. Barrett*, 43 Am. & Eng. R. Cas. 595, 67 Miss. 579, 7 So. Rep. 549.

204. Mere proof of fire caused by one of defendant's engines.—Proof that the fire originated from a locomotive, makes out a *prima facie* case of negligence against the company. *Tilley v. St. Louis & S. F. R. Co.*, 32 Am. & Eng. R. Cas. 324, 49 Ark. 535, 6 S. W. Rep. 8. *Toledo, W. & W. R. Co. v. Larmon*, 67 Ill. 68. *Wabash R. Co. v. Smith*, 42 Ill. App. 527.—QUOTING *Chicago & A. R. Co. v. Quaintance*, 58 Ill. 389.—*Rose v. Chicago & N. W. R. Co.*, 72 Iowa 625, 34 N. W. Rep. 450.—FOLLOWING *Small v. Chicago, R. I. & P. R. Co.*, 50 Iowa 341.—*Central Branch U. P. R. Co. v.*

Hotham, 22 Kan. 41. *Baltimore & O. R. Co. v. Shipley*, 39 Md. 251, 11 Am. Ry. Rep. 269. *Green Ridge R. Co. v. Brinkman*, 23 Am. & Eng. R. Cas. 342, 64 Md. 52, 54 Am. Rep. 755. *Mahoney v. St. Paul, M. & M. R. Co.*, 25 Am. & Eng. R. Cas. 470, 35 Minn. 361, 29 N. W. Rep. 6. *Bedford v. Hannibal & St. J. R. Co.*, 46 Mo. 456.—FOLLOWING *Fitch v. Pacific R. Co.*, 45 Mo. 322.—FOLLOWED IN *Clemens v. Hannibal & St. J. R. Co.*, 53 Mo. 366.—*Daly v. Chicago, M. & St. P. R. Co.*, 43 Minn. 319, 45 N. W. Rep. 611. *Coale v. Hannibal & St. J. R. Co.*, 60 Mo. 227, 9 Am. Ry. Rep. 210.—QUOTED IN *Tilley v. St. Louis & S. F. R. Co.*, 32 Am. & Eng. R. Cas. 324, 49 Ark. 535, 6 S. W. Rep. 8.—*Coates v. Missouri, K. & T. R. Co.*, 61 Mo. 38, 8 Am. Ry. Rep. 60. *Miller v. St. Louis, I. M. & S. R. Co.*, 29 Am. & Eng. R. Cas. 254, 90 Mo. 389, 2 S. W. Rep. 439. *Hoover v. Missouri Pac. R. Co.*, (Mo.) 16 S. W. Rep. 480.—FOLLOWING *Bedford v. Hannibal & St. J. R. Co.*, 46 Mo. 456; *Clemens v. Hannibal & St. J. R. Co.*, 53 Mo. 366; *Fitch v. Pacific R. Co.*, 45 Mo. 322; *Miller v. St. Louis, I. M. & S. R. Co.*, 90 Mo. 389, 2 S. W. Rep. 439; *Coates v. Missouri, K. & T. R. Co.*, 61 Mo. 38; *Wise v. Joplin R. Co.*, 85 Mo. 187.—*Union Pac. R. Co. v. Keller*, 36 Neb. 189, 54 N. W. Rep. 420. *Johnson v. Northern Pac. R. Co.*, 45 Am. & Eng. R. Cas. 554, 1 N. Dak. 354, 48 N. W. Rep. 227.—APPROVING *Kelsey v. Chicago & N. W. R. Co.*, 1 S. Dak. 80, 45 N. W. Rep. 207; *White v. Chicago, M. & St. P. R. Co.*, 1 S. Dak. 326, 47 N. W. Rep. 146.—*Burke v. Louisville & N. R. Co.*, 7 Heisk. (Tenn.) 451, 12 Am. Ry. Rep. 497. *Gulf, C. & S. F. R. Co. v. Johnson*, 3 Tex. App. (Civ. Cas.) 151. *Anderson v. Wasatch & J. V. R. Co.*, 2 Utah 518.—DISTINGUISHED IN *Davis v. Utah Southern R. Co.*, 3 Utah 218.—*Cleveland v. Grand Trunk R. Co.*, 42 Vt. 449.

Negligence is not presumed against a company upon proof that fire was communicated from locomotives to plaintiff's property; but negligence must be proven. *Indianapolis & C. R. Co. v. Paramore*, 31 Ind. 143.—DISAPPROVED IN *Louisville & N. R. Co. v. Reese*, 38 Am. & Eng. R. Cas. 342, 85 Ala. 497, 5 So. Rep. 283, 7 Am. St. Rep. 66. REVIEWED AND QUOTED IN *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 32 Am. & Eng. R. Cas. 374, 110 Ind. 225.—*Pittsburgh, C. & St. L. R. Co. v. Hixon*, 32 Am. & Eng. R. Cas. 374, 110 Ind. 225, 11 N. E. Rep. 285. *Chicago & E. I. R. Co. v. Ostrander*, 32 Am.

Eng. R. Cas. 361, 116 *Ind.* 259, 12 *West. Rep.* 718, 15 *N. E. Rep.* 227, 19 *N. E. Rep.* 110.—CRITICISING *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 79 *Ind.* 111, 110 *Ind.* 225.—*Babcock v. Chicago & N. W. R. Co.*, 11 *Am. & Eng. R. Cas.* 63, 62 *Iowa* 593, 13 *N. W. Rep.* 740; *adhered to on rehearing*, 13 *Am. & Eng. R. Cas.* 477, 62 *Iowa* 598, 17 *N. W. Rep.* 909.—FOLLOWING *Small v. Chicago, R. I. & P. R. Co.*, 50 *Iowa* 338.—*Smith v. Hannibal & St. J. R. Co.*, 37 *Mo.* 287.

If the proof shows that the fire was scattered by the company's engine, the jury are justified in finding negligence on the part of the company, in the absence of any explanation as to the cause of such fire. *Fitch v. Pacific R. Co.*, 45 *Mo.* 322.

205. Mere proof of fire caused by a passing engine.—Proof of the fact of fire escaping from a passing engine and burning the property of another makes a *prima facie* case of negligence against the railroad which provides and operates the engine. *Wise v. Joplin R. Co.*, 29 *Am. & Eng. R. Cas.* 164, 85 *Mo.* 178.—OVERRULING *Smith v. Hannibal & St. J. R. Co.*, 37 *Mo.* 287.—DISTINGUISHED IN *Otis Co. v. Missouri Pac. R. Co.*, 112 *Mo.* 622.—*Eddy v. Lafayette*, 49 *Fed. Rep.* 807, 4 *U. S. App.* 247, 1 *C. C. A.* 441. *Chicago & A. R. Co. v. Pennell*, 110 *Ill.* 435. *Reed v. Missouri Pac. R. Co.*, 50 *Mo. App.* 504.

While the sole fact of fire escaping from a passing locomotive and destroying the property of another is sufficient to warrant an inference of negligence, either in the equipment of the engine or its management, yet the proof of such fact makes out only a *prima facie* case of negligence. *Otis Co. v. Missouri Pac. R. Co.*, 112 *Mo.* 622, 20 *S. W. Rep.* 676.—DISTINGUISHING *Fitch v. Pacific R. Co.*, 45 *Mo.* 322; *Kenney v. Hannibal & St. J. R. Co.*, 70 *Mo.* 243; *Redmond v. Chicago, R. I. & P. R. Co.*, 76 *Mo.* 550; *Wise v. Joplin R. Co.*, 85 *Mo.* 178.

206. Mere proof of fire caused by sparks emitted from an engine.*—Proof that sparks from a locomotive set a fire which injured plaintiff's property makes a *prima facie* case. *St. Louis, A. & T. H. R. Co. v. Strotz*, 47 *Ill. App.* 342. *East Tenn., V. & G. R. Co. v. Hesters*, 90 *Ga.* 11, 15 *S. E. Rep.* 828.—DISTINGUISHED IN *Iman v. Elberton Air Line R. Co.*, 90 *Ga.*

663. FOLLOWED IN *East Tenn., V. & G. R. Co. v. Hall*, 90 *Ga.* 17.—*Chicago & N. W. R. Co. v. McCahill*, 56 *Ill.* 28, 4 *Am. Ky. Rep.* 561. *Chicago & A. R. Co. v. Quaintance*, 58 *Ill.* 389, 12 *Am. Ky. Rep.* 234.—FOLLOWED IN *Louisville, E. & St. L. Con. R. Co. v. Spencer*, 47 *Ill. App.* 503; *Chicago & A. R. Co. v. Clamptit*, 63 *Ill.* 95. QUOTED IN *Wabash R. Co. v. Smith*, 42 *Ill. App.* 527.—*Niskern v. Chicago, M. & St. P. R. Co.*, 22 *Fed. Rep.* 811. *Brown v. Missouri Pac. R. Co.*, 13 *Mo. App.* 462. *Logan v. Wabash Western R. Co.*, 43 *Mo. App.* 71. *Polhans v. Atchison, T. & S. F. R. Co.*, 45 *Mo. App.* 153. *Galveston, H. & S. A. R. Co. v. Horne*, 35 *Am. & Eng. R. Cas.* 238, 69 *Tex.* 643, 9 *S. W. Rep.* 440. *Texas & P. R. Co. v. Erway*, 3 *Tex. App. (Civ. Cas.)* 71. *Piggott v. Eastern Counties R. Co.*, 3 *C. B.* 229, 10 *Jur.* 571, 15 *L. J. C. P.* 225.

If sparks escaping from a locomotive kindle a fire upon the company's right of way, and the fire extends to and destroys adjoining property, the loss is *prima facie* the result of the company's negligence. *Kenney v. Hannibal & St. J. R. Co.*, 70 *Mo.* 252.—DISTINGUISHED IN *Otis Co. v. Missouri Pac. R. Co.*, 112 *Mo.* 622. FOLLOWED IN *Crews v. Kansas City, St. J. & C. B. R. Co.*, 19 *Mo. App.* 302. RECONCILED IN *Patton v. St. Louis & S. F. R. Co.*, 23 *Am. & Eng. R. Cas.* 364, 87 *Mo.* 117. REVIEWED IN *Peck v. Missouri Pac. R. Co.*, 31 *Mo. App.* 123.

The mere proof that the fire was occasioned by sparks emitted from defendant's engine does not make a *prima facie* case of negligence against the defendant. *Gandy v. Chicago & N. W. R. Co.*, 30 *Iowa* 420. *Garrett v. Chicago & N. W. R. Co.*, 36 *Iowa* 121.—FOLLOWING *Gandy v. Chicago & N. W. R. Co.*, 30 *Iowa* 420.—*Gulf, C. & S. F. R. Co. v. Holt*, 11 *Am. & Eng. R. Cas.* 72, 1 *Tex. App. (Civ. Cas.)* 477.

The mere emission of sparks from a locomotive, or the mere setting out of fires thereby, is not, *per se*, evidence of negligence upon the part of the company; but when the emission is of such character as is inconsistent with the common experience or the known efficiency of approved spark arresters in general use, and properly used, it is evidence of negligence. The emission of sparks of unusual size, or both of unusual size and in unusual quantities, is evidence sufficient to raise the presumption of negligence. *Jacksonville, T. & K. W. R.*

* Presumption of negligence from fire started by sparks from engine, see note, 15 *L. R. A.* 40.

Co. v. Peninsular L. T. & M. Co., 49 *Am. & Eng. R. Cas.* 603, 27 *Fla.* 1, 9 *So. Rep.* 661.

The mere fact that sparks are emitted from a locomotive does not in itself establish negligence nor authorize a jury to infer negligence, unless there is further evidence tending to show negligence, such as that the sparks were unusual in degree or character, or of such a size as could not be emitted from a properly constructed engine. *McCaig v. Erie R. Co.*, 8 *Hun (N. Y.)* 599.—QUOTED IN *Ruppel v. Manhattan R. Co.*, 13 *Daly (N. Y.)* 11.

207. Mere proof of fire caused by sparks scattered by a passing engine.—The fact of premises being fired by sparks from a passing engine is *prima facie* evidence of negligence on the part of the company. *Bass v. Chicago, B. & Q. R. Co.*, 28 *Ill.* 9.—FOLLOWING *Piggot v. Eastern Counties R. Co.*, 3 *C. B.* 229.—NOT FOLLOWED IN *Gandy v. Chicago & N. W. R. Co.*, 30 *Iowa* 420. REVIEWED IN *Smith v. Hannibal & St. J. R. Co.*, 37 *Mo.* 287.—*Kelsey v. Chicago & N. W. R. Co.*, 43 *Am. & Eng. R. Cas.* 43, 1 *S. Dak.* 80, 45 *N. W. Rep.* 204. *Texas & P. R. Co. v. Erway*, 3 *Tex. App. (Civ. Cas.)* 71.—FOLLOWING *Houston & T. C. R. Co. v. McDonough*, 1 *Tex. App. (Civ. Cas.)* 354.

Negligence on the part of a railroad company is not necessarily implied from proof that fire was originated by sparks from a passing engine. *Collins v. New York C. & H. R. R. Co.*, 5 *Hun (N. Y.)* 503; *affirmed* in 71 *N. Y.* 609, *mem.*

208. Presumption of negligence in the construction or condition of engine.—The escape of fire from a railroad engine raises a presumption of negligence on the part of the company as to the construction of the engine or its condition at the time. *Illinois C. R. Co. v. Mills*, 42 *Ill.* 407.—APPROVED IN *Louisville & N. R. Co. v. Reese*, 38 *Am. & Eng. R. Cas.* 342, 85 *Ala.* 497, 5 *So. Rep.* 283, 7 *Am. St. Rep.* 66.—*Toledo, St. L. & K. C. R. Co. v. Kingman*, 49 *Ill. App.* 43. *Clemens v. Hannibal & St. J. R. Co.*, 53 *Mo.* 366, 12 *Am. Ry. Rep.* 351. *Bedell v. Long Island R. Co.*, 44 *N. Y.* 367.—QUOTED IN *Ruppel v. Manhattan R. Co.*, 13 *Daly (N. Y.)* 11.—*Gonung v. New York & N. E. R. Co.*, 50 *N. Y. S. R.* 511, 66 *Hun* 632, *mem.*, 21 *N. Y. Supp.* 97. *Koontz v. Oregon R. & N. Co.*, 43 *Am. & Eng. R. Cas.* 11, 20 *Oreg.* 3, 23 *Pac. Rep.* 820. *Kelsey v. Chicago*

& N. W. R. Co., 43 *Am. & Eng. R. Cas.* 43, 1 *S. Dak.* 80, 45 *N. W. Rep.* 204.—QUOTING *Pielke v. Chicago, M. & St. P. R. Co.*, 5 *Dak.* 444, 41 *N. W. Rep.* 669.—APPROVED IN *Johnson v. Northern Pac. R. Co.*, 1 *N. Dak.* 354.—*Spaulding v. Chicago & N. W. R. Co.*, 33 *Wis.* 582.—APPROVED IN *Huber v. Chicago, M. & St. P. R. Co.*, 6 *Dak.* 392. DISAPPROVED IN *Burlington & M. R. Co. v. Westover*, 4 *Neb.* 268. QUOTED IN *Pattee v. Chicago, M. & St. P. R. Co.*, 34 *Am. & Eng. R. Cas.* 399, 5 *Dak.* 267, 38 *N. W. Rep.* 435.

Where sparks of large size are emitted, which, carried to a long distance, set fire to fields, fences, or buildings, it may well be inferred that the engine is not provided with a sufficient spark arrester. *Henderson v. Philadelphia & R. R. Co.*, 48 *Am. & Eng. R. Cas.* 16, 144 *Pa. St.* 461, 22 *Atl. Rep.* 851.

Such evidence is sufficient to justify the presumption that the spark arrester was out of order, and that the engine was not properly operated. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 41 *Fed. Rep.* 917.

A company is not necessarily liable for damages caused by fire merely because the fire originated from sparks emitted from a running locomotive on its road; but proof of that fact raises a presumption of negligence (1) in the construction of the engine, (2) or in the appliances used to prevent accidents from escaping sparks. *Louisville & N. R. Co. v. Reese*, 38 *Am. & Eng. R. Cas.* 342, 85 *Ala.* 497, 5 *So. Rep.* 283, 7 *Am. St. Rep.* 66.—APPROVING *Karsen v. Milwaukee & St. P. R. Co.*, 29 *Minn.* 12; *Illinois C. R. Co. v. Mills*, 42 *Ill.* 407; *Coates v. Missouri, K. & T. R. Co.*, 61 *Mo.* 38; *Burke v. Louisville & N. R. Co.*, 7 *Heisk. (Tenn.)* 451; *Case v. Northern C. R. Co.*, 59 *Barb. (N. Y.)* 644; *Burlington & M. R. Co. v. Westover*, 4 *Neb.* 268. DISAPPROVING *Gandy v. Chicago & N. W. R. Co.*, 30 *Iowa* 420; *Philadelphia & R. R. Co. v. Yerger*, 73 *Pa. St.* 121; *Indianapolis & C. R. Co. v. Paramore*, 31 *Ind.* 143; *McCaig v. Erie R. Co.*, 8 *Hun (N. Y.)* 599. QUOTING *Spaulding v. Chicago & N. W. R. Co.*, 30 *Wis.* 110.—DISTINGUISHED IN *Alabama G. S. R. Co. v. Hill*, 93 *Ala.* 514.

The court cannot presume a company negligent for using an old engine to draw its freight trains, or one in which it was difficult to keep up steam, in the absence of competent testimony showing the spark arrester defective. *Wheeler v. New York*

C. & H. R. R. Co., 51 *N. Y. S. R.* 471, 67 *Hun* 639, 22 *N. Y. Supp.* 561.

Where there is evidence on the part of the company defendant to show that the spark-arresting apparatus on a certain engine was in good order, and it appears on behalf of the plaintiff that large, fresh cinders were found on and near the track shortly after the passage of the engine in question, the jury may pass upon the question whether the spark-arresting apparatus on the engine was or was not in good order and sufficient. *Babcock v. Chicago & N. W. R. Co.*, 13 *Am. & Eng. R. Cas.* 477, 62 *Iowa* 598, 17 *N. W. Rep.* 909; *rehearing denied* in 11 *Am. & Eng. R. Cas.* 63, 62 *Iowa* 593, 13 *N. W. Rep.* 740.

269. Presumption of negligence in the management of the engine.—

Proof that the fire originated from sparks emitted from a passing engine raises a presumption of negligence in the management of the engine and appliances. *Louisville & N. R. Co. v. Reese*, 38 *Am. & Eng. R. Cas.* 342, 85 *Ala.* 497, 7 *Am. St. Rep.* 66, 5 *So. Rep.* 283. *Fitch v. Pacific R. Co.*, 45 *Mo.* 322.—CRITICISED IN *Atchison, T. & S. F. R. Co. v. Bales*, 16 *Kan.* 252. DISTINGUISHED IN *Randle v. Pacific R. Co.*, 65 *Mo.* 325; *Otis Co. v. Missouri Pac. R. Co.*, 112 *Mo.* 622. FOLLOWED IN *Bedford v. Hannibal & St. J. R. Co.*, 46 *Mo.* 456; *Clemens v. Hannibal & St. J. R. Co.*, 53 *Mo.* 366; *Coates v. Missouri, K. & T. R. Co.*, 61 *Mo.* 38.—*Clemens v. Hannibal & St. J. R. Co.*, 53 *Mo.* 366, 12 *Am. Ry. Rep.* 351.—FOLLOWING *Smith v. Hannibal & St. J. R. Co.*, 37 *Mo.* 287; *Bedford v. Hannibal & St. J. R. Co.*, 46 *Mo.* 456; *Fitch v. Pacific R. Co.*, 45 *Mo.* 322. NOT FOLLOWING *Pennsylvania R. Co. v. Kerr*, 62 *Pa. St.* 353; *Ryan v. New York C. R. Co.*, 35 *N. Y.* 310.—APPROVED IN *Gram v. Northern Pac. R. Co.*, 1 *N. Dak.* 252. FOLLOWED IN *Campbell v. St. Louis & I. M. R. Co.*, 58 *Mo.* 498. NOT FOLLOWED IN *Laird v. Connecticut & P. R. R. Co.*, 43 *Am. & Eng. R. Cas.* 63, 62 *N. H.* 254. QUOTED IN *Tilley v. St. Louis & S. F. R. Co.*, 32 *Am. & Eng. R. Cas.* 324, 49 *Ark.* 535, 6 *S. W. Rep.* 8.—*Kelsey v. Chicago & N. W. R. Co.*, 43 *Am. & Eng. R. Cas.* 43, 1 *S. Dak.* 80, 45 *N. W. Rep.* 204. *Wiley v. West Jersey R. Co.*, 44 *N. J. L.* 247. *Koontz v. Oregon R. & N. Co.*, 43 *Am. & Eng. R. Cas.* 11, 20 *Oreg. Co.*, 23 *Pac. Rep.* 820.—NOT FOLLOWING *Sheldon v. Hudson River R. Co.*, 14 *N. Y.* 224, 67 *Am. Dec.* 155; *Phila-*

delphia & R. R. Co. v. Yeiser, 8 *Pa. St.* 374.

Evidence that plaintiff's premises were set on fire by the engineer in throwing out a burning piece of wood from the engine upon the right of way is sufficient to raise the inference of negligence against the company. *Mobile & O. R. Co. v. Gray*, 23 *Am. & Eng. R. Cas.* 373, 62 *Miss.* 383.

If sparks escape through the most approved arrester, and careful and competent servants are employed, the inference that this escape of sparks is to be attributed to carelessness in the management of the train is a fair and reasonable inference. *Sappington v. Missouri Pac. R. Co.*, 14 *Mo. App.* 86.

Plaintiff's evidence showing that he went out a short time after a train had passed and saw fire burning on the right of way, which had not been there before the train passed, which was burning in old grass and refuse, and was carried by a high wind to plaintiff's field, is sufficient to raise the presumption that the fire originated from sparks or coals dropped by the engine, and that it was not properly constructed or managed. *Gunning v. New York & N. E. R. Co.*, 50 *N. Y. S. R.* 511, 66 *Hun* 632, *mem.*, 21 *N. Y. Supp.* 97.

270. Presumption of negligence in allowing combustibles on right of way.—

If a company permits grass or other combustible matter to accumulate on its right of way, in which a fire is started from escaping sparks, which is communicated to plaintiff's lands adjoining, it is *prima facie* sufficient to warrant a finding that the company was guilty of negligence, and it cannot defend on the ground that it only had an easement over the land, and that the owner of the fee ought to have kept the right of way clear. *Pittsburgh, C. & St. L. R. Co. v. Jones*, 11 *Am. & Eng. R. Cas.* 76, 86 *Ind.* 496, 44 *Am. Rep.* 331. *Diamond v. Northern Pac. R. Co.*, 29 *Am. & Eng. R. Cas.* 117, 6 *Mont.* 580, 13 *Pac. Rep.* 367. *Gulf, C. & S. F. R. Co. v. Witte*, 68 *Tex.* 295, 4 *S. W. Rep.* 490.

Under *Minn. Gen. St.* 1878, ch. 34, § 60, the fact that the fire causing the damage was scattered or thrown from a railway engine is *prima facie* evidence only of defects in the engine and negligence of the employees of the company in operating it, and not of negligence in leaving the right of way in an unsafe condition. *Bowen v. St. Paul, M. & M. R. Co.*, 32 *Am. & Eng. R. Cas.* 370, 36 *Minn.* 522, 32 *N. W. Rep.* 751.

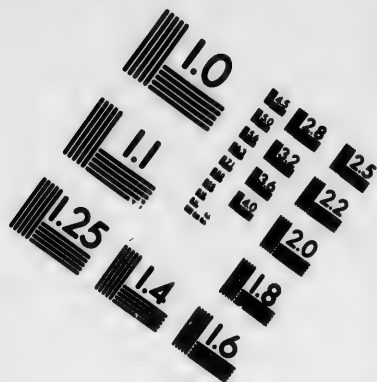
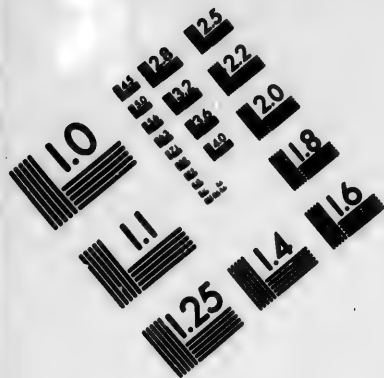
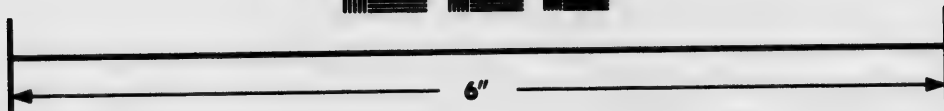
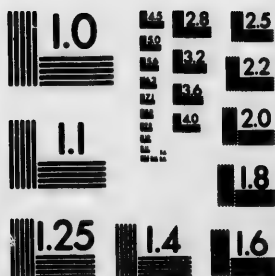


IMAGE EVALUATION TEST TARGET (MT-3)



Photographic Sciences Corporation

22 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4803

1.8
2.0
2.2
2.5
2.8
3.2
3.6
4.0
4.5
5.0
5.6
6.3
7.1
8.0
9.0
10.0
11.2
12.5
14.0
16.0
18.0
20.0
22.5
25.0
28.0
31.5
36.0
40.0
45.0
50.0
56.0
63.0
71.0
80.0
90.0
100.0

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100

271. Rebutting presumption of company's negligence, generally.—

The presumption of negligence raised by proof of the starting of a fire may be rebutted on the part of the company. *Cronk v. Chicago, M. & St. P. R. Co.*, 54 Am. & Eng. R. Cas. 525, 3 S. Dak. 93, 52 N. W. Rep. 420.

The *prima facie* case of negligence arising, under the Minn. Gen. St. 1878, ch. 34, § 60, from the fact that fire was scattered from the locomotive of the defendant, is subject to rebuttal by contrary evidence on the part of defendant. *Mahoney v. St. Paul, M. & M. R. Co.*, 25 Am. & Eng. R. Cas. 470, 35 Minn. 361, 29 N. W. Rep. 6.

272. Duty to rebut.*—To prevent a recovery for damages occasioned by fire a company must overcome the presumption of negligence raised by the evidence on the part of the plaintiff. *Niskern v. Chicago, M. & St. P. R. Co.*, 22 Fed. Rep. 811.

Defendant must rebut the *prima facie* case made by the fact of the escape of fire from a locomotive, by showing the absence of negligence on its part. *Coale v. Hannibal & St. J. R. Co.*, 60 Mo. 227, 9 Am. Ry. Rep. 210.

And this rebutting evidence must be as broad as the presumption, and satisfactorily rebut every negligent act or omission which might, under the circumstances, reasonably or naturally have caused the fire. *Nelson v. Chicago, M. & St. P. R. Co.*, 35 Minn. 170, 28 N. W. Rep. 215.

The company must rebut the presumption by proving that all necessary precautions were taken to avoid such mischief, a character of evidence peculiarly within its possession. *Burke v. Louisville & N. R. Co.*, 7 Heisk. (Tenn.) 451, 12 Am. Ry. Rep. 497.—REVIEWING *Sheldon v. Hudson River R. Co.*, 29 Barb. (N. Y.) 226; *Fremantle v. London & N. W. R. Co.*, 10 C. B. N. S. 89; *Horne v. Memphis & O. R. Co.*, 1 Coldw. (Tenn.) 75.—APPROVED IN *Louisville & N. R. Co. v. Reese*, 38 Am. & Eng. R. Cas. 342, 85 Ala. 497, 5 So. Rep. 283, 7 Am. St. Rep. 66. NOT FOLLOWED IN *Laird v. Connecticut & P. R. R. Co.*, 43 Am. & Eng. R. Cas. 63, 62 N. H. 254.

273. Effect of rebuttal.—When the presumption of defendant's negligence has

been overcome by evidence introduced in rebuttal, and there is no evidence whatever of actual negligence on the part of the defendant, a verdict finding negligence is unsupported by the evidence and must be set aside. *Cronk v. Chicago, M. & St. P. R. Co.*, 54 Am. & Eng. R. Cas. 525, 3 S. Dak. 93, 52 N. W. Rep. 420.

Where it appears that the company equips its engines with the most effective modern appliances to prevent the escape of fire, negligence on its part must be shown by positive, strong, and convincing evidence. *Meyer v. Vicksburg, S. & P. R. Co.*, 41 La. Ann. 639, 6 So. Rep. 218.

274. Effect of failure to rebut.—If a company fails to overcome the presumption of negligence raised by the statute upon proof of loss of property through fire escaping from locomotives, the plaintiff is entitled to recover, unless the company show that he was guilty of contributory negligence. *Niskern v. Chicago, M. & St. P. R. Co.*, 22 Fed. Rep. 811. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 33 Fed. Rep. 361.—REFERRING TO *Gulf, C. & S. F. R. Co. v. Benson*, 69 Tex. 407, 5 S. W. Rep. 822.—*Wabash R. Co. v. Smith*, 42 Ill. App. 527. *Baltimore & O. R. Co. v. Shipley*, 39 Md. 251, 11 Am. Ry. Rep. 269. *Canlon v. Eastern R. Co.*, 45 Minn. 481, 48 N. W. Rep. 22.

And the jury may be properly so instructed. *Wardlaw v. South Carolina R. Co.*, 11 Rich. (So. Car.) 337. *Ft. Worth & N. O. R. Co. v. Wallace*, 40 Am. & Eng. R. Cas. 248, 74 Tex. 581, 12 S. W. Rep. 227.

275. Sufficiency of rebuttal.*—Where the evidence in rebuttal is clearly and satisfactorily against the presumption of negligence raised by plaintiff's evidence, such presumption must be held to be overcome. *Cronk v. Chicago, M. & St. P. R. Co.*, 54 Am. & Eng. R. Cas. 525, 3 S. Dak. 93, 52 N. W. Rep. 420.

The presumption of negligence arising against the company by proof that the fire was started from sparks which escaped from the locomotive, whereby it was communicated to the right of way and from that to the adjoining property, is not overcome by showing that the spread of the

* Rebuttal of the presumption of negligence raised by proof of the starting of a fire, see 54 AM. & ENG. R. CAS. 535, *abstr.*

* Sufficiency of proof to rebut presumption of negligence, see note, 40 AM. & ENG. R. CAS. 691. See also 43 AM. & ENG. R. CAS. 27, *abstr.*; and *post*, 288, 289.

fire was caused by the wind or that there was no considerable accumulation of combustibles upon the right of way. *Kenney v. Hannibal & St. J. R. Co.*, 70 Mo. 252.

276. — by showing exercise of due care.—Proof that the loss was not occasioned by defendant's negligence is sufficient to rebut the presumption of negligence raised by evidence tending to show that the fire resulted from sparks escaping from a passing train. *Chicago & A. R. Co. v. Pennell*, 110 Ill. 435.

Proof of the use of due care on the part of the company is sufficient to rebut the presumptive evidence of negligence raised by the fact that the fire was set out or caused by the operation of the defendant's road. *Small v. Chicago, R. I. & P. R. Co.*, 50 Iowa 338. *Bass v. Chicago, B. & Q. R. Co.*, 28 Ill. 9. *Texas & P. R. Co. v. Ervay*, 3 Tex. App. (Civ. Cas.) 71. *Engle v. Chicago, M. & St. P. R. Co.*, 77 Iowa 661, 37 N. W. Rep. 6, 42 N. W. Rep. 512.

And as the presumption is not a strong one, the highest and clearest kind of evidence is not necessary to rebut it. *Spaulding v. Chicago & N. W. R. Co.*, 30 Wis. 110, 7 Am. Ry. Rep. 507.

Proof of defendant that it exercised reasonable care and prudence, that its engines were properly constructed and in good condition, carefully managed by competent and skillful persons, and its roadbed in a proper condition, will rebut the presumption of negligence raised by proof that property was destroyed by fire which escaped from one of the company's engines. *Baltimore & O. R. Co. v. Shipley*, 39 Md. 251, 11 Am. Ry. Rep. 269.

277. — by showing proper construction, condition, and management of engine and appliances.—(1) *Sufficient.*—Showing that the best known contrivances and machinery were employed, and that they were in repair, will rebut the presumption of negligence raised by proof of the fact that the fire had escaped from the railroad company's engine. *Illinois C. R. Co. v. Mills*, 42 Ill. 407. *Daly v. Chicago, M. & St. P. R. Co.*, 43 Minn. 319, 45 N. W. Rep. 611.

To overcome the *prima facie* inference of negligence which arises from damage caused by fire communicated from a locomotive, it must appear not only that the engine was provided with the best and most approved appliances, but also that they

were at the time in suitable order and repair, and that there was no negligence in their use and management. *Chicago & E. I. R. Co. v. Goyette*, 43 Am. & Eng. R. Cas. 36, 133 Ill. 21, 24 N. E. Rep. 549; *affirming* 32 Ill. App. 574. *St. Louis, V. & T. H. R. Co. v. Funk*, 85 Ill. 460. *Indiana, B. & W. R. Co. v. Craig*, 14 Ill. App. 407. *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 8 Am. & Eng. R. Cas. 717, 79 Ind. 111. *Fitch v. Pacific R. Co.*, 45 Mo. 322. *Coates v. Missouri, K. & T. R. Co.*, 61 Mo. 38, 8 Am. Ry. Rep. 60. *Hoover v. Missouri Pac. R. Co.*, (Mo.) 16 S. W. Rep. 480. *Galveston, H. & S. A. R. Co. v. Horne*, 35 Am. & Eng. R. Cas. 238, 69 Tex. 643, 9 S. W. Rep. 440. *Gulf, C. & S. F. R. Co. v. Johnson*, 3 Tex. App. (Civ. Cas.) 151.

Proof that the company used the best known spark arrester and exercised the highest care in their inspection will overcome the presumption of negligence raised by proof that a fire was started by sparks emitted from the company's engine. *Toledo, St. L. & K. C. R. Co. v. Kingman*, 49 Ill. App. 43. *Brown v. Atlanta & C. A. L. R. Co.*, 13 Am. & Eng. R. Cas. 479, 19 So. Car. 39.

Negligence cannot be established from the mere proof that plaintiff's grass had been fired on former occasions by engines passing the same point, without evidence to show whether they were on up or down grades, where the company shows in rebuttal that on this particular occasion the engine was on a down grade, that the steam was shut off, leaving no chance for the escape of fire, the engine being provided with the most improved spark arrester, so that it could not and did not emit sparks of fire. *East Line & R. R. Co. v. Hart*, 2 Tex. App. (Civ. Cas.) 370.

(2) *Insufficient.*—Where sufficient evidence has been introduced by the plaintiff to make a *prima facie* case, the presumption of negligence on the part of the company thus raised is not rebutted by showing that the company used improved machinery and employed competent men. *Palmer v. Missouri Pac. R. Co.*, 76 Mo. 217.—FOLLOWED IN *Huff v. Missouri Pac. R. Co.*, 17 Mo. App. 356; *Crews v. Kansas City, St. J. & C. B. R. Co.*, 19 Mo. App. 302.—*Huff v. Missouri Pac. R. Co.*, 17 Mo. App. 356.—FOLLOWING *Palmer v. Missouri Pac. R. Co.*, 76 Mo. 217.—*Crews v. Kansas City, St. J. & C. B. R. Co.*, 19 Mo. App. 302.—FOLLOWING *Palmer*

v. Missouri Pac. R. Co., 76 Mo. 217; *Kenney v. Hannibal & St. J. R. Co.*, 70 Mo. 243.

But when such proof is made by defendant, in connection with other facts, to enable the jury to determine whether, on the particular occasion in question, the company's servants were managing the engine carefully and skilfully, then before the jury can find for the plaintiff he must prove other acts of actual negligence of defendant. *Crews v. Kansas City, St. J. & C. B. R. Co.*, 19 Mo. App. 302. *Johnson v. Northern Pac. R. Co.*, 45 Am. & Eng. R. Cas. 554, 1 N. Dak. 354, 48 N. W. Rep. 227.—APPROVING *Hoffman v. Chicago, M. & St. P. R. Co.*, 43 Minn. 334, 45 N. W. Rep. 608.—*Gulf, C. & S. F. R. Co. v. Witte*, 68 Tex. 295, 4 S. W. Rep. 490.

Where sufficient evidence has been introduced by plaintiff to raise a presumption of negligence, evidence for the defense that certain engines were in good condition is not sufficient to rebut this presumption, where the evidence does not show that the fire was caused by the engines to which defendant's evidence relates. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 33 Fed. Rep. 360.

The company cannot rebut the presumption of negligence by showing that the engine was originally constructed with the best appliances to prevent the escape of sparks. It is necessary to show that it was so furnished and provided at the time of the fire complained of. *Chicago & A. R. Co. v. Quaintance*, 58 Ill. 389, 12 Am. Ry. Rep. 234.

And it should be further shown that the engine was properly managed under the circumstances surrounding the case. *Chicago & A. R. Co. v. Clampitt*, 63 Ill. 95, 7 Am. Ry. Rep. 133.—FOLLOWING *Chicago & A. R. Co. v. Quaintance*, 58 Ill. 389.

To disprove the *prima facie* case of negligence made by the plaintiff, it was not enough for the defendant to show that the engine was of approved construction and in good condition, and was operated by a skilful engineer and fireman in the customary manner, without showing that the "customary" manner was also a careful manner. *Woodson v. Milwaukee & St. P. R. Co.*, 21 Minn. 60, 19 Am. Ry. Rep. 293.

f. Burden of Proof.*

278. On plaintiff to prove title.—In an action to recover damages for neg-

ligence in setting a fire which burned over vacant and uncultivated land (and especially where continuing damage by reason of reduced productiveness is claimed) it is incumbent upon the plaintiff to prove his title. *Reed v. Chicago, M. & St. P. R. Co.*, 32 Am. & Eng. R. Cas. 320, 71 Wis. 399, 37 N. W. Rep. 225.

279. — to disprove contributory negligence.—When the danger of fire is imminent the law imposes the burden upon the plaintiff to show that he was not negligent. *Doggett v. Richmond & D. R. Co.*, 78 N. Car. 305, 16 Am. Ry. Rep. 193.—QUOTING *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223.

The burden of proof is not upon the plaintiff to free himself from contributory negligence. *Louisville, N. O. & T. R. Co. v. Natchez, J. & C. R. Co.*, 43 Am. & Eng. R. Cas. 54, 67 Miss. 399, 7 So. Rep. 350.

An instruction is properly refused which imposes upon the plaintiff the burden of showing both the negligence of the defendant and also the absence of negligence upon his own part. *Louisville, N. O. & T. R. Co. v. Natchez, J. & C. R. Co.*, 43 Am. & Eng. R. Cas. 54, 67 Miss. 399, 7 So. Rep. 350.

280. On plaintiff to prove company's negligence, generally.—It is incumbent upon the plaintiff, in an action against a company for setting fire to his property on the line of the road, to prove that it was so set on fire, and also that the firing and destruction of the property resulted from the carelessness or negligence of the company, its agents or servants. *Jefferts v. Philadelphia, W. & B. R. Co.*, 3 Houst. (Del.) 447. *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 32 Am. & Eng. R. Cas. 374, 110 Ind. 225, 11 N. E. Rep. 285.—CRITICISING *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 79 Ind. 111. REVIEWING AND QUOTING *Indianapolis & C. R. Co. v. Paramore*, 31 Ind. 143.—*Chicago & E. I. R. Co. v. Ostrander*, 33 Am. & Eng. R. Cas. 361, 116 Ind. 259, 12 West. Rep. 718, 15 N. E. Rep. 227, 19 N. E. Rep. 110. *McCummons v. Chicago & N. W. R. Co.*, 33 Iowa 187.—FOLLOWING *Gandy v. Chicago & N. W. R. Co.*, 30 Iowa 420.—*Louisville, N. O. & T. R. Co. v. Natchez, J. & C. R. Co.*, 43 Am. & Eng. R. Cas. 54, 67 Miss. 399, 7 So. Rep. 350. *Pennsylvania Co. v. Watson*, 81* Pa. St. 293. *Albert v. Northern C. R. Co.*, 98 Pa. St. 316. *Gulf, C. & S. F. R. Co. v. Holt*, 11 Am. & Eng. R. Cas. 72, 1 Tex. App. (Civ. Cas.) 477. *East*

* Burden of proof in actions for fires caused by sparks from a locomotive, see notes, 35 AM. ST. REP. 237; 38 AM. DEC. 71.

Line & R. R. Co. v. Hart, 2 *Tex. App. (Civ. Cas.)* 370.

Yet very slight proof of negligence is sufficient to throw the burden of exculpation upon the company. *Gulf, C. & S. F. R. Co. v. Holt*, 11 *Am. & Eng. R. Cas.* 72, 1 *Tex. App. (Civ. Cas.)* 477.

Prior to the enactment of section 1289, Iowa Code, the burden was on plaintiff to prove the company's negligence, notwithstanding it appears that the fire was set out by one of the company's engines. *Babcock v. Chicago & N. W. R. Co.*, 11 *Am. & Eng. R. Cas.* 63, 62 *Iowa* 593, 13 *N. W. Rep.* 740.

An instruction is not correct which tells the jury that they must believe from the evidence that the fire was caused by the negligence of the defendant before they can find for the plaintiff, unless it also states that the burden of making this proof is upon the plaintiff. *East Line & R. R. Co. v. Hart*, 2 *Tex. App. (Civ. Cas.)* 370.

When a company equips its engines with the most effective modern and practical appliances to prevent the escape of fire, the burden of proof is on the party alleging damage by fire from the escape of sparks; and to render the company liable, the proof of negligence must be positive, strong, and convincing. *Meyer v. Vicksburg, S. & P. R. Co.*, 41 *La. Ann.* 639, 6 *So. Rep.* 218.

281. — to show that fire was set out in operation of the railroad.—In an action under Iowa Code, § 1289, it is only necessary for the plaintiff to allege and prove an injury by fire set out by the defendant; and an allegation of negligence in the petition is merely redundant matter and need not be proved. *Engle v. Chicago, M. & St. P. R. Co.*, 77 *Iowa* 661, 37 *N. W. Rep.* 6, 42 *N. W. Rep.* 512.

282. — to show that fire originated from engine.—In an action for a loss by fire caused by sparks from a locomotive, the burden is on plaintiff to prove that the fire was communicated by some engine of the defendant, and also to prove negligence in the construction or management of the engine. *Henderson v. Philadelphia & R. R. Co.*, 48 *Am. & Eng. R. Cas.* 16, 144 *Pa. St.* 461, 22 *Atl. Rep.* 851.

The great weight of authority is against the proposition that plaintiff having proved that the fire originated from defendant's engine, his case was made out, and it was not upon him to prove further that the fire was the result of negligence on the part of the

appellant or its employés. *Gulf, C. & S. F. R. Co. v. Holt*, 11 *Am. & Eng. R. Cas.* 72, 1 *Tex. App. (Civ. Cas.)* 477.

283. — to show defects in the engine.—Where the proof shows that a fire originated from an engine running over the defendant's railway, it is unnecessary for the plaintiff to show affirmatively any defect in the construction or condition of the engine, or any negligence in its management. *Union Pac. R. Co. v. Keller*, 36 *Neb.* 189, 54 *N. W. Rep.* 420.

The burden of proof rests upon the plaintiff to show that the emission of sparks was of an unusual character in number or size, such as would not be emitted from a perfectly constructed locomotive. *McCaig v. Erie R. Co.*, 8 *Hun (N. Y.)* 599.

284. — to show negligence in management of engine.—In an action against a railroad for negligently managing its engines, so that fire was communicated to the standing grass and crops of the plaintiff, the burden of proof is upon the plaintiff to show that the fire was caused by the negligence or want of care of the defendant. *Smith v. Hannibal & St. J. R. Co.*, 37 *Mo.* 287.—CRITICISED IN *Atchison, T. & S. F. R. Co. v. Bales*, 16 *Kan.* 252. DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Stanford*, 12 *Kan.* 354. NOT FOLLOWED IN *Clemens v. Hannibal & St. J. R. Co.*, 53 *Mo.* 366. OVERRULED IN *Wise v. Joplin R. Co.*, 85 *Mo.* 178. QUOTED IN *Patton v. St. Louis & S. F. R. Co.*, 23 *Am. & Eng. R. Cas.* 364, 87 *Mo.* 117. REVIEWED IN *Collins v. New York C. & H. R. R. Co.*, 5 *Hun (N. Y.)* 499; *Scaling v. Pullman Palace Car Co.*, 24 *Mo. App.* 29.

285. — to show that fire was wrongfully kindled or guarded.—In an action for the recovery of damages resulting from a fire kindled upon the property of the defendants, the burden is upon the plaintiff to show that the fire was unlawfully kindled, or negligently kindled or guarded. *Read v. Pennsylvania R. Co.*, 44 *N. J. L.* 280.

286. — to show actual negligence after prima facie case disproved.—The plaintiff having shown that the fire was caused by the company's engine as the proximate cause, the burden of proof is then shifted to the company to rebut the presumption of negligence raised by such evidence; yet when the company has produced evidence sufficient to establish a re-

buttal, the burden of proof is again shifted and it becomes the duty of the plaintiff to prove actual negligence on the part of the defendant company. *Coates v. Missouri, K. & T. R. Co.*, 61 Mo. 38, 8 Am. Ry. Rep. 60. *Koontz v. Oregon R. & N. Co.*, 43 Am. & Eng. R. Cas. 11, 20 Oreg. 3, 23 Pac. Rep. 820.

The burden of proof is shifted from defendant to plaintiff, and he must prove acts of actual negligence on the part of the defendant where the defendant has shown that it used good machinery and the most approved appliances to prevent the escape of fire, and that its servants were careful and competent, and were guilty of no negligence in the management of the appliances. *Crews v. Kansas City, St. J. & C. B. R. Co.*, 19 Mo. App. 302.

287. On defendant, generally.—When no issue is made involving the contributory negligence of the plaintiff, the burden of proof is on the company to show that there was in fact no negligence on its part in causing the damage. If such an issue is made, the burden of proof is first upon the plaintiff to show that he was not guilty of negligence. *Missouri Pac. R. Co. v. Bartlett*, 32 Am. & Eng. R. Cas. 343, 69 Tex. 79, 6 S. W. Rep. 549.—FOLLOWED IN *Martin v. Missouri Pac. R. Co.*, 3 Tex. Civ. App. 133.

When property situate contiguous to the right of way is burned by sparks emitted from the company's locomotive, which ignite the dry grass on the right of way, and an injury results therefrom, the burden of proof is on the railway company to show that there was no negligence. *Gulf, C. & S. F. R. Co. v. Benson*, 32 Am. & Eng. R. Cas. 330, 69 Tex. 407, 5 S. W. Rep. 822.—REFERRED TO IN *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 33 Fed. Rep. 361.

Proof that a fire was produced by an engineer or fireman throwing a burning piece of wood from the engine upon the right of way, covered with inflammable material, casts the burden on the defendant of disproving its negligence; and this is true independently of section 1059 of the Miss. Code of 1880. *Mobile & O. R. Co. v. Gray*, 23 Am. & Eng. R. Cas. 373, 62 Miss. 383.

After refuting every other probable cause of a fire, it is competent for the plaintiff to prove that about the time of the fire the company's trains were so managed as to be likely to set on fire other property more re-

mote than that burned, which makes a *prima facie* case, and casts the burden of proof upon the company to prove that the fire was not communicated by its engines. *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218; reversing 29 Barb. 226.

It is not incumbent upon the company to identify the particular engines from which the fires escaped, and to negative carelessness touching them. *Biering v. Gulf, C. & S. F. R. Co.*, 79 Tex. 584, 15 S. W. Rep. 576.

288. To overcome a prima facie case of negligence.*—The burden is upon the company to show absence of negligence on its part when a *prima facie* case has been made against it by plaintiff's evidence. *Spaulding v. Chicago & N. W. R. Co.*, 33 Wis. 582.

Proof that a fire originated from the company's locomotive casts upon it the burden of showing that it was not guilty of negligence. *Green Ridge R. Co. v. Brinkman*, 23 Am. & Eng. R. Cas. 342, 64 Md. 52, 54 Am. Rep. 755. *Tilley v. St. Louis & S. F. R. Co.*, 32 Am. & Eng. R. Cas. 324, 49 Ark. 535, 6 S. W. Rep. 8.—QUOTING *Clemens v. Hannibal & St. J. R. Co.*, 53 Mo. 366; *Coale v. Hannibal & St. J. R. Co.*, 60 Mo. 227.—*Wabash R. Co. v. Smith*, 42 Ill. App. 527. *St. Louis, A. & T. H. R. Co. v. Shotts*, 47 Ill. App. 342. *Chicago & N. W. R. Co. v. McCahill*, 56 Ill. 28, 4 Am. Ry. Rep. 561. *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242. *Baltimore & O. R. Co. v. Dorsey*, 37 Md. 19. *Niskern v. Chicago, M. & St. P. R. Co.*, 22 Fed. Rep. 811. *Bedford v. Hannibal & St. J. R. Co.*, 46 Mo. 456. *Clemens v. Hannibal & St. J. R. Co.*, 53 Mo. 366, 12 Am. Ry. Rep. 351. *Coale v. Hannibal & St. J. R. Co.*, 60 Mo. 227, 9 Am. Ry. Rep. 210. *Hoover v. Missouri Pac. R. Co.*, (Mo.) 16 S. W. Rep. 480. *Koontz v. Oregon R. & N. Co.*, 43 Am. & Eng. R. Cas. 11, 20 Oreg. 3, 23 Pac. Rep. 820. *International & G. N. R. Co. v. Timmermann*, 61 Tex. 660.—DISTINGUISHED IN *Trinity & S. R. Co. v. Meadows*, 39 Am. & Eng. R. Cas. 29, 73 Tex. 32, 3 L. R. A. 565, 11 S. W. Rep. 145.—*Texas & P. R. Co. v. Ervay*, 3 Tex. App. (Civ. Cas.) 71.

Proof of the emission of sparks of an unusual size or in unusual quantity casts the burden on the company of removing the presumption of negligence created against it thereby. *Jacksonville, T. & K. W. R.*

* See also *ante*, 271-277.

Co. v. Peninsular L., T. & M. Co., 49 Am. & Eng. R. Cas. 603, 27 Fla. 1, 9 So. Rep. 661.

Under How. (Mich.) St. § 3378, when it is made to appear that a fire originated from either of the causes mentioned in the statute, the burden is cast upon the railroad company to show itself free from negligence. *Jones v. Michigan C. R. Co.*, 25 Am. & Eng. R. Cas. 482, 59 Mich. 437, 26 N. W. Rep. 662.

Proof that the company failed to keep its right of way free from combustible materials as required by the Montana statute, casts the burden upon it of showing that it was not negligent and at fault with reference to the fire alleged to have been caused through a violation of such statute. *Diamond v. Northern Pac. R. Co.*, 29 Am. & Eng. R. Cas. 117, 6 Mont. 580, 13 Pac. Rep. 367.

Proof that one or more locomotives dropped coal or emitted sparks just prior to or soon after property near the track had been destroyed casts the burden upon the company of showing that their engines were not the cause of it. *Longabaugh v. Virginia City & T. R. Co.*, 9 Nev. 271.

Where it is proved that engines properly constructed will not drop coals, the burden of proof is upon the defendants to show that they were not guilty of negligence in that respect. *Field v. New York C. R. Co.*, 32 N. Y. 339; affirming 29 Barb. 176.

280. — by showing proper condition and management of engine.—After it is shown that a fire originated from sparks or cinders of a locomotive, the burden of proof of establishing the fact that the railroad company used the most improved appliances, which had been tested and found practicable at the time, is upon the company. *White v. Chicago, M. & St. P. R. Co.*, 45 Am. & Eng. R. Cas. 565, 1 S. Dak. 326, 47 N. W. Rep. 146. *St. Louis, A. & T. H. R. Co. v. Montgomery*, 39 Ill. 335. *Miller v. St. Louis, I. M. & S. R. Co.*, 29 Am. & Eng. R. Cas. 254, 90 Mo. 389, 2 S. W. Rep. 439. *Case v. Northern C. R. Co.*, 59 Barb. (N. Y.) 644.—APPROVED IN Louisville & N. R. Co. v. Reese, 38 Am. & Eng. R. Cas. 342, 85 Ala. 497, 5 So. Rep. 283, 7 Am. St. Rep. 66.—*Texas & P. R. Co. v. Ervay*, 3 Tex. App. (Civ. Cas.) 71.

Proof that a fire was caused by a passing engine casts the burden of proof on the company to show that it was not guilty of negligence either as to the construction, condition, or manner of operating the en-

gine. *Karsen v. Milwaukee & St. P. R. Co.*, 7 Am. & Eng. R. Cas. 501, 29 Minn. 12, 11 N. W. Rep. 122. *Louisville & N. R. Co. v. Reese*, 38 Am. & Eng. R. Cas. 342, 85 Ala. 497, 7 Am. St. Rep. 66, 5 So. Rep. 283. *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115, 11 Am. Ry. Rep. 210. *Sibirud v. Minneapolis & St. L. R. Co.*, 7 Am. & Eng. R. Cas. 499, 29 Minn. 58, 11 N. W. Rep. 146. *Clemens v. Hannibal & St. J. R. Co.*, 53 Mo. 366, 12 Am. Ry. Rep. 351. *Sappington v. Missouri Pac. R. Co.*, 14 Mo. App. 86. *Burlington & M. R. Co. v. Westover*, 4 Neb. 268.—DISAPPROVING *Spaulding v. Chicago & N. W. R. Co.*, 33 Wis. 582. QUOTING *Spaulding v. Chicago & N. W. R. Co.*, 30 Wis. 122.—DISAPPROVED IN *Louisville & N. R. Co. v. Reese*, 38 Am. & Eng. R. Cas. 342, 85 Ala. 497, 5 So. Rep. 283, 7 Am. St. Rep. 66.—*Simpson v. East Tenn., V. & G. R. Co.*, 5 Lea (Tenn.) 456. *Aycock v. Raleigh & A. A. L. R. Co.*, 89 N. Car. 321.—EXPLAINING *Herring v. Wilmington & R. R. Co.*, 10 Ired. 402; *Scott v. Wilmington & R. R. Co.*, 4 Jones 432; *Doggett v. Richmond & D. R. Co.*, 81 N. Car. 459; *Durham v. Wilmington & W. R. Co.*, 82 N. Car. 352. QUOTING *Ellis v. Portsmouth & R. R. Co.*, 2 Ired. 138; *Philadelphia & R. R. Co. v. Schultz*, 2 Am. & Eng. R. Cas. 271, 93 Pa. St. 341.—FOLLOWED IN *Moore v. Parker*, 91 N. Car. 275.—*Kelsey v. Chicago & N. W. R. Co.*, 43 Am. & Eng. R. Cas. 43, 1 S. Dak. 80, 45 N. W. Rep. 204. *Burke v. Louisville & N. R. Co.*, 7 Heisk. (Tenn.) 451, 12 Am. Ry. Rep. 497. *East Tenn., V. & G. R. Co. v. Hesters*, 90 Ga. 11, 15 S. E. Rep. 828. *Baltimore & O. R. Co. v. Shipley*, 39 Md. 251, 11 Am. Ry. Rep. 269. *Chicago & A. R. Co. v. Pennell*, 110 Ill. 435. *Ft. Scott, W. & W. R. Co. v. Karracker*, 46 Kan. 511, 26 Pac. Rep. 1027. *Gulf, C. & S. F. R. Co. v. Witte*, 68 Tex. 295, 4 S. W. Rep. 490. *Gulf, C. & S. F. R. Co. v. Benson*, 32 Am. & Eng. R. Cas. 330, 69 Tex. 407, 5 S. W. Rep. 822.—QUOTED IN *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 41 Fed. Rep. 917.—*Houston & T. C. R. Co. v. McDonough*, 1 Tex. App. (Civ. Cas.) 354. *Spaulding v. Chicago & N. W. R. Co.*, 30 Wis. 110, 7 Am. Ry. Rep. 507.

When it appeared from the evidence that within a few minutes after a train passed the fire originated that caused the damages, in two or three places, close to the track, this evidence was sufficient to cast upon the railroad company the burden of showing that it was not the result of defective appli-

ances or of negligence of the employes of the company that the fire escaped. *Atchison, T. & S. F. R. Co. v. Gibson*, 42 Kan. 34, 21 Pac. Rep. 788.

Md. Code of Pub. Gen. Laws, art. 77, § 1, which makes railroads responsible for injuries by fire occasioned by their engines upon any of their roads, applies not only to a case where a party has suffered damage by fire communicated by sparks flying from the smoke-stack, or by sparks, coals, or fire dropping from, or flying out of, the furnace or ash pan of the engine, but also to a case where the fire was communicated from coals or cinders thrown from the engine by the servants of the company having charge of it at the time; and if the party damaged establishes by sufficient proof that the fire thus originated, and that he suffered damage thereby, the *onus* is cast upon the company of proving that such damage was not the result of its negligence or carelessness or that of its agents. *Baltimore & O. R. Co. v. Dorsey*, 37 Md. 19.—REVIEWED IN *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115.

While the burden of proving the negligence of a company is upon the plaintiff, in view of the fact that the tests for determining the adequacy of the company's engines are almost exclusively in the power of the company, very slight proof of negligence offered by the plaintiff is sufficient to throw the burden of exculpation upon the company. *Gulf, C. & S. F. R. Co. v. Holt*, 11 Am. & Eng. R. Cas. 72, 1 Tex. App. (Civ. Cas.) 477.

290. To show plaintiff's contributory negligence.—The burden of proving contributory negligence on the part of the plaintiff rests upon the defendant, unless the plaintiff, in making out his case, prove, or give evidence tending to prove, that he was guilty of such contributory negligence. *Smith v. Chicago, M. & St. P. R. Co.*, 4 S. Dak. 71, 55 N. W. Rep. 717.

Where a company is sued for burning wood and attempts to defend on the ground that the plaintiff was negligent in not clearing the combustible matter from around his wood, it is bound to prove such negligence by a preponderance of evidence; and the burden of proof resting upon it to do so is not shifted by mere proof that plaintiff failed to clear the ground around his wood, as he was not bound to do so. *Northern Pac. R. Co. v. Lewis*, 51 Fed. Rep. 658, 7 U. S. App. 254, 2 C. C. A. 446.—FOLLOWING

Inland & S. Coasting Co. v. Tolson, 139 U. S. 557, 11 Sup. Ct. Rep. 653.

5. Instructions.

291. Generally.—If plaintiff desires a charge as to the burden of proof resting upon the defendant, he must request it. *Biering v. Gulf, C. & S. F. R. Co.*, 79 Tex. 584, 15 S. W. Rep. 576.

Where there is no evidence of negligence on the part of the defendant the omission of the court to give a binding instruction to the jury on the whole testimony, none being asked, is not such an error as to admit of reversal. *Pennsylvania R. Co. v. Page*, (Pa.) 32 Am. & Eng. R. Cas. 386, 12 Atl. Rep. 662.

Where the petition charged that defendant negligently, by means of fire from its locomotive, set out the fire which did the damage complained of, and no motion was made for a more specific statement as to the negligence—*held*, that the court was authorized and required to submit to the jury any and all questions as to negligence which the evidence tended to establish. *Bulliss v. Chicago, M. & St. P. R. Co.*, 76 Iowa 680, 39 N. W. Rep. 245.—DISTINGUISHING *Babcock v. Chicago & N. W. R. Co.*, 72 Iowa 197.

292. Interpretation.—A charge that "if you are satisfied that the fire originated in some other way than from the engine, then return a verdict for the defendant," does not imply that if the fire did originate from the engine the company is liable, without the further proof that it occurred by reason of the negligence alleged—that is, in not having spark arresters and fire boxes, and in suffering the track to be covered with rubbish. *Port Royal & W. C. R. Co. v. Griffin*, 86 Ga. 172, 12 S. E. Rep. 303.

The jury were instructed that if they believed from the evidence that the plaintiff had sustained damages through the negligence of the defendant in permitting dry and combustible grass or other matters to remain along the line of its road, then plaintiff was entitled to recover. *Held*, not objectionable in assuming, as a matter of law, that the permitting of combustible matter to remain along its right of way was negligence. *Gulf, C. & S. F. R. Co. v. Kluge*, 4 Tex. App. (Civ. Cas.) 577, 17 S. W. Rep. 944.

Where a charge to the effect that before plaintiffs could recover the jury must be satisfied from the evidence that defendant's negligence caused the fire, and that

plaintiffs were not guilty of contributory negligence, was qualified as follows—"And the destruction of the cotton by fire under this clause may be shown by circumstantial evidence sufficient in your opinion to justify the belief that the fire was caused by a spark or cinders coming from defendant's engine," this latter clause sufficiently indicated to the minds of the jury that by the word "satisfied" nothing more was meant than opinion or belief; and the charge as an entirety does not present reversible error. *Martin v. Missouri Pac. R. Co.*, 3 *Tex. Civ. App.* 133, 22 *S. W. Rep.* 195.—FOLLOWING *Texas & P. R. Co. v. Levi*, 59 *Tex.* 674; *Missouri Pac. R. Co. v. Bartlett*, 69 *Tex.* 79.—DISTINGUISHING *Baines v. Ullmann*, 71 *Tex.* 529; *Missouri Pac. R. Co. v. Bartlett*, 81 *Tex.* 42.

293. Modifications.—An instruction to the effect that the fact of the repeated setting out of fire by the same engine on the same day tends to show that such engine was not properly constructed as to its appliances for prevention of escape of fire, or that the same was not properly used at the time, or that it was not in repair, is not erroneous; but with the proviso, "if it appears that engines generally and ordinarily do not set out fires in this manner," taken as a whole, it is erroneous. *Slossen v. Burlington, C. R. & N. R. Co.*, 11 *Am. & Eng. R. Cas.* 67, 60 *Iowa* 215, 14 *N. W. Rep.* 244.

An instruction that the defendant was not bound to use any other appliances than such as are known in practical use, should be qualified by the clause "that is, the known and recognized means for preventing the escape of sparks from a locomotive, and such as are best adapted to that purpose." *Bevier v. Delaware & H. Canal Co.*, 13 *Hun (N. Y.)* 254.

294. Relating to company's negligence, what are proper.—In an action for setting fire to plaintiff's wood yard, the court charged the jury that if they believed that a locomotive, if properly constructed and skillfully managed, would not set fire to wood piled on the side of the track; and if they further believed that the plaintiff's wood was destroyed by fire or sparks from defendant's engine, without plaintiff's fault, they should find for plaintiff. *Held*, no error. *Longabaugh v. Virginia City & T. R. Co.*, 9 *Nev.* 271.

Where the evidence tends to show that

the engine was first class, with the most approved spark arrester in good order, and that the escape of sparks cannot be wholly prevented, it is error to refuse to charge the jury that unless there was some defect in the smoke-stack or spark arrester, from which the sparks escaped, the company is not liable. *Collins v. New York C. & H. R. R. Co.*, 5 *Hun (N. Y.)* 503; *affirmed* in 71 *N. Y.* 609, *mem.*

When there is no evidence tending to show that the company used any appliances usual and necessary to prevent the escape of fire from the engine, it is proper to charge the jury to find for plaintiff if they find that the evidence shows that the engine emitted sparks that set fire to the grass that may have accumulated on defendant's right of way adjacent to plaintiff's property, and thereby set fire to and burned the grass of plaintiff. *Ft. Worth & N. O. R. Co. v. Wallace*, 40 *Am. & Eng. R. Cas.* 248, 74 *Tex.* 581, 12 *S. W. Rep.* 227.

In an action to recover for cotton destroyed by fire, instructions to the jury are correct which submit the propositions: (1) Was plaintiff's cotton destroyed by fire communicated from defendant's engine? (2) If it was, did the fire result from the negligence of defendant, its agents, or employees? (3) did plaintiff, by negligence on his part, contribute to the injury? *Allibone v. Texas & P. R. Co.*, 2 *Tex. App. (Civ. Cas.)* 52.

295. — taken in connection with other instructions.—Where a company is charged with negligence in suffering combustible matter to accumulate on its right of way, a part of an instruction which tells the jury that it was the duty of the company to keep its right of way "entirely free from combustible materials" is not objectionable, where the instructions as a whole leave it to the jury to determine whether combustible material had been left on the right of way, and where told that if so it was not conclusive evidence of negligence, but a circumstance tending to show negligence. *Chicago, St. P., M. & O. R. Co. v. Gilbert*, 52 *Fed. Rep.* 711, 10 *U. S. App.* 375, 3 *C. C. A.* 264.

Although from one clause of an instruction the jury might have inferred that the company was liable for the consequences of but slight negligence, yet where the whole instruction taken together expressed the correct rule of law, and it was clearly set forth again in another instruction, the

clause referred to is not a ground for reversal. *Engle v. Chicago, M. & St. P. R. Co.*, 77 Iowa 661, 37 N. W. Rep. 6, 42 N. W. Rep. 512.

The court instructed the jury that the escape of fire was to be regarded as *prima facie* evidence of negligence, and that it rests upon the defendant to rebut the presumption by showing that the engine was equipped with the best appliances in ordinary use for preventing the escape of fire, which were in good repair, and that the engine was carefully and skilfully handled; and further, in another paragraph of its charge, that the defendant was required to exercise reasonable care and diligence in securing and managing an engine. *Held*, that in view of the latter instruction the first was without prejudice to the defendant. *Hamilton v. Des Moines & K. C. R. Co.*, 84 Iowa 131, 50 N. W. Rep. 567.

While an instruction that "it was the duty of the defendant to supply the engine with the best known and ascertained appliances to prevent the escape of fire," considered as a general abstract statement of the law, may not be strictly accurate, yet in this case, when taken in connection with other parts of the charge modifying or explaining it, and considered in the light of the only evidence to which it could be applied, it contained no prejudicial error. *Hoye v. Chicago, M. & St. P. R. Co.*, 46 Minn. 269, 48 N. W. Rep. 1117.

296. — non-prejudicial. — Where the jury specially find that the plaintiff's property was destroyed by fire communicated from one of the defendant's engines which had a defective spark arrester, an instruction cannot be held prejudicial which charged the jury that "even if the fire did not originally escape from the defendant's locomotive, but was started by some other person, but on defendant's right of way, and there continued to burn for such length of time that the defendant either knew, or by ordinary care and diligence should have known, and such fire thereafter escaped to the premises of plaintiff and burned his property without his fault or negligence, the defendant would be liable for its loss, unless you find that the defendant took proper steps to prevent the fire from escaping." *Brasen v. Seattle, L. S. & E. R. Co.*, 4 Wash. 754, 31 Pac. Rep. 34. See also *Chicago & N. W. R. Co. v. Garfield*, 11 Ill. App. 87. *Hamilton v. Des Moines & K. C. R.*

Co., 84 Iowa 131, 50 N. W. Rep. 567. *Hoye v. Chicago, M. & St. P. R. Co.*, 46 Minn. 269, 48 N. W. Rep. 1117. *Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co.*, 54 Am. & Eng. R. Cas. 512, 70 Miss. 119, 12 So. Rep. 156. *Pennsylvania R. Co. v. Page*, (Pa.) 32 Am. & Eng. R. Cas. 386, 12 Atl. Rep. 662. *Bowen v. St. Paul, M. & M. R. Co.*, 32 Am. & Eng. R. Cas. 370, 36 Minn. 522, 32 N. W. Rep. 751. *Martin v. Missouri Pac. R. Co.*, 3 Tex. Civ. App. 133, 22 S. W. Rep. 195.

297. Relating to company's negligence, what are improper.—An instruction asked by defendant, that if the jury found the fire "might have happened" from other causes than the defendant's engine they should find for the defendant, was properly refused. *Hamilton v. Des Moines & K. C. R. Co.*, 84 Iowa 131, 50 N. W. Rep. 567.

The request of the defendant that the jury be instructed to find for it if the fire escaped from the smoke-stack instead of the fire box or ash pan of the engine—*held*, properly refused, although the place of the escape of the fire was alleged in the petition to have been the ash pan and fire box. The evidence on the trial related to the locomotive engine, in providing and operating it, and whether the fire escaped from it through the ash pan or through the smoke-stack was immaterial, unless the defendant was prejudiced by the supposed variance, which was not the case. *Wise v. Joplin R. Co.*, 29 Am. & Eng. R. Cas. 164, 85 Mo. 178.

298. — assuming facts not pleaded.—A direction to the jury to consider whether the fire was caused through the negligence of defendant in the construction or management of the engine was erroneous, where no such negligence was charged in the petition. *Miller v. Chicago, M. & St. P. R. Co.*, 76 Iowa 318, 41 N. W. Rep. 28. —REFERRING TO *West v. Chicago & N. W. R. Co.*, 77 Iowa 654, 35 N. W. Rep. 479.

It was admitted that the fire started outside the defendant's right of way, and there was no averment of negligence on the ground that the right of way was in an improper condition. *Held*, that the court properly refused to instruct the jury that if the fire started outside the right of way they should not consider the question whether the right of way was or was not free from combustible matter. *Comes v.*

567. *Hoye*
 46 *Minn.*
Mississippi Home
T. R. Co., 54
Miss. 119, 12
Co. v. Page,
 386, 12 *Atl.*
M. & M. R.
 36 *Minn.*
v. Missouri
 33, 22 *S. W.*

any's neg-
 er.—An in-
 that if the
 happened"
 endant's en-
 fendant, was
Des Moines
N. W. Rep.

ant that the
 it if the fire
 k instead of
 engine—held,
 place of the
 in the peti-
 and fire box.
 lated to the
 g and operat-
 aped from it
 h the smoke-
 the defendant
 sed variance,
v. Joplin R.
 164, 85 *Mo.*

not plead-
 to consider
 through the
 construction
 was errone-
 was charged
Chicago, M. &
T. W. Rep. 28.
ago & N. W.
Rep. 479.
 started out-
 ay, and there
 ence on the
 y was in an
 at the court
 the jury that if
 right of way
 the question
 s or was not
 er. *Comes v.*

Chicago, M. & St. P. R. Co., 78 *Iowa* 391,
 43 *N. W. Rep.* 235. *Borland v. Chicago, M.*
& St. P. R. Co., 78 *Iowa* 94, 42 *N. W. Rep.*
 590.

299. — assuming facts not proven.

—An instruction is erroneous in assuming facts which have not been proven. *So held*, where an instruction assumed the fact that an engineer could anticipate a misplacement of a switch which caused a derailment which was the efficient cause of the starting of a fire along the right of way. *Brookhaven L. & M. Co. v. Illinois C. R. Co.*, 68 *Miss.* 432, 10 *So. Rep.* 66.

An instruction that if the jury believe that plaintiff's hay was destroyed by fire communicated from one of defendant's engines, and that defendant's right of way was not free from dry grass and other combustible matter at the place where the fire started, etc., is erroneous in that it assumes that the fire started on the right of way, which was one of the questions in dispute. *Chicago & A. R. Co. v. Bloomfield*, 7 *Ill. App.* 211.

When a company is sued for burning a building by sparks from an engine, and the evidence shows that several engines passed shortly before the fire was discovered, but there is no proof of negligence as to the construction or operation of but one, it is reversible error to instruct the jury in effect that there is evidence that might make the company liable for negligence in connection with other engines. *Phoenix Ins. Co. v. New York C. & H. R. R. Co.*, 75 *Hun* 216, 26 *N. Y. Supp.* 1102.

An instruction charging a company with negligence because two of its section hands who were working half a mile distant did not extinguish a fire started by a passing train, is erroneous, where the evidence shows that the grass was very dry and a strong wind was blowing, and that the fire spread rapidly. *Missouri Pac. R. Co. v. Donaldson*, 73 *Tex.* 124, 11 *S. W. Rep.* 163.

Juries are required to decide issues according to the evidence and not according to the pleadings. So it was error for the court, in an action against a company for setting fire to plaintiff's grass, to instruct the jury that if they believed that the grass was destroyed in manner and form as charged in the complaint, it shows a case of *prima facie* negligence. *Fl. Worth & D. C. R. Co. v. Tomlinson*, 4 *Tex. App.* (Civ. Cas.) 175, 16 *S. W. Rep.* 866.

5 *D. R. D.*—60.

300. — Ignoring material facts or issues.

—Where a company is charged with negligence both in allowing sparks to escape and in allowing dry grass to remain on its right of way, an instruction that plaintiff could not recover, if the company was not negligent in allowing the sparks to escape, but which ignores all negligence as to the dry grass, is properly refused. *Steele v. Pacific Coast R. Co.*, 32 *Am. & Eng. R. Cas.* 333, 74 *Cal.* 323, 15 *Pac. Rep.* 851.

An instruction which fails to include the question whether the engine starting the fire was supplied with proper appliances for arresting sparks, is erroneous, where the testimony tends to prove that it was so supplied. *Chicago & A. R. Co. v. Smith*, 10 *Ill. App.* 359.

Where there is evidence that the train which set out the fire was running within an incorporated town more than six miles an hour, in violation of Miss. Code 1880, § 1407, an instruction for defendant is erroneous which assumes to state the duties of defendant under the circumstances, but is silent as to the presumption of negligence arising under said statute from the rate of speed if found to be excessive. *Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co.*, 54 *Am. & Eng. R. Cas.* 512, 70 *Miss.* 119, 12 *So. Rep.* 156.

Under the Mont. Comp. St. div. 5, § 719, providing in substance that any railroad company failing to keep their track free from dead grass, weeds, or any combustible material "shall be liable for any damages which may occur from fire emanating from operating the railroad, and a neglect to comply with the provisions of this chapter in keeping clear any railroad track," it is error to charge the jury, in effect, that upon such failure the statute "makes them liable for any damage that may occur from any fire emanating from operating the railroad," as such instruction leaves out of consideration the question as to the agency of the dead grass or combustible matter in the destruction of the property. *Spencer v. Montana C. R. Co.*, 49 *Am. & Eng. R. Cas.* 678, 11 *Mont.* 164, 27 *Pac. Rep.* 681.

Proof that defendant company had continued the use of an old spark arrester five years after another had been invented which reduced the escape of sparks two thirds, and that the old one frequently emitted showers of sparks, several times before the origin of the fire sued for setting

fire to plaintiff's property, is sufficient proof of negligence to justify the refusal of a charge that there was no evidence upon which the jury could find the defendant negligent in continuing the use of the old appliance. *Flinn v. New York C. & H. R. R. Co.*, 51 N. Y. S. R. 103, 67 Hun 631, 22 N. Y. Supp. 473.

An instruction that "If an expert testifies that he operated the locomotive at that time with due care and thought, and it was so constructed that it would not set fire as thus operated, and the jury believe from the evidence that it actually did set fire at that time, the jury are to consider which of these proofs they will believe, the former or the latter," is erroneous, because it in effect instructed the jury that the only question in dispute was the setting out the fire, and that if they believed the fire was set out by the engine they must find for the plaintiff. *Columbia & P. R. Co. v. Farrington*, 1 Wash. 202, 23 Pac. Rep. 413.

There being some evidence as to the defendant's negligence in certain particulars mentioned in the complaint, the trial court properly refused to instruct the jury that negligence in those respects had not been proved. *Moore v. Chicago, M. & St. P. R. Co.*, 78 Wis. 120, 47 N. W. Rep. 273.

301. — misleading.—Where the action is for destroying property by sparks from a locomotive, a verdict will not be disturbed where it appears that the instructions are not strictly accurate and formal in all respects, but not so erroneous as to be liable to mislead the jury. *Chicago & N. W. R. Co. v. Garfield*, 11 Ill. App. 87.

It being proved that at the time the fires complained of took place coal was used as an experiment upon one railroad leading to the city of Baltimore, and wood upon all others, and that coal made fewer sparks than wood—*held*, that a prayer which required the company to show that when the fires occurred their "engines were propelled by the use of that fuel then in use for such purposes in the city of Baltimore least likely to communicate fire to property along the road," is defective, because it must necessarily have led the jury to conclude that the company was obliged to use coal. *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242.

An instruction that regard must be had to the force and direction of the wind, the dryness of the weather, and the proximity

of the burned building to the railroad—*held*, to be misleading and erroneous. *Michigan C. R. Co. v. Anderson*, 20 Mich. 244.—EXPLAINED IN *Jacksonville, T. & K. W. R. Co. v. Peninsular L. T. & M. Co.*, 27 Fla. 1. QUOTED IN *Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co.*, 70 Miss. 119.

It was misleading to charge the jury that the company was bound to use the reasonable care and diligence of an ordinarily prudent man in preventing the escape of fire from its engines, and in keeping its track clear of combustible material, unless the charge explained that the care required was the ordinary care demanded of an expert engineer or railroad servant. *Diamond v. Northern Pac. R. Co.*, 29 Am. & Eng. R. Cas. 117, 6 Mont. 580, 13 Pac. Rep. 367.

The court, after defining the degree of care, charged the jury to find for the plaintiff, if the fire originated on the right of way and was carried to the adjacent premises by gross carelessness on the right of way, and then further instructed the jury that if they found that the fire originated outside the right of way by fire escaping from the defendant's engines or appliances, then the liability for damages would depend upon the question of negligence of the defendant company or its servants, again defining negligence. *Held*, the charge being correct in principle was not misleading in intimating that the burden of proving due care on the part of defendant was removed from it. If plaintiff desired the charge as to the burden of proof resting upon the defendant, he should have requested the charge. *Biering v. Gulf, C. & S. F. R. Co.*, 79 Tex. 584, 15 S. W. Rep. 576.

302. — not correctly stating the law.—It is a duty which the law imposes upon railroads to use the best and most approved spark arresters; and an instruction which leaves it to the jury to find that a railroad company performed its duty by using those not the best and most approved, is erroneous. *Forest Glen B. & T. Co. v. Chicago, M. & St. P. R. Co.*, 33 Ill. App. 565.

An instruction to the effect that if defendant has proved that the locomotive was in good condition, and "this evidence is not contradicted by any witness," the jury must find for defendant, does not state the law correctly. *Slossen v. Burlington, C. R. & N. R. Co.*, 11 Am. & Eng. R. Cas. 67, 60 Iowa 215, 14 N. W. Rep. 244.

The giving of an instruction defining negligence, which in effect declares that the company's servants are required only to act with regard to known circumstances, and ignores the fact that not knowing may itself be negligence, will not cause a reversal where the record discloses no material circumstances unknown to such servants, which it is their duty to know and act upon in managing the locomotive. *Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co.*, 54 Am. & Eng. R. Cas. 512, 70 Miss. 119, 12 So. Rep. 156.

In an action for damages alleged to have resulted from combustible material upon the right of way, it is error to refuse an instruction to the effect that defendant is not liable in such case unless it be shown that there was such a sufficiency of combustible material upon the right of way at the place where the fire started as to indicate danger from fire to common prudence. *Spencer v. Montana C. R. Co.*, 49 Am. & Eng. R. Cas. 678, 11 Mont. 164, 27 Pac. Rep. 681.

In an action to recover for a warehouse burned by sparks from an engine, the court charged the jury that "It is the duty of defendant to operate its engines and locomotives and run the same so as to guard against any accident by fire, and to employ such machinery and other agencies for safety to property as might be necessary to avoid accidental destruction, whether such machinery was then in common use, or not, on railroads." *Held*, that the instruction was erroneous, as the principle it announces would make defendant an insurer against accident by fire. *Toledo, V. & W. R. Co. v. Larmon*, 67 Ill. 68.—FOLLOWED IN *Louisville, E. & St. L. Con. R. Co. v. Spencer*, 47 Ill. App. 503. NOT FOLLOWED IN *Burke v. Manhattan R. Co.*, 13 Daly (N. Y.) 75.

By the wrongful act of some one unknown, a switch leading upon a side track was left open, and beyond this on the side track, another switch was misplaced. At night the engineer of a passenger train, running on the down grade thirty-five miles an hour, at a distance of 300 feet saw that the first switch was open and promptly applied the air brakes; but the train rushed upon the side track, was derailed at the second switch, and ran into a mill shed, which would not have been struck but for that switch, which the engineer did not see. In an action against the company by the owner of the property destroyed by fire communi-

cated in the collision—*held*, that it was proper to refuse an instruction that the jury should find for plaintiff if the engineer discovered the first open switch at a sufficient distance to have stopped the train before the collision, and failed to resort to such appliances as, if resorted to, would have prevented the collision. *Brookhaven L. & M. Co. v. Illinois C. R. Co.*, 68 Miss. 432, 10 So. Rep. 66.

The error of the above instruction is in requiring of the engineer, in a moment of sudden peril, the prudence and self-possession in action to be expected of one under totally different circumstances. *Brookhaven L. & M. Co. v. Illinois C. R. Co.*, 68 Miss. 432, 10 So. Rep. 66.

The court instructed the jury that if all the evidence satisfied them that there had been negligence on the part of the company in starting the fire, although they might not be able to satisfy themselves in what that negligence consisted, they would be authorized to find a verdict for plaintiff. *Held*, error. If the jury could not find any rational ground upon which to impute negligence to defendant, they should find in its favor. *McCaig v. Erie R. Co.*, 8 Hun (N. Y.) 599.—QUOTING *Daniel v. Metropolitan R. Co.*, L. R. 3 C. P. 222.—DISAPPROVED IN *Louisville & N. R. Co. v. Reese*, 38 Am. & Eng. R. Cas. 342, 85 Ala. 497, 5 So. Rep. 283, 7 Am. St. Rep. 66.

303. Relating to contributory negligence, what are proper.—An instruction to the jury in an action for firing plaintiff's field, that "It shall not in any case be considered negligent on the part of the owner or occupant of the property injured, that he has used the same in the same manner, or permitted the same to be used or remain in the same condition it would have been used or remained, had no railroad passed through or near the property so injured," is proper, where the contradicted evidence shows that the appellee was using her property as the statute gave her the right to do, and no question of "due care" upon her part was raised by any evidence in the case. *Toledo, St. L. & K. C. R. Co. v. Kingman*, 49 Ill. App. 43.

Where the action is founded on alleged negligence—as in causing hay stacks to be burned—if there is any evidence of contributory negligence defendant is entitled, under Kan. Code, § 286, to an instruction that the jury find as to such contributory

negligence. *Central Branch U. P. R. Co. v. Hotham*, 22 Kan. 41.—FOLLOWED IN *Central Branch U. P. R. Co. v. Hotham*, 22 Kan. 54.

Where the charge and instructions omit all mention of contributory negligence on the part of the plaintiff, and the defendant asks the court to instruct the jury—"It is a circumstance the jury may consider, as going to prove contributory negligence, that the plaintiff stacked his hay near the railroad track, without guarding it in any way from fire; persons who live near railroads are bound to take notice of the increased danger to their property from fire, and to exercise a proportionate amount of care to protect it"—held, material error to refuse the instruction. *Kansas City, Ft. S. & G. R. Co. v. Owen*, 25 Kan. 419.

Where there is no evidence of contributory negligence on the part of the plaintiff, the court must assume that the plaintiff was not at fault, and so instruct the jury. *Smith v. Chicago, M. & St. P. R. Co.*, 4 S. Dak. 71, 55 N. W. Rep. 717. See also *Allibone v. Texas & P. R. Co.*, 2 Tex. App. (Civ. Cas.) 52.

304. — what are improper.—Where the uncontradicted evidence shows that plaintiffs' hay was burned while they were making hay in the vicinity, and that the men employed were keeping a constant lookout for fires, and had two water-wagons in the field for the express purpose of extinguishing fires, the court properly refuses a charge which assumes that they did not use "any effort to protect the hay." *Eddy v. Lafayette*, 49 Fed. Rep. 807, 4 U. S. App. 247, 1 C. C. A. 441.

Where defendant asked the court to instruct the jury that if the plaintiff omitted to take certain precautions to prevent fire ignited by sparks from communicating with his property, then the same was negligence on his part, it was properly refused, as it undertook to decide for the jury that certain acts or omissions would constitute, in this respect, negligence on the part of the plaintiff. *Garrett v. Chicago & N. W. R. Co.*, 36 Iowa 121.—EXPLAINING *Kesee v. Chicago & N. W. R. Co.*, 30 Iowa 78.

If the question of plaintiff's negligence involves a consideration of the dryness of the season, the strength and direction of the wind, and the condition of plaintiff's buildings, it is proper to submit it to the jury, under general instructions, to deter-

mine whether the plaintiff exercised due care or not; and if this is done, no exception lies to a refusal to instruct the jury that "if the season was dry, and the wind was from the railroad and strong, and the plaintiff knew those facts, and left a door of a shed open towards the railroad, and shavings within the shed, or old and dry shingles upon the roof known to him to be such, and either of those things contributed to the fire, it is evidence of negligence on his part, which should preclude his recovery." *Ross v. Boston & W. R. Co.*, 6 Allen (Mass.) 87.—EXPLAINED IN *Rowell v. Railroad Co.*, 57 N. H. 132. QUOTED IN *Collins v. New York C. & H. R. R. Co.*, 5 Hun (N. Y.) 499. REVIEWED IN *Murphy v. Chicago & N. W. R. Co.*, 45 Wis. 222.

305. — harmless error in giving or refusing.—Assuming, but not deciding, that the negligence of a lessee or hirer of property in not saving it, or any part of it, may, under some circumstances, preclude the lessor or owner from recovering from the person whose negligence was the proximate cause of a fire by which it was destroyed, the rejection of charges to such effect is immaterial to the defendant when the testimony shows that the lessee not only endeavored to save, but actually saved, some of the property, and does not show that he was negligent in not saving other property than that which he did save, but there is not sufficient testimony in the record to have enabled the jury to find that any particular property destroyed could have been saved by him in the exercise of due diligence. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 Am. & Eng. R. Cas. 603, 27 Fla. 1, 9 So. Rep. 661.—REVIEWING *Bartlett v. Boston Gas Light Co.*, 117 Mass. 533.

The controlling issue in the case being whether or not the fire complained of originated from sparks emitted by a locomotive of the defendant, and the evidence showing clearly that it did not so originate, and consequently that the defendant was not liable, charges based on the hypothesis of negligence on the part of the plaintiff, either contributing to or causing the injury, though not authorized by the evidence, will not require the reversal of a judgment denying the plaintiff a new trial. The issue being as stated, the erroneous charges probably did not influence the jury; or if they did, they did not mislead as to the re-

exercised due
one, no excep-
ct the jury that
the wind was
and the plain-
eft a door of a
road, and shav-
and dry shin-
him to be such,
contributed to
ligence on his
his recovery."
6 *Allen (Mass.)*
v. Railroad Co.,
Collins v. New
Hun (N. Y.) 499.
Chicago & N. W.

for in giving
ut not deciding,
see or hirer of
any part of it,
ances, preclude
recovering from
was the proxi-
ich it was de-
charges to such
defendant when
the lessee not
actually saved,
does not show
t saving other
e did save, but
ony in the recy-
try to find that
stroyed could
the exercise of
T. & K. W.
& M. Co., 49
Fla. 1, 9 So.
lett v. Boston

the case being
lained of orig-
y a locomotive
evidence showing
inate, and con-
was not liable,
thesis of negli-
plaintiff, either
the injury,
evidence, will
a judgment
trial. The is-
aneous charges
the jury; or if
as to the re-

sult, and the verdict being manifestly right, it should not be set aside. *Inman v. Elberton Air Line R. Co.*, 90 Ga. 663, 16 S. E. Rep. 958.

306. Further instructions.—Where, under the pleadings and evidence, the questions of negligence in operating an engine and in leaving combustible matter on the right of way are both in issue, it is not error, as against a mere general exception, for the court to charge the jury generally that the fact that fire was scattered from an engine was *prima facie* evidence of negligence on the part of the railway company. Additional and more specific instructions should have been asked limiting the application of the instructions to the question of negligence in the management of the engine. *Bowen v. St. Paul, M. & M. R. Co.*, 32 Am. & Eng. R. Cas. 370, 36 Minn. 522, 32 N. W. Rep. 751.

307. Directing verdict.—In the absence of evidence to show that the locomotive from which fences, hay, and grass caught fire was improperly constructed, and had not an approved spark arrester, the court was right in directing the jury to find a verdict for defendant. *Jennings v. Pennsylvania R. Co.*, 93 Pa. St. 337. *Philadelphia & R. R. Co. v. Yerger*, 73 Pa. St. 121.—FOLLOWING *Howard Exp. Co. v. Wile*, 64 Pa. St. 201.—DISAPPROVED IN *Louisville & N. R. Co. v. Reese*, 38 Am. & Eng. R. Cas. 342, 85 Ala. 497, 5 So. Rep. 283, 7 Am. St. Rep. 66. FOLLOWED IN *Jennings v. Pennsylvania R. Co.*, 93 Pa. St. 337.

6. Questions of Law and Fact. a. In General.

308. The origin of the fire.—Although the evidence as to the immediate cause of a fire is entirely circumstantial, yet when the testimony tends to show the use of insufficient spark arresters by the company, a sufficient case is made out to submit to the jury. *Gowen v. Glaser*, (Pa.) 10 *Atk. Rep.* 417.

Evidence that, just after a train passed, smoke was seen coming down the railroad, and a fire immediately broke out in plaintiff's field within 100 feet of the track, is sufficient to warrant a submission of the case to the jury, without direct evidence that sparks escaped from the locomotive. *Kenney v. Hannibal & St. J. R. Co.*, 70 Mo. 243.—REVIEWING *Sheldon v. Hudson River R. Co.*, 29 Barb. (N. Y.) 228.—FOLLOWED

IN *Melvin v. St. Louis & S. F. R. Co.*, 89 Mo. 106.

309. Whether caused by company's engine.—Evidence that fire was discovered fifteen minutes after a train had passed, during a very dry time, and that there was none there before, and no one had been at the place, and that all engines are liable to emit some sparks, is sufficient to justify a submission to the jury whether the company's engine started the fire. *Billings v. Fitchburg R. Co.*, 34 N. Y. S. R. 382, 58 Hun 605, 11 N. Y. Supp. 837; affirmed (P) 128 N. Y. 644, mem., 40 N. Y. S. R. 978.

Whether or not a company was negligent in permitting fire to escape, or whether the fire originated from its locomotive, and whether it negligently suffered dry and combustible matter to accumulate on its road, are all questions of fact, and properly submitted to the jury. *Haskell v. Northern Adirondack R. Co.*, 49 N. Y. S. R. 483, 66 Hun 629, 21 N. Y. Supp. 234.

Witnesses who were a quarter of a mile away from a railroad track at the time a train passed, about fifteen minutes afterward observed fire, and going to the place found it was burning on the right of way and also in the plaintiff's field about fifteen yards west of the right of way. The wind was blowing from the east, and the right of way was foul with very dry grass and weeds. There was no fire on the east side of the track, and none had been observed before the passage of the train. *Held*, that this was evidence enough to submit to the jury on the question whether the fire escaped from the locomotive that drew the train. *Redmond v. Chicago, R. I. & P. R. Co.*, 76 Mo. 550.—DISTINGUISHING *Haley v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 614; *Sheldon v. Hudson River R. Co.*, 29 Barb. (N. Y.) 228.—DISTINGUISHED IN *Otis Co. v. Missouri Pac. R. Co.*, 112 Mo. 622.

310. — by coals dropped.—A fire broke out on the defendant's line of road, about fifteen feet from the end of the ties, and to the leeward of the track, soon after the passing of a train, and spread to the adjacent premises of plaintiff. There was no direct evidence as to the cause of the fire, or the condition or management of the engine; but the plaintiff's witnesses testified that a high wind was blowing at the time of the fire; that coals were found at the spot where it originated, although no wood, but

only grass, was to be seen there; and that other fires broke out along the line of the railroad immediately after the passing of the same train. *Held*, that there was evidence to go to the jury that the fire was kindled by coals from the engine, and that the engine was of defective construction, in imperfect condition, or negligently operated. *Woodson v. Milwaukee & St. P. R. Co.*, 21 Minn. 60, 19 Am. Ry. Rep. 293.

Plaintiff proved that a fire was started shortly after defendant's train had passed, in grass and weeds that had been cut and left on the right of way, and that a piece of burning coal was found where the fire started. The company in defense proved that its engines were provided with the most approved spark arresters and in good condition, and were inspected daily. *Held*, that it was for the jury to determine whether the fire was started by coals or sparks from the engine, and their finding was final. *Shepp v. New York C. & H. R. R. Co.*, 21 N. Y. S. R. 568, 51 Hun 638, 4 N. Y. Supp. 951.

311. — by sparks scattered. — Where a fire is shown to have originated outside of the right of way, the question of whether it originated in sparks from a locomotive is for the jury, and their verdict, if justified, will not be disturbed, though the court be not satisfied with the finding. *St. Louis, A. & T. H. R. Co. v. Strotz*, 47 Ill. App. 342. *Wilson v. Northern Pac. R. Co.*, 43 Minn. 519, 45 N. W. Rep. 1132.

Evidence that shortly after the passage of the defendant's locomotive fire was discovered in stacks of hay standing alone 300 feet from where the locomotive had passed, makes a case to go to the jury upon the issue as to whether the fire was occasioned by sparks from the defendant's locomotive. *Holland v. West End Narrow Gauge R. Co.*, 13 Mo. App. 585.

Where there is no direct proof that a building near a railroad is set on fire by sparks from a locomotive, whether it was so set on fire depends on circumstances, and therefore is for the jury. *Philadelphia & R. R. Co. v. Hendrickson*, 80 Pa. St. 182.

312. Which of two engines was the cause. — Where there is a conflict of evidence as to whether the fire producing the damages complained of was caused by an engine upon defendant's road, which was fully protected in respect to fire-screen, or by another engine passing at about the same time with a defective fire-screen, it becomes

a question of fact for the jury to determine which engine caused the fire. *Seeley v. New York C. & H. R. R. Co.*, 29 Am. & Eng. R. Cas. 171, 102 N. Y. 719, 7 N. E. Rep. 734, 2 N. Y. S. R. 452, 1 Silo. App. 76; *affirming* 25 Hun 280.

b. Company's Negligence.

313. Generally. — The question of the company's negligence is for the determination of the jury. *Snyder v. Pittsburgh, C. & St. L. R. Co.*, 11 W. Va. 14, 18 Am. Ry. Rep. 154. *Glaser v. Lewis*, 17 Phila. (Pa.) 345. *Longman v. Grand Junction Canal Co.*, 3 F. & F. 736. *Canada Atl. R. Co. v. Moxley*, 15 Can. Sup. Ct. 145; *affirming* 14 Ont. App. 309.

The proper questions to be considered are as follows: 1. Was the railroad company negligent in permitting the fire to escape? 2. Would the plaintiff's property have been destroyed by fire, as it was destroyed, except for the fire permitted to escape from the company's engine? 3. Could the railroad company, by the exercise of reasonable diligence at or before the time of permitting said fire to escape, have anticipated the burning of the plaintiff's property as likely to occur, and as the natural and probable consequences of permitting said fire to escape? And these are all questions of fact entirely for the jury to consider and determine under proper instructions from the court. *Atchison, T. & S. F. R. Co. v. Bales*, 16 Kan. 252.

Where there is no dispute about the facts in their details, still, if they are stated or proved in such limitless, cumbrous, or diffusive detail that different minds of reasonable capacity might honestly differ with respect to whether they in fact constitute or prove negligence or not, the question as to whether they do or not must be submitted to the jury. *Central Branch U. P. R. Co. v. Hotham*, 22 Kan. 41.

Where the fact of damage from the fire of the railroad was established by the sufferer, and the manner in which the fire was communicated also appeared, it was immaterial whether the evidence came from the plaintiff or from the defendant; and it went properly to the jury, whose province it was to judge of the fact of negligence. *McCready v. South Carolina R. Co.*, 2 Stroth. (So. Car.) 356.

The weight and sufficiency of evidence is purely a question for the consideration of

to determine
Seeley v. New
m. & Eng. R.
E. Rep. 734, 2
76; affirming

gence.

question of the
the determina-
Pittsburgh, C. &
Am. Ry. Rep.
Pa. (Pa.) 345.
Canal Co., 3 F.
Co. v. Moxley,
14 Ont. App.

considered are
bad company
re to escape?
erty have been
destroyed, except
ape from the
the railroad
reasonable dil-
of permitting
anticipated the
erty as likely to
probable con-
re to escape?
f fact entirely
d determine
m the court.
Bales, 16 Kan.

out the facts
re stated or
brious, or dif-
nds of reason-
differ with re-
constitute or
question as to
be submitted
P. R. Co. v.

from the fire
l by the suf-
the fire was
t was imma-
me from the
and it went
vince it was
gence. Mc-
n., 2 Stroth.

f evidence is
ideration of

the jury, and they may take into considera-
tion the peculiar circumstances, if any, at-
tending the conflagration, as tending to show
the company's negligence, or the want of it.
Tyler v. Ricamore, 87 Va. 466, 12 S. E. Rep.
799.

314. — Illustrations. — Plaintiff's
evidence tended to show that fire was dis-
covered immediately after a train passed on
the company's right of way where dry grass,
weeds, and old ties had been permitted to
remain, and that the fire spread thence to
plaintiff's land; that on several occasions
after the engine had passed sparks were
found scattered along the road, and that
frequent fires had been started, and that fre-
quently coals had been found along the
road, some as large as a butternut, and that
an engine suitably equipped would not scat-
ter fire in its way. *Held*, sufficient to justify
a submission to the jury of the company's
negligence. *Douglass v. Rome, W. & O. R.*
Co., 23 N. Y. S. R. 456, 52 Hun 613, mem.,
1 *Silv. Sup. Ct.* 210, 5 N. Y. Supp. 214.

Where a house was set on fire by sparks
from a locomotive, and there was evidence
that the weather was very dry and windy,
and that sparks flew from the defendant's
engines to a great distance, and also set fire
to several fields and fences near the same
time and place, it was for the jury to decide
whether this was sufficient evidence of care-
lessness. *Huyett v. Philadelphia & R. R.*
Co., 23 Pa. St. 373. — FOLLOWED IN *Albert*
v. Northern C. R. Co., 98 Pa. St. 316;
Johnson v. Baltimore & O. R. Co., 25 W.
Va. 570. QUOTED IN *Gerke v. California*
Steam Nav. Co., 9 Cal. 251; *Missouri Pac. R.*
Co. v. Platzer, 38 Am. & Eng. R. Cas. 366,
73 Tex. 117, 3 L. R. A. 639, 11 S. W. Rep.
160. REVIEWED IN *Hull v. Sacramento*
Valley R. Co., 14 Cal. 387; *Atchison, T. &*
S. F. R. Co. v. Stanford, 12 Kan. 354.

A building near a railroad was found to
be on fire whilst a train drawn by an engine
without a "spark catcher" was passing;
there was no direct evidence that sparks had
come from the engine. *Held*, that it was
proper for the court to submit the question
of negligence to the jury. *Lackwanna &*
B. R. Co. v. Doak, 52 Pa. St. 379.

Sparks from the defendant's locomotive
set fire to a car that had been used for
carrying tar and left on a switch by defend-
ant. The fire was then communicated to
an oil tank, thirty-six feet distant, a part of
the plaintiff's oil refinery, whereby almost

the entire plant was destroyed. *Held*, that
the questions of negligence and of prox-
imate and remote cause were properly sub-
mitted to the jury. *Confer v. New York,*
L. E. & W. R. Co., 146 Pa. St. 31, 23 Atl.
Rep. 202.

Where plaintiff's witnesses testify that
coals and cinders of such an unusual size
as to indicate negligence in the management
of the engine were thrown from it, and were
carried by the wind upon and under plain-
tiff's barn, which was on fire a few minutes
afterwards—*held*, sufficient evidence to go
to the jury upon the questions whether the
fire was communicated from the engine to
the barn, and whether the engine was prop-
erly managed, even admitting that defend-
ant's evidence was conclusive that the en-
gine was furnished with the most approved
appliance for preventing the escape of
sparks, coals, and cinders. *Brusberg v.*
Milwaukee, L. S. & W. R. Co., 7 Am. &
Eng. R. Cas. 505, 55 Wis. 106, 12 N. W. Rep.
416. — DISTINGUISHING *Spaulding v. Chi-*
cago & N. W. R. Co., 30 Wis. 110, 33 Wis.
582.

**315. As to adopting means to pre-
vent fires.** — It is for the jury to say
whether a railway company has been guilty
of negligence in failing to adopt means to
prevent an emission of sparks; if the jury
find that the company has not been negli-
gent, a verdict will be directed in its favor.
Dimmock v. North Staffordshire R. Co., 4
F. & F. 1058.

**316. As to construction and con-
dition of engine.** — The question of suf-
ficiency of the construction and equipment
of a locomotive engine is a question of fact
for the determination of the jury. *Bur-*
lington & M. R. Co. v. Westover, 4 Neb.
268.

Whether the company was negligent in
the use of a particular kind of engine, as
being likely to scatter fire, is a question of
fact for the jury. *Hoye v. Chicago, M. &*
St. P. R. Co., 46 Minn. 269, 48 N. W. Rep.
1117. *Fremantle v. London & N. W. R. Co.*,
10 C. B. N. S. 89, 31 L. J. C. P. 12, 9 W.
R. 611, 2 F. & F. 337.

Whether a certain spark arrester on an
engine was or was not in a good and safe
condition is a question of fact to be deter-
mined by the jury. *Babcock v. Chicago & N.*
W. R. Co., 13 Am. & Eng. R. Cas. 477, 62
Iowa 598, 17 N. W. Rep. 909; *adhering to on*
rehearing, 11 Am. & Eng. R. Cas. 63, 62

Iowa 593, 13 *N. W. Rep.* 740. *Wiley v. West Jersey R. Co.*, 44 *N. J. L.* 247.

It is not error to instruct that the jury might consider whether the defendant's employes were negligent in reporting the imperfect condition of screens on the smokestacks of the locomotives; nor that, if the season when the fire occurred was unusually dry, the defendant was bound to take extra precautions against fire. *Pittsburgh, C. & St. L. R. Co. v. Noel*, 7 *Am. & Eng. R. Cas.* 524, 77 *Ind.* 110.

Where the evidence tends to show that the fires started from live coals dropped from the engine on the track, from the size of a walnut to a butternut, and that, if the ash pan were properly adjusted, the coals would fall into it and not upon the ground, even assuming the engine to have been properly constructed, still it is a question for the jury whether the dropping of such coals did not show that the engine was out of order or improperly managed. *Coolidge v. Rome, W. & O. R. Co.*, 23 *N. Y. S. R.* 459, 52 *Hun* 613, 1 *Silv. Supp. Ct.* 214, 5 *N. Y. Supp.* 301.—REVIEWING *Field v. New York C. R. Co.*, 32 *N. Y.* 339; *Webb v. Rome, W. & O. R. Co.*, 49 *N. Y.* 420.—REVIEWED IN *Eighme v. Rome, W. & O. R. Co.*, 32 *N. Y. S. R.* 757, 10 *N. Y. Supp.* 600, 57 *Hun* 586.

Railroad companies have a reasonable time in which to adopt new and improved appliances, such as spark arresters; but whether five years is a reasonable time is a question of fact for the jury. *Flinn v. New York C. & H. R. R. Co.*, 51 *N. Y. S. R.* 103, 67 *Hun* 631, 22 *N. Y. Supp.* 473.

The jury should determine from the evidence whether the locomotives used by the railway were such as the law requires them to use to prevent injury to others, and whether the railway employes used the requisite degree of care, as well as whether the storing of cotton where it was stored, was or was not the exercise of proper care. *Texas & P. R. Co. v. Levi*, 13 *Am. & Eng. R. Cas.* 464, 59 *Tex.* 674.

Where it is conclusively proved that an engine was properly operated, but there is evidence that the ash pan was too short, which would have the effect to facilitate the dropping of coals upon the track, and that the same engine had set three other fires while running a little more than a mile from the place in question, it is sufficient to justify a submission to the jury whether the

engine was in a reasonably safe condition. *Mills v. Chicago, M. & St. P. R. Co.*, 76 *Wis.* 422, 45 *N. W. Rep.* 225.

It cannot be held, in the absence of evidence to show that the engine was improperly constructed, that the fact that the fire took place is *prima facie* evidence that the spark arrester was defective, and that therefore the case should be submitted to the jury. *Jennings v. Pennsylvania R. Co.*, 93 *Pa. St.* 337.—FOLLOWED IN *Reading & C. R. Co. v. Latshaw*, 2 *Am. & Eng. R. Cas.* 267, 93 *Pa. St.* 449.

Where uncontradicted evidence shows that the two locomotives of the defendant (one or the other of which is claimed to have set the fire for which the action is brought) were in good condition and properly constructed to prevent the escape of fire, it is error to submit that question to the jury. *Gibbons v. Wisconsin Valley R. Co.*, 62 *Wis.* 546, 22 *N. W. Rep.* 533.

In an action against a railroad, plaintiff proved that fire was discovered shortly after the passage of a train in plaintiff's field, and that it spread for a considerable distance along the line of the road, burning fences, woods, and grass, the day being somewhat windy. Defendant's testimony showed that the best spark arrester known at that time had been used, and that a thorough system of inspection was in force, which would have discovered defects if any existed. There was no evidence of the size or quantity of the sparks emitted. Held, that the evidence of negligence on the part of defendant was not sufficient to have been submitted to the jury. *Reading & C. R. Co. v. Latshaw*, 2 *Am. & Eng. R. Cas.* 267, 93 *Pa. St.* 449.—FOLLOWING *Jennings v. Pennsylvania R. Co.*, 93 *Pa. St.* 337.

Plaintiff's ice house was near a side track of defendant's road, which had been built to accommodate plaintiffs. In removing sawdust to the house plaintiffs left some, with other inflammable material, on and about the track. Defendant's engine passed over the track a few minutes before the fire was seen between the rails, which rapidly spread before a strong wind and consumed the ice house. The evidence showed that the engine was provided with the most approved appliances, and that fire could not fall on the track if the dampers were closed and the ash pan in proper condition. Held, that the question whether there was negli-

gence in the construction, condition, and operation of the engine was for the jury, not for the court. *Kurz & H. Ice Co. v. Milwaukee & N. R. Co.*, 56 Am. & Eng. R. Cas. 94, 84 Wis. 171, 53 N. W. Rep. 850.

In an action to recover for the destruction of a saw mill, lumber piles, etc., by a fire alleged to have been set by defendant's locomotive, which had been upon a side track near them shortly before, the fire broke out, all the direct evidence as to the condition of the engine was to the effect that it was new and was properly constructed and equipped with all modern appliances to prevent the escape of fire; that it was carefully handled to prevent such escape, and that no coals were thrown out or cinders dumped at the place in question; but witnesses for plaintiff testified that after the engine had passed and the fire had broken out they found ashes, cinders, and coals in considerable quantity between the rails of the side track, and that the fire could be traced in the sawdust from the track to the lumber pile in which it was first discovered. *Held*, that this testimony tended to show that the engine was not carefully and properly handled, or that it was not properly constructed and equipped and in good condition; and that it was error to take from the jury the question as to defendant's negligence in respect to its construction and condition. *Stacy v. Milwaukee, L. S. & W. R. Co.*, 85 Wis. 225, 54 N. W. Rep. 779. —DISTINGUISHING *Spaulding v. Chicago & N. W. R. Co.*, 30 Wis. 110. FOLLOWING *Kurz & H. Ice Co. v. Milwaukee & N. R. Co.*, 84 Wis. 171; *Brusberg v. Milwaukee, L. S. & W. R. Co.*, 55 Wis. 106.

317. In the management of engine.—It is a question for the jury and not for the court whether a railway company has been guilty of negligence in so managing its locomotives as to set fire to property near the track. *Aldridge v. Great Western R. Co.*, 4 Scott, N. R. 156, 1 D., N. S. 247, 3 M. & G. 515. *Fremanille v. London & N. W. R. Co.*, 10 C. B. N. S. 89, 31 L. J. C. P. 12, 9 W. R. 611.

Whether the use of wood as fuel in a locomotive engine built for a coal-burning engine is negligence is a question of fact for the jury, and not a question of law. *Chicago & A. R. Co. v. Pennell*, 94 Ill. 448.

In an action for the value of property destroyed by alleged negligence in running a train, it appeared that the train was run-

ning within a village at an unlawful rate of speed—viz., greater than six miles per hour (Wis. Rev. St. §§ 1809, 4393), and that the train consisted of only two cars, and was running on a straight line; and the grade was not shown. There was no other evidence that the undue speed increased the danger of fire. *Held*, that it was error, as against defendant, to submit that question to the jury. *Brusberg v. Milwaukee, L. S. & W. R. Co.*, 2 Am. & Eng. R. Cas. 264, 50 Wis. 231, 6 N. W. Rep. 821.—DISTINGUISHING *Martin v. Western Union R. Co.*, 23 Wis. 437.

318. As to combustibles on right of way.—Whether a company used the proper care to remove combustible materials from its right of way is a question of fact for the determination of the jury under the particular circumstances of each case. *Illinois C. R. Co. v. Mills*, 42 Ill. 407. *Perry v. Southern Pac. R. Co.*, 50 Cal. 578, 12 Am. Ry. Rep. 187. *Van Fleet v. New York C. & H. R. R. Co.*, 27 N. Y. S. R. 76, 7 N. Y. Supp. 636. *White v. Missouri Pac. R. Co.*, 13 Am. & Eng. R. Cas. 473, 31 Kan. 280, 1 Pac. Rep. 611. *Bowen v. St. Paul, M. & M. R. Co.*, 32 Am. & Eng. R. Cas. 370, 36 Minn. 522, 32 N. W. Rep. 751. *Jones v. Michigan C. R. Co.*, 25 Am. & Eng. R. Cas. 482, 59 Mich. 437, 26 N. W. Rep. 662. *Burlington & M. R. Co. v. Westover*, 4 Neb. 268. *Kelsey v. Chicago & N. W. R. Co.*, 43 Am. & Eng. R. Cas. 43, 1 S. Dak. 80, 45 N. W. Rep. 204. *Texas & P. R. Co. v. Medaris*, 29 Am. & Eng. R. Cas. 169, 64 Tex. 92. *Van Ostrand v. Walkill Valley R. Co.*, 46 N. Y. S. R. 456, 64 Hun 636, 19 N. Y. Supp. 621. *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223, 2 Am. Ry. Rep. 483.—APPROVED IN *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469; *Gram v. Northern Pac. R. Co.*, 1 N. Dak. 252. DISTINGUISHED IN *Murphy v. Chicago & N. W. R. Co.*, 45 Wis. 222. FOLLOWED IN *Erd v. Chicago & N. W. R. Co.*, 41 Wis. 65; *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141. QUOTED IN *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 299; *Rowell v. Railroad Co.*, 57 N. H. 132; *Doggett v. Richmond & D. R. Co.*, 78 N. Car. 305; *Snyder v. Pittsburgh, C. & St. L. R. Co.*, 11 W. Va. 14. REVIEWED IN *Gibbons v. Wisconsin Valley R. Co.*, 13 Am. & Eng. R. Cas. 469, 58 Wis. 335; *Wilder v. Maine C. R. Co.*, 65 Me. 332; *Miller v. St. Louis, I. M. & S. R. Co.*, 29 Am. & Eng. R. Cas. 254, 90 Mo. 389.—

Gibbons v. Wisconsin Valley R. Co., 13 *Am. & Eng. R. Cas.* 469, 58 *Wis.* 335, 17 *N. W. Rep.* 132.—REVIEWING *Kellogg v. Chicago & N. W. R. Co.*, 26 *Wis.* 223.—*Gibbons v. Wisconsin Valley R. Co.*, 25 *Am. & Eng. R. Cas.* 479, 66 *Wis.* 161, 28 *N. W. Rep.* 170.

And this regardless of how much care was observed in the construction and operation of a locomotive. *Gulf, C. & S. F. R. Co. v. Benson*, 32 *Am. & Eng. R. Cas.* 330, 69 *Tex.* 407, 5 *S. W. Rep.* 822.

The fact that the dry grass of the previous season was suffered to remain on the right of way is proper evidence for the jury, and they may find negligence from it. Such negligence is ordinarily a question of fact for the jury; and when the fire was caused by the operation of the railroad, and the jury make special findings, *inter alia*, that the negligence of the defendant consisted in the failure to properly clean its right of way, under *Kan. Laws of 1885*, ch. 155, the defendant is not entitled to judgment upon such special findings, when the general verdict was for the plaintiff. *St. Louis & S. F. R. Co. v. Richardson*, 47 *Kan.* 517, 28 *Pac. Rep.* 183.

Where the action is for dropping fire in dry weeds and other rubbish on the right of way, which extends to plaintiff's lands, and there is positive evidence by the plaintiff that the engines frequently dropped fire and coals of considerable size, and witnesses for the defendant testify that the engines were properly equipped and in good order, but make admissions tending to show that there was something in the mode of attaching some of the appliances that might give a chance for the escape of fire, the question of the company's negligence is properly left to the jury. *Webb v. Rome, W. & O. R. Co.*, 49 *N. Y.* 420, 4 *Am. Ry. Rep.* 547; *affirming* 3 *Lans.* 453.—EXPLAINING *Ryan v. New York C. R. Co.*, 35 *N. Y.* 210; *Pennsylvania R. Co. v. Kerr*, 62 *Pa. St.* 353.—APPLIED IN *Home Ins. Co. v. Pennsylvania R. Co.*, 11 *Hun (N. Y.)* 182; *McNaier v. Manhattan R. Co.*, 46 *Hun* 502, 12 *N. Y. S. R.* 562. APPROVED IN *Gram v. Northern Pac. R. Co.*, 1 *N. Dak.* 252. FOLLOWED IN *Grand Trunk R. Co. v. Richardson*, 91 *U. S.* 454. QUOTED IN *Van Fleet v. New York C. & H. R. R. Co.*, 27 *N. Y. S. R.* 76, 7 *N. Y. Supp.* 636. REVIEWED IN *Longabaugh v. Virginia City & T. R. Co.*, 9 *Nev.* 271; *Coolidge v. Rome, W. & O. R. Co.*, 23 *N. Y. S. R.* 459; *Eighme v. Rome, W. &*

O. R. Co., 32 *N. Y. S. R.* 757, 10 *N. Y. Supp.* 600, 57 *Hun* 586.

In an action for the value of goods burnt in a warehouse through alleged gross negligence, evidence that trainmen took burning packing out of a "hot box" and left it within two or three feet of a platform extending to the warehouse, under which platform, near the packing, were combustible materials; that at the time a strong wind was blowing in the direction of the warehouse, and that about thirty minutes afterwards a fire was discovered in that part of the platform where the packing had been left, is sufficient to take the case to the jury. *Whiting v. Chicago, M. & St. P. R. Co.*, 5 *Dak.* 90, 37 *N. W. Rep.* 222.

319. In allowing fire to spread.—Whether section hands who were working a considerable distance from a fire used due diligence in extinguishing the fire is a question for the jury. *Missouri Pac. R. Co. v. Platzer*, 38 *Am. & Eng. R. Cas.* 366, 73 *Tex.* 117, 3 *L. R. A.* 639, 11 *S. W. Rep.* 160.

320. As the proximate cause of the fire.—In a suit for the destruction of property by fire alleged to have been negligently allowed to escape from defendant's railroad engine, the question whether the fire that escaped from such engine was the direct or proximate cause of the destruction of plaintiff's property is one of fact for the jury to determine from the evidence. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 *Am. & Eng. R. Cas.* 603, 27 *Fla.* 1, 9 *So. Rep.* 661. *Perry v. Southern Pac. R. Co.*, 50 *Cal.* 578, 12 *Am. Ry. Rep.* 187. *Green Ridge R. Co. v. Brinkman*, 23 *Am. & Eng. R. Cas.* 342, 64 *Md.* 52, 54 *Am. Rep.* 755.—FOLLOWING *Annapolis & E. R. Co. v. Gantt*, 39 *Md.* 144.—*Gibbons v. Wisconsin Valley R. Co.*, 25 *Am. & Eng. R. Cas.* 479, 66 *Wis.* 161, 28 *N. W. Rep.* 170.

In a case where fire has not been communicated directly to the plaintiff's property by sparks or cinders from the locomotive of the defendant, as where it has spread from its first beginning, and thus been communicated indirectly to the plaintiff's property, it is a question proper to be submitted to the jury, to determine from all the facts of the case whether the injury complained of is the natural consequence of the defendant's negligence, or whether it has been caused by "some intervening force or power which stands naturally as the cause of the misfortune." *Annapolis &*

N. Y. Supp.

goods burnt
d gross neg-
n took burn
and left it
platform ex-
r which plat-
combustible
strong wind
of the ware-
minutes after
that part of
g had been
case to the
& St. P. R.
222.

spread.—
re working a
re used due
fire is a ques-
ac. R. Co. v.
366, 73 Tex.
rep. 60.

cause of the
tion of prop-
negligently
ant's railroad
the fire that
the direct or
tion of plain-
r the jury to
Jacksonville,
ar L., T. &
603, 27 Fla.
hern Pac. L.
p. 187. Gre.
Am. & Eng.
n. Rep. 755.
C. R. Co. v.
y, Wisconsin
R. Cas. 479.

been com-
ntiff's prop-
the locom-
here it has
g, and thus
to the plain-
proper to be
ine from all
the injury
consequence
or whether
intervening
naturally as
Annapolis &

E. R. Co. v. Gantt, 39 Md. 115, 11 Am. Ry. Rep. 210.—FOLLOWED IN *Green Ridge R. Co. v. Brinkman*, 23 Am. & Eng. R. Cas. 342, 64 Md. 52, 54 Am. Rep. 755.—*Henry v. Southern Pac. R. Co.*, 50 Cal. 176, 12 Am. Ry. Rep. 168. *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 299, 14 Am. Ry. Rep. 226. *Gram v. Northern Pac. R. Co.*, 45 Am. & Eng. R. Cas. 544, 1 N. Dak. 252, 46 N. W. Rep. 972.—APPROVING *Clemens v. Hannibal & St. J. R. Co.*, 53 Mo. 366; *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223; *Higgins v. Dewey*, 107 Mass. 494.—*Pennsylvania R. Co. v. Hope*, 80 Pa. St. 373.—DISTINGUISHING *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353.—APPROVED IN *Pielke v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 349, 5 Dak. 444, 41 N. W. Rep. 669; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469. EXPLAINED IN *Hoag v. Lake Shore & M. S. R. Co.*, 85 Pa. St. 293. FOLLOWED IN *Pennsylvania & N. Y. C. & R. Co. v. Lacey*, 89 Pa. St. 458; *Lehigh Valley R. Co. v. McKeen*, 90 Pa. St. 122.—*Toledo, P. & W. R. Co. v. Pindar*, 53 Ill. 447.—FOLLOWED IN *Fent v. Toledo, P. & W. R. Co.*, 59 Ill. 349; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242.—*Fent v. Toledo, P. & W. R. Co.*, 59 Ill. 349, 11 Am. Ry. Rep. 167.—FOLLOWING *Toledo, P. & W. R. Co. v. Pindar*, 53 Ill. 451.—APPROVED IN *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469; *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141. FOLLOWED IN *Pullman Palace Car Co. v. Laack*, 143 Ill. 242. QUOTED IN *Pielke v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 349, 5 Dak. 444, 41 N. W. Rep. 669.—*Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469.—APPROVING *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 420; *Pennsylvania R. Co. v. Hope*, 80 Pa. St. 373; *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 224; *Perley v. Eastern R. Co.*, 98 Mass. 414; *Higgins v. Dewey*, 107 Mass. 494; *Fent v. Toledo, P. & W. R. Co.*, 59 Ill. 349. DISAPPROVING *Ryan v. New York C. R. Co.*, 35 N. Y. 210; *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353.—APPROVED IN *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *Louisville, N. A. & C. R. Co. v. Nitsche*, 126 Ind. 229; *Purcell v. St. Paul City R. Co.*, 48 Minn. 134. DISTINGUISHED IN *Lewis v. Flint & P. M. R. Co.*, 54 Mich. 55. QUOTED IN *Brown v. Chicago, M. & St. P. R. Co.*, 3 Am. & Eng. R. Cas. 444, 54 Wis. 342; *Pielke v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 349, 5 Dak. 444, 41 N.

W. Rep. 669; *Pike v. Grand Trunk R. Co.*, 38 Am. & Eng. R. Cas. 336, 39 Fed. Rep. 255; *Young v. New Jersey & N. Y. R. Co.*, 46 Fed. Rep. 160; *Denver, T. & G. R. Co. v. Robbins*, 2 Colo. App. 313; *Pullman Palace Car Co. v. Barker*, 4 Colo. 344; *Union Pac. R. Co. v. Callaghan*, 56 Fed. Rep. 988; *Lewis v. Flint & P. M. R. Co.*, 54 Mich. 55; *Pullman Palace Car Co. v. Laack*, 41 Ill. App. 34; *Boss v. Northern Pac. R. Co.*, 2 N. Dak. 128; *Johnson v. Gulf, C. & S. F. R. Co.*, 2 Tex. Civ. App. 139; *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141. REVIEWED IN *Pennsylvania Co. v. Whitlock*, 22 Am. & Eng. R. Cas. 629, 99 Ind. 16; *Mitchell v. Rochester R. Co.*, 4 Misc. (N. Y.) 575.—*Lehigh Valley R. Co. v. McKeen*, 90 Pa. St. 122.—EXPLAINING *Hoag v. Lake Shore & M. S. R. Co.*, 85 Pa. St. 293; *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353. FOLLOWING *Pennsylvania R. Co. v. Hope*, 80 Pa. St. 373.—QUOTED IN *Denver, T. & G. R. Co. v. Robbins*, 2 Colo. App. 313.

This is true where the wind shifts or increases in violence after the fire starts, and before the damage is done. *Gram v. Northern Pac. R. Co.*, 45 Am. & Eng. R. Cas. 544, 1 N. Dak. 252, 46 N. W. Rep. 972.

In such a suit, if the evidence shows that sparks negligently permitted to escape from the defendant's engine caused the original fire, and that its natural and continuous spread could not have been arrested by the plaintiff in the exercise of proper care until it reached and destroyed his property, and that its destruction of his property was not caused by new or intervening force, then, upon the question of direct or proximate cause, it does not matter whether the buildings destroyed of the plaintiff's were the first or the tenth to be consumed by such fire. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 Am. & Eng. R. Cas. 603, 27 Fla. 1, 9 So. Rep. 661.

Plaintiff owned a mill and lumber yard, the former 528 feet and the latter 388 feet from defendant's elevator, which stood on a river bank, with a space clear between them. Defendant ran a steamboat alongside of the elevator, and sparks from its chimney fired the elevator, which communicated the fire to the mill and lumber yard. Held, that the question of whether the burning of the mill and lumber yard was the natural and probable result of burning the elevator was for the jury. *Kellogg v. Milwaukee & St. P. R. Co.*, 5 Dill. (U. S.) 537.

The fire which caused the injury to plaintiff's building occurred between 2 and 3 P. M. A witness testified that a few minutes after the passing of a train, about 10 A. M., he discovered the fire, and that he succeeded in putting it out. It was shown by the plaintiff that the afternoon and forenoon fires were caused by the same engine, and that the original fire must have backed against the wind a considerable distance and then run before a stronger breeze which sprang up in the afternoon. *Held*, that the question whether the fire caused by the train which passed during the forenoon was the proximate cause of the injury to plaintiff's premises ought to have been submitted to the jury. *Pielke v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 349, 5 Dak. 444, 41 N. W. Rep. 669.—APPROVING *Pennsylvania R. Co. v. Hope*, 80 Pa. St. 373. EXPLAINING *Ryan v. New York C. R. Co.*, 35 N. Y. 214; *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353. QUOTING *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475; *Wiley v. West Jersey R. Co.*, 44 N. J. L. 247; *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115, 11 Am. Ry. Rep. 210; *Fent v. Toledo, P. & W. R. Co.*, 59 Ill. 349.—QUOTED IN *Kelsey v. Chicago & N. W. R. Co.*, 1 S. Dak. 80.—*Pielke v. Chicago, M. & St. P. R. Co.*, 6 Dak. 444, 43 N. W. Rep. 813.

Where fire was communicated by one of defendant's engines to a stump upon its right of way, and soon thereafter one of plaintiff's servants was sent to put it out, and reported he had done so, but on the morning of the following day the stump was again found to be on fire, and another of plaintiff's servants was also sent to extinguish it, and attempted to do so, and remained there until he was satisfied that no fire remained; but on the afternoon of that day, in consequence of a fresh wind, a fire broke out in the vicinity of the stump, which destroyed the plaintiff's property, the question whether defendant's negligence was the proximate cause of plaintiff's loss is for the jury. *Haverly v. State Line & S. R. Co.*, 43 Am. & Eng. R. Cas. 31, 135 Pa. St. 50, 19 Atl. Rep. 1013.

321. Weight and sufficiency of defendant's evidence in rebuttal.—

Where the uncontradicted testimony on the part of defendant tended to show that the machinery, smoke-stack, and fire box of the engine were in good order, and properly managed, and of the most approved kind,

and that the engineer and fireman were competent and skilful, the court properly declined to take the case from the jury, or to pass upon the conclusiveness of the testimony offered by defendant. *Hagan v. Chicago, D. & C. G. T. J. R. Co.*, 49 Am. & Eng. R. Cas. 670, 86 Mich. 615, 49 N. W. Rep. 509. *Lehigh Valley R. Co. v. McKeen*, 90 Pa. St. 122.—FOLLOWED IN *Alpern v. Churchill*, 53 Mich. 607; *Albert v. Northern C. R. Co.*, 98 Pa. St. 316.

Where the testimony in behalf of plaintiff shows an escape of sparks of extraordinary size and in unusual quantities, or far in excess of anything likely to occur in the ordinary operation of a locomotive duly supplied with modern appliances approved by the test of use and properly managed by competent operatives, and the evidence in behalf of the defendant shows that the engine was in good condition and supplied with proper appliances for arresting the escape of sparks, and was properly managed by competent operatives, which circumstances are relied on by defendant as showing due care in the operation of the locomotive, and the evidence further shows that sparks of the size and quantity indicated could not have escaped where the engine so supplied with proper appliances is properly managed, and there is a verdict in favor of plaintiff, and, in effect, affirming negligence upon the part of the defendant, such finding will not be disturbed by an appellate court. The testimony upon the issue of negligence *vel non* is palpably irreconcilable, and makes a question dependent entirely upon the credibility of witnesses, and peculiarly for the decision of the jury. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 Am. & Eng. R. Cas. 603, 27 Fla. 1, 9 So. Rep. 661.

Negligence on the part of a company in permitting fire to escape from its engines may be shown wholly by circumstantial evidence, and it is not necessary in such a case that any direct proof of any particular act of negligence should be introduced. And where circumstantial evidence only is introduced by plaintiff, and the defendant company afterwards introduces direct and positive evidence tending to show the contrary, it is a question for the jury to determine which evidence is entitled to the greatest credit. *Atchison, T. & S. F. R. Co. v. Bales*, 16 Kan. 252.—CRITICISING *Smith v. Hannibal & St. J. R. Co.*, 37 Mo. 287;

Fitch v. Pacific R. Co., 45 Mo. 322; Coates v. Missouri, K. & T. R. Co., 61 Mo. 38.

Plaintiff's evidence showed that on a windy day a spark from a passing locomotive fell on his barn, sixty-seven feet from the track, which ignited and burned the barn and his hotel near by. The engine emitting the sparks was hauling a freight train up a grade and was emitting numerous sparks and cinders from a half to three fourths of an inch in diameter, and on a former occasion it had emitted sparks which started a fire in the hotel; and while it was admitted that an engine on an up grade would emit more sparks, yet there was evidence tending to show that an engineer might so control his engine as to lessen the number emitted. Witnesses for the company testified in defense that the spark arrester on the engine had just been examined and was in good condition, and that the meshes in the net were only three sixteenths of an inch. *Held*, that it was proper to submit the case to the jury. *Frace v. New York, L. E. & W. R. Co.*, 52 N. Y. S. R. 102, 22 N. Y. Supp. 953.

322. — in rebuttal of the presumption of negligence.—Whether or not the defendant has sufficiently rebutted the presumption of negligence arising from the plaintiff's evidence is a question of fact for the determination of the jury. *Coale v. Hannibal & St. J. R. Co.*, 60 Mo. 227, 9 Am. Ry. Rep. 210. *Nichols v. Chicago, St. P., M. & O. R. Co.*, 29 Am. & Eng. R. Cas. 175, 36 Minn. 452, 32 N. W. Rep. 176. *Hoffman v. Chicago, M. & St. P. R. Co.*, 43 Minn. 334, 45 N. W. Rep. 608.—APPROVED IN *Johnson v. Northern Pac. R. Co.*, 1 N. Dak. 354.—*Kenney v. Hannibal & St. J. R. Co.*, 80 Mo. 573.

Where a plaintiff makes out a *prima facie* case, and the uncontradicted testimony of the company's witnesses is that it employed the most improved spark arresters, the question of negligence is properly left to the jury. *Brown v. Missouri Pac. R. Co.*, 13 Mo. App. 462. *Greenfield v. Chicago & N. W. R. Co.*, 83 Iowa 270, 49 N. W. Rep. 95.—EXPLAINING *Dean v. Chicago, M. & St. P. R. Co.*, 39 Minn. 413. REVIEWING *Small v. Chicago, R. I. & P. R. Co.*, 50 Iowa 338.—*Sappington v. Missouri Pac. R. Co.*, 14 Mo. App. 86.

Where plaintiff proves that a fire originated from the company's locomotive and the company seeks to rebut a *prima facie* case, thus made, by showing the use of

proper appliances and care in their management, the question of negligence should be submitted to the jury for their consideration under proper instructions. *Hoover v. Missouri Pac. R. Co.*, (Mo.) 16 S. W. Rep. 480.

It is a question for the court and not for the jury to determine the amount and character of proof necessary to overcome the presumption of negligence raised by plaintiff's evidence. It is erroneous on the part of the court, where the testimony of the company absolutely shows that the engines were properly constructed and equipped and provided with the most modern and approved appliances for preventing the escape of fire, to submit the question to the jury as to whether the evidence rebutted the presumption of negligence raised against the company by the plaintiff's evidence. *Spaulding v. Chicago & N. W. R. Co.*, 33 Wis. 582.

323. Weight and sufficiency of plaintiff's evidence in rebuttal.—The defendant adduced proof that the locomotive was furnished with an approved spark arrester, in rebuttal of which the plaintiff was permitted to introduce evidence of numerous fires caused by the same engine. *Held*, that the question of negligence was properly submitted to the jury. *Philadelphia & R. R. Co. v. Schultz*, 2 Am. & Eng. R. Cas. 271, 93 Pa. St. 341.—QUOTED IN *Aycock v. Raleigh & A. A. L. R. Co.*, 89 N. Car. 321.

c. Plaintiff's Contributory Negligence.

324. Generally.—The question of contributory negligence on the part of the property owner is a question that should be submitted to the jury. *Murphy v. Chicago & N. W. R. Co.*, 45 Wis. 222, 18 Am. Ry. Rep. 17.

When the contributory negligence claimed consists only in the place in which the plaintiff has put his property and the means used to protect it from fire, there is ordinarily presented only a question of fact to be determined by the jury. *Missouri Pac. R. Co. v. Kincaid*, 11 Am. & Eng. R. Cas. 83, 29 Kan. 654. *St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. 47. *Gibbons v. Wisconsin Valley R. Co.*, 25 Am. & Eng. R. Cas. 479, 66 Wis. 161, 28 N. W. Rep. 170.

325. — illustrations.—The question whether the owner of a wooden building thirty feet from a railroad, not entirely

finished, is negligent in leaving the door open when a train is passing and a strong wind is blowing from the direction of the railroad, is for the jury under proper instructions. *Fero v. Buffalo & S. L. R. Co.*, 22 N. Y. 209.—REVIEWED IN *Murphy v. Chicago & N. W. R. Co.*, 45 Wis. 222.

A line of railway was laid through plaintiff's land, on which was a barn containing hay. The sills of the barn rested on blocks and were about eight inches above the ground, on which the hay rested, so that part of it was exposed below the sills. A small part of the barn was within the line of the land taken for the railway, and about forty-five feet from the track. In the construction of the railway, and while an engine with a defective smoke-stack was passing near plaintiff's barn (the wind blowing strongly), sparks ignited the hay and destroyed the barn. *Held*, that the fact of the plaintiff not taking any means to protect the hay was not evidence of contributory negligence on his part, and need not have been left to the jury. *Campbell v. McGregor*, 29 *New Brun.* 644.—FOLLOWING *Hole v. Sittingbourne & S. R. Co.*, 6 H. & N. 488.

326. In allowing combustibles on premises.—In an action by the owner of an orchard to recover damages for injury to his trees from fire alleged to have been communicated from the engines of the company, evidence was presented tending to establish that the orchard was situate adjoining the right of way of the company; that the trees were heavily mulched with manure, were wrapped with dry grass, straw, and stalks; that the orchard was covered with old grass and cornstalks; that there was a heavy coating of old vegetation between the trees; that the fire started from red-hot coals or cinders thrown or dropped from the engines of the company upon its right of way; that it ran through the grass and weeds on the right of way to the orchard, and through the orchard into the mulching, dry grass, straw, and stalks around the trees. *Held*, sufficient evidence to require the court, upon the request of the company, to submit to the jury whether the owner of the premises was guilty of contributory negligence; and whether he was guilty of such negligence or not was a question for the jury to decide. *Missouri Pac. R. Co. v. Cornell*, 11 *Am. & Eng. R. Cas.* 56, 30 *Kan.* 35, 1 *Pac. Rep.* 312.

327. In failing to plow around stacks.—Whether one who stacks his hay on the open prairie near a track, with dry grass between the stacks and the track, is guilty of contributory negligence in not taking any means of precaution to prevent the communication of fire, such as plowing around them, etc., is a question of fact for the jury. *Kansas Pac. R. Co. v. Brady*, 17 *Kan.* 380. *Slossen v. Burlington, C. R. & N. R. Co.*, 11 *Am. & Eng. R. Cas.* 67, 60 *Iowa* 215, 14 *N. W. Rep.* 244. *Gram v. Northern Pac. R. Co.*, 45 *Am. & Eng. R. Cas.* 544, 1 *N. Dak.* 252, 46 *N. W. Rep.* 972.—APPROVING *Karsen v. Milwaukee & St. P. R. Co.*, 29 *Minn.* 12, 11 *N. W. Rep.* 122; *Kellogg v. Chicago & N. W. R. Co.*, 26 *Wis.* 223; *Erd v. Chicago & N. W. R. Co.*, 41 *Wis.* 65. EXPLAINING *Murphy v. Chicago & N. W. R. Co.*, 45 *Wis.* 222.

328. In failing to extinguish fire.—Where a female owns a building which is burned by sparks from a locomotive, she is not chargeable with contributory negligence, as a matter of law, where she sees the fire start, and instinctively runs away to prevent peril, without attempting to extinguish it, where she might probably have done so. The question of her contributory negligence is for the jury. *Sugarman v. Manhattan El. R. Co.*, 42 *N. Y. S. R.* 30, 16 *N. Y. Supp.* 533.

Where fire was communicated from a train to a stump on the right of way, where it was discovered by plaintiff, and his servants were sent twice to put it out, the question of plaintiff's contributory negligence for a failure of the servants to extinguish the fire was properly left to the jury. *Haverly v. State Line & S. R. Co.*, 43 *Am. & Eng. R. Cas.* 31, 135 *Pa. St.* 50, 19 *Atl. Rep.* 1013.

329. Comparative negligence.*—In an action to recover for injury resulting to premises adjoining a railroad by reason of fire communicated because of dry grass and weeds accumulating upon the right of way, the question of comparative negligence on the part of plaintiff and the company, in respect to accumulation of such combustible material, is a question of fact properly left to the jury. *Illinois C. R. Co. v. Nunn*, 51 *Ill.* 78.—DISAPPROVED IN *Salmon v. Delaware, L. & W. R. Co.*, 38 *N. J. L.* 5.

* See title, COMPARATIVE NEGLIGENCE.

7. Damages.

a. In General.

330. Right to damages.—It will not be presumed that injuries by fire to fences and timber a mile from the railway were considered in estimating damages for right of way. *Rodemacher v. Milwaukee & St. P. R. Co.*, 41 Iowa 297.

331. — as affected by plaintiff's own negligence.—Damage caused by fire through the negligence of one party, but increased through the negligence of the party suffering the loss, may be recovered up to the time when the contributory negligence began to affect the result; hence, there was error in the charge to the jury when it would be understood by them that if the plaintiff neglected to do what a prudent man would have done when he learned of the fire, it defeated his right of recovery for the previous as well as subsequent damages. *Stebbins v. Central Vt. R. Co.*, 11 Am. & Eng. R. Cas. 79, 54 Vt. 464, 41 Am. Rep. 855.

332. Duty to keep damages down.—Where a company burns a fence between its right of way and adjoining lands, which, under a contract, the landowner is bound to keep in repair, the company is liable to the landowner for the burning of the fence; but it is under no legal obligation to repair it; and the owner cannot abandon his grounds or other property and charge the company with damages until the fence is repaired. *Terry v. New York C. R. Co.*, 22 Barb. (N. Y.) 574.

333. Proximate damages.—In the rule which limits a recovery for a tort to those damages which are its natural and proximate effects, the natural effects are those which might reasonably be foreseen, those which occur in an ordinary state of things; and the proximate effects are those between which and the tort there intervenes no culpable and efficient agency. A mere failure by third parties to extinguish a fire started through the negligence of the defendant, is not such an agency. *Wiley v. West Jersey R. Co.*, 44 N. J. L. 247. — QUOTED IN *Pielke v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 349, 5 Dak. 444, 41 N. W. Rep. 669.

334. Remote damages.—Where a company negligently runs a train across a hose and cuts it in two, thereby stopping the supply of water which is being used to

check a fire, it is not liable for other damages caused by the spread of fire, as such damages are too remote. *Mott v. Hudson River R. Co.*, 1 Robt. (N. Y.) 585. — APPLIED IN *Williams v. Delaware, L. & W. R. Co.*, 39 Hun (N. Y.) 430.

The fact that the fire was communicated to plaintiff's elevator from another building, and not directly from defendant's engine, would not render the damages too remote for recovery. *Small v. Chicago, R. I. & P. R. Co.*, 55 Iowa 582, 8 N. W. Rep. 437.

Where grass is set burning by fire escaping from an engine, the damages claimed would not be too remote or speculative, although the property consumed was separated from the track by a strip of land fifty yards wide, where the plat was covered with dry grass and other combustible matter. *Clemens v. Hannibal & St. J. R. Co.*, 53 Mo. 366, 12 Am. Ry. Rep. 351.

Instances of damages deemed to be too remote, see *Ryan v. New York C. R. Co.*, 35 N. Y. 210. *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353. But compare *Fent v. Toledo, P. & W. R. Co.*, 59 Ill. 349, 11 Am. Ry. Rep. 167.

335. Attorney's fee — Penalty.—In an action for damages from fire caused by dry grass, weeds, etc., being left upon the track, in addition to actual damages under Ill. Act of March 31, 1874, relating to the company's duty to keep its right of way clear of combustibles, and providing a penalty for failure so to do, and the amending act of May 29, 1879, plaintiff may recover reasonable attorney's fees as a penalty for destruction of inanimate property by fire set out under such circumstances. *Toledo, St. L. & K. C. R. Co. v. Anderson*, 48 Ill. App. 130.

Where the statute provides that the "court" shall allow a reasonable attorney fee the amount of such fee is a question for the jury to decide. *Missouri Pac. R. Co. v. Merrill*, 40 Kan. 404, 19 Pac. Rep. 793.

336. Excessive damages.—Where a landowner sues a company for injuries to his fence by fire, evidence that it had been built four years, and cost \$135 per mile, does not support a finding that it was worth that amount when destroyed. *Galveston, H. & S. A. R. Co. v. Hatch*, (Tex. Civ. App.) 22 S. W. Rep. 10.

Where a landowner claims damages for burning over "about nine and one half acres," and the jury find that the land was

injured \$25 to the acre, without finding the number of acres injured, the court cannot presume that plaintiff proved injury to more than nine and one half acres; and any damages above the aggregate of nine and one half times \$25, or \$237.50, will be deemed excessive. *McHugh v. Chicago & N. W. R. Co.*, 41 Wis. 75.

The evidence showed that between 150 and 200 acres had been injured to the extent of \$2.50 per acre, making a total damage of \$500 if the full 200 acres were injured. *Held*, that a verdict of \$650 in favor of plaintiff was not supported by the evidence. *Texas & P. R. Co. v. Ervay*, 3 Tex. App. (Civ. Cas.) 71.—REFERRING TO *Texas & P. R. Co. v. Tippit*, 2 Tex. App. (Civ. Cas.) 710.

337. Nominal damages.—The complaint alleged that the fire was communicated to the plaintiff's property by a locomotive of the defendant, and that the property was destroyed by fire. The defendant suffered a default and the case was heard in damages. *Held*, that plaintiff was *prima facie* entitled to recover her actual loss from the fire to the full extent proved, but that the defendant, to reduce the damages to a nominal sum, might show that the fire was not communicated by its locomotive. *Martin v. New York & N. E. R. Co.*, 62 Conn. 331, 25 Atl. Rep. 239.

338. Damnum absque injuria.—If, while the company is in the lawful pursuit of a legitimate business, operating its road in a careful manner, fire is communicated to adjacent lands by sparks from the engine without negligence of any kind whatever upon the part of the company, the damages sustained must be considered *damnum absque injuria*. *Rood v. New York & E. R. Co.*, 18 Barb. (N. Y.) 80.

b. Elements and Measure of Damages for Property Destroyed or Injured.

339. Generally.*—The measure of the damage in cases where the property of one has been destroyed by fire unintentionally, but by the negligence of another, where there is no element of wilfulness or maliciousness in its destruction, is just compensation in money for the property destroyed; such an amount as will fully restore the loser to the same property status that he occupied at the time of the destruction.

*Measure of damages for property burned, see note, 40 AM. & ENG. R. CAS. 252.

To arrive at the amount of such compensation, inquiry, in the absence of malice, is to be confined strictly to the ascertainment of the value of the property destroyed, with interest thereon for the retention of such value from the date of the destruction. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 Am. & Eng. R. Cas. 603, 27 Fla. 1, 9 So. Rep. 661. *Parrott v. Housatonic R. Co.*, 47 Conn. 575. *Arthur v. Chicago, R. I. & P. R. Co.*, 16 Am. & Eng. R. Cas. 283, 61 Iowa 648, 17 N. W. Rep. 24.—FOLLOWING *Mote v. Chicago & N. W. R. Co.*, 27 Iowa 22.—*Burke v. Louisville & N. R. Co.*, 7 Heisk. (Tenn.) 451, 12 Am. Ry. Rep. 497.

And it is competent to prove its value at that time for any use to which it might have been applied. *Ft. Worth & D. C. R. Co. v. Hogssett*, 67 Tex. 685, 4 S. W. Rep. 365.

When property has been damaged, but not destroyed, through negligence of a railway company in the emission of sparks from a locomotive, the measure of the damages is the difference between its value before and after the injury. *Flannery v. St. Louis, I. M. & S. R. Co.*, 44 Mo. App. 396.

Together with any reasonable expenses incurred or value of time spent in preserving it or restoring it. *Ft. Worth & D. C. R. Co. v. Ratliffe*, 2 Tex. App. (Civ. Cas.) 600.

Where buildings, trees, or crops are destroyed or injured by fire, the proper measure of damages is not the difference in the value of the land upon which they are situated before and after injury, but of the value of the buildings, trees, etc., themselves. *White v. Chicago, M. & St. P. R. Co.*, 45 Am. & Eng. R. Cas. 565, 1 S. Dak. 326, 47 N. W. Rep. 146.—QUOTING *Hannah v. St. Paul, M. & M. R. Co.*, 5 Dak. 1, 37 N. W. Rep. 722.

If the owner bring the action for value of trees destroyed, the proper measure of damages is the market value of the trees destroyed, independent of the real estate. If he bring the action for injury to his realty, the measure of damages is the diminished value of the real estate. *Bailey v. Chicago, M. & St. P. R. Co.*, 3 S. Dak. 531, 54 N. W. Rep. 596.

340. Real property.—In an action for damages for injury to land, caused by fire from a locomotive, the measure of damages is the difference in the value of the land

before and after the fire. *Murray v. Central R. & B. Co.*, 90 Ga. 83, 15 S. E. Rep. 645. *Fl. Worth & D. C. R. Co. v. Hogssett*, 67 Tex. 685, 4 S. W. Rep. 365.

And the amount necessary to restore the property to the condition in which it was before the trespass is a proper measure of damage. *Fl. Scott, W. & W. R. Co. v. Tubbs*, 49 Am. & Eng. R. Cas. 685, 47 Kan. 630, 28 Pac. Rep. 612.

The true rule of damages is that if the thing destroyed, although it is part of the realty, has a value which can be accurately measured and ascertained without reference to the value of the soil in which it stands, or out of which it grows, the recovery must be of the value of the thing destroyed, and not for the difference in the value of the land before and after its destruction. *Whitbeck v. New York C. R. Co.*, 36 Barb. (N. Y.) 644.—DISTINGUISHED IN *Hayes v. Chicago, M. & St. P. R. Co.*, 45 Minn. 17. QUOTED IN *Stewart v. Baltimore & O. R. Co.*, 33 W. Va. 88, 10 S. E. Rep. 26.

In actions to recover damages for injuries to real estate caused by the unlawful separation and removal of something therefrom, the courts recognize two elements of damage: (1) the value of the thing taken after separation from the freehold, if it have any; (2) the damage to the realty, if any, occasioned by the removal. *Dwight v. Elmira, C. & N. R. Co.*, 132 N. Y. 199, 30 N. E. Rep. 398, 43 N. Y. S. R. 723; reversing 56 Hun 646, 31 N. Y. S. R. 1005, mem., 10 N. Y. Supp. 950.—DISTINGUISHING *Whitbeck v. New York C. R. Co.*, 36 Barb. 644.

Where plaintiff asserts his right to go beyond the value of the thing taken or destroyed, after severance from the freehold, so as to secure compensation for the damage done to his land, the measure of damages is the difference in value of the land before and after the injury. *Dwight v. Elmira, C. & N. R. Co.*, 132 N. Y. 199, 30 N. E. Rep. 398, 43 N. Y. S. R. 723; reversing 56 Hun 646, 31 N. Y. S. R. 1005, mem., 10 N. Y. Supp. 950.

341. House.—Where a house partially burned by the negligence of appellant's employés was owned by the same person owning the lot on which it stood, the measure of damages would be the lessened value of the premises caused by the partial destruction of the house, with interest from the time of the act. It was error to admit testimony made the basis of a finding by the 5 D. R. D.—61.

court giving as damages the cost necessary to restore the house to its condition before the fire causing the injury. *Pacific Exp. Co. v. Lasker Real Estate Assoc.*, 81 Tex. 81, 16 S. W. Rep. 792.

342. Fence.—It is proper to refuse to permit the defendant in an action for injury to premises by fire from an engine, to prove the cost of wire fencing which it is claimed might be used to replace that which was destroyed. The value of the fence destroyed is the measure of damages, regardless of what some other fence which might be as efficient for protection would cost. *Ohio & M. R. Co. v. Trapp*, 4 Ind. App. 69, 30 N. E. Rep. 812.

343. Standing trees and timber.*—Where timber is set on fire by sparks from the engines of a railway company, the true measure of damages is the difference between the value of the timber standing and growing upon the land in question immediately before the fire in question, and the value of such timber immediately after such fire. *Burdick v. Chicago, M. & St. P. R. Co.*, 87 Iowa 384, 54 N. W. Rep. 439.—QUOTING *Greenfield v. Chicago & N. W. R. Co.*, 83 Iowa 270, 49 N. W. Rep. 95.—*Greenfield v. Chicago & N. W. R. Co.*, 83 Iowa 270, 49 N. W. Rep. 95.

In an action to recover for the destruction of a grove of trees by fire, the measure of damages is the value which the trees added to the farm, which may be proved by showing the value of the farm with the trees standing on it, and then its value with the trees destroyed. *Hoye v. Chicago, M. & St. P. R. Co.*, 46 Minn. 269, 48 N. W. Rep. 1117.—FOLLOWING *Carner v. Chicago, St. P., M. & O. R. Co.*, 43 Minn. 375; *Hayes v. Chicago, M. & St. P. R. Co.*, 45 Minn. 17, 47 N. W. Rep. 260.—DISTINGUISHING *Whitbeck v. New York C. R. Co.*, 36 Barb. (N. Y.) 644. FOLLOWING *Carner v. Chicago, St. P., M. & O. R. Co.*, 43 Minn. 375.—FOLLOWED IN *Hoye v. Chicago, M. & St. P. R. Co.*, 46 Minn. 269.

The measure of damages for setting fire to timber land is the difference in value of the timber land as it was before and as it was after the fire. *Bevier v. Delaware &*

*Measure of damages for injury or destruction of trees by fire, see note, 19 L. R. A. 659.

Measure of damage to owner of a timber-culture claim by fire, see 43 AM. & ENG. R. CAS. 78, abstr.

H. Canal Co., 13 Hun (N. Y.) 254.—CRITICISING AND DISTINGUISHING *Whitbeck v. New York C. R. Co., 36 Barb. (N. Y.) 644.*

The measure of damages is the amount of damage the trees and timber suffered by reason of the fire, and not the difference in the value of the land with the standing trees and timber before the fires and afterwards. *Fremont, E. & M. V. R. Co. v. Crum, 43 Am. & Eng. R. Cas. 71, 30 Neb. 70, 46 N. W. Rep. 217. Atkinson v. Atlantic & P. R. Co., 63 Mo. 367, 20 Am. Ky. Rep. 442.*

In determining the amount of damages the inquiry should be as to the value of the trees burned as standing timber, and not the market price for transplantation as shade or ornamental trees. *Fremont, E. & M. V. R. Co. v. Crum, 43 Am. & Eng. R. Cas. 71, 30 Neb. 70, 46 N. W. Rep. 217.*

The fire complained of consumed a locust grove on plaintiff's farm of 120 acres; but the grove was wholly on a tract of about twenty-five acres, which was cut off from the rest of the farm by defendant's road. The court instructed the jury that if plaintiff was entitled to recover at all, one element of his damages would be the value of the grove to his farm. *Held*, correct against the objection that the grove was valuable only to the twenty-five acres. *Brooks v. Chicago, M. & St. P. R. Co., 32 Am. & Eng. R. Cas. 383, 73 Iowa 179, 34 N. W. Rep. 805.*

344. Fruit trees and vines.—In an action to recover for fruit trees and vines destroyed by fire set out by sparks from an engine, it is proper to prove the damage by proving the value of the land before and after the fire. *Louisville, E. & St. L. Con. R. Co. v. Spencer, 47 Ill. App. 503. Shannon v. Hannibal & St. J. R. Co., 54 Mo. App. 223.*

Where a fire set out by a railroad engine only partially injured the grass in a meadow and the trees in an orchard, the measure of damages is the difference in value of the grass and trees before and after the fire. *Hamilton v. Des Moines & K. C. R. Co., 84 Iowa 131, 50 N. W. Rep. 567.*

Where the action is for destroying fruit trees, the standard of damages is the value of the trees as they stood before the fire, and not the diminished value of the land by reason of the destruction of the trees. *Whitbeck v. New York C. R. Co., 36 Barb. (N. Y.) 644.*—CRITICISED AND DISTINGUISHED IN *Bevier v. Delaware & H. Canal*

Co., 13 Hun (N. Y.) 254; Dwight v. Elmira, C. & N. R. Co., 132 N. Y. 199.—*Norfolk & W. R. Co. v. Bohannon, 85 Va. 293, 7 S. E. Rep. 236.*

The above method of computing the damages is not open to the objection that the market or commercial value of growing trees cannot be estimated independent of the value of the land. The value may be proved by the opinion of competent witnesses, and ascertained by the jury. *Whitbeck v. New York C. R. Co., 36 Barb. (N. Y.) 644.*

In an action for setting on fire and destroying certain bearing fruit trees upon the plaintiff's premises, plaintiff's witnesses were asked what the trees were worth at the time they were killed, and were permitted to answer under objection and exception. *Held*, error; that the measure of damages was not the value of the trees severed from the soil, but their value as bearing fruit trees connected with and dependent upon the soil. *Dwight v. Elmira, C. & N. R. Co., 132 N. Y. 199, 30 N. E. Rep. 398, 43 N. Y. S. R. 723; reversing 56 Hun 646, 31 N. Y. S. R. 1005, mem., 10 N. Y. Supp. 950.*

The distinction pointed out between this case and where forest trees fully grown or nursery trees are unlawfully severed from the soil and carried away, or where coal or minerals are removed therefrom. *Dwight v. Elmira, C. & N. R. Co., 132 N. Y. 199, 30 N. E. Rep. 398, 43 N. Y. S. R. 723; reversing 56 Hun 646, 31 N. Y. S. R. 1005, mem., 10 N. Y. Supp. 950.*

In an action for negligently causing a fire which destroyed plaintiff's fruit trees and vines, the defendant will not be heard to complain that the measure of damages applied by the court was their cash value, instead of the lessened value of the land, since plaintiff may waive the incidental and additional damage to his land, caused by the destruction of the trees. *Texas & P. R. Co. v. Gorman, 2 Tex. Civ. App. 144, 21 S. W. Rep. 158.*

345. Grass, herbage, pasturage.—Where a railroad starts a fire by sparks from its engine, which burns over plaintiff's grass land, a recovery therefor may include both the value of the grass then on the land and destroyed, and also the damage to the roots of the grass. *Missouri Pac. R. Co. v. Ayers, (Tex.) 8 S. W. Rep. 538.*

And the plaintiff is entitled to interest

ight v. Elmira,
9.—*Norfolk &*
a. 293, 7 S. E.

omputing the
objection that
ue of growing
ndependent of
value may be
ompetent wit-
e jury. *Whit-*
Barb. (N. Y.)

n fire and de-
it trees upon
tiff's witnesses
ere worth at
and were per-
ection and ex-
he measure of
of the trees
their value as
with and de-
ight v. Elmira,
30 N. E. Rep.
rsing 56 Hun-
em., 10 N. Y.

between this
ully grown or
severed from
where coal or
om. *Dwight*
132 N. Y. 199.
S. R. 723; *re-*
Y. S. R. 1005,

causing a fire
ruit trees and
t be heard to
f damages ap-
cash value, in-
the land, since
ental and ad-
caused by the
as & P. R. Co.
144, 21 S. W.

onsturage.—
re by sparks
ver plaintiff's
r may include
en on the land
amage to the
Pac. R. Co. v.
3.
ed to interest

upon the value of the property so destroyed, from the date of its destruction. *Galveston, H. & S. A. R. Co. v. Horne*, 35 Am. & Eng. R. Cas. 238, 69 Tex. 643, 9 S. W. Rep. 440.

Where the claim is for the burning of grass used for pasturage, the measure of damages is its market value at the time and place of its destruction for any legitimate use. *Ft. Worth & N. O. R. Co. v. Wallace*, 40 Am. & Eng. R. Cas. 248, 74 Tex. 581, 12 S. W. Rep. 227.

But where the claim is for injury to the sod or roots of the grass, so that the land will not yield so much in the future, the measure of damages is the difference in the value of the land immediately before and after the injury. *Ft. Worth & N. O. R. Co. v. Wallace*, 40 Am. & Eng. R. Cas. 248, 74 Tex. 581, 12 S. W. Rep. 227.

The true measure of damages in actions against railroad companies to recover grass not severed from the soil, which is destroyed by fire, considering the purposes to which the land had been devoted by the owner, is the difference in the value of the land immediately before and after the fire. *Missouri Pac. R. Co. v. Rabb*, 3 Tex. App. (Civ. Cas.) 63.—FOLLOWING *Missouri Pac. R. Co. v. Patterson*, 2 Tex. App. (Civ. Cas.) 713; *Sabine & E. T. R. Co. v. Joachimi*, 58 Tex. 456. QUOTING *Texas & F. R. Co. v. Tippet*, 2 Tex. App. (Civ. Cas.) 710.

But in estimating such value the purpose to which the land was devoted, the actual value of the grass, and the amount of loss or injury from partial destruction of the sod should be considered. *Texas & P. R. Co. v. Tippet*, 2 Tex. App. (Civ. Cas.) 710.—FOLLOWED IN *Missouri Pac. R. Co. v. Patterson*, 2 Tex. App. (Civ. Cas.) 713.

The measure of damages is the difference between the value of the land for the purpose for which it was used before the fire and immediately thereafter; so where the damage is to grass land it is proper to show whether it was a meadow to gather hay from, or whether used for the purposes of pasture, or whether it was open lands. *Texas & P. R. Co. v. Land*, 3 Tex. App. (Civ. Cas.) 74. *Gulf, C. & S. F. R. Co. v. Matthews*, 3 Tex. Civ. App. 493, 23 S. W. Rep. 90.

A tenant at sufferance, in an action against a railroad for destroying grass by fire, can recover only the value of the grass for grazing purposes, between the date of its destruction and the time that he may be dis-

possessed. *Texas & P. R. Co. v. Torrey*, 4 Tex. App. (Civ. Cas.) 445, 16 S. W. Rep. 547.

Where a company is sued for destroying grass by fire it is proper for the court to submit to the jury whether there was a market value for the grass established by the evidence, and if so, to measure the damage thereby; but if not, that they might ascertain its value by the circumstances of the case. *Gulf, C. & S. F. R. Co. v. Day*, (Tex. Civ. App.) 22 S. W. Rep. 772.

Damages for the destruction of herbage and pasturage by fire should be measured as in the case of an unwilling vendor. *Gibson v. South-Eastern R. Co.*, 1 F. & F. 23.

346. — meadow.—Where the evidence shows that a fire injured or destroyed the roots of grass in a meadow, so that it would not produce grass for mowing, the measure of damages is the cost of restoring the meadow in as good a condition as it was before the fire. *Vermilya v. Chicago, M. & St. P. R. Co.*, 23 Am. & Eng. R. Cas. 108, 66 Iowa 606, 24 N. W. Rep. 234.

The true measure of damages as to a meadow injured by fire from an engine is the difference between the value of the meadow before the fire and its value after the fire. If the meadow was utterly destroyed by the fire the measure of damages would be its value at the time of the fire. *Belch v. Missouri Pac. R. Co.*, 18 Mo. App. 80.

347. Hay.—The measure of damages for hay destroyed by fire from an engine is the value of the hay at the time, with legal interest. *Johnson v. Chicago & N. W. R. Co.*, 77 Iowa 666, 42 N. W. Rep. 512.

Where hay is destroyed in the stack, the measure of damages is its market value in the neighborhood, if it has a market value there. *Huff v. Missouri Pac. R. Co.*, 17 Mo. App. 356.—FOLLOWING *Kenney v. Hannibal & St. J. R. Co.*, 70 Mo. 243.

If property such as hay has no market value in the place where it is burned, then the measure of damages is its value at the nearest market, less the cost of transportation to the market. *Eddy v. Lafayette*, 49 Fed. Rep. 807, 4 U. S. App. 247, 1 C. C. A. 441.

Where the action is for destroying hay, it is technical error to instruct the jury that the measure of damages is the market value of the hay, with interest from the time it was burned, as the allowing or withholding interest should ordinarily be left to the jury;

but such instruction is not ground for reversal where it appears that the jury did not allow interest. *Eddy v. Lafayette*, 49 *Fed. Rep.* 807, 4 *U. S. App.* 247, 1 *C. C. A.* 441.

c. Interest.

348. When may be awarded.*—

Interest may be allowed as damages in cases where property has been destroyed through the culpable negligence of another; but the usual and better practice is to leave the allowance of interest to the discretion of the jury. *Eddy v. Lafayette*, 49 *Fed. Rep.* 807, 4 *U. S. App.* 247, 1 *C. C. A.* 441.

The interest is not allowed as interest, but as a part of the damages. *Parrott v. Housatonic R. Co.*, 47 *Conn.* 575.

In North Dakota the measure of damages is controlled by Comp. Laws, § 4578, which reads as follows: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, and malice, interest may be granted in the discretion of the jury, and the court cannot interfere with such discretion in his instructions to the jury." *Johnson v. Northern Pac. R. Co.*, 45 *Am. & Eng. R. Cas.* 554, 1 *N. Dak.* 354, 48 *N. W. Rep.* 227.

Where a company is sued for destroying grass by fire it is not error for the court to instruct the jury that they may allow interest on the damages awarded, from the date of the fire, which was shown to be prior to the date alleged in the complaint. *Gulf, C. & S. F. R. Co. v. Day*, (*Tex. Civ. App.*) 22 *S. W. Rep.* 772.

349. When may not be awarded.—

In Colorado interest is a creature of statute, and regulated thereby. It is only recoverable in the absence of contract, in the cases enumerated in the statute, and damages to property arising from the wrong or negligence of a defendant is not one of the enumerated cases. *Denver, S. P. & P. R. Co. v. Conway*, 8 *Colo.* 1, 54 *Am. Rep.* 537, 5 *Pac. Rep.* 142.

Interest is not allowable in Missouri for negligently destroying property. *De Steiger v. Hannibal & St. J. R. Co.*, 7 *Am. & Eng. R. Cas.* 492, 73 *Mo.* 33. *Kenney v. Hannibal & St. J. R. Co.*, 63 *Mo.* 99, 20 *Am. Ry. Rep.* 275.—FOLLOWED IN *Atkinson v. Atlantic & P. R. Co.*, 63 *Mo.* 367.—*Atkinson v. At-*

lantic & P. R. Co., 63 *Mo.* 367, 20 *Am. Ry. Rep.* 442.—FOLLOWING *Kenney v. Hannibal & St. J. R. Co.*, 63 *Mo.* 99.—*Flannery v. St. Louis, I. M. & S. R. Co.*, 44 *Mo. App.* 396.

d. Evidence on Question of Damages.

350. Generally.—Evidence of the natural advantages of the lands by reason of their situation with respect to the surrounding country was admissible upon the question of damages. *Moore v. Chicago, M. & St. P. R. Co.*, 78 *Wis.* 120, 47 *N. W. Rep.* 273.

Where it is shown that the land was valuable only as meadow land, and that the roots of the grass growing thereon were destroyed, evidence of the cost of re-seeding, and of its rental value during the time it would not produce a crop of grass, is admissible upon the question of damages. *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 32 *Am. & Eng. R. Cas.* 374, 110 *Ind.* 225, 11 *N. E. Rep.* 285.

The fact that land, after the destruction of a meadow by fires, could have been cultivated in corn, and would have yielded probably a crop more valuable than the hay crop, is entirely irrelevant to the right, or the amount, of recovery of damages for firing the meadow. *Toledo, St. L. & K. C. R. Co. v. Kingman*, 49 *Ill. App.* 43.

Evidence was offered as to the effect of the same fire upon an adjacent meadow. *Held*, that the evidence was properly rejected, since the matter in issue was susceptible of direct proof, and there was an abundance of direct evidence in regard thereto. *Gates v. Chicago & A. R. Co.*, 44 *Mo. App.* 488.

A witness testifying as to the value of the property destroyed cannot base his estimate of the same upon the representations of others; it must be based upon his own knowledge. *Baltimore & O. R. Co. v. Shipley*, 39 *Md.* 251, 11 *Am. Ry. Rep.* 269.

351. Documentary evidence.—

Where a landowner sues for the burning of his fence and woodland, the record of condemnation proceedings, in which the jury were directed, among other things, to estimate "all other inconveniences which may be likely to result to the owner of the land," is admissible on behalf of the company, whether damages were assessed for inconveniences likely to result from fires or not. *Philadelphia & R. R. Co. v. Yeiser*, 8 *Pa. St.* 366.—DISTINGUISHED IN *Sunbury & E.*

* Interest on damages for the destruction of property by fire, see notes, 40 *AM. & ENG. R. CAS.* 253; 18 *L. R. A.* 449.

R. Co. v. Hummell, 27 Pa. St. 99. FOLLOWED IN *Huyett v. Philadelphia & R. R. Co.*, 23 Pa. St. 373. NOT FOLLOWED IN *Koontz v. Oregon R. & N. Co.*, 20 Oreg. 3. REVIEWED IN *Rood v. New York & E. R. Co.*, 18 Barb. (N. Y.) 80.

352. Showing value of property, generally.*—In an action to recover for property destroyed by fire, the quality and uses of the property which added to its value may be shown without being alleged. *Lanning v. Chicago, B. & Q. R. Co.*, 25 Am. & Eng. R. Cas. 493, 68 Iowa 502, 27 N. W. Rep. 478.

Where the damage is to farm lands, it is proper to prove the purposes for which the land was used in estimating the damages. *Texas & P. R. Co. v. Ervay*, 3 Tex. App. (Civ. Cas.) 71.

353. Market value.—In ascertaining the value of property destroyed by fire, where it has a well-known or fixed market value at the time and place of its destruction, the claimant must be confined to the proof of such market value, unless the property destroyed is of a well-known kind in general use, having a well-recognized standard value wherever found; in the latter case the proofs should not be circumscribed within the limits of the market demand at the time when, and at the place where, it was destroyed. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 Am. & Eng. R. Cas. 603, 27 Fla. 1, 9 So. Rep. 661.

354. Where there is no market value.—Where the property destroyed had no market value, the witnesses who showed that they had some knowledge of the value of such property were properly allowed to state what they considered it worth. *Lanning v. Chicago, B. & Q. R. Co.*, 25 Am. & Eng. R. Cas. 493, 68 Iowa 502, 27 N. W. Rep. 478.

In such cases all such pertinent facts and circumstances are admissible in evidence as tend to establish its real and ordinary value at the time of its destruction; such facts as will furnish the jury, who alone determine the amount, with such pertinent data as will enable them reasonably and intelligently to arrive at a fair valuation. And to this end, the original cost of the property, the manner in which it has been used,

its general condition and quality, the percentage of its depreciation since its purchase, or erection, from use, damage, decay, or otherwise, are all elements of proof proper to be submitted to the jury. So also it is proper to introduce the opinions of witnesses who are acquainted with the ordinary standard values of such properties. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 Am. & Eng. R. Cas. 603, 27 Fla. 1, 9 So. Rep. 661.

355. Value of building—Prior tax valuation.—In a suit by a married woman to recover the value of buildings burned, a prior tax valuation made by her husband and the tax assessor, in which the buildings are valued at less than she sues for and testifies they are worth, is not admissible by the railroad to show a less value. *Martin v. New York & N. E. R. Co.*, 56 Am. & Eng. R. Cas. 79, 62 Conn. 331, 25 Atl. Rep. 239.

356. Value of standing trees.—To prove the value of standing trees it is proper to prove the value of the land with the trees standing on it, and its value with the trees destroyed. *Carner v. Chicago, St. P., M. & O. R. Co.*, 43 Minn. 375, 45 N. W. Rep. 713.—FOLLOWED IN *Hayes v. Chicago, M. & St. P. R. Co.*, 45 Minn. 17; *Hoye v. Chicago, M. & St. P. R. Co.*, 46 Minn. 269.

Evidence that it would be difficult to grow trees in the place of those destroyed, by reason of the shade of other trees, is competent, as tending to show the value of the trees destroyed. *Leiber v. Chicago, M. & St. P. R. Co.*, 84 Iowa 97, 50 N. W. Rep. 547.

Where the action is for the destruction of timber, the damages must be assessed with reference to its market value, where it is shown to have such; and it is not competent for the company to prove the value of other timber sold by other parties, similar to plaintiff's timber which was burned. *Bradshaw v. Rome, W. & O. R. Co.*, 17 N. Y. S. R. 307, 49 Hun 605, 1 N. Y. Supp. 691.

357. — by opinion evidence.*—It is competent for the plaintiff to show the value of trees destroyed, by the opinions of expert witnesses. *Haskell v. Northern Adirondack R. Co.*, 49 N. Y. S. R. 483, 66 Hun 629, 21 N. Y. Supp. 234.

* Evidence of value of property before and after fire, see note, 49 AM. & ENG. R. CAS. 691.

* Opinion evidence as to value of land and damages resulting from fire caused by railway, see 45 AM. & ENG. R. CAS. 573, *abstr.*

In an action for the destruction of fruit trees in an orchard, plaintiff offered the opinion of a witness as an expert as to the value of the trees. He lived in the same town, was a nurseryman; was well acquainted with the fruit business, and had heard plaintiff testify in relation to the kind, quality, and product of the trees, but had no personal knowledge of them himself. *Held*, that he was competent to give an opinion as to the value of the trees. *Whitbeck v. New York C. R. Co.*, 36 Barb. (N. Y.) 644.

358. Value of grass.—Where a company is sued for setting fire by sparks from its locomotive and thereby damaging land, fences, and grass, it is proper to admit evidence of the value of the grass. The true measure of damages is not necessarily the difference in the value of the ground before and after the fire. *Gulf, C. & S. F. R. Co. v. Kluge*, 4 Tex. App. (Civ. Cas.) 577, 17 S. W. Rep. 944.

It is competent for the company to prove that the grass was dry, dead, and valueless at the time it was destroyed. *Missouri Pac. R. Co. v. Wise*, 3 Tex. App. (Civ. Cas.) 461.

e. Matters in Mitigation or Reduction.

359. Generally.—In estimating the damages to the land caused by the burning of the sod or turf, the jury cannot take into consideration, in mitigation thereof, the fact that the destruction of the turf renders it less difficult to place the land in crop than it otherwise would have been, the owner being entitled to recover damages according to the injury to his land for any lawful purpose to which he might have appropriated it, or to which it was adapted. *Ft. Worth & N. O. R. Co. v. Wallace*, 40 Am. & Eng. R. Cas. 248, 74 Tex. 581, 12 S. W. Rep. 227.

360. Prior damages awarded in condemnation proceedings.—A jury under a writ of *ad quod damnum* to assess the damages of a landowner for the right of way of a railroad company over his land, under a provision of the charter of the company, has no power or authority to impose any legal obligation upon such landowner to remove a barn near the line located for the railroad, by specifying in their return to the writ the portion of the damages which had been assessed and awarded to him for that purpose, and which he had duly received from the company. But if it is afterwards set on fire and destroyed where

it then stood, by reason of the negligence of the company, its agents, or servants, the fact and the sum so awarded and paid to him may be taken into consideration by the jury in determining the amount of their verdict in an action brought by him against the company to recover for the injury. *Jefferis v. Philadelphia, W. & B. R. Co.*, 3 Houst. (Del.) 447.

361. Right to deduct insurance money.*—Gen. St. Conn. § 3581 provides that when an injury is done to the property of any person by fire from the locomotive, without contributory negligence on his part, the company shall be held responsible in damages to the extent of such injury. Where a company was liable under this statute for the destruction of the plaintiff's property—*held*, that it could not in any form secure the benefit of the insurance held by him upon the property. *Regan v. New York & N. E. R. Co.*, 49 Am. & Eng. R. Cas. 590, 60 Conn. 124, 22 Atl. Rep. 503. —*APPROVING Hart v. Western R. Corp.*, 13 Metc. (Mass.) 99. *REVIEWING Hall v. Nashville & C. R. Co.*, 13 Wall. (U. S.) 367; *Gales v. Hailman*, 11 Pa. St. 515.—*REVIEWED IN Martin v. New York & N. E. R. Co.*, 62 Conn. 331.

On a hearing in damages upon a default, both parties must be confined to such questions of damages as would naturally arise from the facts stated in the complaint. The company could not, on such a hearing, properly make the question of their right to a reduction or extinguishment of the damages by reason of the insurance received by the plaintiff. *Regan v. New York & N. E. R. Co.*, 49 Am. & Eng. R. Cas. 590, 60 Conn. 124, 22 Atl. Rep. 503.

Where the defendant (as tending to show a motive on the part of plaintiff to cause the fire) proves that the plaintiff received payment of an insurance policy on the property, and the court instructs the jury that this cannot be considered in reduction of damages caused by defendant's negligence, the plaintiff cannot complain. *Brookhaven L. & M. Co. v. Illinois C. R. Co.*, 68 Miss. 432, 10 So. Rep. 66.

In an action upon N. H. Gen. Laws, ch. 162, § 8, for the destruction of property by fire from a locomotive, the defendants are entitled to no reduction on account of the

* See also *ante*, 138, 195; FIRE INSURANCE, 11, 12.

plaintiff's insurance, if the insurer has paid nothing. *Smith v. Boston & M. R. Co.*, 63 N. H. 25.

362. — where buildings and furniture were insured.—If a company negligently burns insured buildings, the owner's damages cannot be diminished by reason of the insurance. *Cunningham v. Evansville & T. H. R. Co.*, 23 Am. & Eng. R. Cas. 347, 102 Ind. 478, 52 Am. Rep. 683, 1 N. E. Rep. 800.—REVIEWING *Sherlock v. Alling*, 44 Ind. 184; *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 317.—*Briggs v. New York C. & H. R. R. Co.*, 72 N. Y. 26.

In an action for destroying a building, the fact that it was insured, and that the insurance company had paid the loss, is not admissible in evidence in mitigation of damages. *Collins v. New York C. & H. R. R. Co.*, 5 Hun (N. Y.) 503; affirmed in 71 N. Y. 609, mem. *Hagan v. Chicago, D. & C. G. T. J. R. Co.*, 49 Am. & Eng. R. Cas. 670, 86 Mich. 615, 49 N. W. Rep. 509.—FOLLOWING *Perrott v. Shearer*, 17 Mich. 48.

A person having his house and furniture burned from the carelessness of agents of a company is entitled to recover the entire amount of his loss, in a suit against such company, notwithstanding he has been paid by an insurance company the sum for which they were insured. *Weber v. Morris & E. R. Co.*, 36 N. J. L. 213, 12 Am. Ry. Rep. 411.

8. Verdict; Judgment.

363. Verdict, general.—If the jury cannot find a ground upon which to charge the defendant with negligence, they should render a verdict in its favor. *McCaig v. Erie R. Co.*, 8 Hun (N. Y.) 599.

Where the complaint proceeds upon the theory that the plaintiff's injury was caused by the negligence of the defendant in permitting rubbish and other combustible matter to accumulate on its right of way, from which the fire escaped to the land of the plaintiff, while the verdict rests upon the theory that the injury was occasioned by the negligence of the company in failing to provide its engines with proper spark arresters, a judgment for the plaintiff based thereon will not be sustained. *Chicago, St. L. & P. R. Co. v. Burger*, 124 Ind. 275, 24 N. E. Rep. 981.

Where there was strong testimony that the engine was in perfect order and properly managed, and that no such scattering of fire as was charged was probable, but there

was also testimony equally positive of such an escape of fire as indicated both a defective spark arrester and careless management, the court is not authorized to disturb a verdict as contrary to what we might possibly believe, if called on to decide, the facts. *Kajnowski v. Detroit, B. C. & A. R. Co.*, 74 Mich. 15, 41 N. W. Rep. 849.

364. Special findings.—An interrogatory inquiring if the land upon which the damages were committed did not stand on the tax duplicate in the name of the plaintiff's husband for purposes of taxation, is properly rejected, as it relates to no issuable fact in the case. *Ohio & M. R. Co. v. Trapp*, 4 Ind. App. 69, 30 N. E. Rep. 812.

A special finding that the negligence of defendant which caused the damage to the plaintiff was the condition of its locomotive engine, is within the allegations of the complaint, alleging that "defendant carelessly and negligently ran an engine along its line of railway, which engine then and there was so negligently and insufficiently constructed and equipped, and then and there was so negligently and carelessly operated by the defendant, that it emitted and threw out large sparks of fire." *Smith v. Chicago, M. & St. P. R. Co.*, 4 S. Dak. 71, 55 N. W. Rep. 717.

A special finding that the defendant was negligent in leaving ties, grass, and other combustible material on the right of way is sufficient, as it imports that the defendant was negligent in leaving combustible matter on the right of way and that such negligence caused the fire, although there was no express finding in the special verdict that the fire originated in the right of way, and consequently none that it originated in such combustible material. *Abbot v. Gore*, 40 Am. & Eng. R. Cas. 244, 74 Wis. 509, 43 N. W. Rep. 365.

The findings are inconsistent where a jury specially found that defendant exercised all reasonable diligence for anticipated burning of the property, where plaintiff sought to recover for hay burned three miles from the track, with dry grass and stubble all the way between, and a strong wind blowing. *Manhattan, A. & B. R. Co. v. Keeler*, 32 Kan. 163, 4 Pac. Rep. 143.

Where a company is sued for injury by fire to wire fences, a special finding that the wire was rendered almost useless is not justified by evidence showing that it retained its original strength and color, and was in

use up to the time of trial. *Galveston, H. & S. A. R. Co. v. Hatch*, (Tex. Civ. App.) 22 S. W. Rep. 10.

In an action for burning a barn the jury were required to specially find whether the company was guilty of negligence which caused the loss, and if so, in what the negligence consisted. The jury found that the company was negligent, and that it consisted "in not using proper precaution in handling the engine to prevent the extraordinary escape of sparks in passing the barn." *Held*, that the finding was sufficiently specific. *Caswell v. Chicago & N. W. R. Co.*, 42 Wis. 193, 15 Am. Ry. Rep. 162.

365. Judgment.—Where a suit is brought for destroying grain by fire, and the complaint alleges that 300 bushels in the field and 60 bushels in the crib were destroyed, a judgment finding that 440 bushels were destroyed in the field, and 50 bushels in the crib, with a recovery of the value as alleged, will be set aside. *Gulf, C. & S. F. R. Co. v. Thompson*, 4 Tex. App. (Civ. Cas.) 219, 16 S. W. Rep. 174.

366. — by default.—Where a railroad is sued under Conn. Gen. St. § 3581, making companies liable for injuries caused by fire communicated from their engines, and the company suffers default, and is heard on the question of damages, the default admits that the fire was communicated to plaintiff's property by defendant's engine. *Martin v. New York & N. E. R. Co.*, 56 Am. & Eng. R. Cas. 79, 62 Conn. 331, 25 Atl. Rep. 239.

367. — non obstante veredicto.—In an action for burning a house and the personal property in it, the jury found generally for plaintiff, and found specially that the house was set on fire by sparks from a locomotive which was provided with an efficient, safe, and unsafe spark arrester, and that the burning could have been avoided by the use of a proper spark arrester; that the sparks entered an unoccupied upper room of the house through an open window fronting the railroad, and that the open window contributed to the burning, but that plaintiff was not negligent in leaving it open, as he did not know of the use or presence of the defective locomotive. *Held*, that the company was not entitled to judgment *non obstante*. *Louisville, N. A. & C. R. Co. v. Richardson*, 66 Ind. 43.

FISHERY.

Right of, in navigable waters, see WATERS AND WATERCOURSES, 8.

FIXTURES.

Right of lessee to remove, see LEASES, ETC., 72.

1. Test of, generally.—Whether a structure is a fixture or not depends on the nature and character of the act by which it is put in its place, and the purpose for which it is intended to be used. *Atchison, T. & S. F. R. Co. v. Morgan*, 38 Am. & Eng. R. Cas. 658, 42 Kan. 23, 4 L. R. A. 284, 21 Pac. Rep. 809, 22 Pac. Rep. 995.

One of the tests of whether personal property retains its character or becomes a fixture is the uses to which it is put. If it is placed on the realty to improve it and make it more valuable, it is some evidence that it is a fixture; but if it is placed there for a use that does not enhance the value of the realty, this is some evidence that it is personal property. *Atchison, T. & S. F. R. Co. v. Morgan*, 38 Am. & Eng. R. Cas. 658, 42 Kan. 23, 4 L. R. A. 284, 21 Pac. Rep. 809, 22 Pac. Rep. 995.

2. Actual physical annexation.—In determining what is a fixture, the simple criterion of physical annexation is so limited in its range and so productive of contradiction that it will not apply with much force. *Atchison, T. & S. F. R. Co. v. Morgan*, 38 Am. & Eng. R. Cas. 658, 42 Kan. 23, 4 L. R. A. 284, 21 Pac. Rep. 809, 22 Pac. Rep. 995.

Actual annexation to the realty, or something appurtenant thereto, is the condition upon which property, ordinarily regarded as personal becomes a fixture and part of the realty. The intention to make a chattel a part of the realty is only important upon the question whether the owner intended to make the chattel so affixed a temporary or a permanent accession to the freehold. *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 311, 15 Am. Ry. Rep. 572; reversing 28 N. J. Eq. 277.

The old rule that all things annexed to the realty become a part of it has been greatly relaxed in modern times for the encouragement of trade, manufactures, and transportation. *Oregon R. & N. Co. v. Mosier*, 14 Oreg. 519, 13 Pac. Rep. 300, 58 Am. Rep. 321.—QUOTING *Western N. C. R. Co. v. Deal*, 90 N. Car. 111.

A naked trespasser who erects on the land fixtures which constitute a part of the realty, and who afterwards removes them without the consent of the landowner, is liable in damages for their value. *Houston, E. & W. T. R. Co. v. Adams*, 20 Am. & Eng. R. Cas. 246, 63 Tex. 200.

3. Constructive annexation.—The doctrine of constructive annexation is only applicable to cases in which the chattel, by actual annexation, was once part of the realty, and has been temporarily detached from the freehold without intent to sever it therefrom. Having once been part of the realty, a removal temporarily, without intent to sever permanently, will not reconvert the chattel into personalty and destroy its character as a fixture. *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 311, 15 Am. Ry. Rep. 572; reversing 28 N. J. Eq. 277.

4. What are deemed fixtures, generally.—The material used in the construction of a railway on the land of another, without right acquired from the landowner to place it on his land, does not become such a fixture as to constitute it the property of the landowner. *Preston v. Sabine & E. T. R. Co.*, 70 Tex. 375, 7 S. W. Rep. 825.—FOLLOWING *Railroad Co. v. Hays*, 5 Tex. L. Rev. 771.—DISTINGUISHED IN *Gulf, C. & S. F. R. Co. v. Dunman*, 85 Tex. 176.

5. Bridges and piers.—A company with bona fide intent to subsequently commence proceedings to condemn a right of way across certain land, entered upon such land and erected its track and a bridge. At the time of making the entry the company did not know positively who owned the land, nor did the landowner know that it was his land that was being intruded upon. *Held*, that in the subsequent condemnation proceedings the company was not required, in making just compensation, to pay the landowner the value of the track and bridge previously erected. *Albion River R. Co. v. Hesser*, 44 Am. & Eng. R. Cas. 125, 84 Cal. 435, 24 Pac. Rep. 288.—APPROVING *California Pac. R. Co. v. Armstrong*, 46 Cal. 85. EXPLAINING *United States v. Monterey County*, 47 Cal. 515.—FOLLOWED IN *San Francisco & N. P. R. Co. v. Taylor*, 86 Cal. 246.

Stone piers built by a company as part of its railroad, on lands over which it has acquired the right of way for its road, do not,

though firmly imbedded in the earth, become the property of the owner of the lands as part of the realty. And on the purpose of completing the railroad being abandoned, the company may remove such structures, as personal property. *Wagner v. Cleveland & T. R. Co.*, 22 Ohio St. 563.

6. Buildings, depots, warehouses.*

—A building placed on land of another with the right of removal is a personal chattel, and an action can be maintained to recover damages for an injury to the plaintiff's building standing on land of another. *Laird v. Connecticut & P. R. R. Co.*, 43 Am. & Eng. R. Cas. 63, 62 N. H. 254, 13 Am. St. Rep. 564.

In such a case, where the landlord, before the expiration of the term, enjoins the removal of the building, the tenant will be allowed a reasonable time after the dissolution of the injunction within which to demand and remove the same. *Goodman v. Hannibal & St. J. R. Co.*, 45 Mo. 33.—DISTINGUISHED IN *Hunt v. Missouri Pac. R. Co.*, 76 Mo. 115.

The authorities are to the effect that a depot building erected by a railroad, not for the purpose of improving the inheritance, but to aid and assist the company in carrying on its business, is a trade fixture, and a tenant may remove such fixtures before the expiration of his term. But after having forfeited its estate in the land, and having abandoned its possession, the railroad cannot remove such fixtures. *Carr v. Georgia R. Co.*, 74 Ga. 73.

A company obtained a conveyance of land on condition that it was to be used for railroad purposes. The company erected a depot thereon, but subsequently abandoned it, and the landowner sued in ejectment, and the company appeared and disclaimed title to the land, but went on the land thereafter and tore down the depot building and removed it. *Held*, that the company was liable, even though the building was a trade fixture. *Carr v. Georgia R. Co.*, 74 Ga. 73.

After a company had obtained a decree for the condemnation of land it entered upon it and erected a depot without the knowledge of the landowner, but subsequently the decree was declared void. *Held*, that the depot was a part of the realty, and not

* A depot placed on lands by consent of the owner is not a fixture and may be removed by the company, see 25 AM. & ENG. R. CAS. 251, *abstr.*

affected by the fact that it was erected on posts so that it might easily have been removed. *Hunt v. Missouri Pac. R. Co.*, 76 Mo. 115.—DISTINGUISHING *Goodman v. Hannibal & St. J. R. Co.*, 45 Mo. 33.—EXPLAINED IN *Jacksonville, T. & K. W. R. Co. v. Adams*, 28 Fla. 631.

Where a company erects a depot on leased lands, with the consent of the landowner, it does not become part of the freehold, and the company may remove it after the lease expires. *Western N. C. R. Co. v. Deal*, 90 N. Car. 110.—FOLLOWED IN *Gudger v. Richmond & D. R. Co.*, 43 Am. & Eng. R. Cas. 606, 106 N. Car. 481, 11 S. E. Rep. 515. QUOTED IN *Oregon R. & N. Co. v. Mosier*, 14 Oreg. 519.

A. conveyed to a railroad company a right of way over his land, and afterward A., B. & C., a mercantile firm, erected a guano warehouse upon this right of way by permission of the railroad company. After that A. conveyed to D. land which included within its boundaries the site of the warehouse, but before the recording of D.'s deed A. and B., by deed, sold this building to C., who paid his money, having no knowledge of D.'s deed. In an action brought by D. against C. for the possession of this warehouse—held: (1) that the action could not be maintained for the warehouse as a fixture, for fixtures go with the land as an incident, and plaintiff was not entitled to the immediate possession of the land; (2) that under the facts the warehouse was personal property and did not become a fixture, the builders could sell it, and plaintiff could recover it from the purchaser; (3) that if the warehouse had become a part of the realty, plaintiff could not now recover it, and defendant would be protected as a purchaser for valuable consideration without notice. *Evans v. McLucas*, 11 Am. & Eng. R. Cas. 310, 15 So. Car. 67.

7. Fence rails.—A person in possession of land under a contract of purchase, providing that a failure to pay shall work a complete forfeiture of his interest, has no right, after default, to sell to a railroad company the rails used to inclose the land; and if the company removes them, it is a trespasser and liable to the vendor, though the rails at the time may be accidentally detached from the land. *Hannibal & St. J. R. Co. v. Crawford*, 68 Mo. 80.

8. Pump and boiler.—Where a company dug a well and put in a pump and a

boiler for the purpose of filling its tank on the line of its railroad, and used the same for several years, believing the well and attachments were upon its own land, when it was discovered that they were on another's land, the company could remove the pump and boiler without paying the owner of the land therefor. *Atchison, T. & S. F. R. Co. v. Morgan*, 38 Am. & Eng. R. Cas. 658, 42 Kan. 23, 4 L. R. A. 284, 21 Pac. Rep. 809, 22 Pac. Rep. 995.

9. Rolling stock, locomotives, cars, etc.—The engines, cars, and rolling stock of a railroad are chattels, and remain so after being placed on the track for operation. *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 311, 15 Am. Ry. Rep. 572; reversing 28 N. J. Eq. 277.—CRITICISING *Milwaukee & M. R. Co. v. James*, 6 Wall. (U. S.) 750. REVIEWING *Scott v. Clinton & S. R. Co.*, 6 Biss. (U. S.) 529; *Farmers' L. & T. Co. v. St. Joseph & D. C. R. Co.*, 3 Dill. (U. S.) 412; *State Treasurer v. Somerville & E. R. Co.*, 28 N. J. L. 21.

Railroad cars are not fixtures as between mortgagor and mortgagee. *Speiden v. Parker*, 46 N. J. Eq. 292, 19 Atl. Rep. 21.

The locomotives, cars, etc., are treated as fixtures of the road, and not liable to seizure and sale for municipal taxes. *Elizabethtown & P. R. Co. v. Elizabethtown*, 12 Bush (Ky.) 233.—REVIEWING *Phillips v. Winslow*, 18 B. Mon. (Ky.) 448.

Wis. Rev. St. ch. 79, declaring the rolling stock of railroads to be fixtures, only makes it such for the purpose contemplated in the statute—i.e., to enable companies to create valid liens and mortgages thereon; and such property may be seized and sold for taxes as personal property. *Chicago & N. W. R. Co. v. Ft. Howard*, 21 Wis. 44.—FOLLOWED IN *Neilson v. Iowa Eastern R. Co.*, 51 Iowa 184, 714.

10. Telegraph wires.—Whether telegraph poles, wires, and instruments become a part of the realty may depend upon the agreement between the owner of the land and the telegraph company, and the intent with which they were erected. But the intention of the parties is not the only thing to be considered. The nature of the thing itself is to be looked to, and the rights of subsequent purchasers and creditors must be considered. *Western Union Tel. Co. v. Burlington & S. W. R. Co.*, 3 McCrary (U. S.) 130, 11 Fed. Rep. 1.

A railroad company erected telegraph

poles along its right of way and put two wires thereon, and then entered into an arrangement with a telegraph company to put on a third wire and operate the line, the railroad company agreeing to purchase the extra wire and property belonging to the telegraph company at the expiration of the agreement. Subsequently the property of the railroad was sold under a foreclosure decree, the telegraph company being made a party. *Held*, that the wire erected by the telegraph company became real estate and passed to the purchasers, and they might enjoin the removal of such wire. *New York, O. & W. R. Co. v. Western Union Tel. Co.*, 36 *Hun* (N. Y.) 205.

11. Track — Rails laid down.*—A railroad track laid down upon land with a view to its permanent improvement or beneficial enjoyment is a fixture and part of the realty. *Van Keuren v. Central R. Co.*, 38 *N. J. L.* 165, 13 *Am. Ky. Rep.* 43.

Iron rails, when laid on a track and so fastened down that trains can pass over them, become a part of the realty, especially as between vendor and vendee, unless by agreement between them they are to remain personal property. *Hunt v. Bay State Iron Co.*, 97 *Mass.* 279.

But where rails are sold to the company under an agreement that they are to remain the property of the vendor until paid for, they continue to be personal property as between the vendor and subsequent encumbrancers and grantees of the railroad who had notice of the terms of sale, but not as between the vendor and prior mortgagees of the road or owners of land over which it is built, who are entitled to possession of the land as security for their damages. *Hunt v. Bay State Iron Co.*, 97 *Mass.* 279.—*FOLLOWING* *Pierce v. Emery*, 32 *N. H.* 484; *Haven v. Emery*, 33 *N. H.* 66.—*REVIEWED* IN *Field v. Maine C. R. Co.*, 62 *Me.* 77.

Where the owner of a private railway laid his track across a strip of land, with the acquiescence of the landowner, for a temporary purpose, the iron rails so laid do not become fixtures or a part of the realty, but remain the property of the railroad proprietor, who has an executed license to use this track, and who may remove the rails at will. *De Laine v. Alderman*, 31 *So. Car.* 267, 9 *S. E. Rep.* 950.

* Rails, ties, spikes, tools, implements, and furniture as realty, see note, 12 *AM. & ENG. R. CAS.* 416.

Having such executed license, the track owner may peaceably enter upon the land and remove the rails without thereby committing a trespass, if the removal does no injury, even if forbidden by the landowner so to enter. *De Laine v. Alderman*, 31 *So. Car.* 267, 9 *S. E. Rep.* 950.

Railways constructed for the better enjoyment of a colliery, and intended to remain on the premises as auxiliary to the working of the mines, are fixtures and are not distrainable. *Turner v. Cameron*, 39 *L. J. Q. B.* 125, *L. R.* 5 *Q. B.* 306, 22 *L. T.* 525, 18 *W. R.* 544.

A father of several minor children, who lived with him and had no general guardian, was life tenant in certain lands with the remainder to the children. The father agreed in writing that a railroad company might enter on the land and lay its track pending an assessment of damages, and afterward agreed to convey a right of way to the company. Subsequently the company abandoned the right of way and removed the track, no damages having been paid. *Held*, that the company was not a trespasser, and the removal of the track was lawful. *McNair v. Rochester, N. Y. & P. R. Co.*, 38 *N. Y. S. R.* 271, 14 *N. Y. Supp.* 39, 59 *Hun* 627.

12. Trade fixtures.—Though a building may be regarded as a trade fixture, the company has no right to remove it after title to the land has reverted to the original owner by reason of the company having abandoned it for railroad purposes. *Carr v. Georgia R. Co.*, 74 *Ga.* 73.

The roadbed of a railway, the rails fastened to it, and the buildings at the depots are *prima facie* real property; but under certain circumstances they may be trade fixtures and be treated as personal property. *Northern C. R. Co. v. Canton Co.*, 30 *Md.* 347.

A company obtained a license to build a track over lands under a reasonable belief that it had a free right of way, but subsequently the license was revoked and the owner obtained a judgment for the possession of the land. *Held*, that the rails and the other materials used in constructing the road were trade fixtures, and might be removed as personal property. *Northern C. R. Co. v. Canton Co.*, 30 *Md.* 347.—*DISTINGUISHING* *Farmers' L. & T. Co. v. Hendrickson*, 25 *Barb.* (N. Y.) 484; *State v. Northern C. R. Co.*, 18 *Md.* 193.

FLAGMEN.

- As fellow-servants with other employes, see FELLOW-SERVANTS, 285, 389, 423.
- Contributory negligence at crossing where flagman is stationed, see CROSSINGS, INJURIES, ETC., AT, 213.
- of deceased, in action for causing death, see DEATH BY WRONGFUL ACT, 218.
- Driving street-car against, see STREET RAILWAYS, 518.
- Duty to look and listen as affected by failure to provide, see CROSSINGS, INJURIES, ETC., AT, 266.
- at stations where stationed, see CROSSINGS, INJURIES, ETC., AT, 279.
- Evidence as to, in actions for causing death, see DEATH BY WRONGFUL ACT, 225.
- Liability for failure to station at crossings, see CROSSINGS, INJURIES, ETC., AT, 63-84; CROSSING OF STREETS AND HIGHWAYS, 21; STREETS AND HIGHWAYS, 340; TRESPASSERS, INJURIES TO, 43.

FLAG STATIONS.

- Delivery of goods at, see CARRIAGE OF MERCHANDISE, 260, 353.
- Duty to designate, see STATIONS AND DEPOTS, 32.
- provide safe means of egress from train at, see CARRIAGE OF PASSENGERS, 239.
- Expulsion of passengers at, see EJECTION OF PASSENGERS, 66.
- Injuries to passengers at, see CARRIAGE OF PASSENGERS, 284.
- Right of conductor to refuse to stop at, see CARRIAGE OF PASSENGERS, 252.

FLAGS.

- Rule of company respecting, see EMPLOYES, INJURIES TO, 456.

FLATS.

- Cost of filling in, as an element of land damages, see EMINENT DOMAIN, 677.
- Title to, see RIPARIAN RIGHTS, 4.

FLOODING LANDS.

- Action for damages for, see EMINENT DOMAIN, 993.
- Actions for, when barred by lapse of time, see LIMITATIONS OF ACTIONS, 31, 56.
- As an element of land damages, see EMINENT DOMAIN, 685.
- By means of bridges, see also BRIDGES, ETC., 48.
- — — — — embankments or viaducts, see also EMBANKMENTS, 4.

Competency of evidence of damages caused by, see also EVIDENCE, 55.

Duty to prevent, see CULVERTS, 5.

Evidence under the pleadings in actions for, see PLEADING, 100.

Liability for, see CULVERTS, 21-25; WATERS AND WATERCOURSES, 14.

— — — — — flooding mines, see MINES, ETC., 13.

— of lessor road for, see LEASES, ETC., 47.

Reservation in deed of right to flow land, see DEEDS, 41.

When deemed a taking of lands, see EMINENT DOMAIN, 171.

I. DUTIES AND LIABILITIES OF THE COMPANY.

1. *Obstructing Flow of Water-courses.*..... 972
- a. In General..... 972
- b. Bridges, Culverts, Embankments, etc..... 974
- c. Floods and Freshets..... 977
2. *Flooding Lands with Surface Waters.*..... 978
- a. In General..... 978
- b. Obstructing the Flow of, and Accumulating Surface Waters..... 980
- c. Diverting from Ordinary Course; Discharging upon Premises of Another..... 982
3. *Destruction of, or Injury to, Cattle and Crops.*..... 984

II. REMEDIES.

1. *Right of Action and Defenses*..... 985
2. *Procedure*..... 989
3. *Damages*..... 1000

I. DUTIES AND LIABILITIES OF THE COMPANY.

1. *Obstructing Flow of Watercourses.**
- a. In General.

1. Duty to afford sufficient outlet for water.—A company in constructing its road over a natural watercourse is required to leave such openings as are sufficient to afford an outlet for all water (from whatever source it may come, and in times of floods and freshets, as well as at other times) which may reasonably be expected to flow through such watercourse. *Union Trust Co. v. Cuffy*, 11 Am. & Eng. R. Cas. 562, 26 Kan. 754.

* Overflow of streams, see note, 41 Am. & Eng. R. Cas. 9.

2. Degree of care required of company.—The fact that a railroad company has secured a right of way gives it no authority or right to so construct its road and embankments as to flood the lands of the person over whose premises such right of way is granted. Reasonable care in constructing the road and embankments will not excuse it, if by its structures it causes the land to be overflowed more than it was before. *Kankakee & S. R. Co. v. Horan*, 23 Ill. App. 259.

When the causes of the injuries, such as the backing of water at a culvert at the time of an unusual rain, are such as could not be anticipated or guarded against by the exercise of ordinary and reasonable foresight, care, and skill, the company is not liable. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 57 Fed. Rep. 441.

3. Company's liability, generally.—A company is not liable for so obstructing a stream as to flood adjoining lands, unless it appears that the obstruction was wanton or negligent, or that the company could have constructed its road so as to avoid the injury complained of. *Wallace v. Columbia & G. R. Co.*, 34 So. Car. 62, 12 S. E. Rep. 815.—QUOTING *Tutt v. Port Royal & A. R. Co.*, 28 So. Car. 396, 5 S. E. Rep. 831. A company, after having constructed its roadbed, has the right to make such changes therein as experience may designate as proper, and this is a continuous right; but it cannot at pleasure make an improvement in its roadbed which will interfere with the flow of the waters of a stream without reference to the rights of others. *George v. Wabash Western R. Co.*, 40 Mo. App. 433.

4. — Illustrations.—A grant of a right of way to a railroad company, with the right "to change watercourses," does not authorize the company to divert streams from other lands upon the land of the grantor, to his injury. *St. Louis, I. M. & S. R. Co. v. Harris*, 26 Am. & Eng. R. Cas. 608, 47 Ark. 340, 1 S. W. Rep. 609. *Minor v. Buffalo & L. H. R. Co.*, 9 U. C. C. P. 280.

Defendants, a railway, by a deed from plaintiff, in consideration of £27, obtained 2,000 acres of plaintiff's land, *habendum* in the deed being to defendants, to their sole and only use forever, "to be used for the purpose of the railway company," said sum being in full compensation for the land, and the company so using it as aforesaid. On the land defendants built their railway in

such an unskilful manner as to cause the water to overflow the plaintiff's lands, doing injury to his crops. *Held*, that the compensation paid for the land and for using it for purposes of the railway cannot be considered as paid or received as a compensation for such an unskilful and improper construction thereof as would cause injury and loss to plaintiff. *Vanhorn v. Grand Trunk R. Co.*, 9 U. C. C. P. 264.—DISTINGUISHING *Knapp v. Great Western R. Co.*, 6 U. C. C. P. 187; *Patterson v. Great Western R. Co.*, 8 U. C. C. P. 89.

5. Company's liability substantially same as that of individuals.—The liability of a railroad company is substantially the same as that of an individual for torts or actionable injuries occasioned by its improper or defective construction, and for obstructions created by it to the natural flow of water, whereby adjacent land is injured in its cultivation. *Bourdier v. Morgan's L. & T. R. Co.*, 35 La. Ann. 947.

6. Obstruction of natural or artificial drain-way.—If by the construction of the road water be ponded upon the land, the owner may recover damages if the ponding be the result of the obstruction of a natural or artificial drain-way; otherwise if the ponding be the result of an alteration of the previous grade of the land, caused by the construction of the roadbed. *Raleigh & A. A. L. R. Co. v. Wicker*, 74 N. Car. 220.—REVIEWING *Walker v. Old Colony & N. R. Co.*, 103 Mass. 10.—APPLIED IN *Little Rock & Ft. S. R. Co. v. Chapman*, 39 Ark. 463. FOLLOWED IN *Durham & N. R. Co. v. Bullock Church*, 44 Am. & Eng. R. Cas. 151, 104 N. Car. 525, 10 S. E. Rep. 761. REVIEWED IN *Brown v. Carolina C. R. Co.*, 83 N. Car. 128.

7. Diverting flow of stream.—A charter authority to cross any stream in a manner not to impair its usefulness or value to the owner, does not diminish the liability of the company for so crossing a stream as to obstruct and divert it from its channel and flood the adjacent lands. *Brown v. Cayuga & S. R. Co.*, 12 N. Y. 486.—APPROVING *Fletcher v. Auburn & S. R. Co.*, 25 Wend. (N. Y.) 462. FOLLOWING *Lawrence v. Great Northern R. Co.*, 16 Q. B. 643.—APPLIED IN *Lefurgy v. New York & N. R. Co.*, 21 N.

* Right of landowners to damages from overflowing lands, diverting streams, etc., see note, 4 AM. ST. REP. 403.

Y. S. R. 113, 50 Hun 606, 3 N.Y. Supp. 302. APPROVED IN *Robinson v. New York & E. R. Co.*, 27 Barb. (N. Y.) 512. DISAPPROVED IN *Bellinger v. New York C. R. Co.*, 23 N. Y. 42. DISTINGUISHED IN *Slatten v. Des Moines Valley R. Co.*, 29 Iowa 148; *Wayland v. St. Louis, K. C. & N. R. Co.*, 11 Am. & Eng. R. Cas. 543, 75 Mo. 548; *O'Connor v. Fond du Lac, A. & P. R. Co.*, 52 Wis. 526. EXPLAINED IN *Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. Co.*, 51 N. Y. 573. QUOTED IN *McCleneghan v. Omaha & R. V. R. Co.*, 37 Am. & Eng. R. Cas. 245, 25 Neb. 523, 41 N. W. Rep. 350. RECONCILED IN *Corey v. Buffalo, C. & N. Y. R. Co.*, 23 Barb. 482.

When a company have rightfully and properly turned a stream of water, they are not obliged thereafter to observe the action of the water and so protect the banks, or take other timely measures, as to prevent the encroachment of it upon neighboring lands. *Norris v. Vermont C. R. Co.*, 28 Vt. 99.

8. Backing water.—Backing of water by a superficial structure so as to flow lands is a "taking," and entitles the owner to compensation. *Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall. (U. S.) 166.—APPROVED IN *Gulf, C. & S. F. R. Co. v. Eddins*, 60 Tex. 656; *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504. QUOTED IN *Stanton v. Norfolk & C. R. Co.*, 111 N. Car. 278.

9. Removing or excavating banks of stream.—A railroad company is liable for so excavating and cutting away the banks of a stream as to cause it to overflow and injure adjoining lands. *Robinson v. New York & E. R. Co.*, 27 Barb. (N. Y.) 512.

10. Relative rights of company and landowner under various statutes.—Under the laws of Minnesota a company obtaining land for railroad purposes has absolute control of it, and where the taking of the land will interfere with the improvement of the landowner's water power, he is entitled to damages; and a claim by the company that he may conduct the water along an embankment that it proposes to erect on the land taken will not defeat his right to damages. *Lake Superior & M. R. Co. v. Greve*, 17 Minn. 322 (Gil. 299), 4 Am. Ry. Rep. 173, 8 Am. Ry. Rep. 217.

Mo. Rev. St. 1889, § 2614, requires the con-

struction by railroads of ditches and drains along each side of the roadbed only for the purpose of connecting the same with ditches, drains, or watercourses, so as to afford sufficient outlet to drain and carry off the water; and where such matter is fairly submitted to the jury, with evidence to warrant such submission, the verdict of the jury is conclusive upon the appellate court. *Collier v. Chicago & A. R. Co.*, 48 Mo. App. 398.

Damages caused by diversion of water are not covered by the N. C. statute (code, §§ 1943 *et seq.*) providing for the acquirement of rights of way by railroad companies. *Ward v. Albemarle & R. R. Co.*, 112 N. Car. 168, 16 S. E. Rep. 921.

The obstruction of the flow of the water in the construction of a railway is contrary to Tex. Rev. St. art. 4171, and an action lies for damages for it. *Rosenthal v. Taylor, B. & H. R. Co.*, 79 Tex. 325, 15 S. W. Rep. 268.

A stream diverted into a new channel by the commissioners of the European and North American Railway, under 19 Vict. c. 17, became obstructed in consequence of the new channel filling up and overflowing plaintiff's land. *Held*: (1) that the commissioners were bound to keep the channel open, and were liable to action for the damage to plaintiff's land; (2) that the fact of the plaintiff having been paid by the commissioners land damages for the diversion of the stream was no bar to his recovering damages for their subsequent neglect to keep the channel open. *McLeod v. European & N. A. R. Co.*, 12 New Brun. 584.

That act of Canada which superseded the commissioners did not take away the right of action against them where the cause arose prior to the passing of the act. *McLeod v. European & N. A. R. Co.*, 12 New Brun. 584.—FOLLOWING *Bagnell v. London & N. W. R. Co.*, 7 H. & N. 423.

b. Bridges, Culverts, Embankments, etc.

11. Bridges.*—The ordinary care which a railroad company is bound to exercise in building bridges is that degree of care used by reasonably prudent and careful persons engaged in such work, and not such care as is ordinarily possessed and

* Liability of company for overflow by obstructing a stream by a bridge, see 44 AM & ENG. R. CAS. 490, *abstr.* See also BRIDGES, 22, 23.

used by persons in like employment. *So held*, in an action for flooding lands. *Culver v. Chicago, R. I. & P. R. Co.*, 38 Mo. App. 130.

Where a railroad bridge is so negligently constructed across a river as to form an unlawful obstruction, and become a nuisance by causing an overflow of the river, no right of action accrues to the landowner until he sustains an actual injury caused by such unlawful obstruction—as by an overflow of his land. *Omaha & R. V. R. Co. v. Standen*, 34 Am. & Eng. R. Cas. 179, 22 Neb. 343, 35 N. W. Rep. 183.

The purchasers of a railroad are not liable for damages done to an adjoining landowner by having his lands flooded by reason of a defect in the construction of a railroad bridge, where the purchasers have had no notice of the defect, and no request has been made to make changes therein. *Peoria & P. U. R. Co. v. Barton*, 38 Ill. App. 469.

12. Culverts.*—Where a company, by filling up a trestle under their road, and by making ditches, cattle-guards, and culverts, too small to carry off the water, overflows adjoining lands, and the owner thereof sustains damages by reason thereof, the company is liable to the owner for the amount of the damages actually sustained. *Mississippi C. R. Co. v. Caruth*, 51 Miss. 77. *Gulf, C. & S. F. R. Co. v. Helsley*, 20 Am. & Eng. R. Cas. 89, 62 Tex. 593. — FOLLOWED IN *Galveston, H. & S. A. R. Co. v. Tait*, 63 Tex. 223.

Where a company constructs its road across a basin and raises an embankment with a culvert or waterway, through which the water, collected on one side of the road from the adjacent highlands and from the overflow of a creek, passes to the other side and damages adjoining premises, the company is liable, and the liability of the company remains the same, so far as the overflow of the water from the creek contributes to the injury, whether the company diverted it from the creek by building an imperfect bridge or not. *McCormick v. Kansas City, St. J. & C. B. R. Co.*, 70 Mo. 359, 35 Am. Rep. 431. — APPROVING *Kauffman v. Griesemer*, 26 Pa. St. 415. QUOTING *Waffle v. New York C. R. Co.*, 58 Barb. (N.

Y.) 413. — EXPLAINED IN *Martin v. Benoist*, 20 Mo. App. 262. FOLLOWED IN *Shane v. Kansas City, St. J. & C. B. R. Co.*, 5 Am. & Eng. R. Cas. 64, 71 Mo. 237, 36 Am. Rep. 480. OVERRULED IN *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 20 Am. & Eng. R. Cas. 103, 83 Mo. 271, 53 Am. Rep. 581.

If, when a railway culvert and embankment are being constructed at the crossing of a stream, it is known that extraordinary inundations caused by that stream have occurred within the memory of man, their re-occurrence should be anticipated, and the construction work of the road should be so done as to make provision for the danger likely to result from such work should such an inundation again occur. *Gulf, C. & S. F. R. Co. v. Pomeroy*, 30 Am. & Eng. R. Cas. 200, 67 Tex. 498, 3 S. W. Rep. 722.

In the original construction of a railway, a slough was spanned by a trestle which permitted the passage through the right of way of all the water which came upon it. Subsequently a solid embankment was built, which took the place of the trestle and carried off the water into a neighboring river. The effect of the embankment was to render arable certain lands south of the track which before were flowed. Afterwards, owing to the increase in the amount of water by which the lands of adjoining proprietors were flowed, and the abutment of a bridge being in danger of becoming undermined, the company proposed to reopen the culvert through the embankment and allow the water to flow the land the other side of the track as before. Plaintiff then brought suit to restrain such action. *Held*, that the company had a right to do so; that its acts did not constitute an estoppel against it in favor of the proprietor of the land south of the track, and, consequently, it would not be restrained at the suit of said proprietor. *King v. Chicago, B. & Q. R. Co.*, 26 Am. & Eng. R. Cas. 600, 71 Iowa 696, 29 N. W. Rep. 406.

13. — flood-ways.—Although a railway company is not required by its act to make flood openings in its embankment constructed upon low lands lying near a river, and cannot be compellable by mandamus to make them, yet if proper caution to protect the lands lying on the other side of the embankment requires it to do so, the landowner may maintain an action for the flowing of his land owing to the company's failure to take this precaution. *Lawrence v.*

*Obligation of company as to culverts, see note, 14 AM. & ENG. R. CAS. 271.

Company must construct necessary culverts, see note, 20 AM. & ENG. R. CAS. 92.

Great Northern R. Co., 16 Q. B. 643, 6 *Railw. Cas.* 656, 15 *Jur.* 652, 20 *L. J. Q. B.* 293.

14. — sluice-ways.—If a company, by making imperfect sluices or other passages for streams over which they pass, injure, by overflow, the land of an adjoining proprietor, the company is bound for the damages sustained by the obstruction of the stream. *Mississippi C. R. Co. v. Mason*, 51 *Miss.* 234.

While companies have a right to construct their roads over streams, leaving sluice-ways for the passage of water, they must do so with all necessary care and skill, so as to save the adjacent properties from any injurious consequences which may arise on account of the necessary modification of the natural surface, so far as is reasonably practicable. *Drake v. New York, L. & W. R. Co.*, 75 *Hun* 422, 27 *N. Y. Supp.* 739, 57 *N. Y. S. R.* 345.

15. Dams.—Where a company maintains a dam on its right of way over a watercourse, which constitutes a nuisance in causing the water to overflow adjoining land, it is liable therefor, although the dam was originally erected by the county, under legislative authority. *Payne v. Kansas City, St. J. & C. B. R. Co.*, 112 *Mo.* 6, 20 *S. W. Rep.* 322.—REVIEWING *Eaton v. Boston, C. & M. R. Co.*, 51 *N. H.* 504.

16. Embankments.*—Where a company, in constructing its road over a natural watercourse, makes and maintains a solid embankment across such stream, with an insufficient culvert or opening to permit the free passage of water, or suffers such opening to be so constructed as in ordinary floods and freshets to throw the water back and inundate the lands above, it will be liable in damages to the landowner, in an action on the case. In such case, the payment of damages to the owner or to his grantor, either in a proceeding to condemn or in an action, will afford no bar to subsequent damages. *Ohio & M. R. Co. v. Wachter*, 34 *Am. & Eng. R. Cas.* 194, 123 *Ill.* 440, 15 *N. E. Rep.* 279; *affirming* 23 *Ill. App.* 415.—FOLLOWED IN *Ohio & M.*

* Liability of company for flooding lands by embankments, see note, 47 *AM. REP.* 296. See also 34 *AM. & ENG. R. CAS.* 156, *abstr.*; 52 *Id.* 715, *abstr.*; 58 *Id.* 662, *abstr.*

Liability for raising embankment so as to divert surface water, see 29 *AM. & ENG. R. CAS.* 525, *abstr.*; 58 *Id.* 639, *abstr.* See also *EMBANKMENTS*, 4.

R. Co. v. Singletary, 34 *Ill. App.* 425. QUOTED IN *Chicago & A. R. Co. v. Henneberry*, 42 *Ill. App.* 126; *Ohio & M. R. Co. v. Elliott*, 34 *Ill. App.* 589.—*Gulf, C. & S. F. R. Co. v. Jones*, 3 *Tex. App. (Civ. Cas.)* 39.—FOLLOWING *Gulf, C. & S. F. R. Co. v. Donahoo*, 59 *Tex.* 128; *Ft. Worth & D. C. R. Co. v. Scott*, 2 *Tex. App. (Civ. Cas.)* 137.

A purchaser from a company of a lot subject to overflow, caused by an embankment kept up by the railway company and existing at the time of the sale, might reasonably presume that the company had availed itself of competent engineering skill, and had so constructed its works as not to impede the natural flow of the water. *Sellers v. Texas C. R. Co.*, 48 *Am. & Eng. R. Cas.* 77, 81 *Tex.* 458, 17 *S. W. Rep.* 32.

A railroad corporation is not liable for damages to any person from the overflow of the water of a stream, caused by the necessary and proper elevation of its roadbed, not in the channel of the stream, but upon its own land. *Moyer v. New York C. & H. R. R. Co.*, 8 *Am. & Eng. R. Cas.* 531, 88 *N. Y.* 351; *reversing* 24 *Hun* 138.—FOLLOWING *Bellinger v. New York C. R. Co.*, 23 *N. Y.* 47.—EXPLAINED IN *O'Connell v. East Tenn., V. & G. R. Co.*, 87 *Ga.* 246.

17. Levees.—The grant of a right of way across one's lands to a company is no license to it to overflow the grantor's lands by the unskillful construction of a levee on the right of way. *St. Louis, I. M. & S. R. Co. v. Morris*, 5 *Am. & Eng. R. Cas.* 48, 35 *Ark.* 622.

A company which, without authority, has destroyed a levee and built another at a different place, which soon after gives way, is liable to the landowners for the consequent damages. *Hotard v. Texas & P. R. Co.*, 36 *La. Ann.* 450.

18. Trestles.—A company has not the right to fill up trestle work away from the main channel of a river, if by so doing the overflow of water will be increased, to the damage of landowners in times of freshet. *Noe v. Chicago, B. & Q. R. Co.*, 76 *Iowa* 360, 41 *N. W. Rep.* 42.—FOLLOWING *Sullens v. Chicago, R. I. & P. R. Co.*, 74 *Iowa* 659; *Moore v. Chicago, B. & Q. R. Co.*, 75 *Iowa* 263.

19. Walls.—Where adjoining proprietors join in building a wall along a river to prevent the overflow of low land, and each proprietor fronting on the river is bound to keep up the portion of the wall on his own

land, a railroad company subsequently purchasing the land along the river is bound to maintain the wall, and is liable for lands flooded, for allowing a portion of the wall to become defective. *Savannah, F. & W. R. Co. v. Lavoton*, 75 Ga. 192.

c. Floods and Freshets.

20. Generally.*—The use of such care as a prudent man would exercise in reference to his own affairs requires that a railway company, in the construction of its road, should take into account the probabilities of overflows; and in estimating these, it must consider what effect the size and length of the river near which it is building may have in producing them, as well as the number and frequency of former freshets. The company may not be required to provide against an unprecedented rise in the river, but that cannot be called unprecedented which has for more than a quarter of a century occurred every three, four, or five years; nor can that be called extraordinary which is but the natural result of the length and size of the river, taken in connection with a fall of water liable to occur at intervals, though separated from each other by several years. *Gulf, C. & S. F. R. Co. v. Holliday*, 65 Tex. 512.

21. Company, when liable.—If, in the case of an obstruction of a river or other watercourse, such as a bridge, it appears that the injury resulting therefrom to an adjoining owner arose from causes which might have been foreseen, such as ordinary periodical freshets, the whose superstructure is the immediate cause of the mischief is liable for the damage. On the other hand, if the injury is occasioned by an act of Providence, which could not have been anticipated, no person can be liable. *Ohio & M. R. Co. v. Thillman*, 143 Ill. 127, 32 N. E. R. 529.

Although a rainfall may be more than ordinary, yet if it be such as has occasionally occurred, and, it may be, it is to be foreseen that at irregular intervals it may occur again, it is the duty of those changing or restraining the flow of water to provide against the consequences that will result from it. *Ohio & M. R. Co. v. Ramey*, 139 Ill. 9, 28 N. E. Rep. 1087; *affirming* 39 Ill. App. 409.

If a company erects a solid embankment over bottom lands and across a branch of a natural watercourse, without providing proper outlets for the water, it cannot avoid liability for an injury caused by flooding the adjacent lands on the ground that it was an extraordinary flood. *Ohio & M. R. Co. v. Nuetzel*, 43 Ill. App. 108.

By Texas Rev. St. art. 4171, railway companies are required; in constructing their roads, to take into consideration the natural lay of the land, and to construct culverts and sluices necessary for its proper drainage. In this respect they must use proper care, so as not to obstruct the waters of ordinary floods to the damage of adjacent lands. *Gulf, C. & S. F. R. Co. v. Holliday*, 65 Tex. 512.—DISTINGUISHED IN *Trinity & S. R. Co. v. Meadows*, 39 Am. & Eng. R. Cas. 29, 73 Tex. 32, 3 L. R. A. 565, 11 S. W. Rep. 145.

22. Company not responsible for results of extraordinary floods.*—Where a company has exercised ordinary care in the construction of its road, including its bridges and culverts, and is not guilty of negligence thereafter, it is not liable for damage to an adjacent landowner caused by an extraordinary flood choking up or washing out the channel of a stream. *Illinois C. R. Co. v. Bethel*, 11 Ill. App. 17. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 58 Am. & Eng. R. Cas. 642, 57 Fed. Rep. 441.

A railroad company, in constructing its road and works, is bound to bring to their execution the engineering knowledge and skill ordinarily known and practised in such works. There is no liability on a company for not constructing a culvert so as to pass extraordinary floods. *Baltimore & O. R. Co. v. Sulphur Spring I. S. Dist.*, 2 Am. & Eng. R. Cas. 166, 96 Pa. St. 65, 42 Am. Rep. 529.

It is not culpable negligence on the part of a railroad company in the construction of its roadbed, track, and culverts, if it has failed to provide against such extraordinary and unprecedented storms, flood, or other inevitable casualties caused by the hidden forces of nature, unknown to common experience, and which could not have been reasonably anticipated by that degree of

* Washing away embankments by extraordinary floods, see note, 12 AM. & ENG. R. CAS. 196.

engineering skill and experience required in the prudent construction of such railways. *Libby v. Maine C. R. Co.*, 85 Me. 34, 26 Atl. Rep. 943. *Gulf, C. & S. F. R. Co. v. Pool*, 34 Am. & Eng. R. Cas. 187, 70 Tex. 713, 8 S.W. Rep. 535.—FOLLOWED IN *Gulf, C. & S. F. R. Co. v. Preston*, 74 Tex. 181, 11 S.W. Rep. 1108.—*Sabine & E. T. R. Co. v. Brouard*, 34 Am. & Eng. R. Cas. 199, 69 Tex. 617, 7 S.W. Rep. 374.

Where the evidence shows that the rains which caused land to be flooded were those commonly coming in very rainy seasons, and therefore they might be expected, it is the duty of the company to provide against them; and they could not be termed extraordinary and unexpected floods, such as to be called the act of Providence, and to relieve the company from liability. *Kankakee & S. R. Co. v. Horan*, 23 Ill. App. 259.

23. — Illustrations.—If a properly constructed railroad bridge over a stream be washed out by an extraordinary flood, leaving debris upon the adjacent lands, the company is not bound to remove such debris; and if such debris divert the stream in a subsequent freshet, whether extraordinary or only ordinary, the company is not liable. *Illinois C. R. Co. v. Bethel*, 11 Ill. App. 17.—DISTINGUISHED IN *Illinois C. R. Co. v. Heisner*, 45 Ill. App. 143.

Where the act of God, as an unprecedented storm, is the cause of a loss, it is not enough to show that the defendant's negligence was also an active agent in bringing about the loss, and that the loss would not have occurred without it. So where a company is charged with flooding lands, and it appears that it was due to an unprecedented storm and rainfall, it is error to instruct the jury to find for the plaintiff, if they believe that the defendant's negligence contributed to the loss by leaving the stumps of piling in a stream where a bridge had been built, which caught drift and threw the water out of the channel. *Coleman v. Kansas City, St. J. & C. B. R. Co.*, 36 Mo. App. 476.

Where a railroad company buys a state canal, it has a right to bring the canal to the highest degree of usefulness and prosperity, and is not liable for consequential damages during an unusual flood, by reason of its having raised a dam across a river. *Freeland v. Pennsylvania R. Co.*, 66 Pa. St. 91.

Over thirty years prior to the injury com-

plained of, a company constructed an embankment with a substantial stone culvert across a stream, dry in rainless weather, but which, in times of heavy rains, drained several square miles of land and discharged large quantities of water. Two years before the injury in question there was a heavy rainfall which, not finding sufficient outlet through the culvert, backed up and injured property of the interveners. At the time of the injury in question the back water again damaged property of the interveners, broke down the embankment, and carried away a large quantity of lumber. The company which had constructed the embankment was foreclosed, and its property subsequently passed into the hands of defendant company, which had operated the road for about eleven years prior to the injury complained of. On several occasions since the building of the embankment and culvert, the capacity of the culvert was overtaxed and the water backed up, but no serious damage was done, with the exception of that already stated. The floods which produced the injury of two years prior followed in the path of a cyclone, and the flood which caused the damage for which recovery was sought resulted from unusual, extraordinary, and unprecedented rainfalls. *Held*, that defendant was not liable because of the extraordinary nature of the causes of the damage, which were such that they could not, in the exercise of reasonable diligence and foresight, be guarded against. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 58 Am. & Eng. R. Cas. 642, 57 Fed. Rep. 441.

2. Flooding Lands with Surface Waters.

a. In General.

24. Rights of the company.*—An owner may improve his land for the purpose for which such land is ordinarily used, and may do what is necessary for that purpose. He may build upon it or raise or lower its surface, even though the effect may be to prevent surface water which before flowed upon it from coming upon it, or to draw from adjoining land surface water which would otherwise remain there, or to shed surface

* The law of surface waters, see note, 20 AM. & ENG. R. CAS. 114.

Duty of company as to surface waters, see note, 14 AM. & ENG. R. CAS. 288.

Damage by surface water under peculiar circumstances, see note, 17 AM. & ENG. R. CAS. 71.

ected an em-
stone culvert
weather, but
drained sev-
discharged
two years be-
there was a
ing sufficient
cked up and
rveners. At
on the back
of the inter-
nkment, and
y of lumber.
structed the
nd its prop-
the hands of
ad operated
prior to the
several occa-
embankment
e culvert was
d up, but no
h the excep-
The floods
f two years
yclone, and
damage for
resulted from
precedented
nt was not
inary nature
which were
the exercise
foresight, be
st Co. v. Wa-
Am. & Eng.

face Waters.

pany.*—An
the purpose
ily used, and
hat purpose.
or lower its
t may be to
before flowed
to draw from
which would
shed surface

note, 20 Am.

e waters, see
r peculiar cir-
G. R. Cas. 71.

water over land on which it would not otherwise go; and it makes no difference that the water shed over other land passed to it in a stream instead of in a diffused manner. *Brown v. Winona & S. W. R. Co.*, 53 Minn. 259, 55 N. W. Rep. 123.—QUOTING AND FOLLOWING *O'Brien v. St. Paul*, 25 Minn. 331. REVIEWING *Rowe v. St. Paul, M. & M. R. Co.*, 41 Minn. 384, 43 N. W. Rep. 76.

The right of way to the land upon which a road is constructed, together with a hundred feet on each side of the centre of said road, endows it with no rights beyond those expressed. All lands are of necessity burdened with the servitude of receiving and discharging all water which flows down to them from lands on a higher level. *Carriger v. East Tenn., V. & G. R. Co.*, 7 Lea (Tenn.) 388.

The owner of land, for the purpose of securing or protecting its reasonable use and enjoyment, may obstruct or divert surface waters thereon, and which have come down from higher levels, by embankments, ditches, drains, culverts, and other constructions, and in doing so may lawfully hinder the natural flow of such waters and turn the same back upon or off onto and over the lands of other owners, without liability for injuries ensuing from such obstruction or diversion. *Johnson v. Chicago, St. P., M. & O. R. Co.*, 80 Wis. 641, 50 N. W. Rep. 771.—QUOTING *Lessard v. Stram*, 62 Wis. 112.

The right of drainage of surface water does not exist *jure natura*, and the principles applicable to streams of running water do not extend to the flow of surface water. *Crewson v. Grand Trunk R. Co.*, 27 U. C. Q. B. 68.

25 — easement by prescription.*

—Twenty, and not seven, years is the period of prescription for an easement, such as a right of way or servitude of overflow. *Louisville & N. R. Co. v. Hays*, 14 Am. & Eng. R. Cas. 284, 11 Lea (Tenn.) 382, 47 Am. Rep. 291.—DISTINGUISHED IN *Louisville & N. R. Co. v. Mossman*, 90 Tenn. 157.

To constitute a prescriptive right in favor of a company to overflow the lands of another, by maintaining an insufficient and negligently constructed bridge upon its right

of way, it is not enough to show that the bridge has been maintained in the same manner for twenty years, but it must be shown that there has been a lapse of twenty years since such an invasion of the adjoining proprietor's rights as resulted in the accruing to him of a cause of action therefor. *Sherlock v. Louisville, N. A. & C. R. Co.*, 115 Ind. 22, 14 West. Rep. 843, 17 N. E. Rep. 171.

26. Company's duty to build culverts, etc.—Texas Rev. St. art. 4171, regulating the manner in which a company should construct its roadbed, so far as the necessary drainage to land is concerned, was intended to furnish a simple rule to adjust the rights of persons whose property might be damaged by water not confined in watercourses, by reason of the construction of the railroad, and to compel railway companies, by constructing the necessary sluices and culverts in accordance with the natural lay of the land, to prevent any such damage from arising. *Gulf, C. & S. F. R. Co. v. Helmsley*, 20 Am. & Eng. R. Cas. 89, 62 Tex. 593.

Where a company fails to construct proper culverts to carry off water, and causes an accumulation of surface water on plaintiff's lands for more than a year, which causes malaria and other sickness, he is entitled to recover for the sickness of his family and his expenses incurred thereby. *San Antonio & A. R. Co. v. Gwynn*, 4 Tex. App. (Civ. Cas.) 338, 15 S. W. Rep. 509.

27. Company's duty to dig ditches.

—There is no statute in Missouri, nor principle of the common law, that requires a railroad company to open ditches merely for the purpose of draining the land of an adjoining proprietor. *Field v. Chicago, R. I. & P. R. Co.*, 76 Mo. 614.

A complaint in an action for flooding land, which merely charges that the company negligently and carelessly failed to make and keep open proper ditches for the purpose of leading the water off of plaintiff's land, without showing any legal obligation on the company to maintain ditches, is fatally defective. Where the action is grounded on a breach of duty, the facts out of which the duty arises must be pleaded. *Field v. Chicago, R. I. & P. R. Co.*, 76 Mo. 614.

28. Company's duty with respect to its drains and ditches.—Where plaintiff's land was overflowed by a company's failure to keep open a ditch under an

*Acquisition of right to flood lands by prescription, see note, 48 Am. & Eng. R. Cas. 80. See also *post*, § 51.

embankment built by the company formerly owning the road, a verdict in his favor will not be disturbed. *Willitts v. Chicago, B. & K. C. R. Co.*, 88 Iowa 281, 55 N.W. Rep. 313.

Where a railway company maintains a channel for carrying off water, it is responsible for damage to adjoining landowners by reason of the banks giving way after an unusual rainfall, although this was due to the default of a person who was bound to keep the outlet of the channel of certain dimensions. *Harrison v. Great Northern R. Co.*, 10 Jur. N. S. 992, 33 L. J. Ex. 266, 12 W. R. 1081, 10 L. T. 621, 3 H. & C. 231.

A company, by failing to keep open a ditch which ran alongside of an embankment constituting a part of its roadbed, accumulated the surface water in such quantities as to overflow adjoining lands, the owner of which made constant complaint, but delayed suit until more than seven years after the commencement of this wrong. *Held*, that each overflow was a distinct trespass, which being committed without any claim of right by the company, and without the consent of the owner of the overflowed land, could not establish an easement by prescription or limitation. *Louisville & N. R. Co. v. Hays*, 14 Am. & Eng. R. Cas. 284, 11 Lea (Tenn.) 382, 47 Am. Rep. 291.

29. Liability of the company.—

Where a company condemns a right of way, everything necessary and incident to the construction and operation of the road must be intended to have passed as against the owner of the land; and the right to cut such ditches on the right of way as will protect the roadbed against accumulating surface water is a necessary incident, and the company is not liable, though it obstruct the drainage of the adjacent lands. *Bell v. Norfolk Southern R. Co.*, 36 Am. & Eng. R. Cas. 651, 37 Am. & Eng. R. Cas. 270, 101 N. Car. 21, 7 S. E. Rep. 467.

30. — in the absence of negligence in the construction and maintenance of its road.—A railroad, in the absence of negligence or unskillfulness in the construction of its roadbed, will not be liable to a landowner for injury from the overflow of surface water, occasioned by the obstruction of the roadbed. *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 20 Am. & Eng. R. Cas. 103, 83 Mo. 271, 53 Am. Rep. 581.—**OVERRULING** *McCormick v. Kansas City,*

St. J. & C. B. R. Co., 70 Mo. 359; *Shane v. Kansas City, St. J. & C. B. R. Co.*, 71 Mo. 237. **QUOTING** *McCormick v. Kansas City, St. J. & C. B. R. Co.*, 57 Mo. 433; *Hosher v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 329; *Jones v. Hannovan*, 55 Mo. 462; *Clark v. Hannibal & St. J. R. Co.*, 36 Mo. 224; *Benson v. Chicago & A. R. Co.*, 78 Mo. 512. **REVIEWING** *Imler v. Springfield*, 55 Mo. 119.—*Hosher v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 329, 9 Am. Ry. Rep. 230.—**QUOTED IN** *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 20 Am. & Eng. R. Cas. 103, 83 Mo. 271, 53 Am. Rep. 581.—*Hannaher v. St. Paul, M. & M. R. Co.*, 5 Dak. 1, 37 N.W. Rep. 717.—**REVIEWING** *Hogenson v. St. Paul, M. & M. R. Co.*, 31 Minn. 224, 17 N.W. Rep. 374.

31. — where its road was negligently constructed or maintained.—

Such damages to adjoining lands as naturally occur from the drainage of surface water, where the road is properly constructed and used, are presumed to have been included in the damages paid for the right of way, and exempt the company from further liability; but it is otherwise where the injuries result from the tort or negligence of the company in failing to properly construct or maintain its roadbed. *McCormick v. Kansas City, St. J. & C. B. R. Co.*, 57 Mo. 433, 9 Am. Ry. Rep. 133.—**QUOTED IN** *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 20 Am. & Eng. R. Cas. 103, 83 Mo. 271, 53 Am. Rep. 581.

32. Tide waters.—The lands of the plaintiffs were protected from the tide by the structure constituting the roadway of the Boonton branch railroad. *Held*, that the partial removal of such structure, thereby letting in the tide on the plaintiffs' property, was not actionable, even though such act was done by a trespasser. *Koch v. Delaware, L. & W. R. Co.*, 53 N. J. L. 256, 21 Atl. Rep. 284.

An act of the legislature forbidding the cutting through such roadbed is void; the legislature cannot circumscribe the right of the landowner in the legal use of its own property. *Koch v. Delaware, L. & W. R. Co.*, 53 N. J. L. 256, 21 Atl. Rep. 284.

b. Obstructing the Flow of, and Accumulating Surface Waters.

33. Company when liable, generally.—A railroad has no right to obstruct the natural flow of the surface water

and thereby force it in an increased quantity upon the lands of another; and if it does so, it is liable for any injury that the owner may sustain. *Toledo, W. & W. R. Co. v. Morrison*, 71 Ill. 616.

A company has no right, in the use of its right of way, to injure the lands of upper proprietors by flooding them with surface water which had been used to pass over the right of way, when, by reasonable care and expense, it might, consistently with the enjoyment of the right of way, leave a free passage for the water. *Little Rock & Ft. S. R. Co. v. Chapman*, 17 Am. & Eng. R. Cas. 51, 39 Ark. 463, 43 Am. Rep. 280.—APPLYING *Raleigh & A. A. L. R. Co. v. Wick-er*, 74 N. Car. 220. REVIEWING *Bassett v. Salisbury Mfg. Co.*, 28 N. H. 438, 3 Am. Law Reg. (N. S.) 223; *Swett v. Cutts*, 50 N. H. 439, 11 Am. Law Reg. (N. S.) 11; *Gill-ham v. Madison County R. Co.*, 49 Ill. 484; *Bloomington v. Brokaw*, 77 Ill. 194.

A company is liable for injuries to adjoining land occasioned by closing ditches and obstructing drains, whereby surface water is impeded or obstructed in its passage. *Bourdier v. Morgan's L. & T. R. Co.*, 35 La. Ann. 947.

A company has no right to concentrate into one stream the water coming upon its own land and discharge it upon the adjoining lands. Even if it would naturally flow in that direction the company is liable for increasing the injury by concentrating the water. *McCormick v. Kansas City, St. J. & C. B. R. Co.*, 70 Mo. 359, 35 Am. Rep. 431.

A company may, as a question of prudence and care, as well be required to have regard to the prevention of damage to a landowner, by the accumulation of surface water merely, as by a running stream, when the geographical formation and surrounding circumstances are such as to show that such precautions are necessary; and ordinarily, what is a reasonable performance of their duty in this respect is a question of fact and not of law. *Waterman v. Connecticut & P. R. R. Co.*, 30 Vt. 610.

34. — and when not.—As a general rule the obstruction of the flow of mere surface water from land by the construction of a railroad does not constitute a cause of action in favor of the landowner. *Han-lin v. Chicago & N. W. R. Co.*, 20 Am. & Eng. R. Cas. 70, 61 Wis. 515, 21 N. W. Rep. 623.—DISTINGUISHING *Waterman v.*

Connecticut & P. R. R. Co., 30 Vt. 610; *O'Connor v. Fond du Lac, A. & P. R. Co.*, 52 Wis. 526.—*Morrison v. Bucksport & B. R. Co.*, 67 Me. 353. *Collier v. Chicago & A. R. Co.*, 48 Mo. App. 398. *Wagner v. Long Island R. Co.*, 5 T. & C. (N. Y.) 163, 2 Hun 633. *Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. Co.*, 5 T. & C. (N. Y.) 651, 3 Hun 523.

It is only for interfering with and obstructing a defined watercourse, whereby injury is occasioned to another, that the defendant can be held liable. *Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. Co.*, 3 Hun (N. Y.) 523, 5 T. & C. 651.

Under 43 Vict. c. 8, confirming the agreement of sale by the Grand Trunk R. Co. to the crown of the purchase of the Riviere du Loup branch of their railway, the crown cannot be held liable for damages caused from the accumulation of surface water to land crossed by the railway since 1879, unless it is caused by acts or omissions of the crown's servants. *Morin v. Queen*, 20 Can. Sup. Ct. 515; affirming 2 Can. Exch. 396.

35. Rule where there was no natural channel.—A company is not liable in damages for obstructing the flow of surface water from its natural course by the construction of an embankment, when there is no channel or watercourse containing living or running water obstructed. *Kansas City & E. R. Co. v. Riley*, 20 Am. & Eng. R. Cas. 116, 33 Kan. 374, 6 Pac. Rep. 581.—LIMITING *Palmer v. Waddell*, 22 Kan. 352. QUOTING *Livingston v. McDonald*, 21 Iowa 160.

Even though it appears that the company might have constructed culverts, so as to carry off the water. *Atchison, T. & S. F. R. Co. v. Hammer*, 22 Kan. 763. *Nichol v. Canada Southern R. Co.*, 40 U. C. Q. B. 583.—REVIEWING *McGillivray v. Great Western R. Co.*, 25 U. C. Q. B. 69.

The injury done by such embankment in causing the water to overflow the land of the adjoining proprietors must be considered as the natural consequence of what the corporation had acquired the lawful right to do by a condemnation of the land and the assessment of the damages therefor, and such damages must be taken to have been included in the compensation assessed. *Clark v. Hannibal & St. J. R. Co.*, 36 Mo. 202.—FOLLOWED IN *Jones v. St. Louis, I. M. & S. R. Co.*, 84 Mo. 151. QUOTED IN *Abbott v. Kansas City, St. J. & C. B. R. Co.*,

20 Am. & Eng. R. Cas. 103, 83 Mo. 271, 53 Am. Rep. 581.

36. Accumulation by drainage.—

The natural drainage caused a lake of three acres to form on plaintiff's land, but a railroad was subsequently built which diverted water from its natural course, so as to increase the lake thirty acres. *Held*, that the company was liable. *Galveston, H. & S. A. R. Co. v. Tail*, 63 Tex. 22.

37. Obstruction of flow and accumulation by dams and embankments.—All lands are of necessity burdened with the servitude of receiving and discharging all waters which flow down to them from lands on a higher level; the owner of the lower land is liable when he, without grant or prescription, by artificial means dams up the water and causes it to overflow the higher lands, and the owner of the higher lands, when he collects the water and pours it down in a concentrated form or unnatural quantities upon the lower lands. This rule embraces rain and surface water as well as running streams. *Louisville & N. R. Co. v. Hays*, 14 Am. & Eng. R. Cas. 284, 11 Lea (Tenn.) 382, 47 Am. Rep. 291.—*QUOTING Colcough v. Nashville & N. W. R. Co.*, 2 Head (Tenn.) 173.

A company was sued for building its road so as to obstruct the flow of large quantities of water which collected in winter and passed off in a ditch along the side of a highway. *Held*, that this could not be said to be a watercourse, and therefore the company was not liable. *Wagner v. Long Island R. Co.*, 5 T. & C. (N. Y.) 163, 2 Hun 633. *Hill v. Cincinnati, W. & M. R. Co.*, 29 Am. & Eng. R. Cas. 502, 109 Ind. 511, 10 N. E. Rep. 410.

Where the gravamen of plaintiff's action was the alleged negligent, improper, and careless construction of an embankment, from which resulted the overflow of plaintiff's land, it is proper to presume, in the absence of any proof on the subject, that said embankment was, for railway purposes, properly constructed. *Morrissey v. Chicago, B. & Q. R. Co.*, 58 Am. & Eng. R. Cas. 622, 38 Neb. 406, 56 N. W. Rep. 946.

38. — by filling up ditches, etc.—

Where a company builds an embankment so as to obstruct surface water, and then constructs a ditch so as to carry off the surface water, it is liable if it allows the ditch to become filled up, which throws the water

onto the adjoining lands. *Mitchell v. New York, L. E. & W. R. Co.*, 36 Hun (N. Y.) 177.

The fact that a company, in constructing its roadbed, has filled up an artificial ditch on the land of a third person, by which surface water was conducted from the plaintiff's premises to a river, and has thus turned back the water upon said premises, is no ground of action. *O'Connor v. Fond du Lac, A. & P. R. Co.*, 5 Am. & Eng. R. Cas. 82, 52 Wis. 526, 9 N. W. Rep. 287, 38 Am. Rep. 753.—*DISTINGUISHING Young v. Chicago & N. W. R. Co.*, 28 Wis. 171; *Lyon v. Green Bay & M. R. Co.*, 42 Wis. 538; *Brown v. Cayuga & S. R. Co.*, 12 N. Y. 486; *Hatch v. Vermont C. R. Co.*, 25 Vt. 49; *Lawrence v. Great Northern R. Co.*, 16 Q. B. 643, 71 Eng. C. L. 643; *Hamden v. New Haven & N. Co.*, 27 Conn. 158; *Johnson v. Atlantic & St. L. R. Co.*, 35 N. H. 569. *QUOTING Waterman v. Connecticut & P. R. R. Co.*, 30 Vt. 610.—*DISTINGUISHED IN Hanlin v. Chicago & N. W. R. Co.*, 20 Am. & Eng. R. Cas. 70, 61 Wis. 515.

39. — by deposits of stone and debris.—Where a strip of ground in a suburban village lies opposite to the premises of A., from which premises, without artificial means, the water naturally flows over said strip and over a railroad track laid along the same, and the company owning said strip had been accustomed to receive stone for shipment on its cars, which stone was first deposited on said strip, between said track and the premises of A., and the debris from said stone had gradually formed an embankment, which caused the surface water coming from the land of A. to be turned back thereon, to the damage of A.—*held*, that A. could maintain an action against the company for a nuisance, and recover for the damage so sustained. *Cincinnati, H. & D. R. Co. v. Ahr*, 2 Cin. Super. Ct. 504.

c. Diverting from Ordinary Course; Discharging upon Premises of Another.

40. Company liable for diversion, generally.*—Where the roadbed of a railroad diverts water, either in streams having channels and banks, or mere surface water, and causes it in undue quantities to overflow the land of another, the company

* Diverting surface water. Liability for, see note, 34 AM. & ENG. R. CAS. 149.

is liable in damages therefor. *Illinois C. R. Co. v. Miller*, 68 *Miss.* 760, 10 *So. Rep.* 61. *Ft. Worth & D. C. R. Co. v. Scott*, 2 *Tex. App. (Civ. Cas.)* 137.

If a company undertakes to change the flowing of surface water on land, it must see that such change does not operate to the injury of the landowner. *Gulf, C. & S. F. R. Co. v. Helsley*, 20 *Am. & Eng. R. Cas.* 89, 62 *Tex.* 593.

Where the nature of the land is such that the building of a railroad makes embankments necessary, which will interfere with the natural flow of surface water, but where necessary drains can easily be constructed on the right of way, it will not be presumed that the company paid for the right to obstruct the surface water in obtaining the right of way; and it will be liable to a landowner who is damaged by reason of its failing to provide necessary drainage. *Drake v. Chicago, R. I. & P. R. Co.*, 17 *Am. & Eng. R. Cas.* 45, 63 *Iowa* 302, 50 *Am. Rep.* 746, 19 *N. W. Rep.* 215.—APPLIED IN *Ohio & M. R. Co. v. Thillman*, 143 *Ill.* 127.

While a company has a right to drain surface water from its roadbed, so as to protect the same for continued and profitable use, the work must be so done as to occasion no unnecessary inconvenience or damage to the adjoining proprietor. And the latter may recover for injuries produced by mere negligence without proving malicious intent. *McCormick v. Kansas City, St. J. & C. B. R. Co.*, 57 *Mo.* 433, 9 *Am. Ky. Rep.* 133.—DISAPPROVED IN *O'Connell v. East Tenn., V. & G. R. Co.*, 87 *Ga.* 246. QUOTED IN *Jones v. Wabash, St. L. & P. R. Co.*, 18 *Mo. App.* 251; *Martin v. Benoist*, 20 *Mo. App.* 262. REVIEWED IN *Rychlicki v. St. Louis*, 98 *Mo.* 497.

Surface water is a common enemy, and if a railroad, in obstructing the flow of water from the land of another, changes its direction, as in general it must, and it then runs off upon the land of a third person, where before it would not run, causing damage, no action will lie therefor, and the maxim, *Sic utere tuo ut alienum non laedas*, does not apply. *Collier v. Chicago & A. R. Co.*, 48 *Mo. App.* 398.

41. Diverting by means of ditches, etc.*—If a company diverts surface water

from its natural channel to a ditch along its right of way and throws it on the lands of another, it is liable. *Chicago & A. R. Co. v. Connors*, 25 *Ill. App.* 561.—QUOTING *Peck v. Herrington*, 109 *Ill.* 611. REVIEWING *Jacksonville, N. W. & S. E. R. Co. v. Cox*, 91 *Ill.* 500.—*Chicago & A. R. Co. v. Riley*, 25 *Ill. App.* 569. *Illinois C. R. Co. v. Heisner*, 45 *Ill. App.* 143.—DISTINGUISHING *Illinois C. R. Co. v. Bethel*, 11 *Ill. App.* 17.

Nor does the fact that the owner, across whose land the roadbed was constructed without her consent, while the work was progressing, failed to notify the company that she would claim damages, restrict her remedy to a recovery of the value of the land appropriated as a right of way. *Gulf, C. & S. F. R. Co. v. Donahoo*, 59 *Tex.* 128.—QUOTED IN *Springfield & M. R. Co. v. Henry*, 44 *Ark.* 360.

Where a company in constructing its road crossed the "lead ditch" of an adjacent tract, and in consequence of the erection of its necessary embankments and cutting of side ditches the lead ditch was unable to carry away the excess of surface water, which overflowed the adjacent lands, and it appeared that the land so used had been properly condemned and damages paid to the owner—*held*, that the company was not liable for the damages thus produced. *Bell v. Norfolk Southern R. Co.*, 36 *Am. & Eng. R. Cas.* 651, 37 *Am. & Eng. R. Cas.* 270, 101 *N. Car.* 21, 7 *S. E. Rep.* 467.—QUOTING *Willey v. Norfolk Southern R. Co.*, 98 *N. Car.* 263.

42. Diverting by changing outlet.—If a company closes or alters the accustomed outlet or drain for carrying off surface waters, the substituted or altered outlet must be of sufficient capacity to provide for ordinary rainfalls, etc., but need not be constructed in view of infrequent and extraordinary occurrences which cannot be foreseen and provided against. *Philadelphia, W. & B. R. Co. v. Davis*, 34 *Am. & Eng. R. Cas.* 143, 68 *Md.* 281, 11 *Atl. Rep.* 822, 10 *Cent. Rep.* 551.

Where a company undertakes to alter the established outlet through which the surface water was carried away, it is incumbent on it to have the work done in a careful and skilful manner; and if it is done carelessly and negligently, so that as a consequence injury to neighboring property ensues, an action for damages is maintainable by the owner. *Philadelphia, W. & B. R.*

* Diversion of surface water by ditches, see notes, 23 *AM. & ENG. R. CAS.* 85; 14 *Id.* 292; 29 *Id.* 530.

Co. v. Davis, 34 *Am. & Eng. R. Cas.* 143, 68 *Md.* 281, 11 *Atl. Rep.* 822, 10 *Cent. Rep.* 551.

43. Turning surface water into accustomed channel.—A street railway company is not liable to adjoining landowners for turning surface water into the channel where it is accustomed to flow, where the amount of water thrown into the channel is not thereby increased. *Whitney v. Willamette Bridge R. Co.*, 23 *Oreg.* 188, 31 *Pac. A.* 472.

44. Turning surface water into watercourses.—A company is responsible for damages suffered by a party in consequence of the cutting of certain line ditches by the company in the building of their road, which line ditches served to carry away the waters, the surplus waters being thereby made to flow into a watercourse upon the land of the plaintiff, which land, in consequence of the insufficiency of the watercourse to carry off such surplus waters, was inundated. In such a case the rule of law which says "that he who, in the construction of any work upon his property, uses his right without violating any law, or usage, or title, or contrary possession, is not held for the damage resulting therefrom," is not applicable. *Grand Trunk R. Co. v. Miville*, 14 *Low. Can.* 469.

45. Right to discharge surface water upon lands of another.—No action lies for the turning of mere surface water from one's own land upon the land of another. *Greeley v. Maine C. R. Co.*, 53 *Me.* 200.—DISTINGUISHED IN *Eaton v. Boston, C. & M. R. Co.*, 51 *N. H.* 504.

The right to cut ditches on a right of way which has been condemned, such as will protect the roadbed against the accumulating surface water, is a necessary incident to the construction and operation of the road, and will be deemed to have been included in the damages paid for the right of way. *Bell v. Norfolk Southern R. Co.*, 36 *Am. & Eng. R. Cas.* 651, 37 *Am. & Eng. R. Cas.* 270, 101 *N. Car.* 21, 7 *S. E. Rep.* 467.

46. Liability for discharging surface water upon lands of another.—A company has no right to cut trenches through its embankment and permit the water which has flowed on one side thereof to flow through and flood the land on the other side. *Whalley v. Lancashire & Y. R. Co.*, 17 *Am. & Eng. R. Cas.* 66, *L. R.* 13 *Q. B. D.* 131, 53 *L. J. Q. B. D.* 285, 50 *L. T.* 472, 32 *W. R.* 711, 48 *J. P.* 500.—QUOTING *Hurd-*

man v. Northeastern R. Co., 26 *W. R.* 489, 3 *C. P. D.* 168.—*Hogenson v. St. Paul, M. & M. R. Co.*, 14 *Am. & Eng. R. Cas.* 291, 31 *Minn.* 224, 17 *N. W. Rep.* 374.—FOLLOWED IN *Olson v. St. Paul, M. & M. R. Co.*, 34 *Am. & Eng. R. Cas.* 152, 38 *Minn.* 419; *Jordan v. St. Paul, M. & M. R. Co.*, 41 *Am. & Eng. R. Cas.* 1, 42 *Minn.* 172, 6 *L. R. A.* 573, 43 *N. W. Rep.* 849. REVIEWED IN *Hannaher v. St. Paul, M. & M. R. Co.*, 5 *Dak.* 1, 37 *N. W. Rep.* 717.—*Illinois C. R. Co. v. Miller*, 68 *Miss.* 760, 10 *So. Rep.* 61. *Fremont, E. & M. V. R. Co. v. Marley*, 25 *Neb.* 138, 40 *N. W. Rep.* 948.—QUOTING *Gregory v. Bush*, 64 *Mich.* 37, 31 *N. W. Rep.* 94.

If the water from springs opened by a company in constructing its road, is unnecessarily collected and conducted in artificial trenches and discharged on the land of another, the company is liable as for a tort; and this is so, although the water passes from the trench through an embankment on which the track is laid, and mingles with surface water before reaching the land. *Curtis v. Eastern R. Co.*, 98 *Mass.* 428.

A dominant proprietor has no right to collect surface water and divert it into artificial ditches, and then discharge it on the servient owner in increased volume; but a grant of a right of way to a railroad company carries with it the right to make necessary embankments and ditches, and if the company exercises due care and skill in this matter, an injury resulting to adjoining lands from this cause is *damnum absque injuria*. *Benson v. Chicago & A. R. Co.*, 20 *Am. & Eng. R. Cas.* 96, 78 *Mo.* 504.—DISTINGUISHED IN *Byrne v. Keokuk & W. R. Co.*, 47 *Mo. App.* 383. QUOTED IN *Jones v. Wabash, St. L. & P. R. Co.*, 18 *Mo. App.* 251; *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 20 *Am. & Eng. R. Cas.* 103, 83 *Mo.* 271, 53 *Am. Rep.* 581.

3. Destruction of, or Injury to, Cattle and Crops.

47. Company's liability for cattle injured or drowned.—If a company, by the negligent or improper construction of its road, deluges land, and the overflow, without the intervention of other agencies, directly or proximately causes the drowning of cattle, their owner is entitled to recover their value, whether they were drowned on his land or not. *Sabine & E. T. R. Co. v. Johnson*, 65 *Tex.* 389.

If an overflow be caused by the negligence of the defendant, and it was the direct and proximate cause of the injury to the stock of the plaintiff, he taking proper care to protect his cattle during and after the overflow, then he could recover for such injury, as also for drowning his cattle. *Broussard v. Sabine & E. T. R. Co.*, 80 *Tex.* 329, 16 *S. W. Rep.* 30.

After a company had so constructed its road as to flow, in times of rain, certain low lands, the owner of the lands constructed cattle sheds thereon, and contracted with a third party to shed and feed cattle. *Held*, that the owner of the cattle could not maintain an action against the railroad for an injury by water to the cattle. *Toledo, W. & W. R. Co. v. Hunter*, 50 *Ill.* 325.

48. Company's liability for crops injured or destroyed.—A company is liable in damages for injuries to crops, resulting from an embankment so constructed as to cause an overflow. *Houston & T. C. R. Co. v. Knapp*, 51 *Tex.* 592. *Fremont, E. & M. V. R. Co. v. Marley*, 25 *Neb.* 138, 40 *N. W. Rep.* 948.

A company should provide for the egress of surface water without unnecessary damage or injury to an adjoining landowner, or prevent its flow upon his land; and the fact that he has given the company permission to dig a ditch along a wagon road on his premises to carry off such surface water, which proves ineffectual for the purpose, will not preclude him from recovering for injury to his crops resulting from the original wrongful act. *Jacksonville, N. W. & S. E. R. Co. v. Cox*, 91 *Ill.* 500.—QUOTED IN *Ohio & M. R. Co. v. Thillman*, 143 *Ill.* 127. REVIEWED IN *Chicago & A. R. Co. v. Connors*, 25 *Ill. App.* 561.—*Utter v. Great Western R. Co.*, 17 *U. C. Q. B.* 392.

The fact that a landowner conveys a company a right of way will not estop him from recovering damages for the wrongful construction of the road by which surface water from other lands is collected and thrown on his. Where the consideration of the deed is only for the land conveyed as a right of way, it gives no right to divert the surface waters from other lands, the natural flow of which would have carried them in another direction. *Jacksonville, N. W. & S. E. R. Co. v. Cox*, 91 *Ill.* 500.

Where a company fills in a trestle so as to throw water back on adjoining lands, one acquiring the lands and planting a crop

after the fill has been made, and with knowledge thereof, may recover damages. He was not bound to refrain from planting a crop, as he was not bound to assume that the company would continue the nuisance. *Ohio & M. R. Co. v. Singletary*, 34 *Ill. App.* 425.—FOLLOWING *Ohio & M. R. Co. v. Wachter*, 123 *Ill.* 440.

Plaintiff's crops could have been protected by the construction of a ditch which would have cost \$300. The plaintiff was not required to make such an expenditure to protect his property from injury resulting from the alleged negligence of appellant. Besides, he was a lessee, and it is doubtful whether under any circumstances a lessee would be required to cut such a ditch for his protection against the wrongful act of another, and under an ordinary lease he would have no authority to do so. *Galveston, H. & S. A. R. Co. v. Borsky*, 2 *Tex. Civ. App.* 545, 21 *S. W. Rep.* 1011.

Plaintiff sued defendants for so negligently constructing their railway as to obstruct a watercourse by which his land had been drained, thereby causing the same to overflow and injure his crops. *Held*, that an action would lie, and might be brought within six months from the time when the injury accrued. *Vanhorn v. Grand Trunk R. Co.*, 18 *U. C. Q. B.* 356.—DISTINGUISHING *Wallace v. Grand Trunk R. Co.*, 16 *U. C. Q. B.* 551; *L'Esperance v. Great Western R. Co.*, 14 *U. C. Q. B.* 173.

II. REMEDIES.

1. Right of Action and Defenses.

49. Right of action.—Although the obstruction which causes water to overflow upon adjoining lands has been placed in the streams before the plaintiff in an action acquired title, the injury is to be deemed a continuing one, and the plaintiff is entitled to recover damages. *Mississippi & T. R. Co. v. Archibald*, 41 *Am. & Eng. R. Cas.* 4, 67 *Miss.* 38, 7 *So. Rep.* 212.

It appeared that the defendant, a canal company, retained the waters of a natural stream on its lands by a dam, and in dry seasons, in the use of the stream as a feeder for its canal, it discharged the water in such quantities that it overflowed its banks, causing injury to the lands of plaintiff, who was the riparian owner below. Defendant had never acquired the right to such use of the stream by condemnation proceedings, or otherwise. *Held*, that plaintiff was en-

titled to damages and an injunction; and that the special provision for assessing damages in such cases, contained in defendant's charter (§ 10, ch. 238, N. Y. Laws of 1823), did not deprive plaintiff of his remedy at law or in equity. *McKee v. Delaware & H. Canal Co.*, 125 N. Y. 353, 26 N. E. Rep. 305, 35 N. Y. S. R. 12; *affirming* 52 Hun 52, 22 N. Y. S. R. 224, 4 N. Y. Supp. 753.

A railway company, in constructing their road, crossed the plaintiff's land at a point where a watercourse draining plaintiff's land passed, by which the watercourse was obstructed and plaintiff's land afterward overflowed. Upon action brought after the expiration of six months after the act done—*held*, that as it is to be assumed that defendants constructed their railway upon plaintiff's land either upon agreement with plaintiff, or upon a reference by arbitration under the statute 4 Wm. IV., c. 3, and that plaintiff had been paid therefor, and that damage resulted from the construction as originally made, no subsequent claim for that damage as a continuing damage could be maintained. *Knapp v. Great Western R. Co.*, 6 U. C. C. P. 187.—**DISTINGUISHING** *Lawrence v. Great Northern R. Co.*, 16 Q. B. 643.

Defendants purchased part of plaintiff's land for the use of their road, which ran through his land; the price was fixed by agreement, and the land conveyed without any reservation in the deed. Plaintiff had previously drained his land by means of a ditch which he had made running through the land conveyed to defendants. In constructing their railway defendants stopped up this ditch, and the plaintiff's land was in consequence overflowed. For this injury the plaintiff sued, charging the defendants with negligence in so constructing their road. *Held*, that the action could not be maintained, the injury being one attributable to the mere construction of the railway, which should have been taken into consideration at the time of the contract for sale, or at the reference provided for in the act, if the parties had disagreed. *L'Esperance v. Great Western R. Co.*, 14 U. C. Q. B. 173.—**DISTINGUISHED IN** *Vanhorn v. Grand Trunk R. Co.*, 18 U. C. Q. B. 356; *Tolton v. Canadian Pac. R. Co.*, 22 Ont. 204.—*L'Esperance v. Great Western R. Co.*, 14 U. C. Q. B. 187.

50. — when accrues.—Where damages result to adjoining lands by the faulty

construction of the road, a remedy may be had every time an injury occurs. *Ohio, I. & W. R. Co. v. Dooley*, 32 Ill. App. 228.

Where land is taken for a railroad, all damages therefor, and all that naturally and proximately result from the proper construction and operation of the road, must be recovered in one action; and such damages accrue to the one owning the land at the time, and do not pass to a subsequent purchaser, except by assignment. *Sherlock v. Louisville, N. A. & C. R. Co.*, 115 Ind. 22, 17 N. E. Rep. 171, 14 West. Rep. 843.

But a subsequent grantee of the land may maintain an action for damages resulting during a freshet by throwing the water back on the land, due to the negligent construction of a bridge over a natural watercourse, as in such case the cause of action accrues at the time of the overflow, and not at the time the bridge was constructed. *Sherlock v. Louisville, N. A. & C. R. Co.*, 115 Ind. 22, 14 West. Rep. 843, 17 N. E. Rep. 171.

51. Statute of limitations.*—Where a recovery is sought for the flowing of lands, occurring during the preceding two years, the fact that six years (period of limitation) have passed since the land was first overflowed constitutes no bar to the action. *Hunt v. Iowa C. R. Co.*, 86 Iowa 15, 52 N. W. Rep. 668.

In actions for damages for flowing lands plaintiff's measure of recovery is limited to the damage done in the six months previous to the bringing of the action. *McGillivray v. Great Western R. Co.*, 25 U. C. Q. B. 69.—**REVIEWED IN** *Nichol v. Canada Southern R. Co.*, 40 U. C. Q. B. 583.

Where a watercourse is dammed, or partially dammed, by the defective construction of a railroad culvert, so that water is thrown back upon plaintiff's adjacent land, his cause of action for damages on account of such obstruction accrues at the time he sustains his damages, and the statute of limitations commences to run then and not before. *Union Trust Co. v. Cuppy*, 11 Am. & Eng. R. Cas. 562, 26 Kan. 754.

52. Necessity of demand to have nuisance abated.—A company acquiring a road already constructed is not liable for overflowing land by reason of the negligent manner in which ditches were cut, in

* Flooding lands. Limitation of actions for, see 44 AM. & ENG. R. CAS. 493, *abstr.*; 48 *Id.* 72, *abstr.* See also *ante*, 25.

medy may be
rs. *Ohio, I.*
App. 228.

railroad, all
naturally and
proper con-
road, must
d such dam-
g the land at
a subsequent
nt. *Sherlock*
Co., 115 Ind.
Rep. 843.

the land may
ges resulting
e water back
ent construc-
watercourse,
tion accrues
nd not at the
ed. *Sherlock*
, 115 Ind. 22,
ph. 171.

ns.—Where
ving of lands,
g two years,
(of limitation)
as first over-
the action.
Iowa 15, 52 N.

owing lands
is limited to
nths previous
McGillivray
C. Q. B. 69,
ada Southern

med, or par-
ive construc-
that water is
d adjacent land,
s on account
the time he
e statute of
then and not
uppy, 11 Am.
54.

and to have
pany acquir-
is not liable
of the negli-
s were cut, in

of actions for,
str., 48 Id. 72,

the absence of evidence that any demand had been made upon it to abate the nuisance. *Rouse v. Chicago & E. I. R. Co., 42 Ill. App. 421.*

Otherwise where the company's officers must have been fully informed of the injury complained of. *Willitts v. Chicago, B. & K. C. R. Co., 88 Iowa 281, 55 N. W. Rep. 511.*

An action will not lie for injury to land from the insufficiency of a culvert constructed by a railway company, where no complaint has been made by the owner of the land of the insufficiency of the culvert and no application made to the justices for additional accommodation works within the five years limited by the Railways Clauses Consolidation Act of 1845, § 73. *Colley v. London & N. W. R. Co., L. R. 5 Ex. D. 277, 49 L. J. Ex. D. 575, 42 L. T. 807, 29 W. R. 16.*

53. Successive actions.—The duty of a company to so construct and maintain its road across a stream as not to injure adjacent land by throwing water back upon the same is a continuing one, and every continuance of such nuisance is, in judgment of law, a fresh nuisance and injury. *Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 32 N. E. Rep. 529.*—APPLYING *Chicago, R. I. & P. R. Co. v. Moffitt, 75 Ill. 524; Groff v. Ankenbrandt, 124 Ill. 51; Chicago, B. & Q. R. Co. v. Schaffer, 124 Ill. 112; Drake v. Chicago, R. I. & P. R. Co., 63 Iowa 302.*

The general rule is that when an injury to land, caused by the erection of a nuisance, is of a permanent character and goes to the entire value of the estate, a recovery for the whole injury shall be had in a single suit; but this rule does not apply where a railroad company diverts a stream of running water, causing plaintiff's land to be annually overflowed. Such injury is susceptible of periodical apportionment in separate actions. *Van Hoozier v. Hannibal & St. J. R. Co., 70 Mo. 145.*—DISTINGUISHED IN *Wallace v. Kansas City & S. R. Co., 47 Mo. App. 491.* FOLLOWED IN *Dickson v. Chicago, R. I. & P. R. Co., 2 Am. & Eng. R. Cas. 538, 71 Mo. 575.* QUOTED IN *Bird v. Hannibal & St. J. R. Co., 30 Mo. App. 365.*—*Offield v. Wabash, St. L. & P. R. Co., 22 Mo. App. 607.*—QUOTED IN *Bird v. Hannibal & St. J. R. Co., 30 Mo. App. 365.*—*Clark v. Dyer, 81 Tex. 339, 16 S. W. Rep. 1061.*

In an action for damages caused by the defendant's erection of an embankment obstructing a natural waterway, and the con-

struction of a defective and insufficient outlet, so that the plaintiffs' lands were repeatedly flooded during a series of years, the court did not err in refusing to hold that each overflow created a separate cause of action, or in compelling the plaintiffs to elect upon which particular flooding, or period of flooding, they would proceed to trial. *Bird v. Hannibal & St. J. R. Co., 30 Mo. App. 365.*—QUOTING *Van Hoozier v. Hannibal & St. J. R. Co., 70 Mo. 145; Offield v. Wabash, St. L. & P. R. Co., 22 Mo. App. 607.*—DISTINGUISHED IN *Bunten v. Chicago, R. I. & P. R. Co., 50 Mo. App. 414.*

54. Form of action—Injunction.—A riparian owner who retains or stores the waters of a natural stream and discharges them in such quantities as to overflow its banks and injure the lands of a riparian owner below, is liable as for a trespass for the damages occasioned thereby, and may be restrained therefrom by injunction. *McKee v. Delaware & H. Canal Co., 125 N. Y. 353, 26 N. E. Rep. 305, 35 N. Y. S. R. 12; affirming 52 Hun 52, 22 N. Y. S. R. 224, 4 N. Y. Supp. 753.*

55. Matters of defense, generally.—In an action for damages for injuries caused by the overflow of plaintiff's premises, alleged to have been occasioned by the construction of dams by the defendant, the plaintiff was not entitled to recover, where the evidence showed that plaintiff would have suffered like injury if the dams had been removed. *Langdon v. Chicago, B. & Q. R. Co., 48 Iowa 437.*

A company building a levee across a branch which overflows, and thereby causing a greater overflow of adjoining lands, is not relieved from the damages therefor by making ditches and trestles that carry off the water as fast as the branch would when not overflowed. *St. Louis, I. M. & S. R. Co. v. Morris, 5 Am. & Eng. R. Cas. 48, 35 Ark. 622.*

Where a company builds a defective culvert, and causes the water to overflow and injure a mill, it cannot defend on the ground that the mill stands partly on a public street, where it appears that the owner was misled in building it by the inaccurate laying off the street. *Houston & G. N. R. Co. v. Parker, 50 Tex. 330.*

In such a case, where the company builds a bridge in connection with such culvert it is no defense, so far as injury results from the defective construction of the bridge, that it

was built on a street and became the property of the city. *Houston & G. N. R. Co. v. Parker*, 50 Tex. 330.

56. Act of God—Freezing.—Where a company turns its waste water from a tank upon the premises of another, where it freezes, doing damage, the company cannot claim exemption from liability on the ground that the freezing of the water was an act of nature, as such a result from its wrongful act might have been foreseen. *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339.

57. Statutory authority to construct road.—Where a company is sued for damages for constructing its road so as to cause plaintiff's land to be flooded, and thereby creating a nuisance, no statutory authority authorizing the construction of the road can be set up as a defense. *Mundy v. New York, L. E. & W. R. Co.*, 75 Hun 479, 27 N. Y. Supp. 469, 57 N. Y. S. R. 367. *Hooker v. New Haven & N. Co.*, 14 Conn. 146.—DISTINGUISHED IN *Burroughs v. Housatonic R. Co.*, 15 Conn. 124. REVIEWED IN *Elizabethtown, L. & B. S. R. Co. v. Combs*, 10 Bush (Ky.) 382; *Cushman v. Smith*, 34 Me. 247; *Hatch v. Vermont C. R. Co.*, 25 Vt. 49.

58. Ownership of fee by company.—Where a company is charged with building defective culverts, thereby causing the overflow of adjoining lands, it is no defense that it had condemned the right of way and paid the damages, as acquiring the right to build the road implied the right to construct it skilfully, and damages growing out of a wrongful structure could not be considered as included in the condemnation proceedings. *Ohio, I. & W. R. Co. v. Dooley*, 32 Ill. App. 228.

Where a company, by the digging of a ditch along its track, diverts the flow of a natural watercourse, wholly or in part, to the injury of an adjoining landowner, it is no defense to an action to recover for such damages that the digging of the ditch was necessary for the protection of its track, or that the ditch was wholly on land owned by it in fee. *Union Pac. R. Co. v. Dyche*, 14 Am. & Eng. R. Cas. 272, 31 Kan. 120, 1 Pac. Rep. 243.

59. Parol license from plaintiff's grantor.—Where plaintiff's grantor gave a company a parol license to build a culvert so as to divert the water of a canal upon his lands, the license is a protection as long as the grantor held the land and it

was unrevoked, and plaintiff can only recover damages for injuries occurring since he obtained title. *Foot v. New Haven & N. Co.*, 23 Conn. 214.

The fact that plaintiff's grantor consented by parol to the building of the culvert and to the subsequent diversion of the water will not prevent plaintiff from recovering damages occurring after he obtains title. *Foot v. New Haven & N. Co.*, 23 Conn. 214.

—CRITICISING *Liggins v. Inge*, 7 Bing. 682. Under the statute of frauds such parol license, being for an interest in land, is revocable at any time, either by plaintiff or his grantor who made it, notwithstanding the fact that the grantor assisted in building the culvert, and agreed to save the defendant harmless from all damages occurring. *Foot v. New Haven & N. Co.*, 23 Conn. 214.

And the right to revoke such license was not affected by the fact of defendant being authorized to build a railroad, and empowered by its charter to condemn lands, and to divert the water of the canal upon plaintiff's land by condemnation proceedings, where no such proceedings had been had. *Foot v. New Haven & N. Co.*, 23 Conn. 214.

60. Acts of plaintiff—Contributory negligence.—Where a company has been in the habit of running the waste water from a tank upon a street, a party cannot acquire a right of action against the company by going upon the street under a permission from the city council and piling lumber there in such manner that the water from the tank will flow upon it. *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339.

A landowner adjoining a railway track is not guilty of contributory negligence by planting his usual crops thereon, although the land had formerly been overflowed, in an action for damages to his crop by an overflow caused by the neglect to construct and maintain the necessary culverts along the railway track. *Clark v. Dyer*, 81 Tex. 339, 16 S. W. Rep. 1061. *Knight v. Albe-marle & R. R. Co.*, 111 N. Car. 80, 15 S. E. Rep. 929.—DISTINGUISHING *Emry v. Raleigh & G. R. Co.*, 109 N. Car. 589.

Where a railroad is so constructed as to flood adjoining lands, it is not the duty of the landowner to mitigate the injury by digging ditches to drain off the water. *Kankakee & S. R. Co. v. Horan*, 23 Ill. App. 259.

Action by landowner for damages to his land and the crop thereon from overflow of

water, caused by the embankment erected and kept up by the defendant. It was shown in defense that at an outlay of \$35, which sum plaintiff was able to expend, the land could have been drained from the overflow, and the injury avoided. *Held*, such facts were not a perfect defense unless it had been shown further that he (plaintiff) had the right to make such drain without injury to neighboring lands. *Austin & N. W. R. Co. v. Anderson*, 85 Tex. 88, 19 S. W. Rep. 1025.

61. Release—Receipt in full of all damages, etc.—A release in a deed conveying a right of way, of all damages by reason of "the location and completion of the road," is not a bar to an action for diverting surface water out of its natural course and throwing it on plaintiff's adjoining land. *St. Louis, V. & T. H. R. Co. v. Hurst*, 25 Ill. App. 98.

A company was sued for trespass resulting from the construction of its road, and the parties submitted to the jury, by agreement entered of record, the question of assessing the full amount "of past, present, and future damages for matters charged in the declaration," and agreed that if a verdict was found for the plaintiff a judgment should be entered thereon, and when paid no further action should be brought. A judgment was entered for plaintiff and was paid. *Held*, that this was a bar to a subsequent suit brought for damages to plaintiff's lands by the washing of mud and sediment from an embankment onto his land. *Illinois C. R. Co. v. Allen*, 39 Ill. 205.

Plaintiff sued the Grand Trunk R. Co., alleging that their road passing through his land obstructed the flow of water which used to escape along a ravine, and thereby flooded several acres of his farm, and made his residence unhealthy and unfit to live in. There was no natural stream through the ravine; and no negligence was complained of in the construction of the railway. It appeared that the plaintiff had purchased from one B., who in 1854 had conveyed to defendants the right of way and given a receipt in full for the purchase money, and for all damages occasioned by the railway passing over his land. *Held*, that the action could not be maintained. *Wallace v. Grand Trunk R. Co.*, 16 U. C. Q. B. 551.—DISTINGUISHED IN *Tolton v. Canadian Pac. R. Co.*, 22 Ont. 204; *Vanhorn v. Grand Trunk R. Co.*, 18 U. C. Q. B. 356.

62. Acts of third parties.—Where a company diverts surface water and conducts it in a ditch along its right of way, and then throws it off where it overflows plaintiff's land, it is liable therefor; but it is not liable for additional damages incurred on account of water that may be brought into the ditch by artificial drains that other parties made without the sanction or approval of the company. And in such case no presumption can be indulged that such parties had the right to turn their water into the railroad ditch, or that they did so with the consent of the company. *Chicago & A. R. Co. v. Glenney*, 29 Am. & Eng. R. Cas. 527, 118 Ill. 487, 9 N. E. Rep. 203; reversing 28 Ill. App. 304.

A company that has bridged a creek near plaintiff's premises is not liable for an overflow, where the evidence shows that it is caused by the giving way of a dam above that, belonging to third parties, which caused timbers and drift to wash down against plaintiff's building. *Peck v. Fonda*, J. & G. R. Co., 25 N. Y. S. R. 95, 53 Hun 634, 3 Silv. Sup. Ct. 10, 6 N. Y. Supp. 379.

2. Procedure.

63. Parties—Who may sue.—Where a railroad is constructed so as to stop the flow of water and cause a pond to be formed on adjoining land, the damage accrues to the one owning the land at the time, and a subsequent purchaser cannot recover for the loss of the land covered by the water. *Illinois C. R. Co. v. Allen*, 39 Ill. 205.

Where the damage results to land from negligently constructing trestles so as to flood it, one subsequently obtaining an interest in the land may recover for damages occurring after he obtains his interest. *St. Louis, A. & T. H. R. Co. v. Brown*, 34 Ill. App. 552.

Plaintiff alleged that he was possessed of land through which a stream was accustomed to flow, and away from which the surface water was accustomed to escape, and that defendants negligently constructed an embankment on their railway across said land by not providing sufficient openings to allow the water to escape. The jury found that "there was a stream of water, and it was obstructed by the railway"; there was a creek on the plaintiff's land which clearly had not been interfered with; and the only obstruction shown was of such a stream as

a general flow of surface water would present on a gradual slope of land. *Held*, that the word "stream" in their finding must be taken to mean such water, and that as the plaintiff showed no right to the land on both sides of the embankment, nor any easement over the land on the other side, he had no right of action. *Crewson v. Grand Trunk R. Co.*, 27 U. C. Q. B. 68.—*REVIEWING Skelton v. London & N. W. R. Co.*, L. R. 2 C. P. 631.

64. — landlord.—A landlord has no such interest in the growing crops of his tenant as to enable him to maintain an action against a person who injured the crop. *Drake v. Chicago, R. I. & P. R. Co.*, 29 Am. & Eng. R. Cas. 514, 70 Iowa 59, 29 N. W. Rep. 804.

Where a landlord is to receive his rent in a share of the crops, he may maintain an action for damages to the crops, and if no objection is made he may sue without joining his tenants; in which case his recovery will be apportioned according to his interest in the crops. *Van Hoonzer v. Hannibal & St. J. R. Co.*, 70 Mo. 145.

65. — tenant.—Where a tenant is in possession of lands under a lease by which he is to have all of the crops, he is entitled to recover the entire damages for a loss of the crops by flooding the lands. *Kankakee & S. R. Co. v. Horan*, 23 Ill. App. 259.

A tenant voluntarily leasing property adjoining a railroad embankment, which is subject to overflow, cannot recover damages for the loss of vegetables growing on the ground, and for personal property in his house, caused by the overflow. *Chicago & A. R. Co. v. Smith*, 17 Ill. App. 58.

But a tenant who knowingly leases lands that are subject to overflow by reason of an improperly constructed railway, which diverts water from a stream, may recover damages caused by the overflow. *Ohio & M. R. Co. v. Elliott*, 34 Ill. App. 589.—*FOLLOWING Ohio & M. R. Co. v. Wachter*, 123 Ill. 440.

66. Who may be sued.—If a company, by the construction of its embankments and culverts, collects and discharges surface water in such a manner as to injure adjoining lands, it is liable for the damages thereby ensuing; and although it did not construct the railroad originally, nevertheless, if it took and maintained it as so constructed it would be liable as of the date when it went into possession. *Wead v. St.*

Johnsbury & L. C. R. Co., 64 Vt. 52, 24 Atl. Rep. 361.

A company desiring to drain a lake dug a ditch from it to a river, which for the most part was on its right of way, but near where it emptied it was on the land of another. When the river was high water ran through the ditch into the lake and flooded adjoining lands. If only that portion of the ditch which was not on the company's right of way had been dug the same result would have happened; and if the ditch had only been on the company's right of way it would have contributed to the overflow. The company that dug the ditch sold its right of way and property to another company. *Held*, that the purchasing company was not liable for an overflow after it purchased. *Wayland v. St. Louis, K. C. & N. R. Co.*, 11 Am. & Eng. R. Cas. 543, 75 Mo. 548.—*DISTINGUISHING Brown v. Cayuga & S. R. Co.*, 12 N. Y. 487.

67. — trust company.—Where, at the time that damages were sustained by reason of the backing of waters over plaintiff's land, on account of the defective construction of a culvert, it was shown that the railroad was in the hands of a trust company, which was operating it for the benefit of the company and its creditors, such trust company would be liable for participating in maintaining a nuisance. *Union Trust Co. v. Cuppy*, 11 Am. & Eng. R. Cas. 562, 26 Kan. 754.

And in such case, in order that the plaintiff may recover against the trust company, it would not be necessary for him to prove that prior to the damage he notified the trust company of the defective condition of the culvert, or that any request was made upon the company to remedy or abate the nuisance caused by the culvert. All that would be necessary to prove would be that the trust company, before such damages occurred, actually had full knowledge of all these matters, independent of any notice from the plaintiff. *Union Trust Co. v. Cuppy*, 11 Am. & Eng. R. Cas. 562, 26 Kan. 754.

In such a case both the railroad company and the trust company would be liable for the injury occurring, the railroad company being liable as principal and the trust company as an agent. *Union Trust Co. v. Cuppy*, 11 Am. & Eng. R. Cas. 562, 26 Kan. 754.

68. Pleadings—Complaint.—If a complaint shows a good cause of action in

any part of the demand it is good on demurrer. So where a landowner sues to recover damages for flooding his land by allowing culverts to be stopped up, his complaint is good if it shows that some of the acts complained of happened since he became the owner of the land. *Terre Haute & I. R. Co. v. McCoy*, 34 *Am. & Eng. R. Cas.* 212, 113 *Ind.* 498, 13 *West. Rep.* 316, 16 *N. E. Rep.* 395.

A complaint stating in substance that the defendant company negligently, unlawfully, and wrongfully constructed a bridge over a river "so as to create an unlawful obstruction in said river, and to prevent the natural flow of ice and water therein, and cause a natural flow of ice and water in the spring of the year to gorge, back up, and overflow the banks of the river, and thereby greatly injure and damage adjoining lands and property, and especially the lands of plaintiff," is sufficient as to the charge of negligence, and to show that the bridge was an unlawful structure. *Omaha & R. V. R. Co. v. Standen*, 34 *Am. & Eng. R. Cas.* 179, 22 *Neb.* 343, 35 *N. W. Rep.* 183.

69. — declaration.—In an action for injury to a farm, plaintiff's declaration claimed an estate in reversion after the expiration of an existing tenancy. It then set out the construction of the defendant's road with certain embankments, ditches, and bridges, by means of which a certain slough or watercourse was permanently dammed up, diverted to, and caused to set back and overflow the farm, thus causing a permanent injury thereto and damage to plaintiff's reversion. *Held*, on motion in arrest of judgment, that the declaration showed a cause of action to the reversionary interest. *Kankakee & S. R. Co. v. Horan*, 41 *Am. & Eng. R. Cas.* 13, 131 *Ill.* 288, 23 *N. E. Rep.* 621; *affirming* 30 *Ill. App.* 552.

In such case the declaration will not be insufficient on motion in arrest of judgment merely because it does not allege that the tenancy has terminated, or how long it will continue. An injury to land which is permanent in its nature is necessarily an injury to the entire estate, which includes the reversion. *Kankakee & S. R. Co. v. Horan*, 41 *Am. & Eng. R. Cas.* 13, 131 *Ill.* 288, 23 *N. E. Rep.* 621; *affirming* 30 *Ill. App.* 552.

The estate in possession, its nature and duration, and the amount of rent reserved,

if any, are material matters to be considered in the assessment of damages in favor of the owner of the reversion; but they are immaterial when the question is merely as to the sufficiency of the declaration to show a cause of action, or to warrant a recovery of any damages. *Kankakee & S. R. Co. v. Horan*, 41 *Am. & Eng. R. Cas.* 13, 131 *Ill.* 288, 23 *N. E. Rep.* 621; *affirming* 30 *Ill. App.* 552.

A count, charging that the defendant did an act on its own land whereby the water from a creek was caused to flow onto the land of the plaintiff, must show that the act so alleged to have been done was tortious. *Koch v. Delaware, L. & W. R. Co.*, 54 *N. J. L.* 401, 24 *Atl. Rep.* 442.

A statement that a defendant many years ago filled up and altered a creek so as to divert its water onto the land adjacent to the plaintiff's land, but by a bank or roadway kept it from coming thereon, and that recently the defendant has made an opening in such bank or roadway whereby such water escaped onto the premises of the plaintiff, discloses an actionable wrong. *Koch v. Delaware, L. & W. R. Co.*, 54 *N. J. L.* 401, 24 *Atl. Rep.* 442.

A sufficient cause of action is shown by a declaration that plaintiff was seised of certain lands adjoining defendants' railway, which land ought of right to be drained by ditches through defendants' lands; that defendants were using these lands for their road; yet that they negligently, unskillfully, wrongfully, and injuriously placed earth, etc., in, upon, and across the said drains so passing through their lands, and thereby obstructed the same, whereby the plaintiff's land became wet and useless. *Alton v. Hamilton & T. R. Co.*, 13 *U. C. Q. B.* 595.—**FOLLOWING** *Lawrence v. Great Northern R. Co.*, 16 *Q. B.* 643.

A declaration alleged that defendants constructed their railway in so careless and negligent a manner as to obstruct a stream and prevent the water from flowing as it used to do, and did not restore it to its former state, though a sufficient time for so doing had elapsed before the stream, being increased by rains and the passage being obstructed, overflowed the plaintiff's land and injured his crops. A plea as to so much of the causes of action, and damages in respect thereof, as accrued more than six months before the trial, that the plaintiffs should not maintain their action,

because the defendants committed the grievances in the construction of their railway, and that the said grievances did not accrue within six months next before the commencement of this suit, is bad on demurrer, the issue tendered being in fact whether those causes of action which accrued more than six months before the commencement of the suit did not accrue within six months next before such commencement. *Moison v. Great Western R. Co.*, 14 U. C. Q. B. 102.

70. — petition.—Where a petition alleges successive overflows to land, covering a period long enough to allow the growing of two crops, it should specify the seasons in which the injured crops grew. *International & G. N. R. Co. v. Pape*, 73 Tex. 501, 11 S. W. Rep. 526.

Where the petition alleged that the waters of the river followed a certain slough and overflowed the land, and described the slough and manner of construction of the embankment, the negligence of the defendant and want of proper sluices, an allegation that the space under the bridge was too low to allow the water to flow and this caused it to back up and overflow plaintiff's land, is sufficient to sustain a finding that the waters, not having a sufficient outlet through the embankment, overflowed the land. *Gulf, C. & S. F. R. Co. v. Preston*, 74 Tex. 181, 11 S. W. Rep. 1108.

A general statement in the petition that by reason of the construction of the railroad without proper culverts, surface water had accumulated on the plaintiff's land for more than a year, thus depriving him of the use of his land and of the street in front of his house, and causing his family to be sick by reason of the malarial poisons therefrom, with a statement of the whole amount of damages suffered thereby, is sufficient without pleading them specially. *San Antonio & A. R. Co. v. Gwynn*, 4 Tex. App. (Civ. Cas.) 338, 15 S. W. Rep. 509.—REVIEWING *Ellis v. Kansas City, St. J. & C. B. R. Co.*, 63 Mo. 135.

A petition alleged that the embankment causing an overflow was constructed and continued in use without sufficient culverts to draw off the surface water, and that the damages resulted therefrom. This was sufficient, as it alleges the failure of the duties prescribed by law, and resulting injuries. The express charge of negligence

was not necessary. *Clark v. Dyer*, 81 Tex. 339, 16 S. W. Rep. 1061.

Where an owner of land sues a company to recover for permanent injuries caused by flooding it, after a tenant has sued for damages to growing crops, it is no objection that the petition does not allege that the land is in plaintiff's possession, or that he is entitled to possession, if it clearly alleges his ownership and rights in the premises. *Gulf, C. & S. F. R. Co. v. Harmonson*, (Tex. Civ. App.) 22 S. W. Rep. 764.

A petition which states that the company "so negligently and carelessly kept, constructed, and maintained its said line of said railroad that it caused the water to collect and back over, and inundate and overflow" growing crops, and destroy the same, is not sufficient when specially excepted to. The cause of action should be stated by distinct averments, and with such particularity as to be reasonably sufficient to inform the defendant of the acts or omissions relied upon. *Missouri Pac. R. Co. v. Johnson*, 3 Tex. App. (Civ. Cas.) 334.

Allegations of injuries to adjoining land not belonging to the plaintiff are properly stricken out. *Sabine & E. T. R. Co. v. Brouard*, 34 Am. & Eng. R. Cas. 199, 69 Tex. 617, 7 S. W. Rep. 374.

A petition stated that defendant "failed to keep its road in such condition as to prevent injury to plaintiff, but negligently and carelessly failed to make and keep open proper ditches for the purpose of leading the water off of plaintiff's land." There was no averment of any fact showing that defendant was under any legal obligation to maintain ditches. *Held*, that for want of such averment the petition was fatally defective. *Field v. Chicago, R. I. & P. R. Co.*, 76 Mo. 614.—QUOTED IN *Woodward v. Oregon R. & N. Co.*, 18 Ore. 289.

71. — variance.—Where a landlord sues for the destruction of growing crops, a declaration charging that he was the owner of the crops is not supported by evidence showing that they were being grown by a tenant who was charged with the marketing of the same, and the landlord to receive his rents out of the proceeds, and that he had lost his rents by reason of the destruction of the crops. Such evidence shows that the title to the crops vested in the tenant. *Ohio & M. R. Co. v. Hoeltzman*, 34 Ill. App. 429.

Where plaintiff charges that his land was

flooded and damaged by the diversion of a stream of water from its natural channel, he cannot recover on proof showing that the injuries were caused solely by surface water. And the distinction between the cases and the relative liability of the company should be explained to the jury under appropriate instructions. *Munkers v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 334, 9 Am. Ky. Rep. 234.

Where a declaration alleges that a company so constructed its trestles as to flow lands in 1885, 1887, and 1890, evidence that a certain flood occurred in 1887 or 1888 does not constitute a variance. *St. Louis, A. & T. H. R. Co. v. Winkelmann*, 47 Ill. App. 276.

Where plaintiff testified to an overflow in 1884, evidence as to an overflow in 1885 is properly admitted under an allegation that plaintiff in 1885 had growing crops on the land which were damaged by an overflow of that date, there having been no special demurrer to the sufficiency of the complaint in that respect. *Gulf, C. & S. F. R. Co. v. Preston*, 74 Tex. 181, 11 S. W. Rep. 1108.

72. Evidence—What is admissible.

—(1) *For plaintiff.*—Where the embankments were regarded as permanent structures, and the damages as entire, it was competent for plaintiff's witnesses in giving their estimates of the value of his land before and after the acts complained of, to state that the land, after being flooded, became baked and broke up in clods, and was foul with weeds—not as a distinct element of damages, but as showing the effect of the overflow upon the land. *Noe v. Chicago, B. & Q. R. Co.*, 76 Iowa 360, 41 N. W. Rep. 42.

Where crops destroyed constitute an element of damage, the plaintiff may properly testify that he planted the crops under the assurance of the company's officers that the defect causing the overflow would be remedied. *Willits v. Chicago, B. & K. C. R. Co.*, 88 Iowa 281, 55 N. W. Rep. 313.

Evidence is admissible that the defendant's officers, in discussing at different interviews with the plaintiff his claim for damages, did not at any time deny the defendant's liability. *Proctor v. Old Colony R. Co.*, 154 Mass. 251, 28 N. E. Rep. 13.

Where a declaration alleged that the defendant caused water to overflow the plaintiff's meadow, and thereby rendered it spongy and impassable, and he was deprived of the use of his meadow, evidence was

admissible to show that his muck-bed in the meadow was made inaccessible by the flowage. *Johnson v. Atlantic & St. L. R. Co.*, 35 N. H. 569.

Where the defendant has pleaded that the overflow was the result of an extraordinary and unusual flood, against which human foresight could not provide, and evidence has been introduced of freshets having occurred at different intervals for a series of years prior to the one by which the plaintiff was damaged, which were equal to it, evidence of a freshet in the years following that in which the damage complained of occurred, greater than the one which caused such damage, is admissible in connection with the proof relating to previous overflows, as a circumstance tending to show that the flood causing the damage to the plaintiff was an occurrence against which ordinary and reasonable care might have provided. *Gulf, C. & S. F. R. Co. v. Holliday*, 65 Tex. 512.

(2) *For defendant.*—Where a landowner sues for damages to his land, caused by defendant company opening a ditch along its track, it is error to refuse a deed offered by the company as evidence, which shows that the right of way was granted under terms giving it the same rights as if the right of way had been condemned; because if the ditching was a necessary incident to the construction and operation of the road, the release in the deed would constitute a good defense. *St. Louis, V. & T. H. R. Co. v. Hurst*, 14 Ill. App. 419.

Where a company is sued for negligently building a bridge with an embankment on either side, so as to throw water back on the land, it is error to reject evidence offered by the company to the effect that the abutments of the bridge were properly and skillfully placed and sufficient to discharge water in time of ordinary floods, inasmuch as the company is not liable, if it appears that the bridge was properly constructed, for any flooding caused by the embankment. *Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. Co.*, 3 Hun (N. Y.) 523, 5 T. & C. 651.—FOLLOWING *Bellinger v. New York C. R. Co.*, 23 N. Y. 42.

73. — *what is inadmissible.*—In an action for an overflow resulting from negligence in constructing an embankment without sufficient outlets for the escape of water, testimony that notice was given to the defendant's road master to remove the

alleged nuisance is inadmissible where the question of notice is not an issue in the case, and where it does not appear that the road master was a proper agent to whom notice could be given. *St. Louis, I. M. & S. R. Co. v. Lyman*, 57 Ark. 512, 22 S. W. Rep. 170.

In a suit for the destruction of crops, where plaintiff alleges that such crops were planted, cultivated, and owned at the time of the destruction by himself and his tenant, and that he had obtained, by transfer, his tenant's claim for damages prior to bringing the suit, the plaintiff's recovery is limited to such crops as the tenant at the time of the destruction had an interest in, and evidence of the destruction of crops in which the tenant never had been interested is inadmissible. *Gulf, C. & S. F. R. Co. v. McGowan*, (Tex.) 34 Am. & Eng. R. Cas. 210, 8 S. W. Rep. 57.

Where the action is for flooding growing cotton, evidence that plaintiff only gathered one and a half bales, where he otherwise would have gathered three and a half bales, is not admissible for the purpose of showing the amount of damages, unless it is followed up by other evidence, showing the cost of maturing the cotton after the time of flooding, and putting it in the market. *International & G. N. R. Co. v. Pape*, 73 Tex. 501, 11 S. W. Rep. 526.

That lands above and below the injured lands the subject of litigation had suffered by the overflow, although the disturbing cause complained of was not present, is incompetent to negative the testimony of witnesses that by the embankment of the railway the waters had been collected into a culvert and the increased flow caused thereby had washed away the soil and injured the crops upon which the current was thrown. *Gulf, C. & S. F. R. Co. v. Locker*, 78 Tex. 279, 14 S. W. Rep. 611.

Testimony to the condition of adjoining land, as bearing upon that alleged to have been injured, should not be allowed unless the condition of the two places with respect to productiveness should be proved in every material particular. It is not sufficient that they were contiguous and of the same elevation. *Green v. Taylor, B. & H. R. Co.*, 79 Tex. 604, 15 S. W. Rep. 685.

In the absence of testimony as to injury to the surface of the land overflowed, or to the soil, it was error to admit testimony as to value before and after the overflow, and

to charge upon supposed permanent injury to the land. *Gulf, C. & S. F. R. Co. v. Hepner*, 52 Am. & Eng. R. Cas. 670, 83 Tex. 136, 18 S. W. Rep. 441.

In trespass on the case for wrongfully and injuriously building an embankment on defendant's own land, so as to cause an obstruction and reflow of water on plaintiff's land, it is not error to refuse the introduction of testimony on the part of defendant that the drain constructed by the defendant to carry the water from the land of the plaintiff was such a drain as is usual and customary to be constructed at such embankments on railroads generally, and has been found sufficient for the purposes of carrying off the water at like places. *Beaty v. Baltimore & O. R. Co.*, 6 W. Va. 388.—QUOTING *Whitcomb v. Vermont C. R. Co.*, 25 Vt. 49.

74. Expert testimony.—In an action for damages to crops by flooding lands, expert testimony is admissible to show the laws of alluvial streams, the cause and manner of the growth of deposits of sediments, and the effects of such deposits upon streams in a long course of years, in a case where the channel of a stream has been obstructed. *Ohio & M. R. Co. v. Neutzel*, 143 Ill. 46, 32 N. E. Rep. 529.

In an action for damages to growing crops, opinions of competent witnesses in reference to the extent of the injury and the value of the growing crops may be received, and also the average product or yield of like crops under similar conditions, and, within reasonable limitations as to time, the average market value of such grain, less the expense of harvesting and marketing. *Lom-meland v. St. Paul, M. & M. R. Co.*, 26 Am. & Eng. R. Cas. 596, 35 Minn. 412, 29 N. W. Rep. 119.

Testimony of witnesses tending to show that the piers of a bridge were twenty feet apart from centre to centre; that prior to the construction of the bridge, floods had occurred in the river overflowing the bottom lands, and that driftwood frequently, at such times, floated down the river and was liable to lodge against any obstruction, and that in the breaking up of the ice in each spring cakes of ice more than twenty feet square frequently floated down which could not go between the piers unless broken up, is proper for the jury to consider in connection with testimony of experts in substance that the bridge at the time of its construction was a prudent, safe, and proper structure,

Omaha & R. V. R. Co. v. Brown, 44 Am. & Eng. R. Cas. 475, 29 Neb. 492, 46 N. W. Rep. 39. See, to same effect, *Omaha & R. V. R. Co. v. Standen*, 29 Neb. 622, 46 N. W. Rep. 46.

75. Documentary evidence.—A railroad company, sued for flooding adjoining lands by opening a ditch along its track, filed a plea of the statute of limitations of five years, and the plaintiff admitted that the acts complained of were committed more than five years before, but contended that the action should not be barred, because it was a continuing injury down to the time of bringing suit, and an issue was thus joined and trial had. *Held*, that this opened for investigation damages from the time of the construction of the road; but it was the right of the company to introduce a deed from the plaintiff, granting the right of way and releasing it from all damages which might occur as necessary incidents to the construction and operation of the road. *St. Louis, V. & T. H. R. Co. v. Hurst*, 14 Ill. App. 419.

76. Sufficiency of evidence.—Where one company constructs a road and another immediately takes charge and operates it, and both are sued for flooding land, by reason of defects in the construction, evidence to the effect that the operating company had furnished the funds for the construction, and had exercised authority over it, and had been the moving spirit from the beginning, and that it had filed a bill in a federal court to restrain the suit, in which it had made admissions against interest, is admissible, and sufficient to warrant a jury in finding that it was the real owner from the first, and therefore liable. *Kankakee & S. R. Co. v. Horan*, 23 Ill. App. 259.

Where the evidence shows that at the time plaintiff bought his land it was sufficiently drained by ditches and a culvert put in to supply the place of a natural drain, which had been filled up by a railroad embankment, and that these ditches and culvert were afterwards permitted by the defendant to fill up, which caused plaintiff's land to overflow, it is sufficient to support a verdict for plaintiff, and, the damages not being excessive, the court will not interfere. *St. Louis, A. & T. H. R. Co. v. Claunch*, 41 Ill. App. 592.—QUOTING *Ohio & M. R. Co. v. Wachter*, 123 Ill. 440.

To maintain such an obstruction is a violation of a public duty and an invasion of

private rights, creating a liability for damages to persons injured thereby. *St. Louis, A. & T. H. R. Co. v. Claunch*, 41 Ill. App. 592.

An overflow occurring on the line of a railroad bed built a few years afterwards, followed by two other overflows occurring after the road was built and within nine months of each other, tended so strongly to the conclusion that such overflows might reasonably have been expected, that a verdict for damages caused by the railway bed damming up the water and destroying crops, was not set aside. *Sabine & E. T. R. Co. v. Hadnot*, 30 Am. & Eng. R. Cas. 197, 67 Tex. 503, 4 S. W. Rep. 138.

A verdict is sustained by proof showing that the flooding of the land was caused by an embankment made by the company, which prevented the water from passing off as freely as it formerly did, though considerable openings were left in the embankment for that purpose. *Texas & P. R. Co. v. Snyder*, (Tex.) 18 S. W. Rep. 559.

Plaintiff sued for flooding his land by maintaining a bridge so constructed as not to give sufficient passage to the water. The evidence showed that the bridge had been maintained for twelve years, and never before had there been any complaint, and that the land had been subject to overflow for many years before the bridge was built; that only once by actual measurement the waters on the upper side of the bridge during a flood had been found to stand up two and a half inches, which would have no appreciable effect at the place of the overflow, and that the banks had not been as well protected by riprapping since the bridge was built as before. *Held*, not sufficient to warrant a verdict for plaintiff. *Hodge v. Lehigh Valley R. Co.*, 56 Fed. Rep. 195.

In an action for obstructing a stream, where the evidence shows that the only obstruction was a sill ten inches square placed by the defendant railroad across the bottom of the channel, that the stream had been obstructed at a point below to such an extent as to cause sand to accumulate and bury the sill some four feet under it, and that this filling of the stream had caused the overflow, a verdict against the defendant will be set aside as against the evidence. *Southwestern R. Co. v. Lee*, 47 Ga. 380.

A landowner introduced proof to show that the flooding was caused by an embankment which was constructed across a stream

without sufficient openings; that for thirty years before the embankment was built the lands had never been flooded but once, and then at a time of an unusual rain, but since the embankment was built the lands were overflowed every time there was a rain which amounted to anything. The company introduced evidence to show that the openings in the embankment were sufficient, even in times of high freshets; that the land was subject to overflow before the embankment was built. *Held*, sufficient to justify a verdict in favor of the landowner. *Dallas & W. R. Co. v. Kinnard*, (Tex.) 18 S. W. Rep. 1062.

77. Instructions, generally.—In an action for damages from backwater caused by an insufficient culvert in an embankment, it was the duty of the court to instruct the jury as to the law applicable to the case of injury to the property of an adjacent landowner, growing out of the manner in which the railroad was constructed. *Houston & G. N. R. Co. v. Parker*, 50 Tex. 330.

Where suit is brought by an owner of leased land for permanent injuries thereto by flooding it, caused by the negligent manner in which a railroad is constructed, an error in admitting evidence as to temporary damages thereto is cured by an instruction that the right of recovery for any temporary damage is in the tenant, and that plaintiff could only recover for permanent injuries. *Gulf, C. & S. F. R. Co. v. Harmonson*, (Tex. Civ. App.) 22 S. W. Rep. 764.

Where the court has instructed the jury that plaintiff is entitled to recover such a sum as will be a fair compensation for the injury done, the company cannot complain that the court failed to indicate a rule by which to assess the damages, where it did not ask the court to instruct further. *Gulf, C. & S. F. R. Co. v. Harmonson*, (Tex. Civ. App.) 22 S. W. Rep. 764.

78. — what are proper.—An instruction that if the defendant's "negligence contributed in a large degree, along with the act of God, in causing the loss sustained by the plaintiff, it [the defendant] would be liable in damages for the additional damages sustained by the plaintiff by reason of such negligence of the defendant," is not erroneous. *Republican Valley R. Co. v. Fink*, 18 Neb. 24 N. W. Rep. 691.

An instruction that the jury should con-

sider whether the water on the land, inclusive of what might fall as rain water and what was there as overflowed water, would have run off the land in the natural course of drainage without the injury complained of, if defendant's roadbed had not been constructed as it was, is not erroneous as authorizing the jury to take into consideration sources of overflow not alleged in the plaintiff's petition. *Sabine & E. T. R. Co. v. Brouard*, 41 Am. & Eng. R. Cas. 26, 75 Tex. 597, 12 S. W. Rep. 1126.

An instruction that the jury should consider whether the damage would have occurred if the embankment or roadbed had been so constructed as to properly drain the country, is not open to the objection that the duty of the defendant was to so construct its roadbed and embankment as not to impede natural drainage, and that the instruction imposed a greater duty upon it. *Sabine & E. T. R. Co. v. Brouard*, 41 Am. & Eng. R. Cas. 26, 75 Tex. 597, 12 S. W. Rep. 1126.

An instruction that if defendant, by building its roadbed south of plaintiff's lot, collected the surface water and caused it to flow upon said lot, whereby it was damaged, the finding should be for the plaintiff for the damages sustained at the time of the institution of the suit, sufficiently distinguishes such temporary damages from the damages arising from a permanent approach to defendant's roadbed, extending in front of plaintiff's lot. *Wallace v. Kansas City & S. R. Co.*, 47 Mo. App. 491.—**DISTINGUISHING** *Van Hoozier v. Hannibal & St. J. R. Co.*, 70 Mo. 145. **FOLLOWING** *Martin v. Chicago, S. F. & C. R. Co.*, 47 Mo. App. 452.

The evidence was conflicting as to whether the water thrown upon the plaintiff's land was simply surface water or that of a natural stream or watercourse which had been diverted. The jury were instructed that if it was surface water the company would not be liable, if the road was constructed with proper care; but that the company would be liable if it had diverted water from a stream, but that plaintiff could not recover if he might have prevented the injury with comparatively small cost. *Held*, that the company had no right to complain of the instructions. *Munkres v. Kansas City, St. J. & C. B. R. Co.*, 5 Am. & Eng. R. Cas. 79, 72 Mo. 514.—**QUOTED IN** *Hannaher v. St. Paul, M. & M. R. Co.*, 5 Dak. 1, 37 N. W. Rep. 717.

79. — and properly given.—An instruction is properly given which tells the jury that the proper measure of damages is the aggregate sum of the differences in value of the land immediately before and immediately after each flooding during the preceding five years, making no allowance for crops destroyed where they were planted under the knowledge that their destruction was certain. *Willits v. Chicago, B. & N. W. R. Co.*, 88 Iowa 281, 55 N. W. Rep. 313.

Where the evidence shows that plaintiff's land and building were injured by the overflow of a stream, and that defendant company, in constructing its road, had cut away the banks of the stream so as to conform to the grade of its road, it is proper for the court to instruct the jury that if they found that the injury was caused by such excavation, and that the injury would not otherwise have occurred, then the company is liable. *Robinson v. New York & E. R. Co.*, 27 Barb. (N. Y.) 512.

80. — what are improper.—Where the answer is a general denial, and the witnesses disagree as to the amount of damages, an instruction that "the question of amount of damages scarcely requires much attention, since in the trial defendant has made no contest thereon," is erroneous. *Republican Valley R. Co. v. Fink*, 18 Neb. 89, 24 N. W. Rep. 691.

A charge that "the proper criterion for ascertaining the damages would be the actual damage to the value of the land before the water was turned on it, and the reasonable worth or value of the land with the water so changed or turned onto the land, and in this way arriving at the actual damages sustained by the plaintiff," is error. *Galveston, H. & S. A. R. Co. v. Tait*, 63 Tex. 223.—**APPROVING** Gulf, C. & S. F. R. Co. v. Helsley, 62 Tex. 593; *Van Pelt v. Davenport*, 42 Iowa 314.

In an action for the loss of pasture, an instruction that the jury might find what, if any, was the value for one year, and then take the proportionate rate for the length of time which the evidence showed plaintiff was deprived of his pasture, is erroneous where it appears that the value of the pasture varied at different seasons of the year. *Sabine & E. T. R. Co. v. Broussard*, 34 Am. & Eng. R. Cas. 199, 69 Tex. 617, 7 S. W. Rep. 374.

An instruction was held erroneous which authorized recovery if the jury believed that

the injury complained of was occasioned by water forced out of the bed of the creek by the obstructions of the bridge, uniting with other waters of the creek which had escaped from its bed at other points. Such instruction entirely leaves out of view the question whether or not the company was negligent. *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 20 Am. & Eng. R. Cas. 103, 83 Mo. 271, 53 Am. Rep. 581.—**FOLLOWING** *Price v. St. Louis, K. C. & N. R. Co.*, 72 Mo. 416; *Waldhier v. Hannibal & St. J. R. Co.*, 71 Mo. 514; *Edens v. Hannibal & St. J. R. Co.*, 72 Mo. 212; *Iron Mountain Bank v. Murdock*, 62 Mo. 70; *Zimmerman v. Hannibal & St. J. R. Co.*, 71 Mo. 491.

In an action for an overflow above a bridge, the evidence showed that below the bridge the water was caused to rise several feet by a dam across a natural watercourse; that above the bridge the water was two feet higher than below it. The trial court ruled that no recovery could be had on account of the dam, because the water was higher above than below the bridge. *Held*, error, because but for the dam the water below the bridge would have passed off and to some extent have increased the flow under it, thus reducing the backwater. *Payne v. Kansas City, St. J. & C. B. R. Co.*, 112 Mo. 6, 20 S. W. Rep. 322.

An instruction charging the jury "that notwithstanding the fact that the railroad company, when it constructed its bridge, did so in a prudent manner, according to the best information it could obtain at the time of its construction, yet if it subsequently appeared that its construction was such that damages would result from the gorging of ice against the bridge, and that damages would result to the plaintiff and other property holders in the vicinity of the bridge by reason of the overflow of ice and water in consequence of such gorge, and the defendant had the time and the opportunity and means, by reasonable effort on its part in that behalf, to avoid or prevent such damage, it was its duty so to do, and it was required to use all reasonable effort to avert such damage, and if it failed so to do, it is liable to plaintiff for the damages sustained by him resulting directly from such failure"—*held*, erroneous, and a new trial awarded. *Omaha & R. V. R. Co. v. Brown*, 11 Am. & Eng. R. Cas. 501, 14 Neb. 170, 15 N. W. Rep. 321.—**FOLLOWED IN** *McClennan v. Omaha & R. V. R. Co.*, 37

Am. & Eng. R. Cas. 245, 25 Neb. 523, 41 N. W. Rep. 350.

In an action for the overflow of land on which plaintiff had a brick-yard, the overflow being alleged to result from the inability of the waterway under a bridge built by defendant to carry off the water at times of heavy rains, the plaintiff testified that previous to the time he placed his brick-yard at the place the overflows did not occur every year, but did occur at an average of four years in five; the defendant asked the court to instruct the jury that upon plaintiff's evidence he was guilty of contributory negligence, which was refused, and the court charged the jury that if the circumstances were such that a man of ordinary prudence would have placed the brick-yard at that place, it would not be contributory negligence. *Held*, to be erroneous. *Emry v. Raleigh & G. R. Co.*, 52 Am. & Eng. R. Cas. 695, 109 N. Car. 589, 14 S. E. Rep. 352, 15 L. R. A. 332.—DISTINGUISHED IN *Knight v. Albemarle & R. R. Co.*, 111 N. Car. 80.

The breaking of a culvert under the embankment of defendant's road, in a freshet, having caused an accumulation of water, which, the embankment being opened, overflowed plaintiff's land, to his damage, the circuit judge charged the jury that if the servants of the defendant let off the water, the defendant was liable for the actual damage therefrom ensuing to the plaintiff, no matter how much care and caution they exercised. *Held*, erroneous, and that the defendant was not liable unless guilty of negligence in setting free the accumulated water. *Mills v. Greenville & C. R. Co.*, 5 Am. & Eng. R. Cas. 55, 13 So. Car. 97. *Cairo & V. R. Co. v. Houry*, 5 Am. & Eng. R. Cas. 62, 77 Ind. 364.

Plaintiff sued the company for negligently overflowing his lands, causing loss and injury to corn and cotton crops and to grass. The charge submitted the injury to the crops. *Held*, that the omission of damages to the grass was a material error, there being testimony to its injury. *Green v. Taylor, B. & H. R. Co.*, 79 Tex. 604, 15 S. W. Rep. 685.

81. — and properly refused.—It was not error to refuse to charge the jury upon the theory that a railroad company is not liable for damages for failure to provide sufficient outlets for the escape of the water of all streams crossing its roadbed. *St.*

Louis, I. M. & S. R. Co. v. Lyman, 57 Ark. 512, 22 S. W. Rep. 170.

Where the evidence shows that the freshet which flooded plaintiff's lands was not extraordinary or unprecedented, it is proper to refuse to instruct the jury that the company would not be liable if its bridge and trestle were sufficient except for "extraordinary freshets." *Noe v. Chicago, B. & Q. R. Co.*, 76 Iowa 360, 41 N. W. Rep. 42.

Where, in an action for damages caused by diversion of water from its regular channel, the plaintiffs expressly abandoned all claim for injury arising from the diversion and direction of surface water upon their land, and where the response to issues already submitted would necessarily negative the idea of damages by "surface water," it was not error for the judge to refuse to submit an issue presenting the question whether the water diverted (if any) was rain or surface water. *Ward v. Albemarle & R. R. Co.*, 112 N. Car. 168, 16 S. E. Rep. 921.

Instructions to the effect that an owner of land adjacent to a railroad, under purchase after its construction, cannot recover for injury to his crops by overflow resulting from insufficient outlets for water and defects in the construction of the railroad—*held*, properly refused. *Atlantic & D. R. Co. v. Peake*, 87 Va. 130, 12 S. E. Rep. 348.—DISTINGUISHING *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203.—QUOTING *Southside R. Co. v. Daniel*, 20 Gratt. (Va.) 344.

82. Instructions assuming facts.—In an action for flooding land by a defective culvert, it was error to instruct the jury "that defendant had no right in the construction of its roadbed to so construct the same as to obstruct the natural flow of surface water so as to overflow the premises of another." The instruction assumed as a fact a question which was in dispute. *Chicago, M. & N. R. Co. v. Eichman*, 47 Ill. App. 156.

Special charges are properly refused, where they assume as matter of law that a railway company is excused for having failed to construct its roadbed, culverts, and ditches in such a manner as to afford free passage and egress to water coming from a large river and from a great distance; and where they assume as matter of law that a particular freshet was an extraordinary one. *Gulf, C. & S. F. R. Co. v. Holliday*, 65 Tex. 512.

83. Instructions incorrectly stating the law.—The action being to recover damages to land above by reason of an embankment erected in 1881, and also the damages to land below by reason of the breaking of the embankment in 1886, the trial judge erred in instructing the jury that in estimating the damages they could go back only to 1886. *Gentry v. Richmond & D. R. Co.*, 38 So. Car. 284, 16 S. E. Rep. 893.

The court properly refused to charge the jury that "if a roadbed was constructed so as to let the water pass with as little injury to plaintiff as could be practically done without making the road insecure, then the defendant company would not be liable for injury from water action after it left the right of way." This is not the law. *Austin & N. W. R. Co. v. Anderson*, 79 Tex. 427, 15 S. W. Rep. 484.

84. What are questions of fact for the jury.—What are ordinary and what extraordinary damages are questions for the jury; and it is error in the court to say that a company is not liable for ordinary damages, and so instruct the jury that they may infer that the company would not be liable for ordinary damages, but would be liable for extraordinary damages. *Hannaker v. St. Paul, M. & M. R. Co.*, 5 Dak. 1, 37 N. W. Rep. 717. — QUOTING *Walker v. Old Colony & N. R. Co.*, 103 Mass. 10; *Munkres v. Kansas City, St. J. & C. B. R. Co.*, 72 Mo. 514.

Whether a trestle constituted an obstruction to the natural flow of water, by reason of which plaintiff's lands were flooded, or whether the amount of water overflowing plaintiff's land was increased by reason of the manner of construction of the trestle, were questions of fact for the jury. *St. Louis, A. & T. H. R. Co. v. Winkelmann*, 47 Ill. App. 276.

Where a company is sued for flooding lands by reason of certain embankments and ditches, and there is some evidence tending to show that the seasons were so rainy that the damages would have accrued regardless of the embankment and ditches, the question of the cause of the injury is for the jury. *Kankakee & S. R. Co. v. Horan*, 23 Ill. App. 259.

Where a company in constructing its road opens up underground springs, and subsequently, for the protection of its track, conducts the water in an artificial channel and throws it on the land of another, it is liable,

if discharging the water in the manner that it did is not reasonably necessary for the maintenance of its road; and whether it is reasonably necessary is for the jury. *Curtis v. Eastern R. Co.*, 14 Allen (Mass.) 55.—DISTINGUISHED IN *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504.

Where there is a conflict of evidence, but plaintiff's evidence is sufficient to show that the injury resulted from the narrowing of a bridge and the obstruction of a stream by defendant, causing the water to flow upon plaintiff's land, and the jury have been properly instructed as to the law, a verdict for plaintiff should not be disturbed. *Woodruff v. Syracuse, B. & N. Y. R. Co.*, 73 Hun 296, 26 N. Y. Supp. 421.

Where lands are flooded by the alleged imperfect construction of a railroad bridge and embankment, it is a question for the jury whether the flood complained of was of such extraordinary character as to relieve the company from liability, or whether it should have been anticipated and provided against. *Van Duser v. Elmira, C. & N. R. Co.*, 75 Hun 487, 27 N. Y. Supp. 474, 57 N. Y. S. R. 355.—FOLLOWING *Mundy v. New York, L. E. & W. R. Co.*, 75 Hun 479.—*Mundy v. New York, L. E. & W. R. Co.*, 75 Hun 479, 27 N. Y. Supp. 469, 57 N. Y. S. R. 367.

Where a railroad company buys an existing road, and at a point thereon an embankment and bridge are constructed so as to interfere with the flow of water in times of very high freshets, it is a question for the jury whether the company was charged with notice of the imperfect construction of the bridge and embankment before the happening of a flood to test its defective character. *Van Duser v. Elmira, C. & N. R. Co.*, 75 Hun 487, 27 N. Y. Supp. 474, 57 N. Y. S. R. 355.

85. — and what are not.—Where the evidence does not show any change of condition in the surface of the soil or any permanent injury to the land itself, it is proper for the court to withdraw that question from the jury. *Green v. Taylor, B. & H. R. Co.*, 79 Tex. 604, 15 S. W. Rep. 685.

Where a landowner sues for both permanent and temporary damages resulting to his land by flooding, caused by the negligent manner in which the road was constructed, and the court on demurrer strikes out the allegation as to the temporary damages, it is error to submit to the jury an

issue as to temporary damages, and a verdict rendered in such case cannot be sustained, though supported by evidence. *Gulf, C. & S. F. R. Co. v. Frederickson*, (Tex.) 19 S. W. Rep. 124.

3. Damages.

86. Right to damages.—The words "deprived" and "taken," in the Magna Charta (N. C. Decl. of Rights, § 17), are broad enough to include damages for flooding land. *Staton v. Norfolk & C. R. Co.*, 52 Am. & Eng. R. Cas. 686, 111 N. Car. 278, 16 S. E. Rep. 181.—QUOTING *Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall. (U. S.) 166; *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504.

If crops have been destroyed or damaged by negligence or wrong in causing overflows, etc., then the owner is entitled to recover their value; and if the land has been rendered less productive or otherwise injured, then he is entitled to recover such damage as will be a fair compensation to him for the loss sustained, and from time to time, if injury results to him from the negligence or wrong continuing, he will be entitled to relief by a proper action or actions. *Green v. Taylor, B. & H. R. Co.*, 79 Tex. 604, 15 S. W. Rep. 685.—QUOTING AND FOLLOWING *Gulf, C. & S. F. R. Co. v. Helsley*, 62 Tex. 596.

87. Proximate and remote damages.—A company whose road is constructed over a watercourse is not liable for remote and uncertain consequences, but only for the necessary and proximate results of the structure. *Ohio & M. R. Co. v. Thillman*, 143 Ill. 127, 32 N. E. Rep. 529.

Where water is diverted from its natural course and spread over land, the damages caused by its carrying seeds of noxious weeds on the land are not too remote to be recovered. *Illinois C. R. Co. v. Heisner*, 45 Ill. App. 143.

Where the injurious overflow from a natural stream wrongfully obstructed is aggravated by the effects of melting snow and falling rains, it is not incumbent on either court or jury to discriminate between the damages so caused and those resulting purely from the action of the living stream. *Bird v. Hannibal & St. J. R. Co.*, 30 Mo. App. 365.

Starvation of cattle cannot be added to the value of the use of the pasture during the alleged overflow, etc. Such matters are

too remote. Besides, if allowed, there would be double damages for same injury. *Broussard v. Sabine & E. T. R. Co.*, 80 Tex. 329, 16 S. W. Rep. 30.

The landowner is entitled to recover the value of his grass submerged, but not the price of new pastures or the expense of driving his cattle to them. *Sabine & E. T. R. Co. v. Johnson*, 65 Tex. 389.

Where a company, before suit brought, wrongfully suffered water to flow upon the plaintiff's lot, where it spread and froze several feet deep—*held*, that the plaintiff might recover damages occurring after suit brought, caused by melting ice. *Chicago & W. R. Co. v. Hoag*, 90 Ill. 339.

A company cut ditches, and the water which it turned into them, together with the water turned in by plaintiff and others, overflowed plaintiff's land. *Held*, that the company was not liable if the water which it alone turned into the ditches would not have overflowed the land. *Illinois C. R. Co. v. Heisner*, 45 Ill. App. 143.

88. Special damages—Pleading.—In an action for alleged special damages to plaintiff, occasioned by overflow of water on his land caused by defendant's negligence in constructing a dam, damages for injuries to the land itself, and as to which the petition contains no averment, cannot be recovered. *Brown v. Chicago & A. R. Co.*, 80 Mo. 457.

Sickness in plaintiff's family, caused by an overflow of water from defendant company's negligently constructed dam, is a proper element of damages where the same is pleaded in the petition. *Brown v. Chicago & A. R. Co.*, 80 Mo. 457.

Special damages being alleged to crops and fruit trees, and there being no testimony to permanent injury, the court erred in refusing a charge restricting the damage to that from destruction and injury to crops and fruit trees. *Gulf, C. & S. F. R. Co. v. Hepner*, 52 Am. & Eng. R. Cas. 670, 83 Tex. 136, 18 S. W. Rep. 441.

89. Nominal damages.—Where the jury are instructed to assess the damages to plaintiff's crop and to his life interest in a tract of land, occasioned by an overflow, a general verdict in plaintiff's favor for a substantial amount will be set aside where there was evidence as to the damage to the crop, but not of the damage to the life estate. No verdict in such case, save for nominal damages, could be sustained upon

the latter score. *St. Louis, A. & T. R. Co. v. Graham*, 55 Ark. 294, 18 S. W. Rep. 56.

Where the owner of a lot claims damages from the flowing of water and the proof shows that most of the water is attributable to negligence of defendant in suffering it to escape from a tank, and a part was the flowing of surface water in its natural course, it is not proper to instruct the jury that if they cannot determine from the evidence what part of the damage was occasioned by defendant, they cannot find more than nominal damages in favor of plaintiff. *Chicago & N. W. R. Co. v. Hong*, 90 Ill. 339.

90. Aggravation or mitigation.—A recovery of damages for injury to pasture through a flood caused by another's negligence is not limited to the value of the grass actually destroyed by the overflow; but it may be shown that the land was rendered incapable, for a time after the water subsided, of producing grass as it did before the overflow. *Sabine & E. T. R. Co. v. Brouard*, 34 Am. & Eng. R. Cas. 199, 69 Tex. 617, 7 S. W. Rep. 374.

In determining the company's responsibility, the fact that the injured parties constructed a mill and maintained a lumber yard at a place where, if the culvert was insufficient, damages must certainly ensue to them, should be taken into consideration. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 58 Am. & Eng. R. Cas. 642, 57 Fed. Rep. 441.

Damages for overflowing land by the construction of a railroad levee cannot be diminished by the enhanced value given to the land, in common with other lands in the vicinity, by the presence of the road. *St. Louis, I. M. & S. R. Co. v. Morris*, 5 Am. & Eng. R. Cas. 48, 35 Ark. 622.

91. Excessive damages.—Where the evidence shows that a growing crop was destroyed by backwater from a railway embankment, but that a few days afterwards there was a general overflow which would have destroyed the crop had the embankment not been erected, a verdict for damages which was based upon the assumption that the crop would have matured will be set aside. *St. Louis, I. M. & S. R. Co. v. Yarrowborough*, 52 Am. & Eng. R. Cas. 682, 56 Ark. 612, 20 S. W. Rep. 515.

Where the evidence shows damages, not to crops directly, but that the land is rendered incapable of producing full crops, plaintiff cannot recover the value of the land, and,

in addition, damages on account of the failure to make such crops. *Illinois C. R. Co. v. Miller*, 68 Miss. 760, 10 So. Rep. 61.

Where property owners sue a railroad company for so erecting an embankment as to cause water to flow on the premises, if it appear that plaintiffs could have diverted the water by reasonable precautions, such as a person of ordinary prudence would have used, and thereby might have materially reduced the damages, there can be no recovery of full damages. *Galveston, H. & S. A. R. Co. v. Becht*, (Tex. Civ. App.) 21 S. W. Rep. 971.

In such case the measure of damages, where the land and a house thereon are injured, is compensation to the property as realty, and is the difference between its value before and after the injury, and not its reduced rental value. *Galveston, H. & S. A. R. Co. v. Becht*, (Tex. Civ. App.) 2: S. W. Rep. 971.

Plaintiff sued for throwing water back on his land by an embankment which had been erected and maintained for eighteen years, but by the statute of limitations a recovery was limited to six years last past; but the jury awarded damages which, under the evidence, were large enough to cover the entire time. *Held*, that the damages were excessive and the verdict should be set aside, unless plaintiff would agree to reduce it to a proportion of the amount. *Smith v. Philadelphia & R. R. Co.*, 57 Fed. Rep. 903.

92. Confined to damages done up to the institution of suit.—In an action for flooding land by improper construction of an embankment, the amount of damages recoverable is that which has accrued prior to the commencement of the action. *Kansas City, Ft. S. & M. R. Co. v. Cook*, 58 Am. & Eng. R. Cas. 654, 57 Ark. 387, 21 S. W. Rep. 1066.

It is therefore error to instruct the jury that the proper measure of damages is the difference between the market values of the land immediately before and immediately after the flooding took place. *Benson v. Chicago & A. R. Co.*, 20 Am. & Eng. R. Cas. 96, 78 Mo. 504.

The true measure of damage is the injury which the land and other property sustain from the successive overflows when they occur. *Gulf, C. & S. F. R. Co. v. Helsley*, 20 Am. & Eng. R. Cas. 89, 62 Tex. 593.—QUOTING *Van Pelt v. Davenport*, 42 Iowa 314.—APPROVED IN *Galveston, H. & S. A.*

R. Co. v. Tait, 63 Tex. 223. QUOTED AND FOLLOWED IN *Green v. Taylor*, B. & H. R. Co., 79 Tex. 604.

The damages to crops must be computed to the very time of the flood at the place where it occurred, and should not be extended to the date of the maturity of the crop nor to the place where it would usually find a market. *Sabine & E. T. R. Co. v. Joachimi*, 11 Am. & Eng. R. Cas. 539, 58 Tex. 456.—REVIEWING *Foot v. Merrill*, 54 N. H. 490; *Gresham v. Taylor*, 51 Ala. 505.

93. Elements and measure of damages, generally.*—Where a company, in constructing a second track, obstructs a prior drainage under the first track, so as to flow the water back on plaintiff's land, the depreciation in the value of the land, caused solely by the structure, may be considered as the measure of damages as to the real estate injured thereby. But in considering such depreciation it is necessary to take into account whether the injury can be obviated, in whole or in part, by expending money to remove the obstruction. If the injury is permanent and cannot be removed, the measure of damages is the depreciation of the property injured. *Chicago, R. I. & P. R. Co. v. Carey*, 90 Ill. 514.

If the obstruction causing the injury is upon the company's right of way, the owner of the land has no right to enter thereon to remove the obstruction. In such case the party injured by the obstruction has the right to claim it as a permanent injury, and the jury to allow damages as such. But if the obstruction is upon plaintiff's land, he may remove the same, and the jury may consider the cost necessary to restore the property to its former condition, and that cost would be the depreciation in the value of his land. *Chicago, R. I. & P. R. Co. v. Carey*, 90 Ill. 514.

Where the usual outlet of water is obstructed so as to overflow plaintiff's lands he may recover for the loss of, or injury to, the crops of hay, etc., or the expense of securing them, in addition to the loss by the depreciation of the land. *Chicago, R. I. & P. R. Co. v. Carey*, 90 Ill. 514.

Where the court instructs the jury that in estimating the damages it is proper for

them to consider the value of the land at the time the injury occurred, and the decrease in value, if any, in consequence of the injury, it is error to further instruct them that they may also consider the inconvenience and damage in having one portion of the land separated from another by reason of such overflow, if there is such separation, the damage sustained to the land covered by such overflow, the damage, if any, to the portion not overflowed by the overflow of the portion covered with water, and the necessary expense, if any, which the plaintiff sustained in the construction of necessary roads and bridges in consequence of such overflow, as such damages necessarily enter into and would be considered in fixing the amount of depreciation in the value of the land, and thus authorize a double allowance for such injuries. *Chicago, R. I. & P. R. Co. v. Carey*, 90 Ill. 514.

The measure of the damage for flooding land is as follows: (1) For rendering land so that it cannot be tilled, the measure of damages is the rental value. (2) Where a crop is planted but not up, the measure of damages is the rental value of the land and the cost of seed and labor expended in planting. (3) Where the crops are up and more or less matured, the measure of damages is the rental value, the cost of seed and labor in planting, and the cost of labor bestowed after the planting; or, at the plaintiff's option, he may recover the value of the crop at the time of its destruction. (4) Where the crop is injured but not destroyed, the measure of damages is the amount of depreciation in its value. *Kankakee & S. R. Co. v. Horan*, 17 Ill. App. 650.

The proper measure of damages in an action by a tenant for years, for injuries by flowage to lands held by him as such tenant, is such as would compensate him for the direct and immediate injury caused by defendant's acts, such as the loss of crops; but such damages should be confined to the loss of the use of the lands and their yearly products, and none should be given for any permanent injury to the lands. *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

The measure of damage from an overflow of cultivated land, caused by ditches cut by another, is not such damage as would result if the evil complained of were permanent, but such as has already resulted to grow-

* Measure of damages for the overflow of land, see note, 26 AM. & ENG. R. CAS. 598.

Overflow of lands by diversion of water of a stream. Measure of damages, see 52 AM. & ENG. R. CAS. 676, *abstr.*

ing crops and the like when the suit is brought. The cause of the injury may or may not continue; the injured party may enjoy the continuance of the causes which produce the injury, or he may sue from time to time as damages result from the wrongful act. *Galveston, H. & S. A. R. Co. v. Seymour*, 63 Tex. 345.—FOLLOWING *Gulf, C. & S. F. R. Co. v. Helsley*, 62 Tex. 593.

Plaintiff conveyed a free right of way across his land, with a provision that the company should not cause any of his land to be flooded; but the company constructed an insufficient waterway, whereby much of a growing crop of vegetables was destroyed and unplanted ground injured. *Held*: (1) that he was entitled to actual damages for the destruction of the growing crop, which was the difference between the actual value of the crop immediately after and immediately before the injury; (2) that the measure of damages for the injury to the unplanted land was the cost of restoring it to its former condition and the loss occasioned by being deprived of the use of the land, with interest. *Sabine & E. T. R. Co. v. Joachimi*, 11 Am. & Eng. R. Cas. 539, 58 Tex. 456.—FOLLOWED IN *Texas & St. L. R. Co. v. Young*, 13 Am. & Eng. R. Cas. 544, 60 Tex. 201.

94. Productiveness of the land.—The amount allowable as damages for a flooding of plaintiff's land may be estimated by comparing the productiveness of the land when flooded with its productiveness when not so flooded. *Spilman v. Roanoke Nav. Co.*, 74 N. Car. 675.—DISTINGUISHING *Sledge v. Reid*, 73 N. Car. 440.

95. Rental value.—In an action to recover the damage to land from an overflow caused by a continuing but removable nuisance, such as an insufficient outlet in a railway track, the measure of damage, in the absence of any injury to the soil, is the loss to the owner in the use or the rental value of the land, not in its salable value. *Kansas City, Ft. S. & M. R. Co. v. Cook*, 57 Ark. 387, 21 S. W. Rep. 1066.

Where cultivated lands are flooded by a defective railroad culvert, the measure of damages is the loss of the growing crop, the rental value of the land until restored to fertility, and the necessary cost of restoring it. *Chicago, M. & N. R. Co. v. Eichman*, 47 Ill. App. 156.

The measure of damages for the destruction of grass is its value at the time de-

stroyed. When the injury is of such a character by an overflow as to prevent the growth of the grass and to deprive the owner of the use of his pasture for a considerable time, he is entitled to damages for the value of the use of the land for such purpose of pasturage in the condition it would have been but for the overflow, there being no permanent injury to the land. *Broussard v. Sabine & E. T. R. Co.*, 80 Tex. 329, 16 S. W. Rep. 30.

96. Difference in value before and after overflow.—The rule for assessing damages for flooding by an embankment is to take the actual value of the land at the completion of the work, supposing the consequences to be known, compare it with what the value would have been if the overflow had remained as before the construction of the embankment, and fix the damages at the difference. *St. Louis, I. M. & S. R. Co. v. Morris*, 5 Am. & Eng. R. Cas. 48, 35 Ark. 622. *Workman v. Great Northern R. Co.*, 32 L. J. Q. B. 279.

In an action for obstruction of water by an embankment, the measure of plaintiff's damages for each year was the difference between the fair market value of the land immediately before the injury each year and its fair market value immediately after such injury; and the term "land," so used, included the growing crops. *Sullens v. Chicago, R. I. & P. R. Co.*, 74 Iowa 659, 7 Am. St. Rep. 501, 38 N. W. Rep. 545.

A different rule prevails when the damage consists in permanent injury to the land itself; in such a case the measure of damages is the difference between the value of the land immediately before the erection of the embankment, and its value after all the damage caused by the obstruction to the flow of water had been done. *Owens v. Missouri Pac. R. Co.*, 30 Am. & Eng. R. Cas. 205, 67 Tex. 679, 4 S. W. Rep. 593.

Where the plaintiff sues for flooding his house and grounds, the measure of damages is the difference in their value immediately before and immediately after the injury, reckoning only such damages as result from the flooding, and could not have been prevented by plaintiff in the exercise of reasonable care. *Chase v. New York C. R. Co.*, 24 Barb. (N. Y.) 273.

Where the action is for diverting a stream which throws up a bar on plaintiff's land, the measure of damages is the depreciation in the value of the land thereby,

and has no reference to the cost of removing the bar. *Easterbrook v. Erie R. Co.*, 51 Barb. (N. Y.) 94.

The measure of damages for negligently deluging the land of another, without permanently taking it, is the value of the products destroyed, including fruit trees, and the injury done to the land, and not the difference between the value of the land before and after the overflow. *Sabine & E. T. R. Co. v. Johnson*, 65 Tex. 389.

The defendant company negligently constructed a culvert which diverted a stream of water from its channel and threw up a gravel bar on plaintiff's land, for which the company paid him damages. Subsequently his land was flooded again and the presence of the gravel bar increased the damages by throwing the current still further out of the natural course. *Held*, that the plaintiff was not prevented from recovering for the second loss because he had received damages for the first, and had failed to remove the bar. *Easterbrook v. Erie R. Co.*, 51 Barb. (N. Y.) 94.

Suit was brought for damages caused by raising an embankment in the construction of the road, and thus flooding adjoining lands. Plaintiff claimed that the embankment was so constructed as to divert the water of ordinary rains from creeks and branches, which inundated forty acres of his best tillable land until it was a total loss, and that the value of his entire farm had thereby been impaired. *Held*, under these allegations, that it was proper to permit proof of injury to the entire tract, and the measure of damage was the difference between the value of the land immediately before and immediately after the injury. *Texas C. R. Co. v. Clifton*, 2 Tex. App. (Civ. Cas.) 433.

97. Value of the crop.—The measure of damages in an action against a railroad for flooding cultivated lands and destroying a growing crop is the value of the crop at the time of the flooding, and not its value at maturity, less the expense of cultivation and harvesting. *Gulf, C. & S. F. R. Co. v. Hedrick*, (Tex.) 7 S. W. Rep. 353.—FOLLOWING *Sabine & E. T. R. Co. v. Joachimi*, 58 Tex. 460; *Texas & St. L. R. Co. v. Young*, 60 Tex. 204.—*St. Louis, I. M. & S. R. Co. v. Lyman*, 57 Ark. 512, 22 S. W. Rep. 170.—FOLLOWING *St. Louis, I. M. & S. R. Co. v. Yarborough*, 56 Ark. 612.—*Byrne v. Minneapolis & St. L. R. Co.*, 38 Minn. 212,

36 N. W. Rep. 339.—**DISTINGUISHING** *Braken v. Minneapolis & St. L. R. Co.*, 29 Minn. 41, 11 N. W. Rep. 124.

The measure of damages will be: (1) if the crops are wholly destroyed, the cash value of the crops at the time and place destroyed, with legal interest to the time of trial; (2) if the crops were damaged but not destroyed, the difference between the actual cash value of the crops as they stood upon the land at the time immediately before the injury, and their cash value immediately after such injury, with interest; (3) with respect to land, if its value be totally destroyed, the owner is entitled to recover as damages the actual cash value of the land at the time of the destruction of value, with interest; (4) in case of permanent injury the owner should recover the difference between the actual cash value at the time immediately preceding the injury and the actual cash value immediately after the injury, with interest; (5) if the injury is temporary only, the owner should recover the amount necessary to repair the injury and put the land in the condition it was at the time immediately preceding the injury, with interest. *Trinity & S. R. Co. v. Schofield*, 72 Tex. 496, 10 S. W. Rep. 575.

Where land is flooded after a crop is planted but before it is up, the measure of damages is the rental value of the land and the cost of seed and labor in planting; but where the crop is up and more or less matured, the value of the crop when destroyed is the measure of damages. *Ohio & M. R. Co. v. Nuetzel*, 43 Ill. App. 108.

Where the action is by a landowner for flooding his land and destroying growing crops, and the evidence shows that they were grown by tenants and that plaintiff was to receive but a certain share of the crops, he is only entitled to recover the value of his interest therein. *Texas & P. R. Co. v. Saunders*, 4 Tex. App. (Civ. Cas.) 528, 18 S. W. Rep. 793.

The most satisfactory means of determining the value of the growing crop, at any stage of existence, is to prove its probable yield under proper cultivation, the value of such yield matured and ready for market, and the expense of producing the crop and transporting it to market. *Gulveston, H. & S. A. R. Co. v. Borsky*, 2 Tex. Civ. App. 545, 21 S. W. Rep. 1011.

98. — at the time and place of injury.—The proper measure of damages

for destroying a crop is the value of the crop at the time and place of destruction just as it stood upon the ground, and not its value when matured and placed upon the market some four miles away. *Sabine & E. T. R. Co. v. Smith*, 73 Tex. 1, 11 S. W. Rep. 123. *Lommelund v. St. Paul, M. & M. R. Co.*, 26 Am. & Eng. R. Cas. 596, 35 Minn. 412, 29 N. W. Rep. 119. *Missouri Pac. R. Co. v. Johnson*, 3 Tex. App. (Civ. Cas.) 334.

Where the action is both for an injury to the land and the destruction of a growing crop, the measure of damages is the amount of the injury to the land plus the market value of the crop at the time it was destroyed. *Gulf, C. & S. F. R. Co. v. Pool*, 34 Am. & Eng. R. Cas. 187, 70 Tex. 713, 8 S. W. Rep. 535.

99. — with interest.—The damages recoverable for the destruction of a growing crop by overflow are limited to the actual value of the crop at the time of its destruction, with legal interest from date of injury; such value is to be ascertained from consideration of the circumstances existing at the time of its destruction, as well as at any time before the trial, favoring or rendering doubtful the conclusion that it would attain to a more valuable condition, and from consideration of the hazards and expenses incident to the process of supposed growth or appreciation. *St. Louis, I. M. & S. R. Co. v. Yarbrough*, 52 Am. & Eng. R. Cas. 682, 56 Ark. 612, 20 S. W. Rep. 515.—FOLLOWED IN *St. Louis, I. M. & S. R. Co. v. Lyman*, 57 Ark. 512.

When one's crop has been destroyed by overflow caused by the improper construction of a railway, the injured party, as far as money can do so, ought to be put in the same condition that he would have been had the tort not been committed; and interest upon the value of the crop so destroyed, from the date of its destruction, is as necessary as the value itself. *Gulf, C. & S. F. R. Co. v. Holliday*, 65 Tex. 512.

What a plaintiff, whose crop has been destroyed by overflow, might have made had he planted another crop, is too uncertain to base upon it any estimate as to the amount by which his damages should be reduced. *Gulf, C. & S. F. R. Co. v. Holliday*, 65 Tex. 512.

100. — where part of crop only was destroyed.—In an action for negligently flooding the plaintiff's vegetable garden, the measure of damages was held to be

the difference between the value of the vegetables saved and the whole crop before the overflow damaged it, together with interest to the time of verdict. *Sabine & E. T. R. Co. v. Joachimi*, 11 Am. & Eng. R. Cas. 539, 58 Tex. 456.

101. Cost and expense of restoring land.—In an action for negligently flooding land not actually used for growing vegetables, but fit for that purpose, the measure of damages is the cost of restoring the land to its former condition, and the loss occasioned by being deprived of the use of the same, with interest. No account of loss of profits by consequent delay in getting the crop to market should enter into the calculation. *Sabine & E. T. R. Co. v. Joachimi*, 11 Am. & Eng. R. Cas. 539, 58 Tex. 456.

Where the action is for washing sand on plaintiff's land, the measure of damages is not the market value of the land before the sand was washed on it, if the cost of removing the sand is less than the value of the land. *Trinity & S. R. Co. v. Schofield*, 72 Tex. 496, 10 S. W. Rep. 575.

The defendant company caused plaintiff's house to be flooded and greatly injured and weakened, but plaintiff repaired it and occupied it until seven months after the flooding, when it was destroyed by another storm, together with furniture and other personal property in it, plaintiff claiming that the loss was attributable to its weakened condition by the first overflow. *Held*: (1) that plaintiff could only recover such damages as directly and necessarily resulted from the first overflow, not those resulting from the second storm; (2) if the house was rendered insecure by the overflow plaintiff could not negligently place his goods in it and then recover for their loss; (3) the true measure of damages was the cost of restoring the house to its former condition, with reasonable compensation for the loss of its use while being repaired. *Galveston, H. & S. A. R. Co. v. Ware*, 30 Am. & Eng. R. Cas. 203, 67 Tex. 635, 4 S. W. Rep. 13.

FLOODS.

Caused by bridges, see BRIDGES, ETC., 23.

Delays caused by, see CARRIAGE OF MERCHANDISE, 135; CARRIAGE OF PASSENGERS, 121.

Duty of company to employe to guard against, see EMPLOYEES, INJURIES TO, 51.

Embankment giving way by reason of, see EMBANKMENTS, 6.
 Liability of company in cases of, see FLOODING LANDS, 20-23.
 Providing against, see CARRIAGE OF PASSENGERS, 175, 176; CULVERTS, 13, 14.

FLORIDA.

Aid to railways by the state, see STATE AID, 16.
 Assessment and levy of taxes in, see TAXATION, 254.
 Construction of statute of, relative to liability for injuries caused by negligence of fellow-servants, see FELLOW-SERVANTS, 170.
 — stock laws of, see ANIMALS, INJURIES TO, 20.
 Exemption from taxation under Improvement Act of, see TAXATION, 150.
 Federal grants to, see LAND GRANTS, 20.
 Grants of swamp lands in, see LAND GRANTS, 130.
 Homesteads in public lands in, see PUBLIC LANDS, 4.
 Injuries to animals running at large in, see ANIMALS, INJURIES TO, 245.
 Occupation of streets by steam roads under legislative grants of, see STREETS AND HIGHWAYS, 41.
 Posting schedule of passenger rates in, see TICKETS AND FARES, 116.
 Review of town bonding proceedings by mandamus in, see MUNICIPAL AND LOCAL AID, 442.
 Taxation in aid of railways in, see MUNICIPAL AND LOCAL AID, 409.

FLYING SWITCH.

Assumption of risk in making, see EMPLOYEES, INJURIES TO, 195.
 Contributory negligence in making, see EMPLOYEES, INJURIES TO, 407.

1. Negligence, injuries caused by, generally.*—It is negligence *per se* for a railroad company to make a flying switch across the streets of a town along which persons are constantly accustomed to walk. *Alabama & V. R. Co. v. Summers*, 68 Miss. 566, 10 So. Rep. 63. *O'Connor v. Missouri Pac. R. Co.*, 32 Am. & Eng. R. Cas. 61, 94

* Flying or running switch at crossings, see notes, 19 AM. & ENG. R. CAS. 291; 18 Id. 144.

Negligence of company in making flying switches, or detached cars moving by their own momentum, see note, 18 L. R. A. 63. See also 55 AM. & ENG. R. CAS. 267, *abstr.*

Mo. 150, 7 S. W. Rep. 106, 13 West. Rep. 587. *Brown v. New York C. R. Co.*, 32 N. Y. 597; *affirming* 31 Barb. 385.—QUOTED IN *Pennsylvania R. Co. v. State*, 19 Am. & Eng. R. Cas. 326, 61 Md. 108.—*Stillwell v. New York C. R. Co.*, 34 N. Y. 29.—DISTINGUISHED IN *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358. REVIEWED IN *Ormsbee v. Boston & P. R. Corp.*, 14 R. I. 102, 51 Am. Rep. 354.

Any person who, without negligence on his part, is injured at such crossing by the act of the running switch, may recover of such company for the damages sustained, without other proof of negligence than the act of making such running switch. *Brown v. New York C. R. Co.*, 32 N. Y. 597; *affirming* 31 Barb. 385.—APPLIED IN *Butler v. Manhattan R. Co.*, 52 N. Y. S. R. 498. DISTINGUISHED IN *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112; *Webster v. Hudson River R. Co.*, 38 N. Y. 260; *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358. FOLLOWED IN *Stillwell v. New York C. R. Co.*, 34 N. Y. 29; *Mooney v. Hudson River R. Co.*, 5 Robt. (N. Y.) 548. LIMITED IN *Robinson v. New York C. & H. R. R. Co.*, 66 N. Y. 11. NOT FOLLOWED IN *Robinson v. New York C. & H. R. R. Co.*, 65 Barb. (N. Y.) 146. REVIEWED IN *Ormsbee v. Boston & P. R. Corp.*, 14 R. I. 102, 51 Am. Rep. 354; *The Bernina*, 12 P. D. 58.

Proof that a train in a populous village was cut in two, and the front cars permitted to run across a street 15 or 20 rods in advance of the rear portion, with no lookout on the front car of the rear section, and no flagman at the crossing, is sufficient evidence to establish gross negligence on the part of the company. *Butler v. Milwaukee & St. P. R. Co.*, 28 Wis. 487, 5 Am. Ry. Rep. 454.—APPLIED IN *Ferguson v. Wisconsin C. R. Co.*, 19 Am. & Eng. R. Cas. 285, 63 Wis. 145. DISTINGUISHED IN *Heddles v. Chicago & N. W. R. Co.*, 39 Am. & Eng. R. Cas. 645, 74 Wis. 239, 42 N. W. Rep. 237.

It is gross negligence for the servants of a railroad company to kick detached freight cars at a rapid rate of speed, and unattended by locomotive or brakemen, on a spur track over a private road crossing, where they have reason to know people frequently cross with the knowledge and consent of the company. *Schindler v. Milwaukee, L. S. & W. R. Co.*, 87 Mich. 400, 49 N. W. Rep. 670.—DISTINGUISHING *Chicago & N. W. R. Co. v. Smith*, 46 Mich. 504.—DISTINGUISHED

IN *Sanborn v. Detroit, B. C. & A. R. Co.*, 91 Mich. 538.

It is clearly negligent for a railway company to permit detached cars without signals or warnings to run upon a down grade through the streets of a city, when the public had the right to use the track in passing along the street. *Lewis v. Galveston, H. & S. A. R. Co.*, 39 Am. & Eng. R. Cas. 372, 73 Tex. 504, 11 S. W. Rep. 528.

No general rule can be laid down defining the amount of care to be exercised in all cases in running trains past highway crossings; but proof of the severing of a train in the night-time, and leaving a part of the cars not under control, otherwise than by ordinary brakes, to run across a highway at grade without some warning by a flagman, or by bell or whistle, or in some other effective mode, justifies a holding, as a matter of law, that the company is guilty of negligence. *Delaware, L. & W. R. Co. v. Converse*, 49 Am. & Eng. R. Cas. 323, 139 U. S. 469, 11 Sup. Ct. Rep. 569.—QUOTING *North Pa. R. Co. v. Commercial Bank*, 123 U. S. 727.—QUOTED AND FOLLOWED IN *Northern Pac. R. Co. v. Sullivan*, 53 Fed. Rep. 219, 10 U. S. App. 473, 3 C. C. A. 506.

The use of kicking switches or running switches in detaching and propelling cars cannot be said to constitute negligence, as they seem to be in general use by well-regulated companies; but there may be negligence in connection with their use. *Williams v. South & N. Ala. R. Co.*, 91 Ala. 635, 9 So. Rep. 77.

It is negligence to propel the detached cars at a speed of eight or ten miles an hour. *Louisville & N. R. Co. v. Davis*, 91 Ala. 487, 8 So. Rep. 552.

It is gross negligence to switch cars in a populous city by the "flying switch," where they pass crossings at a speed of five miles an hour. Such negligence is not cured by signals from the engine. *Illinois C. R. Co. v. Baches*, 55 Ill. 379, 1 Am. Ry. Rep. 585.—QUOTED IN *Ohio & M. R. Co. v. McDanel*, 5 Ind. App. 108.

Where cars in a city are switched by what is called the "flying switch," it is gross negligence on the part of the brakeman not to be at the brakes, or, being there, to fail to respond to the signal for "down brakes." Having adopted that dangerous way of switching, the brakeman should have been where he could have full com-

mand of the train and also see in front of it. *Illinois C. R. Co. v. Baches*, 55 Ill. 379, 1 Am. Ry. Rep. 585.

A company is not guilty of negligence *per se* in shunting or kicking cars along its tracks inside its yard for the purpose of making up trains, pursuant to the custom of long standing, of which its employés are fully cognizant. *Schaible v. Lake Shore & M. S. R. Co.*, 97 Mich. 318, 56 N. W. Rep. 565.

If, in a populous town, a detached car is negligently sent on a flying switch, running rapidly in violation of law, and over a public crossing, and one on the crossing is injured by it, proof of contributory negligence not being clear, it is error for the court to instruct the jury to find for the defendant. *Fulmer v. Illinois C. R. Co.*, 68 Miss. 355, 8 So. Rep. 517.

It is proper for a company to adopt rules for the government of its employés in making flying switches and in shunting and kicking cars, in order to warn persons liable to be injured. *Reagan v. St. Louis, K. & N. W. R. Co.*, 93 Mo. 348, 12 West. Rep. 367, 6 S. W. Rep. 371.

In making a running switch at a point where the track crosses a public business street in a populous village, a railroad company is bound to exercise a high degree of care; and the question whether all reasonable precautions were employed to prevent accidents is ordinarily one for the jury. *Ferguson v. Wisconsin C. R. Co.*, 19 Am. & Eng. R. Cas. 285, 63 Wis. 145, 23 N. W. Rep. 123.—REVIEWED IN *Ohio & M. R. Co. v. McDanel*, 5 Ind. App. 108.

A construction train approaching a station made a flying switch, whereby a collision occurred between the tender and the caboose car, after which the engine moved forward and struck one of the cars standing on a side track, throwing it forward against a car upon which iron was being loaded by men, without any notice to them. One of the men, in attempting to reach the platform, was killed by the train coming down the track at the rate of eight miles an hour. *Held*, that the jury might well infer negligence from these facts. *Chicago & A. R. Co. v. Kelly*, 127 Ill. 637, 21 N. E. Rep. 203; affirming 28 Ill. App. 655.

The jury gave \$1000 damages in an action by plaintiff on behalf of her children for causing the death of her husband by

the negligent operation of the defendant's railroad. The train, while moving rapidly at a public crossing in the village of Lawrencetown, was divided into three sections in order to shunt the middle section, all three sections being in rapid motion. Deceased was old and deaf, and after the first section with the locomotive, leaving the crossing enveloped in smoke and steam, had passed, he attempted to cross. The brakeman on the second section, when it was about a hundred feet off, shouted to him, but he did not hear and was run down. The brakeman let the brake off before the deceased was out of danger, and said that otherwise the cars from behind might have run on the middle section. *Held*, that there was sufficient evidence on which to find negligence and to negative contributory negligence, or even to warrant the jury in finding that if there were the latter defendants could have prevented the results by diligence on their part. *McLeod v. Windsor & A. R. Co.*, 23 Nov. Sc. 69.

2. Contributory negligence.—Although a company by a rule prohibited its conductors and engineers from making flying switches, a brakeman working under the direction of an engineer was not guilty of contributory negligence when the manner of switching by which he was killed had been the usual and customary way of doing the same, though contrary to the rule, and though he knew of the rule. *Union Pac. R. Co. v. Springsteen*, 41 Kan. 724, 21 Pac. Rep. 774.

The violation by a conductor of a rule of the company forbidding a "running switch" does not preclude him from recovering against the company for an injury received in making such a switch, it appearing that this was the only practicable way of putting cars on the particular switch, and that it had been so habitually resorted to as to raise the presumption that the company was aware and approved of it. *Alexander v. Louisville & N. R. Co.*, 25 Am. & Eng. R. Cas. 458, 83 Ky. 589.

It was not negligence for a traveler on a highway to drive across a railroad track immediately after the passage of a train for which he had waited, without looking in the direction from which it came, and from which a single car was following it at a distance of 150 or 200 feet, moving by its own momentum, having been detached from the train for the purpose of making a flying

switch. *Ward v. Chicago, St. P., M. & O. R. Co.*, 85 Wis. 601, 55 N. W. Rep. 771.—*FOLLOWING* *Ferguson v. Wisconsin C. R. Co.*, 63 Wis. 152.

The conductor of the train, who was on such car and saw the traveler approaching the crossing when the car was from fifty to seventy feet from it, and who hallooed to the traveler, but, although he might have stopped the car with the brakes, did not do so, because he thought he could get over the crossing before the traveler reached it, was guilty of gross negligence causing the injury to the traveler, whose wagon was struck by the car on the crossing. *Ward v. Chicago, St. P., M. & O. R. Co.*, 85 Wis. 601, 55 N. W. Rep. 771.

It is immaterial whether the traveler was or was not drunk at the time, if his drunkenness in no way contributed to the accident. *Ward v. Chicago, St. P., M. & O. R. Co.*, 85 Wis. 601, 55 N. W. Rep. 771.

It was not error to charge the jury that the making of the flying switch over the street crossing was a most dangerous proceeding, and that it was the duty of the defendant to take special pains to give the public full warning of the danger, and that it was the duty of the conductor to see persons approaching the crossing, unaware of the danger, and give them sufficient warning. *Ward v. Chicago, St. P., M. & O. R. Co.*, 85 Wis. 601, 55 N. W. Rep. 771.—*REVIEWING* *Ferguson v. Wisconsin C. R. Co.*, 63 Wis. 152; *Butler v. Milwaukee & St. P. R. Co.*, 28 Wis. 487; *Johnson v. Chicago & N. W. R. Co.*, 49 Wis. 529.

Evidence as to the distance within which such a car, with a sound brake, could be stopped was admissible. *Ward v. Chicago, St. P., M. & O. R. Co.*, 85 Wis. 601, 55 N. W. Rep. 771.

O., a deaf mute, was struck and killed by a train of cars which was making a flying switch across a highway. The engine had passed by, and O. walked in the highway onto the track, "bent forward, as an old man would walk, with his head bowed down, looking toward the engine." There was an unobstructed view of the tracks for a long distance in both directions; a gate was closed across the highway on the further side of the tracks; but there was no stationary bell nor whistle sounded as required by statute. In an action by O.'s administrator against the railroad company for causing O.'s death—*held*, that O.'s neg-

ligence precluded a recovery. *Ormsbee v. Boston & P. R. Corp.*, 14 R. I. 102, 51 Am. Rep. 334.

Plaintiff, in attempting to cross a street, stopped upon the track just after an engine had passed and was struck by a detached car which was following. The evidence tended to show that he did not know, and had no reason to suspect, that a running switch was being made, and that he could not see the car by reason of the smoke and steam from the engine, and could not hear it for the noise. *Held*, that the question of his contributory negligence was properly left to the jury. *Ferguson v. Wisconsin C. R. Co.*, 19 Am. & Eng. R. Cas. 285, 63 Wis. 145, 23 N. W. Rep. 123.—APPLYING *Butler v. Milwaukee & St. P. R. Co.*, 28 Wis. 487.

3. Questions for the jury.—Whether a railroad company is negligent in severing a train into two parts, and making a flying switch over a highway crossing, is a question for the jury. *York v. Maine C. R. Co.*, 84 Me. 117, 24 Atl. Rep. 790. *White v. Fitchburg R. Co.*, 18 Am. & Eng. R. Cas. 140, 136 Mass. 321.

Where the evidence shows that it is feasible and proper for a company to have rules and regulations for the government of its employes in making flying switches, and in shunting or kicking cars, the negligence of the company, in a given case, for failing to provide such rules is a question for the jury. *Reagan v. St. Louis, K. & N. W. R. Co.*, 93 Mo. 348, 12 West. Rep. 367, 6 S. W. Rep. 371.

Whether the rate of speed at which a car was "kicked" across a street, and whether "kicking" is a more dangerous mode of propelling a car than pushing, are questions for the jury. *Howard v. St. Paul, M. & M. R. Co.*, 19 Am. & Eng. R. Cas. 283, 32 Minn. 214, 20 N. W. Rep. 93.—REVIEWED IN *Ohio & M. R. Co. v. McDanel*, 5 Ind. App. 108.

It is a question of fact for the jury whether at a given crossing a railroad company is guilty of negligence in making a "flying switch" at the speed of twenty miles an hour. *Lehigh & W. B. Coal Co. v. Lear*, (Pa.) 32 Am. & Eng. R. Cas. 74, 9 Atl. Rep. 267.

4. Injuries to children.—A railroad company attempting to make a running or flying switch on the streets of a populous city is guilty of a high degree of negligence, and is liable to a boy injured, though he may be guilty of ordinary negligence. *Ken-*

tucky C. R. Co. v. Smith, 93 Ky. 449, 20 S. W. Rep. 392.—FOLLOWING *Kentucky & I. Bridge Co. v. Krieger*, 93 Ky. 243, 19 S. W. Rep. 738; *Illinois C. R. Co. v. Baches*, 55 Ill. 379.

Three small children who were playing near a track heard a train approaching, placed pins on the rail to see how the car wheels would flatten them, and then concealed themselves near by. Before reaching the place the train was cut in three parts to make a flying switch. After the first section had passed the children ran out, and as one of them was stooping to pick up the pins, he was struck by the second section, the conductor being unaware of their presence. The place was within the limits of a platted street, but which had not been opened for vehicles, but persons walked over it. *Held*, that it was proper to refuse to direct a verdict for the company, as the failure to keep a lookout at such a place tended to show negligence. *Chicago, M. & St. P. R. Co. v. McArthur*, 53 Fed. Rep. 464, 10 U. S. App. 546, 3 C. C. A. 594.

In such case, where the charge to the jury was otherwise correct, it was not error to charge that the children were not trespassers, being on a public street; and such instruction is not open to the objection that the jury might infer therefrom that the children had a right to play on the track. *Chicago, M. & St. P. R. Co. v. McArthur*, 53 Fed. Rep. 464, 10 U. S. App. 546, 3 C. C. A. 594.

Where a child of tender years was injured by a car running detached from the train at a street crossing, the evidence showed that the employes in charge of a heavy freight train were making a running switch, crossing the public streets in the city, where the tracks were continually being crossed and recrossed by the public and by children, which fact was well known to said employes, and that at the time of the accident they had no watchman at the front end of the train, and no precaution was taken to avoid injury to persons traveling upon said streets and liable to cross the tracks at any time. The brakeman was upon the back end of the detached car, and gave no heed to persons and children who might be crossing the track in front of the car, and could not see what was in front. *Held*, that the evidence clearly established negligence on the part of the defendant company. *Louisville, N. A. & C. R. Co. v. Schmidt*, 126 Ind.

290, 25 *N. E. Rep.* 149, 26 *N. E. Rep.* 45; former appeal 106 *Ind.* 73, 5 *N. E. Rep.* 684.

A weak-minded girl between twelve and thirteen years of age started upon a foot-path which lay within the limits of a village of about fifty houses. Upon approaching the tracks, which were three in number, she stepped upon the first track, on observing the approach of an engine on the third track. The engine stopped directly abreast of her, and seeing no approaching train, she started to walk down the track on which she had been standing, and so around the engine. While engaged in so doing, she was struck and injured by a train of stone cars which had been detached from the engine about three quarters of a mile above, and which, having attained a rate of speed of fifteen or eighteen miles an hour, had been by a flying switch turned from the third track upon the track on which the girl was walking, only about one hundred and fifty feet from the point where she was struck. There was no whistle blown or alarm of any kind given to the girl. The engineer of the standing engine, the only one of the employés of the railroad company who saw her, did not attempt to save her, because, as he testified, he did not observe that she was upon the track. *Held*, that the evidence disclosed negligence on the part of the company's employés. *Philadelphia & R. R. Co. v. Troutman*, (Pa.) 6 *Am. & Eng. R. Cas.* 117, 11 *W. N. C.* 453.

FOG.

Effect of, on duty to look and listen, see CROSSINGS, INJURIES, ETC., AT, 305.

FOG SIGNALS.

Liability for use of, see EXPLOSIONS, 2.

FOOD AND WATER.

Duty to provide cattle with, during transit, see CARRIAGE OF LIVE STOCK, 29-35, 40.

FOOTBOARD.

Of engine, contributory negligence in riding on, see EMPLOYEES, INJURIES TO, 371.

On side of open car, riding on, see STREET RAILWAYS, 426-428.

FORCE.

What may be employed in ejecting passenger, see EJECTION OF PASSENGERS, 54, 55.

FORCIBLE ENTRY AND DETAINER.

1. What constitutes.—A railroad track is "lands and tenements," and a contractor turned out of possession by force may maintain an action for forcible entry and detainer, under Mansf. Ark. Dig. ch. 67, § 3347, enacting that "if any person shall enter into or upon any lands, tenements, or other possessions," and hold the same with force, he shall be deemed guilty of a forcible entry and detainer. *Iron Mountain & H. R. Co. v. Johnson*, 119 *U. S.* 608, 7 *Sup. Ct. Rep.* 339.—APPLIED IN *James v. Miles*, 54 Ark. 460. FOLLOWED IN *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 33 Fed. Rep. 440.

Possession of a part of premises sought to be recovered in forcible detainer, taken after suit brought, by a railway company on a proceeding to condemn for right of way, cannot affect plaintiff's rights, nor will the fact that the company, before suit, made a survey across the premises, as this constitutes no possession. *Leshner v. Sherwin*, 86 *Ill.* 420.

In 1851 a life tenant conveyed to defendant all her "right, title, interest, and estate of, in, and to" her land in a certain county, which might be laid out "for the construction of its railroad." The life tenant died in 1881, without any steps having been taken by the company to acquire the right of way, except the above conveyance. Within three years after the death of the life tenant the remainderman brought unlawful detainer against the company. *Held*, that the deed conveyed only the rights of the life tenant, and plaintiff was entitled to judgment for the land. (Richardson, J., dissenting.) *Hope v. Norfolk & W. R. Co.*, 22 *Am. & Eng. R. Cas.* 171, 79 *Va.* 283.

In such case the right of action to the remainderman did not accrue until the death of the life tenant. *Hope v. Norfolk & W. R. Co.*, 22 *Am. & Eng. R. Cas.* 171, 79 *Va.* 283.

Defendants, employés of the Great Western R. Co., in obedience to orders from the company, went upon the land in question, then in the possession of the Stratford & Huron R. Co., and occupied by its employés. No actual force was used, but the latter had good reason to apprehend that sufficient force would be used to compel them to leave, and they left accordingly. *Held*, that this was a forcible entry within

the statutes relating thereto. *Reg. v. Smith*, 43 U. C. Q. B. 369.

The judge at the trial having granted a writ of restitution—*held*, that such writ is in the discretion of the presiding judge, which had been properly exercised. *Reg. v. Smith*, 43 U. C. Q. B. 369.

2. When the action will not lie.—Franchises which are incorporeal hereditaments of an intangible nature, are not embraced within the meaning of the terms "lands or tenements" in the act regulating the proceeding of unlawful detainer. Hence, a railroad being a public work, the possession of which is necessarily attended by the right and duty to use and employ the franchises granted by the sovereign in connection with it, an action of unlawful detainer does not lie to recover possession of a part thereof, as this involves the right to, and the public duty of exercising, these franchises. *Gibbs v. Drew*, 16 Fla. 147.

An action of forcible detainer cannot be maintained by a vendor of real estate against a purchaser who is in possession under his contract of purchase and has made default in the payment of a part of the purchase price, even though the contract provides that time is the essence of the contract and a failure to pay promptly as the payments become due shall work a forfeiture of the contract and the vendor be entitled to the possession of the land. *Chicago, B. & Q. R. Co. v. Skupa*, 16 Neb. 341, 20 N. W. Rep. 393.—*DISTINGUISHING Phelps v. Illinois C. R. Co.*, 63 Ill. 468.

Entering upon the lands of another and removing therefrom iron rails gives no right of action, under the South Carolina statute prohibiting a forcible entry or detainer of the lands or tenements of another, or the forcible exclusion of the owner from his lands or tenements. *De Laine v. Alderman*, 31 So. Car. 267, 9 S. E. Rep. 950.

Where the owner of a private railway lays a track across land, with the acquiescence of the owner, for a temporary purpose, the rails do not become fixtures, but remain the personal property of the owner of the railroad, who may remove them at pleasure without being liable to an action of forcible entry. *De Laine v. Alderman*, 31 So. Car. 267, 9 S. E. Rep. 950.

And in such case, when the purpose of laying the track is accomplished, the owner thereof may peaceably enter and remove the rails without committing a trespass,

if no injury is done, even after being forbidden to enter by the landowner. *De Laine v. Alderman*, 31 So. Car. 267, 9 S. E. Rep. 950.

The plaintiff railroad company and a city united in building a bridge across a river. Afterwards, by permission of the city, defendant fastened beams to stringers of the bridge, which beams projected at right angles from the bridge over land not belonging to the company, and on these erected a building. *Held*, that the company could not maintain an action of forcible entry and detainer against the defendant for a part of its bridge. *Boston & M. R. Co. v. Durgin*, 67 Me. 263.

FORECLOSURE.

Lease, how affected by, see LEASES, ETC., 98.

Of deeds of trust, see DEEDS OF TRUST, 14-20.

— mechanic's lien, see LIENS, 38-42.

— mortgages on land condemned, see EMINENT DOMAIN, 140.

— railway mortgages, see MORTGAGES, 150-303.

Provisions for, in deed of trust, see DEEDS OF TRUST, 8.

Removal of suits for, to federal court, see REMOVAL OF CAUSES, 14.

Setting aside, at instance of creditors after reorganization, see REORGANIZATION, 10.

Staying proceedings in, see INJUNCTION, 45.

When barred by lapse of time, see LIMITATIONS OF ACTIONS, 53.

— lessee should be a party to, see LEASES, ETC., 95.

FOREIGN ADMINISTRATORS.

Right of, to sue for causing death, see DEATH BY WRONGFUL ACT, 98.

FOREIGN CARS.

Duty to employes as to safety of, see EMPLOYES, INJURIES TO, 126, 154.

FOREIGN CORPORATIONS.

Appointment of receiver of, see RECEIVERS, 6.

Escheat of lands of, see ESCHEAT, 1, 2.

Jurisdiction of suits by and against, see also FEDERAL COURTS, 10.

Leases to or from, see LEASES, ETC., 20.

Liability of, as garnishees, see ATTACHMENT, ETC., 12.

License taxes on, validity of, see INTERSTATE COMMERCE, 208-214.

Power of, to exercise right of eminent domain, see EMINENT DOMAIN, 77.

Prima facie evidence of capacity of, to contract, see CARRIAGE OF MERCHANDISE, 753.

Removal of suits by or against, see REMOVAL OF CAUSES, 8, 34-37.

Right of, to issue bonds, see BONDS, 9.

— — — plead statute of limitations, see LIMITATIONS OF ACTIONS, 73.

Service of process on, see PROCESS, 10-21.

Stock in, when subject to taxation, see TAXATION, 103.

Taxation of, generally, see TAXATION, 67.

— — — interstate business of, see INTERSTATE COMMERCE, 201.

— — — on basis of number of cars in state, see INTERSTATE COMMERCE, 191.

When limitation begins to run in actions against, see LIMITATIONS OF ACTIONS, 34.

I. GENERAL PRINCIPLES..... 1012

II. ACTIONS BY AND AGAINST..... 1017

I. GENERAL PRINCIPLES.

1. What corporations are deemed foreign.*—A foreign railroad corporation does not become a domestic corporation under the law of another state which authorizes it to enter and construct and operate a road therein, but providing that it shall be deemed a domestic corporation whenever sued on a cause of action arising therein. *Chicago, M. & St. P. R. Co. v. Becker*, 32 Fed. Rep. 849. — FOLLOWING *Moore v. Chicago, St. P., M. & O. R. Co.* 21 Fed. Rep. 817.

Neither will the company, in such case, become a domestic corporation by purchasing and operating property in the state under such a statute. *Wilkinson v. Delaware, L. & W. R. Co.*, 20 Am. & Eng. R. Cas. 597, 22 Fed. Rep. 353. — EXPLAINING *Baltimore & O. R. Co. v. Harris*, 12 Wall. (U. S.) 65. REFERRING TO *Williams v. Missouri, K. & T. R. Co.*, 3 Dill. (U. S.) 267. — *Conn v. Chicago, B. & Q. R. Co.*, 50 Am. & Eng. R. Cas. 640, 48 Fed. Rep. 177. — DISTINGUISHING *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. Rep. 812. FOLLOWING *Nashua & L. R. Corp. v. Boston & L. R.*

*Citizenship of foreign corporations. Removal of causes, see note, 20 AM. & ENG. R. CAS. 622.

Personality, residence, and citizenship, see note, 35 AM. & ENG. R. CAS. 507.

Adoption of foreign corporation, see note, 50 AM. & ENG. R. CAS. 622.

Corp., 136 U. S. 356, 10 Sup. Ct. Rep. 1004. — *State v. Delaware, L. & W. R. Co.*, 30 N. J. L. 473; reversed in 31 N. J. L. 531. — FOLLOWING *Phillipsburgh Bank v. Lackawanna R. Co.*, 27 N. J. L. 206. — *Baltimore & O. R. Co. v. Cary*, 28 Ohio St. 208, 14 Am. Ry. Rep. 97. — FOLLOWING *State v. Sherman*, 22 Ohio St. 411.

2. What are deemed domestic.—It is competent for a state, by statute, to determine the mode of creating corporations within its limits; and in the same way it may declare that a foreign corporation shall become a domestic corporation by filing a copy of its articles of incorporation with the secretary of state, and by building a railroad within the state. *Stout v. Sioux City & P. R. Co.*, 3 McCrary (U. S.) 1, 8 Fed. Rep. 794.

The Boston, Hartford & Erie R. Co., by acting upon the authority to purchase property conferred by the act of the legislature of New York of April 25, 1864, became a New York corporation, by its then existing name, so as to authorize its stockholders thereafter to meet in that state. *Graham v. Boston, H. & E. R. Co.*, 25 Am. & Eng. R. Cas. 53, 118 U. S. 161, 6 Sup. Ct. Rep. 1009. — FOLLOWED IN *Union Trust Co. v. Rochester & P. R. Co.*, 29 Fed. Rep. 609.

The Lake Shore & Michigan Southern R. Co. is a domestic corporation created under the laws of New York, and subject to all the duties and obligations imposed by the laws of that state upon domestic corporations; and therefore the New York statute of 1842, ch. 165, entitled "An act to compel transfer agents of foreign corporations to exhibit a list of the stockholders thereof," does not apply to the road. *People ex rel. v. Lake Shore & M. S. R. Co.*, 11 Hun (N. Y.) 1; appeal dismissed in 70 N. Y. 220.

A company incorporated by the act of congress is not a foreign corporation within the meaning of the Pa. Revenue Act of June 7, 1879, § 16 (Pamph. L. p. 120), and although it does business in Pennsylvania, is not, therefore, obliged to take out the license and to pay the tax provided for by said section. *Com. v. Texas & P. R. Co.*, 98 Pa. St. 90.

3. Corporations chartered in two or more states.*—The status of a rail-

*Corporations created by concurrent action of several states, see notes, 25 AM. & ENG. R. CAS. 67; 7 Id. 22.

road corporation chartered by two or more states is, that it is a distinct and independent corporation in each state, and when it exercises its functions in either of the states it acts under the authority of that state. *Holland v. Mobile & O. R. Co.*, 16 *Lea* (Tenn.) 414. *State v. Northern C. R. Co.*, 18 *Md.* 193.

Where a railroad corporation, chartered by another state, leases a railroad chartered by North Carolina, it is bound to observe and obey all laws of this state regulating the business of transportation. *Hines v. Wilmington & W. R. Co.*, 95 *N. Car.* 434.

Where a railroad corporation is chartered by the laws of North Carolina, and also of another state, it is completely subject to the laws of this state, except as otherwise expressly provided by its charter. *Hines v. Wilmington & W. R. Co.*, 95 *N. Car.* 434.

4. Constitutionality of statutes imposing restrictions on.—State laws imposing conditions on which foreign corporations may enter a state are not in conflict with the Interstate Commerce Law. *Pembina Con. S. M. & M. Co. v. Pennsylvania*, 125 *U. S.* 181, 8 *Sup. Ct. Rep.* 737.—EXPLAINED IN *McCall v. California*, 136 *U. S.* 104. FOLLOWED IN *Norfolk & W. R. Co. v. Pennsylvania*, 45 *Am. & Eng. R. Cas.* 9, 136 *U. S.* 114.

A state may make such regulations in regard to foreign corporations as it deems best. It may exclude them altogether, or it may place such restrictions upon them as the legislature may determine. *Central R. & B. Co. v. Georgia C. & I. Co.*, 32 *So. Car.* 319, 11 *S. E. Rep.* 192, 638.

Chapter 76, Iowa Laws of 1886, requiring all foreign corporations for pecuniary profit desiring to do business in Iowa, excepting those organized for mercantile and manufacturing purposes, to become domesticated in the state, and to submit to the jurisdiction of the state courts to the exclusion of the federal courts, is not, when applied to foreign railroad corporations, repugnant to section 10, art. 1 of the constitution of the United States, or to section 21, art. 1 of the constitution of Iowa, which provides that no law shall be passed impairing the obligations of contracts; nor to section 8, art. 1 of the constitution of the United States, which gives to congress the power to regulate commerce among the states; nor to the fourteenth amendment to the constitution of the United States; nor is it void as

an attempt to interfere with the constitutional jurisdiction of the federal courts. *Goodrel v. Kreichbaum*, 70 *Iowa* 362, 30 *N. W. Rep.* 872.

The Kentucky Act of March 2, 1860, requiring that foreign express companies shall procure a license before they are entitled to do business within the state, is not in violation of the federal constitution, which guarantees that "the citizens of each state shall be entitled to all the immunities of citizens of the several states." *Woodward v. Com.*, (Ky.) 35 *Am. & Eng. R. Cas.* 498, 7 *S. W. Rep.* 613.

Minnesota Act of March 9, 1885, relating to foreign corporations doing business in that state, is repugnant to the constitution of the United States, in so far as it attempts to prevent foreign corporations, doing business in the state, from suing or being sued in the federal courts of the state. *Chicago, M. & St. P. R. Co. v. Becker*, 32 *Fed. Rep.* 849.

5. Construction of such statutes.—Compliance with the Arkansas statute, providing that "every railroad corporation of any other state which has heretofore leased or purchased any railroad in this state, shall, within sixty days from the passage of this act, file a duly certified copy of its articles of incorporation or charter with the secretary of state of this state, and shall thereupon become a corporation of this state," makes a foreign corporation a corporation of the state. *James v. St. Louis & S. F. R. Co.*, 46 *Fed. Rep.* 47.—QUOTING *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 *U. S.* 290, 6 *Sup. Ct. Rep.* 1094.

Michigan Comp. L. 1857, § 4834, applies only to acts forbidden to be done by any corporation, etc., and puts foreign corporations upon the same footing as domestic corporations are placed by those state laws, and those only, which apply generally to all the corporations in the state. *Thompson v. Waters*, 25 *Mich.* 214, 4 *Am. Ry. Rep.* 331.

Minnesota Gen. Laws 1877, ch. 14, authorizes railroad companies organized under the laws of Iowa to extend their lines into Minnesota, and gives them the powers and privileges, and subjects them to the same liabilities, of railroad companies organized under the laws of Minnesota; provided such non-resident companies shall first file a copy of their articles of incorporation with the secretary of state. Minn. Gen. Laws 1889, ch. 225, provides that no corporation shall

be created or organized under the laws of Minnesota, unless the incorporators shall, at or before the filing of the articles of incorporation, pay into the state treasury a certain per cent. of the capital stock of such corporation. *Held*, that the latter act applies to Iowa railroad companies who accept the provisions of the law of 1877, and such companies are required, as a condition precedent to filing their articles, to pay the fees prescribed by the act of 1889. *State ex rel. v. Sioux City & N. R. Co.*, 46 *Am. & Eng. R. Cas.* 257, 43 *Minn.* 17, 44 *N. W. Rep.* 1032.

A foreign incorporated trust company entering a state for the purpose of buying the bonds of a railroad, and taking a mortgage on its property to secure them, is not "doing business in the state" within the meaning of Montana Comp. St. 1888, § 442, requiring foreign corporations, among other things, to file a copy of their charters "before doing business in the state." *Gilchrist v. Helena, H. S. & S. R. Co.*, 47 *Fed. Rep.* 593.

The laws of Ohio, which authorize foreign corporations to make contracts and transact business within their appropriate spheres of action in that state, do not purport to create domestic corporations, but merely to permit and regulate the action, within the state, of existing foreign corporations. *Erie R. Co. v. Stringer*, 32 *Ohio St.* 468.

The proviso in the Pa. Revenue Act of June 7, 1879, § 16, that if a majority of the stock of a foreign corporation doing business in Pennsylvania be owned or controlled by a corporation of the state, then the foreign corporation need not take out the license and pay the tax therein provided for—*held*, to mean majority of stock actually issued, and not the total authorized stock. *Com. v. Texas & P. R. Co.*, 98 *Pa. St.* 90.

6. Powers in foreign state, generally.—Corporations acting beyond the jurisdiction that created them, can do only those things which, by express grant or necessary implication, they are authorized or empowered to do by the laws of the state granting their charters. *Rue v. Missouri Pac. R. Co.*, 36 *Am. & Eng. R. Cas.* 449, 74 *Tex.* 474, 8 *S. W. Rep.* 533.

A foreign railroad corporation cannot, from comity, exercise powers within the state which a domestic corporation would be prevented from exercising under the constitution of the state. *Clarke v. Central*

R. & B. Co., 52 *Am. & Eng. R. Cas.* 115, 50 *Fed. Rep.* 338.

Strictly the legal existence of a corporation is confined to the state which created it and endowed it with its powers, capacities, and rights; and it can only exercise those powers, capacities, and rights in another state by the permission, express or implied, of the legislative power there. But the mere right of such corporation to purchase and sell property, not being in its nature strictly a franchise, will be recognized and protected in another state, subject only to the qualification that the enjoyment and exercise of such right shall not be contrary to the laws or settled policy of the latter state, or prejudicial to its interests or those of its citizens. *Thompson v. Waters*, 25 *Mich.* 214, 4 *Am. Ry. Rep.* 331.

A foreign railroad company, authorized by act of assembly to construct a portion of its road through the state, is entitled to the same rights and privileges as a Pennsylvania corporation. *New York & E. R. Co. v. Young*, 33 *Pa. St.* 175.—FOLLOWING *Monongahela Nav. Co. v. Coons*, 6 *Watts & S. (Pa.)* 101; *Susquehanna Canal Co. v. Wright*, 9 *Watts & S.* 9; *McKinney v. Monongahela Nav. Co.*, 14 *Pa. St.* 65; *Shrunk v. Schuylkill Nav. Co.*, 14 *S. & R. (Pa.)* 71; *Case of Philadelphia & T. R. Co.*, 6 *Whart. (Pa.)* 45; *Rundle v. Delaware & R. Canal Co.*, 14 *How. (U. S.)* 80.

7. Power to do business, generally.—A corporation is clothed everywhere with the powers given by its charter, and has the capacity to carry on its business and extend its operation in other states and countries, so long as it does not depart from the terms of the charter under which it was created. *Atchison, T. & S. F. R. Co. v. Fletcher*, 24 *Am. & Eng. R. Cas.* 34, 35 *Kan.* 236, 10 *Pac. Rep.* 596.—QUOTED IN *Venner v. Atchison, T. & S. F. R. Co.*, 28 *Fed. Rep.* 581.

A corporation is a creature of the sovereign will, and when created by one sovereignty it can operate within another's limits only by the latter's express permission, or by permission implied from principles of comity; but such permission does not make it any the less a foreign corporation. *State Treasurer v. Auditor General*, 13 *Am. & Eng. R. Cas.* 296, 46 *Mich.* 224, 9 *N. W. Rep.* 258. *Central R. & B. Co. v. Carr*, 23 *Am. & Eng. R. Cas.* 487, 76 *Ala.* 388. *State Board of Assessors v. Morris & E. R. Co.*, 49 *N. J. L.* 193, 7 *All. Rep.* 826.

Com. v. New York, L. E. & W. R. Co., 129 Pa. St. 463, 18 Atl. Rep. 412.

A corporation created by the state of Pennsylvania which cannot do business in that state nor have an office there, cannot do business in the state of Kansas. *Land Grant R. & T. Co. v. Coffey County Com'rs*, 6 Kan. 245.—QUOTED IN *State ex rel. v. Milwaukee, L. S. & W. R. Co.*, 45 Wis. 579.

8. Power to hold real estate.*—The question whether a railroad company, organized under the laws of Indiana, is competent to take the title to lands in Michigan, depends both upon the laws of Indiana and upon the laws of Michigan, and the public policy indicated by the legislation of Michigan. *Thompson v. Waters*, 25 Mich. 214, 4 Am. Ry. Rep. 331.

Such corporation has no powers or capacities which are not, expressly or by implication, given by the laws of Indiana; none which would not be recognized and sustained by the courts of that state had the same question of capacity to take these lands come before them for adjudication. It appears, however, that so far as the question depends upon the laws of Indiana, such corporation is competent to take lands in Michigan, in payment of, or security for, debts due to it. *Thompson v. Waters*, 25 Mich. 214, 4 Am. Ry. Rep. 331.

An affirmative enabling act is not necessary to give a foreign corporation the capacity to take, hold, and convey lands in another state; this capacity rests upon the same principles of comity as their capacity to make or enforce contracts, or to acquire, hold, and convey personal property; and the courts of any state should, unless the constitution or the legislature have, either expressly or by clear implication, declared a contrary rule, recognize the right of corporations of another state to realize and collect the debts due to them by receiving a conveyance of lands in the former state. *Thompson v. Waters*, 25 Mich. 214, 4 Am. Ry. Rep. 331.

So far as any question of state policy, or of danger to be apprehended, or of comity, is concerned, there is no distinction to be made between recognizing the equitable right of a foreign corporation as *cestui que trust*, where the legal title is vested in a trustee, and its right to hold the legal

estate. *Thompson v. Waters*, 25 Mich. 214, 4 Am. Ry. Rep. 331.

There is no reason why railroad companies should not be accorded the same privileges as will be, under the above principles, accorded to corporations generally. *Thompson v. Waters*, 25 Mich. 214, 4 Am. Ry. Rep. 331.

The legislature of Michigan have not adopted any policy or enacted any statute which restricts the courts of the state from applying the principles of comity above stated to corporations of other states desiring to hold lands in Michigan. The provisions of several statutes bearing upon the subject, examined and explained. *Thompson v. Waters*, 25 Mich. 214, 4 Am. Ry. Rep. 331.

Pennsylvania Act of April 26, 1855, forbidding foreign corporations to acquire and hold real estate therein, does not render a conveyance to such corporation absolutely void, but passes title subject to the right of escheat at the suit of the state, which is the only authority that can take advantage of the matter. *Hickory Farm Oil Co. v. Buffalo, N. Y. & P. R. Co.*, 32 Fed. Rep. 22.

9. Power to condemn right of way.*—Although a constitutional provision of a state may prohibit a non-resident railroad company from acquiring lands for the use of its road by condemnation or appropriation, still it may acquire such lands by an agreement with any citizen having a right to contract. *St. Louis & S. F. R. Co. v. Foltz*, 52 Fed. Rep. 627.

Under Neb. Const. art. 11, § 8, a foreign railroad corporation is prohibited from acquiring a right of way or real estate, for depot or other uses, either by purchase or by condemnation. *State ex rel. v. Scott*, 22 Neb. 628, 36 N. W. Rep. 121.

10. Power to construct and operate railways.†—Under the present laws of Ohio, foreign railroad corporations whose roads lie partly within this state are accorded the right to own, operate, and maintain their roads in Ohio, in the same manner as domestic railroad companies. *State v. Sherman*, 22 Ohio St. 411.

In an action to enjoin a railway company from laying a side track across the plaintiff's lot it was alleged that the "defendant

* See also EMINENT DOMAIN, 77.

† Foreign railroad company authorized to construct line in state, see note, 57 AM. & ENG. R. CAS. 90.

* Power of foreign corporation to hold land, see note, 30 AM. & ENG. R. CAS. 144.

was a foreign and non-resident railroad corporation, organized and incorporated under the laws of Illinois," etc., which allegations the defendant in its answer and supplemental answer admitted to be true. *Held*, that under the issue made in the pleadings the defendant, unless it became a corporation under the laws of Nebraska, was prohibited absolutely by the constitution from acquiring a right of way; and as it could not acquire the same directly, it could not do so indirectly through a corporation organized under the laws of the state, and might be enjoined from appropriating the property. *Koenig v. Chicago, B. & Q. R. Co.*, 27 Neb. 699, 43 N. W. Rep. 423.—COMMENTING ON *State v. Chicago, B. & Q. R. Co.*, 25 Neb. 156. FOLLOWING *State v. Scott*, 22 Neb. 628.

11. Power to have an office in the foreign state.—The sixteenth section of the Pa. Act of June 7, 1879, provides that "no foreign corporation, except foreign insurance companies, which does not invest and use its capital in this commonwealth, shall have an office or offices in this commonwealth for the use of its officers, stockholders, agents, or employés, unless it shall first have obtained from the auditor-general an annual license so to do; and for said license every such corporation shall pay into the state treasury, for the use of the commonwealth, annually, one fourth of a mill on each dollar of capital stock which said company is authorized to have; *provided*, that no license shall be necessary for any corporation paying a tax under any previous section of this act, or whose capital stock, or a majority thereof, is owned or controlled by a corporation of this state which does pay a tax under any previous section of this act." *Held*, that this section does not apply to a corporation created by the congress of the United States. A corporation created by the government of the United States cannot with propriety be called a foreign corporation. *Com. v. Texas & P. R. Co.*, 1 *Pennyp. (Pa.)* 215.—FOLLOWING *Eby v. Northern Pac. R. Co.*, 6 W. N. C. 385; *Eby v. Northern Pac. R. Co.*, 7 W. N. C. 145.

Where a corporation was authorized by its charter to issue stock to the amount of \$50,000,000, but the amount actually issued was only \$7,902,500, and all of this, with the exception of a few shares, was owned or controlled by a corporation created by the

state of Pennsylvania, and having its capital and transacting its business therein, which latter corporation had paid a tax under a preceding section of the act, the said first-mentioned corporation, assuming it to be a foreign corporation, is not required to obtain a license in order to have an office within the commonwealth. *Com. v. Texas & P. R. Co.*, 1 *Pennyp. (Pa.)* 215.

12. Power to make contracts.—Corporations may contract outside of the sovereignty creating them. *Bank of Augusta v. Earle*, 13 *Pet. (U. S.)* 519.—APPLIED IN *Day v. Ogdensburgh & L. C. R. Co.*, 107 N. Y. 129. FOLLOWED IN *Tombigbee R. Co. v. Kneeland*, 4 *How. (U. S.)* 16. QUOTED IN *Denver & S. R. Co. v. Denver City R. Co.*, 2 *Colo.* 673. REVIEWED IN *Chicago & W. I. R. Co. v. Dunbar*, 95 *Ill.* 571.

Since, under article 14, § 4, Ala. Const., providing that no "foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent," the contracts in Alabama and relative to Alabama property made by a foreign trust company doing business in Alabama without having a known place of business or authorized agent, are not void, but merely voidable, a plea in bar to a foreclosure suit by such company, based on that provision of the constitution, is not sufficient. *American L. & T. Co. v. East & W. R. Co.*, 36 *Am. & Eng. R. Cas.* 276, 37 *Fed. Rep.* 242.

Where a railroad corporation is created in Indiana with power to construct a railroad there, and to own and manage property in the adjoining state of Ohio, it cannot, by reason of such latter authority, change its domicile to Ohio, nor because the latter state gave it authority to act therein; and where it receives subscriptions to its capital stock in Indiana, payable in instalments, as may be determined, and then migrates to Ohio, and there determines in what instalments the subscriptions shall be paid, such corporate acts are inoperative and void, and the subscriptions cannot be collected. *Aspinwall v. Ohio & M. R. Co.*, 20 *Ind.* 492.

Where a foreign corporation obtains permission to build its road into New York and transact business there, as to contracts made therein it must be deemed to possess the powers and be subject to all the liabilities of similar corporations created in

the state. It should not be permitted to make a contract, valid and enforceable in New York, and then, when its interests dictate, set up the decisions of the other state holding a want of power as an excuse for its violation. *Milnor v. New York & N. H. R. Co.*, 53 N. Y. 363, 5 Am. Ry. Rep. 381; *affirming* 4 Daly 355.—FOLLOWED IN *Kessler v. New York C. & H. R. R. Co.*, 61 N. Y. 538.

Before a foreign railroad corporation can be restrained by a court of New York from issuing bonds, or from executing a mortgage on its property to secure such bonds, it must appear that the execution of such mortgage would be an injury or obstruction to rights of plaintiff, as a creditor, which could be enforced in a New York court. *Rogers v. Michigan S. & N. I. R. Co.*, 28 Barb. (N. Y.) 539.

13. Power to borrow money.—Ohio Act of December 15, 1852, relating to the sale of railroad bonds at such price as the directors may choose, does not apply to foreign corporations. Such corporations are governed by the same rules as private individuals, so far as their power to raise money at usurious rates of interest is concerned. *McGregor v. Covington & L. R. Co.*, 1 Disney (Ohio) 509.

14. Certificate, special tax, etc.*—The fourteenth amendment to the U. S. constitution does not prevent the states from imposing terms on foreign corporations as a condition for admission to do business in another state. *Philadelphia F. Assoc. v. New York*, 119 U. S. 110, 7 Sup. Ct. Rep. 108.—FOLLOWED IN *Norfolk & W. R. Co. v. Pennsylvania*, 45 Am. & Eng. R. Cas. 9, 136 U. S. 114.

Where contracts of insurance were made in another state and policies were issued there upon goods in Arkansas, the insurance company cannot be considered as carrying on business in Arkansas within the meaning of a statute requiring it to file a certificate designating the agent upon whom service of process may be made before it shall "carry on business" in the state. *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.*, 43 Am. & Eng. R. Cas. 79, 41 Fed. Rep. 643.

II. ACTIONS BY AND AGAINST.

15. Jurisdiction, and right to sue.†—The organization of an express company

* License taxes on foreign corporations, see note, 45 AM. & ENG. R. CAS. 8.

† Jurisdiction of federal courts of suits by

under the laws of one state as a joint stock company, or partnership, does not make it a citizen of that state, so as to authorize it to sue in the federal courts of another state, in the absence of anything to show the residence of the individuals composing the company. *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. Rep. 426.

A corporation in Indiana cannot sue in that state a corporation doing business in Michigan. *Northern Ind. R. Co. v. Michigan C. R. Co.*, 5 McLean (U. S.) 444.

The mere grant of authority to a foreign corporation to exercise its franchises and hold property in Indiana cannot be construed as containing a grant of jurisdiction to foreign courts over the property of such corporation in this state. *Eaton & H. R. Co. v. Hunt*, 20 Ind. 457.—QUOTED IN *Meyer v. Johnston*, 64 Ala. 603.

A foreign corporation operating cars in Iowa for the purpose of exhibition and advertisement cannot be sued under the statutes of that state, section 2582, authorizing suit in any county through which a road passes or is operated; nor under section 2585, providing for suit in any county where any corporation or individual has an office or agency, as to any matter connected with such office or agency; and this applies to a case where the cause of action is the infringement of a patent caused by operating such cars. *Carpenter v. Westinghouse Air-Brake Co.*, 32 Fed. Rep. 434.

A court of equity has no jurisdiction to compel a foreign corporation to declare and pay dividends when it has neither officers nor a place of business in the state. *Williston v. Michigan S. & N. I. R. Co.*, 13 Allen (Mass.) 400.

The court of chancery of New Jersey will not take jurisdiction of a bill filed by stockholders of a foreign corporation against it and another foreign corporation to prevent a lease of the road, when none of the property is situate in New Jersey. *Gregory v. New York, L. E. & W. R. Co.*, 24 Am. & Eng. R. Cas. 83, 40 N. J. Eq. 38.

Under N. Y. Code, § 427, a foreign corporation may be sued (1) by a resident of the state for any cause of action; (2) by

aliens against foreign corporation, see note, 57 AM. & ENG. R. CAS. 92.

Jurisdiction of federal court where foreign corporation is sued in state where it does business, see note, 57 AM. & ENG. R. CAS. 94.

one not a resident of the state when the cause of action arose in the state, or the subject-matter of the action is situate within the state; (3) or when an attachment is issued, whether the property is attached at the time of issuing the summons or at any time afterward; but it is not necessary that proof of these facts be made before the commencement of proceedings. They may be shown on a motion to set aside the summons. *Bates v. New Orleans, J. & G. N. R. Co.*, 4 Abb. Pr. (N. Y.) 72, 13 How. Pr. 516.

It seems that N. Y. Act of 1858, ch. 121, authorizing the Buffalo & Lake Huron R. Co., a corporation organized under the laws of Canada, to enter the state and construct a road, and for that purpose to take and hold real estate, and making it subject to the general railroad act of the state, does not give authority to proceed against the corporation except as a foreign corporation. *Whitehead v. Buffalo & L. H. R. Co.*, 18 How. Pr. (N. Y.) 218.

A foreign corporation may be sued in Manitoba for work done for the corporation there. And it will be assumed that a United States corporation is liable to be sued there in its corporate capacity until the contrary be shown. *Crotty v. Oregon & T. R. Co.*, 3 Man. 182.

16. Effect of appearance to confer jurisdiction.—Where the court has jurisdiction of the subject-matter of an action, consent will confer jurisdiction of the person, and in case of a foreign corporation such consent may be expressed by appearing by attorney and answering generally in the action. *McCormick v. Pennsylvania C. R. Co.*, 49 N. Y. 303, 4 Am. Ry. Rep. 429.—DISAPPROVING *Jones v. Norwich & N. Y. Transp. Co.*, 50 Barb. 193. DISTINGUISHING *Harriott v. New Jersey R. & T. Co.*, 2 Hilt. 262; *Cumberland Coal Co. v. Sherman*, 8 Abb. Pr. 243. QUOTING *Faulkner v. Delaware & R. Canal Co.*, 1 Den. 441.—APPROVED IN *Anderson v. Southern Minn. R. Co.*, 21 Minn. 30. DISTINGUISHED IN *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 16 Civ. Pro. 255, 19 N. E. Rep. 625, 20 N. Y. S. R. 741. REVIEWED IN *Pease v. Delaware, L. & W. R. Co.*, 10 Daly 459.—*March v. Eastern R. Co.*, 40 N. H. 54^f.

A general appearance before answering by a foreign corporation gives the court jurisdiction over the person of the defendant, but not necessarily over the cause of

action, for a defendant voluntarily appearing may yet object to the jurisdiction of the court over the subject-matter. *Ervin v. Oregon R. & N. Co.*, 62 How. Pr. (N. Y.) 490.

17. Liability to be sued, generally.

—A foreign railway corporation may enter a state, and, in consideration of being allowed to do business there, may consent to be sued; but this rule does not apply to a foreign company which builds its road into the state under a statute providing that it shall become a corporation of the state upon filing its articles of association. *Stout v. Sioux City & P. R. Co.*, 3 McCrary (U. S.) 1, 8 Fed. Rep. 794.

Where a foreign railroad corporation goes into a state and operates a road, and has an agent under the laws of the state upon whom process may be served, it is an inhabitant, within the meaning of the act of congress of March 3, 1887, and is suable in the United States circuit court sitting in the state. *Riddle v. New York, L. E. & W. R. Co.*, 39 Fed. Rep. 290.—FOLLOWING *Zambrino v. Galveston, H. & S. A. R. Co.*, 38 Fed. Rep. 449. NOT FOLLOWING *Filli v. Delaware, L. & W. R. Co.*, 37 Fed. Rep. 65.

A foreign corporation carrying on business in New Jersey, under legislative sanction, is liable for injuries occasioned by its acts, upon the same principles and to the same extent that a company incorporated by the laws of that state would be. *Austin v. New York & E. R. Co.*, 25 N. J. L. 381.

The provisions of 2 N. Y. Rev. St. 459, § 15, as amended in 1849, providing how foreign corporations might be sued, are not repealed by the code. *Bank of Commerce v. Rutland & W. R. Co.*, 10 How. Pr. (N. Y.) 1.

18. — on cause of action arising abroad.—Under Iowa Code, §§ 2582, 2585, providing how railway corporations may be sued, a citizen of that state cannot sue a corporation, on a cause of action not arising there, which does not own or operate a road in the state and which has no agent or offices in the state. *Elgin Canning Co. v. Atchison, T. & S. F. R. Co.*, 24 Fed. Rep. 866.—DISTINGUISHING *Ex parte Schollenberger*, 96 U. S. 369.

In New York a resident plaintiff may maintain an action against a foreign railroad company, although the acts out of which his cause of action arose were done, and

the property through the management and disposition of which his loss and damages were sustained, are out of the state. *Ervin v. Oregon R. & N. Co.*, 62 How. Pr. (N. Y.) 490.

An action may be maintained in New Brunswick for a wrong committed abroad, if, at the time the action is brought here, the wrong complained of was actionable according to the laws of the country where committed. *Campbell v. McGregor*, 29 New Brun. 644.

19. Liability, by what law determined.—Where railroad corporations are sued out of the jurisdiction by which they were created, and under whose laws alone they can act, the extent and degree of their responsibility must be determined by the law of the place of the existence and action of such corporation. *New Orleans, J. & G. N. R. Co. v. Wallace*, 50 Miss. 244.

20. When subject to suit in personam.—A railroad corporation, whether *de facto* or *de jure*, and whether foreign or domestic, is subject to suit in Georgia *in personam* by a citizen thereof if it owns and operates a railroad there, which was built by virtue of an act of the legislature authorizing another corporation, chartered by an adjoining state, to build and operate said railroad, and which act declared the corporation so building and operating it subject to suit by citizens of the state in the county in which the road is located. *Alabama G. S. R. Co. v. Fulghum*, 87 Ga. 263, 13 S. E. Rep. 649.

Previous to the New York code, foreign corporations were not the subject of litigation in the courts of the state, except when proceeded against by attachment of their property for the collection of a debt or the redress of a wrong. And the code was not intended to extend that power any further than it existed at that time, although its language is more general and might be construed more liberally. *Howell v. Chicago & N. W. R. Co.*, 51 Barb. (N. Y.) 378. — CRITICISED IN *Prouty v. Michigan S. & N. I. R. Co.*, 4 T. & C. (N. Y.) 230, 1 Hun 655.

If the legislature has power to authorize any suit it may prescribe what kind and mode of procedure, as there is nothing constitutional or fundamental in the method. Hence a legislature may authorize suits against foreign corporations as well *in personam* as *in rem*. *Barnett v. Chicago & L. H. R. Co.*, 4 Hun (N. Y.) 114, 6 T. & C. 358.

Humphreys v. Newport News & M. V. Co., 39 Am. & Eng. R. Cas. 363, 33 W. Va. 135, 10 S. E. Rep. 39.

21. Property in state to justify suit.—N. Y. Code, § 134, subd. 1, does not require any specific amount of property to be found in the state to justify an action against a foreign corporation. But it certainly should be something from which the creditor may have some chance of benefit. Unissued bonds and maps are not, however, such property. *Barnes v. Mobile & N. W. R. Co.*, 12 Hun (N. Y.) 126.

22. Venue.—A foreign corporation having an office in Missouri is to be treated as a non-resident defendant, and Mo. Rev. St. § 3481 applies, providing that suit may be brought in any county, where the defendants are non-residents but have an office in the state. *Estill v. New York, L. E. & W. R. Co.*, 41 Fed. Rep. 849.

A foreign corporation doing business in West Virginia, having no principal office or president or other chief officer resident therein, may be sued in any county wherein it does business, where the cause of action arose out of the state, if process can be legally served in such county. *Humphreys v. Newport News & M. V. Co.*, 39 Am. & Eng. R. Cas. 363, 33 W. Va. 135, 10 S. E. Rep. 39.

23. Who may sue, generally.—Under N. Y. Code of Pro. § 427, relating to actions against foreign corporations, a resident of the state may sue such corporation for any cause of action. *Prouty v. Michigan S. & N. I. R. Co.*, 4 T. & C. (N. Y.) 230, 1 Hun 655. — CRITICISING *Howell v. Chicago & N. W. R. Co.*, 51 Barb. 378. DISTINGUISHING *Whitehead v. Buffalo & L. H. R. Co.*, 18 How. Pr. 218.

Under N. Y. Code Civ. Pro. § 1780, providing that an action against a foreign corporation may be maintained by a resident of the state or a domestic corporation for any cause of action, resident stockholders of a foreign railroad company may enjoin it from expending funds of the corporation, to the injury of the stockholders, in constructing a branch road in the state. *Ives v. Smith*, 3 N. Y. Supp. 645; affirmed in 8 N. Y. Supp. 46.

It is not necessary that a stockholder of a non-resident corporation have his stock registered in order to maintain an action against his corporation. *Ervin v. Oregon R. & N. Co.*, 62 How. Pr. (N. Y.) 490.

24. — non-residents.—A foreign construction company cannot maintain a bill in equity in Massachusetts against a foreign railroad corporation and a citizen of Massachusetts to enforce specific performance of a covenant in a contract for the delivery of bonds and certificates of stock in payment of work to be performed by the construction company in a foreign state, and to restrain by injunction the citizen of Massachusetts from disposing there of shares of stock and bonds of the railroad company, alleged to have been delivered to him in violation of the plaintiff's rights, although the railroad corporation has an office in Massachusetts for the transfer of stock, and has appeared by attorney in the suit. *Kansas & E. R. Constr. Co. v. Topeka, S. & W. R. Co.*, 16 *Am. & Eng. R. Cas.* 495, 135 *Mass.* 34, 46 *Am. Rep.* 439.

To enable a non-resident plaintiff to maintain an action in the New York court of common pleas against a foreign corporation one of three things must appear: (1) That the action is upon contract made, executed, or delivered in the state; (2) that the cause of action arose in the state; (3) or that the subject of the action is situate within the state. *Harriott v. New Jersey R. Co.*, 8 *Abb. Pr. (N. Y.)* 284, 2 *Hill.* 262.

In such case the defendant corporation does not waive the above statutory requisites to jurisdiction by appearing and answering. *Harriott v. New Jersey R. Co.*, 8 *Abb. Pr. (N. Y.)* 284, 2 *Hill.* 262.

But where the objection is for want of jurisdiction of the person of the defendant, not of the subject-matter, such objection may be waived; and it is waived if the defendant fails to make the objection in its answer or before answering. *Pease v. Delaware, L. & W. R. Co.*, 10 *Daly (N. Y.)* 459. —REVIEWING *Harriott v. New Jersey R. Co.*, 2 *Hill.* 262; *McCormick v. Pennsylvania C. R. Co.*, 49 *N. Y.* 308. —APPLIED IN *McLean v. St. Paul & C. R. Co.*, 1 *N. Y. S. R.* 89, 18 *Abb. N. Cas.* 423.

Since the adoption of the N. Y. Code Civ. Pro. § 1780, limiting the jurisdiction of the courts in actions against foreign corporations to cases where the action is brought to recover damages for breach of a contract made within the state, or relating to property situate within the state, or to recover real estate therein, or chattels replevied therein, or where the cause of action arose within the state, a foreign corpo-

ration cannot be sued except as provided therein. *Ervin v. Oregon R. & N. Co.*, 28 *Hun (N. Y.)* 269; *affirming* 62 *How. Pr.* 490.

And under the above statute residents of New York cannot sue a foreign corporation by taking an assignment of a claim after suit; but it might be otherwise if the assignment were made before suit. *Ervin v. Oregon R. & N. Co.*, 28 *Hun (N. Y.)* 269; *affirming* 62 *How. Pr.* 490.

Under N. Y. Code Civ. Pro. § 1780, providing how foreign corporations may be sued, a non-resident cannot sue such corporation, in the absence of special contract for payment in the state, for services rendered under a contract which was made out of the state, but for services to be performed within the state. *Perry v. Erie Transfer Co.*, 20 *N. Y. Supp.* 891; *reversing* 19 *N. Y. Supp.* 239; *adhered to in* 23 *N. Y. Supp.* 878.

25. Process — Summons — Attachment.—At common law jurisdiction over a foreign corporation could not be acquired by service of process upon any officer thereof outside of the state which gave it existence. *Barnett v. Chicago & L. H. R. Co.*, 4 *Hun (N. Y.)* 114.

A suit against a foreign corporation cannot be commenced by original writ or summons. Attachment is the mode provided by statute. *Heath v. Wright*, 1 *How. Pr. (N. Y.)* 230. *Brewster v. Michigan C. R. Co.*, 5 *How. Pr. (N. Y.)* 183. *Sprague v. Hartford, P. & F. R. Co.*, 5 *R. I.* 233.

A foreign corporation having its chief office or place of business in Missouri may, it seems, be sued as if resident there, by ordinary writ of summons. *Farnsworth v. Terre Haute, A. & St. L. R. Co.*, 29 *Mo.* 75.

26. Service of process on.*—A state legislature may authorize the commencement of suits by the service of process upon the president, secretary, or treasurer of a foreign corporation having a place of business or making contracts within that state. *Weymouth v. Washington, G. & A. R. Co.*, 1 *MacArth. (D. C.)* 19.

At common law jurisdiction over a foreign corporation could not be acquired by service of process upon any officer thereof outside of the state which gave it exist-

* Process cannot be served on agent of foreign corporation casually in jurisdiction, see note, 16 *AM. & ENG. R. CAS.* 557. See also *PROCESS*, 16 *et seq.*

ence; but under the New York code, jurisdiction may be acquired by service on certain designated officers, without at the same time issuing an attachment. *Barnett v. Chicago & L. H. R. Co.*, 4 Hun (N. Y.) 114, 6 T. & C. 358.

A foreign railroad company that has no road in the state is not "doing business within the state" within the meaning of N. Y. Laws of 1855, 470, because it has a resident agent in the state who sells tickets. *Doty v. Michigan C. R. Co.*, 8 Abb. Pr. (N. Y.) 427.

Such ticket agent cannot be said to be a "managing agent of the corporation" within the meaning of section 134 of the code. *Doty v. Michigan C. R. Co.*, 8 Abb. Pr. (N. Y.) 427.—REVIEWED IN *Emerson v. Auburn & O. L. R. Co.*, 13 Hun 150.

27. Pleading.—In an action against a foreign corporation, operating a railroad within New Jersey by legislative authority, when the action is not founded upon any special statutory provisions, but is brought to enforce the common law liability of the defendants, it is not necessary to aver in the declaration upon what road the injury was sustained. *Austin v. New York & E. R. Co.*, 25 N. J. L. 381.

Under N. Y. Code Civ. Pro. § 488, defects in pleadings, to be available as grounds of demurrer, must appear on the face of the complaint. So the fact that a defendant is a non-resident corporation, and the court therefore has no jurisdiction over its person, cannot be raised on demurrer, unless the want of jurisdiction appears on the face of the complaint. *Cervais v. Chicago, R. I. & P. R. Co.*, 13 N. Y. Supp. 589.

28. Right to sue in foreign state.—A corporation created by the laws of another state, although associated with one in the state where suit is brought, the two having a common interest, is a foreign corporation within the meaning of the federal Judiciary Act, and is entitled to file a bill in a U. S. circuit court and claim its protection. *Chicago & N. W. R. Co. v. Chicago & P. R. Co.*, 6 Biss. (U. S.) 219.—DISTINGUISHED IN *Chicago & W. I. R. Co. v. Lake Shore & M. S. R. Co.*, 10 Biss. (U. S.) 122, 5 Fed. Rep. 19.

A corporation of another state can sue an alien corporation in the federal courts. *Merchants' Mfg. Co. v. Grand Trunk R. Co.*, 21 Butchf. (U. S.) 109, 63 How. Pr. (N. Y.) 459.

A railroad corporation, created by the laws of Mississippi, can sue in Alabama upon a contract made in the latter state. *Tombigbee R. Co. v. Kneeland*, 4 How. (U. S.) 16.—FOLLOWING *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519.

A foreign corporation cannot interfere by bill to enjoin taxes legally or illegally assessed, under the laws of Illinois, against a domestic corporation, unless the former will itself be injuriously affected by the collection of such taxes, as to its property or otherwise. *Archer v. Terre Haute & I. R. Co.*, 7 Am. & Eng. R. Cas. 249, 102 Ill. 493.

When the suit of a foreign railroad corporation was brought prior to the passage of Tenn. Act 1891, ch. 122, or when it does not affirmatively appear that the company has not complied with the requirements of that act, the company's right to maintain the suit cannot be questioned upon the ground of non-compliance therewith. *Louisville & N. R. Co. v. Mississippi & T. R. Co.*, 92 Tenn. 681, 22 S. W. Rep. 920.

29. — in District of Columbia.—Foreign corporations, not only those created by the several states of the Union, but corporations created by foreign governments, are allowed by the comity of states to come into the District of Columbia, open an office for the transaction of business, make contracts upon which they may sue in the courts of the District, and in turn such corporations may be sued in the District. *Weymouth v. Washington, G. & A. R. Co.*, 1 MacArth. (D. C.) 19.

A railroad company was chartered in Virginia and was permitted to extend its road into the District of Columbia. Through its treasurer it borrowed money in New York and suit was afterwards commenced in that state to recover the amount, and process was served on the company's secretary, and judgment obtained, and subsequently an action was commenced in the District of Columbia upon a transcript of the judgment. Held, that the New York court obtained complete jurisdiction by such service, and the judgment was as conclusive here as in that state. *Weymouth v. Washington, G. & A. R. Co.*, 1 MacArth. (D. C.) 19.

FOREIGN EXECUTORS.

Powers of, see EXECUTORS AND ADMINISTRATORS, §.

FOREIGN JUDGMENTS.

Conclusiveness of, see JUDGMENT, ETC., 24.

FOREIGN RECEIVERS.

Right of, to sue, see RECEIVERS, 119.

FOREIGN STATE.

Jurisdiction of action for causing death in,
see DEATH BY WRONGFUL ACT, 109-124.

FOREMAN.

As fellow-servant with other employees, see
FELLOW-SERVANTS, 308-341.

Contributory negligence in disobeying orders
of, see EMPLOYEES, INJURIES TO, 390.

Evidence of statement of, in actions for in-
juries to employees, see EMPLOYEES, IN-
JURIES TO, 579, 580.

FORFEITURE.

By passenger, for failure to pay fare or pro-
duce ticket, see TICKETS AND FARES,
144.

— subcontractors, see CONSTRUCTION OF
RAILWAYS, 83.

For breach of condition in deed, waiver of,
see DEEDS, 37.

— failure to lay or extend tracks as required
by charter, see CHARTERS, 125.

— non-completion of street railway within
time limited, see STREET RAILWAYS, 117-
120.

— non-payment of subscription, see SUBSCRIP-
TIONS TO STOCK, 180-188.

— overcharge in passenger fare, see TICKETS
AND FARES, 132.

In criminal prosecutions for causing death,
see DEATH BY WRONGFUL ACT, 450.

Interpretation of mortgage as regards, see
MORTGAGES, 85.

Of charter, as a defense to action on sub-
scription, see SUBSCRIPTIONS TO STOCK,
158.

— grounds for, see DISSOLUTION, ETC., 1-
10.

— when lease of road will not prevent, see
LEASES, ETC., 5.

— compensation by receiver, for fraud or mis-
conduct, see RECEIVERS, 162.

— contracts for railway construction, see
CONSTRUCTION OF RAILWAYS, 33, 34;
GOVERNMENT RAILROADS, 10.

— deposit with company, on discharge of
employee, see EMPLOYEES, 9.

— donation, see MUNICIPAL AND LOCAL AID,
202.

— exclusive grant to use streets for railways,
see STREET RAILWAYS, 51.

Of franchise, see CHARTERS, 77-92; FRAN-
CHISES, 10.

— of branch roads, see BRANCH AND LAT-
ERAL ROADS, 19.

— to keep toll bridge, see BRIDGES, ETC.,
93.

— land grants, for breach of condition, see
LAND GRANTS, 83, 91.

— lands granted only available at instance
of government, see LAND GRANTS, 59.

— lease, rights of parties after, see LEASES,
ETC., 34.

— location, after approval of commissioners,
see LOCATION OF ROUTE, 12.

— stock, for non-payment of assessments, is
a cumulative remedy only, see SUBSCRIP-
TIONS TO STOCK, 77.

— to company, effect of, on liability of
stockholders to creditors, see STOCK-
HOLDERS, 54.

— subcontracts, enforcement of provisions
for, see CONSTRUCTION OF RAILWAYS, 86.

— wages, see EMPLOYEES, 20.

Provisions for, in municipal grant of right of
way in street, see STREETS AND HIGH-
WAYS, 95.

Waiver of, by public agents, see AGENCY,
118.

FORGERY.

Liability of collector in cases of, see EXPRESS
COMPANIES, 20.

Of transfer of stock, see STOCK, 86-90.

Prosecutions for, see CRIMINAL LAW, 24.

FORMA PAUPERIS.

Suits in, see PAUPERS, 2.

— for injuries to children, see CHILDREN,
INJURIES TO, 156.

FORMER ADJUDICATION.

Judicial notice of, see EVIDENCE, 104.

FORMER RECOVERY.

As a defense to action for causing death,
see DEATH BY WRONGFUL ACT, 163.

FORMS OF ACTION.

Election between, see ACTIONS, 10.

FORWARDERS.

Distinguished from carriers, see CARRIAGE
OF MERCHANDISE, 31-34.

Express companies are not, see EXPRESS
COMPANIES, 23.

FRANCHISES.

Abandonment and forfeiture of, see CHARGES, 77-92.

Alienation of, when ultra vires, see ULTRA VIRES, 10.

Amendment of charter by conferring new, see CHARTERS, 32.

Assessment of, for local improvements, see STREET RAILWAYS, 295.

Assignability of, see ASSIGNMENT, 6.

Effect of transfer of, after subscription but before issue of bonds, see MUNICIPAL AND LOCAL AID, 326.

For private railroad, power of city to grant, see PRIVATE RAILROADS, 2.

Forfeiture for misuser of, see DISSOLUTION, 6.

Granted by city to cable railways, see CABLE RAILWAYS, 2.

— — — congress, state tax on, see INTERSTATE COMMERCE, 188.

Impairment of, as an element of land damages, see EMINENT DOMAIN, 688.

Injunction to restrain exercise of, see STOCKHOLDERS, 80.

License tax for privilege of exercising, see INTERSTATE COMMERCE, 209.

Of branch road, forfeiture of, see BRANCH AND LATERAL ROADS, 19.

— company aided, effect of assignment of, see MUNICIPAL AND LOCAL AID, 214.

— street railway, power of legislature to grant, see STREET RAILWAYS, 8.

— — — taxation of, see STREET RAILWAYS, 278.

Power of city to alter, amend, or repeal, see STREET RAILWAYS, 26.

— — — corporation to alienate, see CORPORATIONS, 9.

— — — legislature to alter, amend, or repeal, see STREET RAILWAYS, 27.

Purchaser of, takes cum onere, see MORTGAGES, 254.

Right to take, in condemnation proceedings, see EMINENT DOMAIN, 101-124.

Sale or transfer of, forfeiture for, see DISSOLUTION, ETC., 8.

Statutes impairing obligation of, see STATUTES, 15.

— providing remedy for violation of, see BRIDGES, ETC., 6.

Surrender of, forfeiture for, see DISSOLUTION, ETC., 9.

To erect toll bridge, see BRIDGES, ETC., 90-93.

— run ferries, see FERRIES, 3, 4.

Validity of mortgage of, see MORTGAGES, 12, 13.

What will pass on sale in foreclosure, see MORTGAGES, 242.

When subject to levy of execution, see EXECUTION, 5.

— — — taxation, see TAXATION, 97, 160.

1. Definition and general nature.*

— The word "franchise" is often used in the sense of privileges generally, but in its more appropriate and legal sense the term is confined to such rights and privileges as are conferred upon corporate bodies by legislative grant. It is nothing more than the right or privilege of being a corporation, and of doing such things, and such things only, as are authorized by the charter. *Fiet-sam v. Hay*, 122 Ill. 293, 13 N. E. Rep. 501, 11 West. Rep. 581.

It follows, from the very nature of a corporation, that a franchise, or the right to be and act as an artificial body, is vested in the individuals who compose the corporation, and not in the corporation itself. *Fiet-sam v. Hay*, 122 Ill. 293, 13 N. E. Rep. 501, 11 West. Rep. 581.

Every franchise granted is, in its nature and in the absence of express provision to the contrary, exclusive, except as against the government. *New Jersey Southern R. Co. v. Long Branch Com'rs*, 39 N. J. L. 28, 14 Am. Ky. Rep. 211.

The duration of a franchise or right granted by a state legislature to a corporation is fixed by the constitution in force at the time it is granted, or by the charter itself. *Atlantic & G. R. Co. v. Allen*, 15 Fla. 637.

2. Power to confer.—The prohibition in U. S. Const. art. 1, § 10, to the effect that "no state, without the consent of congress, shall enter into any agreement or compact with another state, or with a foreign power," is political in its character, and has no reference to a mere matter of contract, or to the grant of a franchise to a railroad, which in no wise conflicts with the powers delegated to the general government by the states. *Union Branch R. Co. v. East Tenn. & G. R. Co.*, 14 Ga. 327.

A railroad franchise may be conferred upon a corporation; and it follows that the legislature can constitutionally bestow grants of this kind. The constitution contains no prohibition and no restrictions on this power. *New York & H. R. Co. v. Forty-second St. & G. S. F. R. Co.*, 32 How.

*Corporate franchises as public grants, see note, 8 L. R. A. 498.

Pr. (N. Y.) 481, 50 *Barb.* 309; *affirming* 50 *Barb.* 285, 26 *How. Pr.* 68.

The right of corporate existence cannot be divided up and made applicable to the different divisions of a railroad. Nor can the right to expropriate property be parceled out among the purchasers of the various divisions of a railroad. *State v. Morgan*, 28 *La. Ann.* 482.

Several corporations, possessing the rights and franchises stated, cannot spring into existence by the act of a railroad company in mortgaging and selling separate divisions of their road, with the rights and franchises applicable to each division, because this would be the exercise of a prerogative by a creature that belongs exclusively to its creator. *State v. Morgan*, 28 *La. Ann.* 482.

3. Inviolability.*—A franchise granted by a municipal corporation, on a valuable consideration, by an ordinance in the nature of a contract, if legal, is within the protection of the constitutional provision against laws impairing the obligation of contracts; and it can neither be taken away by the repeal of the ordinance nor impaired by a subsequent grant of such franchise to another. *Birmingham & P. M. St. R. Co. v. Birmingham St. R. Co.*, 79 *Ala.* 465. *Mobile v. Louisville & N. R. Co.*, 36 *Am. & Eng. R. Cas.* 171, 84 *Ala.* 115, 4 *So. Rep.* 106.

An absolute right, vested by the legislature of the state and assented to by the councils of a city, cannot be subverted by a city ordinance; it cannot prohibit the enjoyment of a franchise solemnly granted. *Hesterville, M. & F. Pass. R. Co. v. Philadelphia*, 89 *Pa. St.* 210. *Com. ex rel. v. Smedley*, 17 *Phila. (Pa.)* 18.

The use of the line of the track by a railroad company is a franchise granted by law to such company, in the nature of a contract, and, as such, inviolable, except under the general power reserved to the state to alter or repeal charters. *In re Com'rs of Central Park*, 63 *Barb. (N. Y.)* 282.

A franchise, if granted by the state with a reservation of a right of repeal, must be regarded as a mere privilege while it is suffered to continue, and the legislature may

take it away at any time, and the grantees must rely for the perpetuity and integrity of the franchise granted to them solely upon the faith of the sovereign grantor. *Cincinnati Inclined Plane R. Co. v. City & S. Tel. Assoc.*, 48 *Ohio St.* 390, 27 *N. E. Rep.* 890.

4. Assignability and transfers.*—The franchises of a railroad company cannot be alienated without the consent of the state which granted them. When the state covenants and agrees that a certain corporation shall administer certain franchises, the ordinary judgment creditors of that corporation may seize and sell its property, but not the franchises. It is a state prerogative to put the administration of its franchises into such hands as it may choose, and they cannot be transferred without the consent of the state. *State v. Morgan*, 28 *La. Ann.* 482. *Fietsam v. Hay*, 122 *Ill.* 293, 13 *N. E. Rep.* 501, 11 *West. Rep.* 581. *Chollette v. Omaha & R. V. R. Co.*, 37 *Am. & Eng. R. Cas.* 16, 26 *Neb.* 159, 41 *N. W. Rep.* 1106. *Russell v. Texas & P. R. Co.*, 68 *Tex.* 646, 5 *S. W. Rep.* 686.

A railroad corporation cannot, without special statutory authority, alienate its franchise or property acquired under the right of eminent domain, or essential to the performance of its duty to the public, whether by sale, mortgage, or lease. *Singleton v. Southwestern R. Co.*, 21 *Am. & Eng. R. Cas.* 226, 70 *Ga.* 464, 48 *Am. Rep.* 574.—*QUOTING Bryan v. Acee*, 27 *Ga.* 91.—*Braslin v. Somerville Horse R. Co.*, 32 *Am. & Eng. R. Cas.* 406, 145 *Mass.* 64, 4 *N. Eng. Rep.* 888, 13 *N. E. Rep.* 65. *Black v. Delaware & R. Canal Co.*, 22 *N. J. Eq.* 130; *reversed in* 24 *N. J. Eq.* 455.

The franchise will not pass by a sale of the road itself, nor is the corporation thereby dissolved, although it might be ground of forfeiture at the suit of the state. *Arthur v. Commercial & R. Bank*, 17 *Miss.* 394.

And a statute authorizing the leasing of completed railroads does not authorize the transfer of a franchise to build a road. *Wood*

*Power of railroad companies to transfer franchises and property, see notes, 75 *AM. DEC.* 548; 35 *AM. ST. REP.* 390.

Right of corporation to lease franchises, see note, 35 *AM. ST. REP.* 402.

Sale of franchises on foreclosure of mortgage, see note, 36 *AM. & ENG. R. CAS.* 275.

Franchises of road pass to purchaser at foreclosure sale, see note, 30 *AM. & ENG. R. CAS.* 315.

*Alteration or repeal of corporate grants, see note, 14 *AM. & ENG. R. CAS.* 33.

Power of city to repeal grant of franchise to street railway company, see note, 54 *AM. & ENG. R. CAS.* 27. See also *CHARTERS*, 17-50.

v. Bedford & B. R. Co., 8 Phila. (Pa.) 94.—
FOLLOWING *Gratz v. Pennsylvania R. Co.*,
41 Pa. St. 447.—APPLIED IN *Troy & B. R.*
Co. v. Boston, H. T. & W. R. Co., 7 Am. &
Eng. R. Cas. 49, 86 N. Y. 107.

A railroad company, organized and incorporated under the laws of Nebraska, cannot absolve itself from the performance of duties imposed upon it by law or relieve itself from liability for the wrongful acts or omissions of duty of persons operating its road, by transferring its corporate powers to them, or permitting them to operate its road as owners of its capital stock. To allow it to do so would be contrary to the public policy of the state as expressed in its constitution and laws with reference to railroad companies. *Chollette v. Omaha & R. V. R. Co.*, 37 Am. & Eng. R. Cas. 16, 26 Neb. 159, 41 N. W. Rep. 1106.

The franchises to build or own and manage a railroad, and to take tolls thereon, are not necessarily corporate rights, and may be assigned; but the franchise to form or be a corporation, and act in a corporate capacity, is legislative, and not the subject of sale or transfer, except by some positive provision of statute law pointing out the mode of transfer. *Ragan v. Aiken*, 9 Am. & Eng. R. Cas. 201, 9 Lea (Tenn.) 609, 42 Am. Rep. 684. *Bank of Middlebury v. Edgerton*, 30 Vt. 182.

Under the general rule that a corporation cannot mortgage its franchise without clear authority, authority to mortgage its "road, income, and other property" does not authorize a mortgage of its franchise. *Pullan v. Cincinnati & C. A. L. R. Co.*, 4 Biss. (U. S.) 35.

A corporation cannot, in general, transfer its franchise; but where a mortgage of a franchise by a corporation has been recognized as valid by the legislature, it is good between the parties. *Hall v. Sullivan R. Co.*, *Brunn. Col. Cas.* (U. S.) 613.

Where a railroad company makes an unauthorized transfer, the legislature can only waive the rights of the public in a ratification, but cannot impair the rights of stockholders as between themselves. *Knoxville v. Knoxville & O. R. Co.*, 22 Fed. Rep. 758.

An unauthorized transfer made in disguise, as a "traffic contract," which has the effect of placing the management of the property in the hands of others for the legal lifetime of the corporation, will not be treated with greater favor than if the con-

tract expressly stated the real intention of the parties. *Earle v. Seattle, L. S. & E. R. Co.*, 56 Fed. Rep. 909.

There is, it seems, no constitutional provision in New York that prohibits railroad franchises being conferred upon or exercised by individuals; nor does there appear to be any objection to making such rights assignable. *New York & H. R. Co. v. Forty-second St. & G. S. F. R. Co.*, 32 How. Pr. (N. Y.) 481, 50 Barb. 309; affirming 50 Barb. 285, 26 How. Pr. 68.

Where a railroad, in pursuance of an act of the legislature, transfers or conveys to others its franchise to be a corporation, the transaction, in legal effect, is a surrender or abandonment of its charter by the corporation, and a grant by the legislature of a similar charter to the transferees or purchasers; and the charter so granted is subject to all the provisions of the constitution existing at the time it is so granted. *State v. Sherman*, 22 Ohio St. 411.—QUOTED IN *Memphis & L. R. R. Co. v. Berry*, 41 Ark. 436.

The Ohio Act of April 4, 1863, authorizing the purchasers of the property of a railroad company to acquire the franchise to be a corporation by deed from the company, is a general law within the meaning of article 13, section 2, of the constitution; but a deed made by such company to a corporation of another state, which corporation had become the assignee of property sold as contemplated in said act, without any new organization, or taking of stock, under the deed, or as a corporation of Ohio, does not constitute the foreign corporation or its members an Ohio corporation, and in so far as said act may assume to create them such, it is unconstitutional, for the reason that it does not secure the individual liability of the stockholders. *State v. Sherman*, 22 Ohio St. 411.—FOLLOWED IN *Baltimore & O. R. Co. v. Cary*, 28 Ohio St. 208.

5. How construed—Extent.*—Grants of franchises to individuals or private corporations are to be strictly construed, and no exclusive privilege passes unless it be plainly conferred by express words or necessary implication. *Citizens' St. R. Co. v. Jones*, 34 Fed. Rep. 579.

Any ambiguity in the terms of the con-

*Grants of corporate rights or privileges strictly construed, see note, 9 L. R. A. 34.

tract must operate against the corporation in favor of the public, the corporation taking nothing that is not clearly given by the act. *Delaware & R. Canal Co. v. Camden & A. R. Co.*, 16 N. J. Eq. 321.—FOLLOWED IN *Pennsylvania R. Co. v. National R. Co.*, 23 N. J. Eq. 441.

The practical and long-continued construction of a grant, acquiesced in by the public and not denied by those adversely interested, is the strongest evidence that it has been rightly interpreted. *Mobile v. Louisville & N. R. Co.*, 36 Am. & Eng. R. Cas. 171, 84 Ala. 115, 4 So. Rep. 106.

A franchise is a particular privilege conferred by grant from a sovereign or government, and vested in individuals or a corporation. The franchise of a private corporation organized under the general law is to be ascertained from the objects of the corporation, as stated in its articles of incorporation. *Chicago Municipal G. L. & F. Co. v. Lake*, 130 Ill. 42, 29 Am. & Eng. Corp. Cas. 230, 22 N. E. Rep. 616, 27 Ill. App. 346.—QUOTING *Quincy v. Bull*, 106 Ill. 337. REVIEWING *Chicago City R. Co. v. People*, 73 Ill. 541.

Monopolies are odious, and generally unjust and detrimental, and are never implied from a simple grant of a franchise not necessarily of an exclusive character. *Louisville & P. R. Co. v. Louisville City R. Co.*, 2 Duv. (Ky.) 175.

6. Duties imposed and care required in use of.—The grant of a franchise giving the right to build, own, and operate a railway carries with it the duty to so use the property and manage and control the railroad as to do no unnecessary damage to the person or property of others. *Pennsylvania Co. v. Ellett*, 42 Am. & Eng. R. Cas. 64, 132 Ill. 654, 24 N. E. Rep. 559.

A railroad company in the use of its franchise is responsible for the negligent acts of its servants, and for the habitual carelessness which it knows of and permits to be practised by others on its trains, and is also liable for the negligence of any other company or person whom it permits to use its road. *Ohio & M. R. Co. v. Simms*, 43 Ill. App. 260.

Railroad corporations are common carriers, and they occupy a peculiar relation to the public as invested with certain franchises for the public benefit, and they are bound to use them with fairness and for the common good. *Messenger v. Pennsylvania R.*

Co., 37 N. J. L. 531; affirming 36 N. J. L. 407, 12 Am. Ry. Rep. 393.—QUOTED IN *Hoover v. Pennsylvania R. Co.*, 156 Pa. St. 220.

The company possessed of the grant must exercise a perfect impartiality to all who seek the benefit of the trust. *Messenger v. Pennsylvania R. Co.*, 37 N. J. L. 531.

There is no express or implied obligation or duty on a railroad company to maintain and operate its road for the public use, irrespective of its own interest. The granting of a charter under the general railroad act only implies the privilege of building and operating a road, but does not make the company a party to a contract to do so. *People v. Albany & V. R. Co.*, 24 N. Y. 261; affirming 16 Abb. Pr. 465.

An equitable action in the name of the people cannot be maintained to compel a railroad company to operate a part of its road. The remedy is by mandamus, *quo warranto*, or indictment. *People v. Albany & V. R. Co.*, 24 N. Y. 261; affirming 37 Barb. 216, 16 Abb. Pr. 465.—APPROVED IN *McCann v. South Nashville St. R. Co.*, 2 Tenn. Ch. 773. REVIEWED IN *People v. New York C. & H. R. R. Co.*, 9 Am. & Eng. R. Cas. 1, 28 Hun (N. Y.) 543, 3 Civ. Pro. 11, 2 McCar. 345.

7. Conditions, and how enforced.—While a company continues in the exercise of its franchise, the state has the right to compel it to perform the condition upon which the franchise was granted, by petition invoking the equity powers of the court, prosecuted by the attorney-general in the name of the state. *State ex rel. v. Dayton & S. E. R. Co.*, 5 Am. & Eng. R. Cas. 312, 36 Ohio St. 434.—RECONCILING *People v. Chicago & A. R. Co.*, 67 Ill. 118; *People v. Dutchess & C. R. Co.*, 58 N. Y. 152.—REVIEWED IN *Moundsville v. Ohio R. Co.*, 37 W. Va. 92.

8. Are subject to police power.—The police power of a state comprehends all those general laws of internal regulation which are necessary to secure the peace, good order, health, and comfort of society, but the proper limit, in its bearing upon chartered rights and privileges of private corporations for public uses, would seem to be this: that the legislature may at all times regulate the exercise of the corporate franchise, by general laws passed in good faith for the legitimate ends contemplated by the state police power—that is, for

the peace, good order, health, comfort, and welfare of society; but it cannot, under the color of such laws, destroy or impair the franchise itself, nor any of those rights or powers which are essential to the beneficial exercise of it. *Philadelphia, W. & B. R. Co. v. Bowers*, 4 *Houst. (Del.)* 506, 6 *Am. Ry. Rep.* 105.—REVIEWING *Thorpe v. Rutland & B. R. Co.*, 27 *Vt.* 140.

All corporations accept their franchises subject to regulation under the police power; and it is competent under that power, in proper cases, to regulate or restrain burials of the dead within villages or cities. *Concordia Cemetery Assoc. v. Minnesota & N. W. R. Co.*, 30 *Am. & Eng. R. Cas.* 363, 121 *Ill.* 199, 12 *N. E. Rep.* 536, 10 *West. Rep.* 573.

A right to run over a line of railway cannot be claimed independently of the rules and regulations which by act of parliament the directors are empowered to make for the management of the line. Parties whose right to use a railway is secured by act of parliament cannot insist upon their right and at the same time say that the rules and regulations made for the security of the line, the passengers, and the traffic are unreasonable, unnecessary, and inapplicable to their particular traffic. *Rhymney R. Co. v. Taff Vale R. Co.*, 30 *L. J. Ch.* 482; *affirmed in* 30 *L. J. Ch.* 486, n. (1), 1 *Ry. & C. T. Cas.* 21.

D. Remedies for Interference or Disturbance.—(1) *Action at law.*—An action at law will not lie for the recovery of the possession of a franchise. Such franchises being intangible and wholly incapable of physical identification or delivery, a judgment of a court of law could not be enforced. *Budd v. Multnomah St. R. Co.*, 40 *Am. & Eng. R. Cas.* 551, 15 *Oreg.* 404, 15 *Pac. Rep.* 654.

But an action at law to recover damages for the disturbance of a franchise will lie. *Budd v. Multnomah St. R. Co.*, 40 *Am. & Eng. R. Cas.* 551, 15 *Oreg.* 404, 15 *Pac. Rep.* 654.

Where a charter authorizing the construction of a street railway is granted in favor of A. "and such other person or persons or others as he may associate with himself therein," and A. thereupon organizes a corporation of which he acts as superintendent and director, and which expends money in constructing, equipping, and operating the railroad, the acquiescence of A.

in the construction and operation of the road and his acts as director and superintendent are sufficient to bar him from maintaining an action against the company for unlawful disturbance by it of his rights by operating the railroad to his exclusion, although he has made no written assignment of the franchise granted to him. *Budd v. Multnomah St. R. Co.*, 40 *Am. & Eng. R. Cas.* 551, 15 *Oreg.* 404, 15 *Pac. Rep.* 654.

(2) *Injunction.*—Equity will interfere to protect and secure the enjoyment of a franchise given by statute, because it affords the only plain and adequate remedy for the wrong. Equity will protect rights of a like character acquired under city ordinances. *Springfield R. Co. v. Springfield*, 85 *Mo.* 674.

Where a city has by ordinance granted to a railroad company the right to load and unload its cars in a street through which it passes, an injunction will be granted to protect such franchise and restrain an interference with such right under an ordinance attempting to discontinue its exercise. *Mobile v. Louisville & N. R. Co.*, 36 *Am. & Eng. R. Cas.* 171, 84 *Ala.* 115, 4 *So. Rep.* 106.

A railroad company which seeks to enjoin an interference with an alleged franchise granted to it by a city ordinance, the validity of which franchise depends upon the construction of the grant, and which the city attempts to destroy by a subsequent ordinance, is not bound to first establish its right at law to such franchise. *Mobile v. Louisville & N. R. Co.*, 36 *Am. & Eng. R. Cas.* 171, 84 *Ala.* 115, 4 *So. Rep.* 106.

Where a city has agreed to permit a company to lay a track through its streets, and given further assurance that another road should not be allowed to run its track along the same streets except upon payment to the first company of one half of the expense of grading, excavating, etc., and where the first company has built its road along such streets, and the second company has proceeded to lay its tracks upon the condition made by the city that it pay to the other company one half of the expense of grading, etc., and it appearing that the first company is insolvent, equity will enjoin the city from revoking the conditions of their grant and will restrain the payment of such money to the city instead of to the first company. *Southwestern R. Co. v. Screven*, 45 *Ga.* 613.

The original grantee from the city of New Orleans of a franchise or privilege of a right

of way over certain streets for railroads, for a term of twenty years, cannot, after the expiration of said term, enjoin the city from advertising and selling the same franchise, on the ground that the city has failed to comply with its alleged contract obligation to take and pay for its "railroad, rolling stock, equipments, and fixtures." *Canal & C. St. R. Co. v. New Orleans*, 30 Am. & Eng. R. Cas. 146, 39 La. Ann. 709, 2 So. Rep. 388.

A court of equity has power to protect a corporation holding an exclusive franchise, from irreparable injury arising from the usurpation of a like franchise. *Elizabeth-town Gas Light Co. v. Green*, 46 N. J. Eq. 118, 18 Atl. Rep. 844.

A railroad corporation, which is unlawfully disturbed in the enjoyment of its franchise by another railroad corporation, may maintain a bill in equity in the supreme court for an injunction as of a nuisance; and it is not obliged to apply to the county commissioners for damages, under Mass. Rev. St. ch. 39, § 56, nor to the supreme court for leave to file an information in the nature of a *quo warranto*, under the act of 1852, ch. 312 § 42. *Boston & L. R. Corp. v. Salem & L. R. Co.*, 2 Gray (Mass.) 1.—FOLLOWED IN *Caro v. Metropolitan El. R. Co.*, 14 J. & S. (N. Y.) 138.

Where an ordinary railway company owns a tract of land without any limitation as to the ownership, and has granted to a street railway company, for a valuable consideration, by a contract which is of record, the right to build over such land to a station, the latter company may exclude other street railways, and, if necessary, may enjoin an interference with its right of way. *Ft. Worth St. R. Co. v. Queen City R. Co.*, 71 Tex. 165, 9 S. W. Rep. 94.

10. Forfeiture.*—(1) *In general*.—A public franchise can be forfeited only to the public. *Prop'rs of Locks & Canals v. Nashua & L. R. Co.*, 104 Mass. 1.

Where there are various alternative modes of exercising a franchise authorized without limitation of time by a charter, subject each of them to be changed at the will of the corporation, no experimental trial of

one of the modes could work a forfeiture of the right to resort to either of the other modes during the continuance of the charter. *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. (Md.) 1.

A non-performance of a condition of an act of incorporation will forfeit the grant at common law, and a like effect should be given to the non-performance of a condition under the New York Act of 1875, ch. 606, providing for the construction and operation of steam railways in the counties of the state; but such default does not of itself work a forfeiture, and cannot take effect except upon some proceeding where the question is brought directly before the court, unless the statute otherwise provides. *In re Kings County El. R. Co.*, 105 N. Y. 97, 13 N. E. Rep. 18, 7 N. Y. S. R. 186, 7 Cent. Rep. 232; reversing 41 Hun 425, 1 N. Y. S. R. 512.—DISTINGUISHING *In re Brooklyn, W. & N. R. Co.*, 72 N. Y. 245, 75 N. Y. 335; *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524.

(2) *Non-user or misuser.**—The duty of a railroad corporation to maintain and operate its road is a public duty, and the chief end and object of its creation and existence, and the condition and consideration upon which it receives its grants and franchises from the state; and the suspension of such duties is a suspension of its lawful business within the meaning of the statute, and a cause for declaring a forfeiture, though the corporation also possess, and continue to exercise, other franchises, subordinate and secondary to its principal franchises and business, unless such forfeiture is waived, or the right to continue to exist as a corporation after such suspension of its business is sanctioned by the state. *State ex rel. v. Minnesota C. R. Co.*, 29 Am. & Eng. R. Cas. 440, 36 Minn. 246, 30 N. W. Rep. 816.

When a railway company violates the constitution of the state by making a transfer and sale of its property and franchises in a manner forbidden by that instrument, and afterwards wilfully persists for a long time in a non-user of its franchises, a cause for forfeiture of its franchises exists, and nothing contained in the statute indicates an intention of the state to waive its right to forfeiture under such circumstances. *East*

* Forfeiture of corporate franchises, generally, see notes, 8 AM. ST. REP. 179; 2 L. R. A. 255.

When cause of forfeiture of charter is shown, can company excuse or atone therefor? see note, 8 AM. ST. REP. 185.

Waiver by state of cause of forfeiture, see note, 14 AM. & ENG. R. CAS. 47.

* Misuser or non-user as ground for forfeiture of franchises, see notes, 20 AM. & ENG. R. CAS. 561; 14 Id. 46; 8 AM. ST. REP. 180, 186, 201; 8 L. R. A. 498.

Line & R. R. Co. v. State, 40 Am. & Eng. R. Cas. 574, 75 Tex. 434, 12 S. W. Rep. 690.

There can be no "abuse or misuse" of a corporate franchise without a positive act of malfeasance.* This, to furnish ground of forfeiture, must be wilful. It must be something more than accidental negligence, excess of power, or mistake in the mode of exercising an acknowledged power. *Baltimore v. Connellsville & S. P. R. Co.*, 6 Phila. (Pa.) 190.

(3) *Power to enforce.*—The state is not estopped from maintaining an action to enforce the forfeiture of the franchise of a street railroad corporation on account of non-user, from the mere fact that in a prior action it had obtained a judgment against the company enjoining it from continuing to operate a portion of its road as it was built, on the ground that such portion of the road as constructed was a nuisance. *People ex rel. v. Stanford*, 77 Cal. 360.

If a corporation has usurped privileges or franchises not belonging to it, to the detriment of the public, the remedy is by an action in the name of the state. *Kelly v. People's Transp. Co.*, 3 Oreg. 189.

It seems where the power to condemn land is conferred upon a corporation duly formed, it will not be defeated simply because the corporation has done or omitted some act which may be a cause of forfeiture of its rights and franchises, as it rests with the state to determine whether such forfeiture will be enforced. *New York Cable Co. v. Mayor, etc.*, of N. Y., 104 N. Y. 1, 10 N. E. Rep. 332, 4 N. Y. S. R. 308; *affirming* 40 Hun 1.—FOLLOWING *In re Brooklyn, W. & N. R. Co.*, 72 N. Y. 245.

While the courts of Texas have no power to forfeit the franchise of a railway company granted in another state, whose line of railway has been extended into Texas, they can withdraw the franchise granted in Texas whenever a violation of the laws of Texas justifies it, and can by injunction prohibit it from carrying on business in Texas in violation of Texas laws. They may also place the property of such corporation situate in Texas in the hands of a receiver to adjust the claims of creditors. *East Line & R. R. Co. v. State*, 40 Am. & Eng. R. Cas. 574, 75 Tex. 434, 12 S. W. Rep. 690.

(4) *Judicial action necessary**—Acts suffi-

cient to cause a forfeiture of a franchise conferred upon a corporation do not *per se* produce a forfeiture; but the corporation continues to exist until the sovereignty which created it shall, by proper proceedings in a proper court, procure an adjudication of forfeiture and enforce it. *People ex rel. v. Los Angeles Elec. R. Co.*, 91 Cal. 338, 27 Pac. Rep. 673. *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. (Md.) 1.—DISTINGUISHED, *In Bonaparte v. Baltimore, H. & L. R. R. Co.*, 75 Md. 340. REVIEWED *In Wallamet Falls C. & L. Co. v. Kittridge*, 5 Sawy. (U. S.) 44.

(5) *Not raised collaterally.**—Where a corporation has forfeited its franchise, such forfeiture cannot be taken advantage of by individuals collaterally, but must be asserted by the state. *New York & N. E. R. Co. v. New York, N. H. & H. R. Co.*, 25 Am. & Eng. R. Cas. 215, 52 Conn. 274.—QUOTING *National Pahquioque Bank v. First Nat. Bank*, 36 Conn. 334.—*Hamilton v. Annapolis & E. R. R. Co.*, 1 Md. Ch. 107. *Toledo & A. A. R. Co. v. Johnson*, 49 Mich. 148, 13 N. W. Rep. 492.

Where a land grant railroad company sues an individual for trespass upon the lands, the defendant cannot raise the question of the company's title on the ground that it had no authority to take the lands. This is a question between the state and the corporation only. *Southern Pac. R. Co. v. Orton*, 6 Sawy. (U. S.) 157.

(6) *Proceedings to enforce.*†—Where the attorney-general, in the name of the people of the state, proceeds against individuals assuming to act as a corporation without being duly incorporated, it is not necessary to first obtain leave of the court to bring the action under New York Code Civ. Pro. § 1948. *People v. Boston, H. T. & W. R. Co.*, 27 Hun (N. Y.) 528.—FOLLOWED *In Re Attorney-General*, 50 Hun 511, 18 N. Y. S. R. 122, 3 N. Y. Supp. 464.

But an order granting such leave will not be reversed on appeal. *People v. Boston, H. T. & W. R. Co.*, 27 Hun (N. Y.) 528.

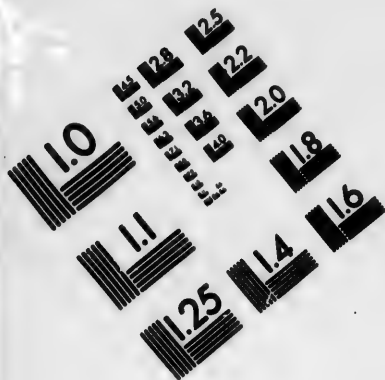
Under New York Code Civ. Pro. § 1799, forfeiture is necessary, see note, 5 AM. ST. REP. 803.

* Cause of forfeiture cannot be taken advantage of collaterally, see note, 14 AM. & ENG. R. CAS. 47.

† How forfeiture of franchise is declared, see note, 2 L. R. A. 256; 9 Id. 35, 273.

Courts proceed with caution in proceedings to declare forfeitures of corporate franchises, see note, 8 AM. ST. REP. 181.

* Non-performance of condition in grant of franchise. Whether judicial act declaring for-



18 20 22 25
E E E E E

10
E E E E E

providing that the court in its discretion may require previous notice of proceedings by the attorney-general to have charters declared forfeited, notice to the corporation is in the discretion of the court, and an order will not be declared void for want of notice. *People v. Boston, H. T. & W. R. Co.*, 27 Hun (N. Y.) 528.

(7) *Statutory forfeiture*.*—A statute imposing a forfeiture of franchises for a failure to perform should explicitly fix the time at which the forfeiture may be enforced. *Tomb & A. A. R. Co. v. Johnson*, 49 Mich. 148, 13 N. W. Rep. 492.

It seems that the provision of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, protects charters or franchises from being taken away or declared forfeited by an alteration or amendment to the state constitution subsequently made. *Lejee v. Continental Pass. R. Co.*, 10 Phila. (Pa.) 362.—FOLLOWING Dartmouth College v. Woodward, 4 Wheat. (U. S.) 625. QUOTING Com. v. Pittsburg & C. R. Co., 58 Pa. St. 43; Com. ex rel. v. Collins, 8 Watts (Pa.) 349.

FRAUD.

Actions for, when barred by lapse of time, see LIMITATIONS OF ACTIONS, 46.

As a defense in actions on subscriptions to stock, see SUBSCRIPTIONS TO STOCK, 143-152.

Carrier cannot limit liability for, see CARRIAGE OF MERCHANDISE, 456.

Collateral impeachment of judgment in cases of, see JUDGMENT, 36.

Delivery produced by, does not destroy lien for charges, see CARRIAGE OF MERCHANDISE, 393.

Effect of, on assignment for creditors, see ASSIGNMENT FOR BENEFIT OF CREDITORS, 4.

— — — validity of deeds, see DEEDS, 51.

— — — — — release, see RELEASE, 11.

Exception of, under statute of limitations, see LIMITATIONS OF ACTIONS, 70.

Forfeiture of compensation by receiver for, see RECEIVERS, 162.

Impeachment of accord for, see ACCORD AND SATISFACTION, 6.

— — — award for, see ARBITRATION AND AWARD, 32.

— — — release for, see RELEASE, 15, 18, 24.

In condemnation proceedings, as ground for injunction, see EMINENT DOMAIN, 1036.

* Forfeitures declared by statute, see note, 38 AM. & ENG. R. CAS. 501.

In creditor's claim, as a defense to stockholder, see STOCKHOLDERS, 70.

— elections, effect of, see MUNICIPAL AND LOCAL AID, 150.

— inducing sale, seller's action for, see SALES, 13.

— receivers' certificates, remedy for, see RECEIVERS, 107.

— release, burden of proof to show, see RELEASE, 21.

— tax assessment, injunction for, see TAXATION, 350.

Inducing conductor to violate rule and carry free, see CARRIAGE OF PASSENGERS, 18.

Of agent, liability of principal for, see AGENCY, 86, 87.

— directors, action by stockholders to restrain, see STOCKHOLDERS, 99.

— — — in relation to construction contract, see DIRECTORS, ETC., 49.

— officers no defense against innocent purchaser of bonds, see MUNICIPAL AND LOCAL AID, 353.

— passenger, when a defense to action for personal injury, see CARRIAGE OF PASSENGERS, 559.

— shipper, in concealing kind or value of goods, see CARRIAGE OF MERCHANDISE, 199-203.

— station agents, liability of company for, see STATION AGENTS, 10.

On part of engineer or company, relief against, see CONSTRUCTION OF RAILWAYS, 65.

— — — shipper, when excuses carrier, see CARRIAGE OF MERCHANDISE, 186-189.

Parol evidence to vary bill of lading in cases of, see BILLS OF LADING, 41.

Procuring signatures to petition in aid of railway by, see MUNICIPAL AND LOCAL AID, 84.

Remedy of railway contractor for, see CONSTRUCTION OF RAILWAYS, 45.

Rescission of bonds on ground of, see BONDS, 61.

Rights of holder of ticket procured by, see TICKETS AND FARES, 11.

Setting aside foreclosure sale for, see MORTGAGES, 286.

When limitation begins to run in actions for, see LIMITATIONS OF ACTIONS, 29.

FRAUDULENT CONVEYANCES.

Of property, as ground for receiver, see RECEIVERS, 15.

1. What conveyances are fraudulent.*—A provision in a deed to secure

* Conveyances to defraud creditors, see note, 1 AM. & ENG. R. CAS. 426.

future advances is not necessarily fraudulent; it depends on the *bona fides* of the transaction. Where, therefore, a banking company, to which a railroad was attached by its charter, assigned all its effects, real and personal, to trustees, with power to them to borrow, on the security of the property of the bank thus assigned, a large sum of money to expend in the completion of the road—*held*, that this provision in the assignment was not necessarily and on the face of it, fraudulent and void. *Arthur v. Commercial & R. Bank*, 17 Miss. 394.

2. — and what are not.—A construction company took title to a railroad, with a condition that it should be forfeited for certain specified causes. Before it had done any work of value, and when it was not in a position to have prevented a speedy forfeiture, it retransferred the road to the railroad company, taking in payment the obligations of the company that only had a speculative value. *Held*, that the conveyance was not fraudulent as against the creditors of the construction company. *Schlesinger v. Kansas City & S. R. Co.*, 39 Fed. Rep. 741.

A transportation company created under the laws of Virginia, executed a deed conveying all of its property to trustees for the benefit of creditors, but reserved to itself the possession and use of the property for a certain time, and required the trustees to pay all debts that the company might owe to any of its officers or agents, or to railroad companies; and reserved to itself absolutely the benefit of any express matter not then delivered nor transported. *Heil*, that the conveyance was not fraudulent: under the laws of the state where made. *Baltimore & O. R. Co. v. Glenn*, 28 Md. 287.

P. contracted with the Mississippi & Alabama R. Co. to build a railroad from Jackson to Brandon, for which he was to receive about \$281,000, the money to be paid from time to time, as P., in the construction of the road, might, in his own opinion, require it. The company failed to keep him supplied with par funds, and after paying him \$298,026, most of which was in depreciated bank paper, they released him from the further prosecution of the work on the road, and canceled the mortgage he had given them for the diligent and faithful performance of the work. When this release was given and the mortgage was canceled, P. claimed large damages against the company

for their failure to comply with their contract; they refused to allow him the whole amount claimed, but they allowed him a part of it, and a final settlement took place between them. P., in his answer, stated, and several witnesses proved, that the settlement was fair, and made in good faith. *Held*, that even though P. may have received more than he was strictly entitled to, the settlement was not only binding on the company, but was legal and valid as against their creditors. *Petrie v. Wright*, 14 Miss. 647.

3. Who may attack.—A railroad corporation, when but little in debt and solvent, conveys a certain realty to a party, who conveys it to the president and two directors of the corporation. Three years afterwards subsequent creditors obtain judgment against the corporation, and then attack the above conveyances on the ground of fraud. The corporation itself never attacked the transaction, but, on the contrary, confirmed it. Such subsequent creditors cannot question the transaction. *Graham v. La Crosse & M. R. Co.*, 1 Am. & Eng. R. Cas. 416, 102 U. S. 148.—**DISTINGUISHED** IN *Atlanta & F. R. Co. v. Western R. Co.*, 50 Fed. Rep. 790, 2 U. S. App. 227, 1 C. C. A. 676; *Simmons v. Taylor*, 38 Fed. Rep. 682.

FRAUDULENT REPRESENTATIONS.

As a defense in actions on subscriptions to stock, see SUBSCRIPTIONS TO STOCK, 143-152.

Competency of evidence to prove, see EVIDENCE, 21.

FREEHOLDERS.

Jurors to assess land damages must be, see EMINENT DOMAIN, 536, 537.

FREEZING.

Liability for loss of fruit by, see CARRIAGE OF MERCHANDISE, 581.

Limiting liability for loss by, see BILLS OF LADING, 92.

FREIGHT.

Agents, as experts, see WITNESSES, 184.

— power to make contracts for through carriage of, see CARRIAGE OF MERCHANDISE, 562.

Carriage of baggage as, see BAGGAGE, 14-16.

Carriage of, on land grant roads, see **LAND GRANT RAILROADS**, 4.
 Cars, contributory negligence in riding in, see **DEATH, ETC.**, 185.
 Classification of, see **INTERSTATE COMMERCE**, 44, 72-86.
 Continuous carriage of, under Interstate Commerce Act, see **INTERSTATE COMMERCE**, 142-144.
 Conversion of, by carrier, see **CARRIAGE OF MERCHANDISE**, 159-164.
 Houses, when exempt from taxes, see **TAXATION**, 170.
 In parcels or in bulk, overcharges for, see **CHARGES**, 28-33.
 Penalties for overcharges, see **PENALTIES**, 6.

FREIGHT TRAINS.

Authority of conductor to allow persons to ride on, see **CONDUCTOR**, 2.
 Carriage of passengers on, see **CARRIAGE OF PASSENGERS**, 3, 116, 286-297.
 Ejection of passenger riding on, see **EJECTION OF PASSENGERS**, 2.
 Prohibition of travel on, see **CARRIAGE OF PASSENGERS**, 81.
 Riding on, against rules, and without paying fare, see **COLLISIONS**, 19.
 Rights of persons riding on, see **CARRIAGE OF PASSENGERS**, 43-50.
 Stipulation in mileage ticket against riding on, see **TICKETS AND FARES**, 100.
 Taking passage on, when contributory negligence, see **CARRIAGE OF PASSENGERS**, 356, 359.
 Who deemed trespassers on, see **TRESPASSERS**, 13.

FRESHETS.

Liability of company in cases of, see **FLOODING LANDS**, 20-23.

FRIGHT.

Measure of damages for consequences of, see **DAMAGES**, 72.
 When considered in estimating damages, see **CARRIAGE OF PASSENGERS**, 620.

FRIGHTENED TEAMS.

At crossing, see **CROSSINGS, INJURIES, ETC.**, AT, 15-17.
 — or near bridges, see **BRIDGES, ETC.**, 53.
 Competency of evidence in cases of, see **EVIDENCE**, 62.
 Duty to look and listen where team becomes frightened, see **CROSSINGS, INJURIES, ETC.**, AT, 284.
 Fire falling from elevated structure on horses, see **ELEVATED RAILWAYS**, 219.

Fright of horses caused by cable cars, see **CABLE RAILWAYS**, 17.
 Frightening teams and stock by passing trains as an element of land damages, see **EMINENT DOMAIN**, 686.
 — by failure to give, or by giving, signals, see **CROSSINGS, INJURIES, ETC.**, AT, 130, 140.
 Liability for acts of independent contractor, see **INDEPENDENT CONTRACTORS**, 24.
 — of street car companies in cases of, see **STREET RAILWAYS**, 482, 483.
 — trolley line in cases of, see **ELECTRIC RAILWAYS**, 22.

1. Generally.*—(1) Extent of the company's liability.—Railroad companies are not liable for frightening animals by their locomotives, cars, or carriages while using them in the ordinary way. *Leavitt v. Terre Haute & I. R. Co.*, 5 Ind. App. 513, 31 N. E. Rep. 860, 32 N. E. Rep. 866.—**APPLYING** *Lamb v. Old Colony R. Co.*, 140 Mass. 79. **FOLLOWING** *Ohio & M. R. Co. v. Trowbridge*, 126 Ind. 391; *Hahn v. Southern Pac. R. Co.*, 51 Cal. 605.

A complaint against a railroad company, alleging that its servants and agents managed and operated its locomotive and cars in such a recklessly and culpably negligent manner as to wilfully and wrongfully cause a team of horses to take fright and run away, and that because of such fright, and while unmanageable and running away, they ran against the plaintiff's horse and caused its death, contains facts sufficient to constitute a cause of action. *Billman v. Indianapolis, C. & L. R. Co.*, 6 Am. & Eng. R. Cas. 41, 76 Ind. 166, 40 Am. Rep. 230.—**QUOTED IN** *Denver, T. & G. R. Co. v. Robbins*, 2 Colo. App. 313.

In such case, the fact that between the wrongful act of the company and the injury complained of there was an intervening cause, is not sufficient to defeat a recovery. An intervening agency does not always shield the wrong-doer from responsibility, where the injury flows from his wrongful act. *Billman v. Indianapolis, C. & L. R. Co.*, 6 Am. & Eng. R. Cas. 41, 76 Ind. 166, 40 Am. Rep. 230.—**APPROVING** *Scott v. Shepherd*, 2 W. Bl. 892; *Clark v. Chambers*, L. R. 3 Q. B. D. 327. **DISAPPROVING** *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353; *Ryan v. New York C. R. Co.*, 35 N. Y. 210. **REVIEWING** *Thomas v. Winchester*, 6 N. Y. 397;

* Liability of company for frightening horses, see notes, 37 AM. & ENG. R. CAS. 488; 6 Id. 49.

cable cars, see

by passing
land damages,

giving, signals,
ETC., AT, 130,

ent contractor,
TORS, 24.
n cases of, see
483.

, see ELECTRIC

nt of the com-
panies are
imals by their
es while using
eavitt v. Terre
513, 31 N. E.
5.—APPLYING

140 Mass. 79.
Co. v. Trow-
v. Southern

road company,
agents man-
ative and cars
ably negligent
ongfully cause
right and run
ch fright, and
unning away,
T's horse and
s sufficient to
Billman v.
Am. & Eng.
v. Rep. 230.—
Co. v. Rob-

between the
and the in-
n intervening
t a recovery,
not always
responsibility,
his wrongful
C. & L. R.
76 Ind. 166,
NG Scott v.
v. Chambers,
OVING Penn-
t. 353; Ryan
Y. 210. RE-
6 N. Y. 397;

tening horses,
488; 6 Id. 49.

Ricker v. Freeman, 50 N. H. 420; Griggs v. Fleckenstein, 14 Minn. 81; Weick v. Lander, 75 Ill. 93; Powell v. Deveney, 3 Cush. (Mass.) 300; McDonald v. Snelling, 14 Allen (Mass.) 290; Lane v. Atlantic Works, 111 Mass. 136; Vandeburgh v. Truax, 4 Den. (N. Y.) 464; Webb v. Rome, W. & O. R. Co., 49 N. Y. 420; Wasmer v. Delaware, L. & W. R. Co., 80 N. Y. 212.—APPROVED IN Martin v. New York & N. E. R. Co., 62 Conn. 331.

The liability of horses to take fright at unusual noises or objects is a thing to be apprehended and guarded against; and the wrong-doer who does an act likely to cause horses to take fright must be deemed to be responsible for injuries caused by horses running away under the influence of the fright. *Billman v. Indianapolis, C. & L. R. Co.*, 6 Am. & Eng. R. Cas. 41, 76 Ind. 166, 40 Am. Rep. 230.

In such case the injury sued for was the usual and proximate result of the wrongful act of the company, showing, not passive negligence, but wanton and wilful wrong. *Billman v. Indianapolis, C. & L. R. Co.*, 6 Am. & Eng. R. Cas. 41, 76 Ind. 166, 40 Am. Rep. 230.

It cannot be said that plaintiff ought not to have recovered, if, by reason of the carelessness of the engine driver and without any want of prudent care on his part, he found himself in such close proximity to the locomotive as that his team, composed of horses ordinarily well broken and of ordinary gentleness, became frightened and ran. All the circumstances were to be considered by the jury. *Strong v. Sacramento & P. R. Co.*, 8 Am. & Eng. R. Cas. 273, 61 Cal. 326.

To negligently frighten an animal being at the time driven by the plaintiff, renders the person guilty of the negligence liable to respond in damages for any injury sustained by the plaintiff in consequence of the fright. *Hudson v. Louisville & N. R. Co.*, 14 Bush (Ky.) 303.

(2) *Ringling bell*.—A company is not liable for frightening a horse by ringing the train bell, unless it be shown that it was rung in an unusual manner or at an improper place. *Fouhy v. Pennsylvania R. Co.*, (Pa.) 2 Atl. Rep. 536.

(3) *Sounding whistle*.—The mere sounding of a locomotive whistle, even at a place of extraordinary danger, where teams are likely to be frightened thereby, is not of itself negligence, and to justify an inference

of negligence from such act the party having the burden of the issue must show that it was done under such circumstances as made it at that time negligent. *Cincinnati, I., St. L. & C. R. Co. v. Gaines*, 104 Ind. 526, 54 Am. Rep. 334, 4 N. E. Rep. 34, 5 N. E. Rep. 746. *Cahoon v. Chicago & N. W. R. Co.*, 85 Wis. 570, 55 N. W. Rep. 900.

If an engineer sounds his whistle upon the proper occasion and in doing so frightens a team of horses so that they become unmanageable and do injury, negligence will not be imputed to him by reason of the act, unless there are circumstances within his knowledge admonishing him that injury will probably result if the act is done. *Louisville, N. A. & C. R. Co. v. Stanger*, (Ind. App.) 32 N. E. Rep. 209. *Hargis v. St. Louis, A. & T. R. Co.*, 75 Tex. 19, 12 S. W. Rep. 953.

If an engineer in approaching a point where it is his duty to sound his whistle under the requirements of the statute, observes near by a man struggling with a team of horses hitched to a vehicle in which are women and children, and can see from the surroundings that the sounding of his whistle will render the team unmanageable and thus greatly endanger the lives of such persons, it will be his duty to desist until the danger point is passed, or to stop his train. *Louisville, N. A. & C. R. Co. v. Stanger*, (Ind. App.) 32 N. E. Rep. 209.

Whether the sounding of the whistle by a locomotive engineer, whereby the plaintiff's horse was frightened, was an act of negligence, and whether due care was used by both parties to prevent injury, are questions for the jury. *Walker v. Boston & M. R. Co.*, 64 N. H. 414, 13 Atl. Rep. 649.

A company is liable for the act of its engineer in blowing a whistle and thereby frightening a horse, if the act was carelessly and negligently done, but not if it was wantonly and maliciously done. *Philadelphia, W. & B. R. Co. v. Brannen*, (Pa.) 2 Atl. Rep. 429.

(4) *Escape of steam*.—A railroad company is not liable for injuries caused by horses becoming frightened by the escape of steam from a locomotive, where there was no excessive noise or unusual escape of steam, and it was not blown off wantonly or recklessly. *Cahoon v. Chicago & N. W. R. Co.*, 85 Wis. 570, 55 N. W. Rep. 900. *Burton v. Philadelphia, W. & B. R. Co.*, 4 Harr. (Del.) 252.—DISTINGUISHED IN *Strong v. Sacra-*

mento & P. R. Co., 8 Am. & Eng. R. Cas. 273, 61 Cal. 326.

If, however, an engineer within a city, where teams are constantly passing, needlessly and unnecessarily opens the valves of his engine and frightens such horses and causes them to run away and commit injury, the company will be liable, provided the plaintiff is free from contributory negligence. *Omaha & R. V. R. Co. v. Clark*, 55 Am. & Eng. R. Cas. 145, 35 Neb. 867, 53 N. W. Rep. 970.—REVIEWING *Andrews v. Mason City & Ft. D. R. Co.*, 77 Iowa 669, 42 N. W. Rep. 513.—*Indianapolis Union R. Co. v. Boettcher*, 131 Ind. 82, 28 N. E. Rep. 551.

Proof that train employes unnecessarily blew a whistle or let off steam in close proximity to a team, does not necessarily establish negligence as a matter of law. *Toledo, St. L. & K. C. R. Co. v. Crittenden*, 42 Ill. App. 469.

Where the evidence was that the engineer was absent from the engine at the time of the injury, and that when he went away he said to the fireman, "Watch her"—the engine at the time standing in the street of a town—and the fireman while "watching her" discharged the steam which frightened plaintiff's horses and caused the injury—held, that the jury were justified in finding that he was in charge of the engine, though the engineer testified that he was not left "in charge"; and that the court was justified in instructing that the defendant was liable if the fireman, while so in charge, negligently discharged the steam. *Andrews v. Mason City & Ft. D. R. Co.*, 77 Iowa 669, 42 N. W. Rep. 513.

2. In highways or streets.—(1) *In general.**—Where a track is laid on a street both the company and the public have a right to use the street, and the former will not be liable for frightening teams by the appearance of trains, or the ordinary noise incident to moving them; but it is liable for making sudden or unusual noises such as blowing off steam. *Hahn v. Southern Pac. R. Co.*, 51 Cal. 605, 12 Am. Ry. Rep. 226.—FOLLOWED IN *Leavitt v. Terre Haute & I. R. Co.*, 5 Ind. App. 513.—*Abbot v. Kalbus*, 39 Am. & Eng. R. Cas. 594, 74 Wis. 504, 43

N. W. Rep. 367.—QUOTING *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. St. 219.

Those in charge of an engine upon a street-car track upon seeing a team of horses near the track showing signs of fright must, in order to relieve the company from liability, heed the danger, slacken the speed, and, if necessary to avoid injury, stop the train. *Muncie St. R. Co. v. Maynard*, 5 Ind. App. 372, 32 N. E. Rep. 343.—FOLLOWING *Cornell v. Detroit Elec. R. Co.*, 82 Mich. 495.

An instruction to the jury in such action that the servants of the company were not required to stop their train unless it was necessary to do so to avoid the injury, but if they could see that the collision was inevitable or reasonably probable then they should make all reasonable effort to avoid the injury, correctly stated the rule of law as to the degree of care required of the defendant. *Muncie St. R. Co. v. Maynard*, 5 Ind. App. 372, 32 N. E. Rep. 343.

If the taking of part of the bed of a turnpike for the track of a railroad, or the bringing the railroad into close proximity to the turnpike, renders it dangerous to persons traveling with teams on the latter, and thus impairs its usefulness to the public, the company is bound either to remove the two roads further apart, or separate them by protecting guards or screens; otherwise it will be liable. *Moshier v. Utica & S. R. Co.*, 8 Barb. (N. Y.) 427.

Such encroachment by a railroad upon a turnpike is a public nuisance for which any person sustaining a particular injury may maintain an action. *Moshier v. Utica & S. R. Co.*, 8 Barb. (N. Y.) 427.

Railroad companies, in the use and management of their roads, are bound only to exercise ordinary care; and the omission to erect fences, screens, or guards between a railroad and a highway contiguous thereto to prevent frightening teams, cannot be considered a want of such care. *Coy v. Utica & S. R. Co.*, 23 Barb. (N. Y.) 643.—DISAPPROVING *Moshier v. Utica & S. R. Co.*, 8 Barb. 427.—DISTINGUISHED IN *Lafferty v. Hannibal & St. J. R. Co.*, 44 Mo. 291.

Under the statute a company is liable for injuring a team of horses where its track is unfenced, without reference to its negligence; but it is otherwise as to injuries to a wagon to which the horses are hitched. *Gulf, C. & S. F. R. Co. v. Keith*, 74 Tex. 287, 11 S. W. Rep. 1117.

* Frightening teams by using engines on or near highways, see note. 22 AM. REP. 528.

Frightening horses by operation of street railways, see 46 AM. & ENG. R. CAS. 204, *abstr.*

When the legislature authorizes a railway company to use locomotives on its road, without words of qualification, a company is not liable, in the absence of negligence, to indictment for using engines whereby horses were frightened and accidents occasioned on the highway alongside the track. *Rex v. Pease*, 1 N. & M. 690, 4 B. & Ad. 30, 2 L. J. M. C. 36.—APPROVED IN *Hammer-smith & C. R. Co. v. Brand*, L. R. 4 H. L. Cas. 171, 38 L. J. Q. B. 265, 21 L. T. 238, 18 W. R. 12.—*London, B. & S. C. R. Co. v. Truman*, L. R. 11 App. Cas. 45, 54 L. T. 250, 55 L. J. Ch. 354, 34 W. R. 657.—DISAPPROVED IN *Powell v. Fall*, L. R. 5 Q. B. D. 597, 49 L. J. Q. B. 428, 43 L. T. 562, 45 J. P. 156.

Plaintiff's team was frightened and he was injured while attempting to drive past defendant's engine, which was standing in the street of a town. The horses were frightened by a discharge of steam as they were passing. *Held*, in an action to recover, that the court properly refused to restrict the jury to the consideration of defendant's negligence in discharging the steam, and submitted to them the question of negligence in keeping the engine on the street for an undue time. *Andrews v. Mason City & Ft. D. R. Co.*, 77 Iowa 669, 42 N. W. Rep. 513.

(2) *Obstructions or encroachments.*—A railroad company which has violated its duty to restore a public highway along which it has constructed its track, to its former condition, so far as it can effect a restoration by the exercise of reasonable care and skill, and has thus created a nuisance, is liable to one who, by reason of the obstruction left in the highway, combined with the fright of his horse at a hand-car negligently managed, sustains an injury while rightfully riding upon the highway. *Evansville & T. H. R. Co. v. Crist*, 116 Ind. 446, 19 N. E. Rep. 310, 2 L. R. A. 450.—DISTINGUISHING *Indiana, B. & W. R. Co. v. Greene*, 106 Ind. 279; *Indiana, B. & W. R. Co. v. Hammock*, 113 Ind. 1; *Cincinnati, H. & I. R. Co. v. Butler*, 103 Ind. 31.

(3) *Leaving cars on or near highway.*—The owner of a horse cannot maintain a suit for damages against a railroad company, caused by the horse taking fright at a car left on the track at night near the highway, unless it was so left as to frighten horses of ordinary quiet and gentleness. *Kyne v. Wilmington & N. R. Co.*, 8 Houst. (Del.) 185, 14 Atl. Rep. 922.

The illegal obstruction of a highway by a freight train standing across it is not the proximate cause of an injury which a driver, who is waiting to get across the track, may suffer from having his horses frightened by a passing train while he is detained there. *Selleck v. Lake Shore & M. S. R. Co.*, 23 Am. & Eng. R. Cas. 338, 58 Mich. 195, 24 N. W. Rep. 774.—FOLLOWING *Lewis v. Flint & P. M. R. Co.*, 54 Mich. 55.

A company having the right to extend a switch track into a highway is bound to use such track so as not to unnecessarily interfere with public travel on the highway; and if it negligently leave cars on such track within the limits of the highway, which causes a passing team to take fright, it may be held liable. *Bussian v. Milwaukee, L. S. & W. R. Co.*, 10 Am. & Eng. R. Cas. 716, 56 Wis. 325, 14 N. W. Rep. 452.

For a distance of one half mile west of a highway crossing, the highway and the railway ran parallel 100 feet apart. For this distance the view of one traveling upon the highway is unobstructed, and the employes of the railway could plainly see any one traveling along the public road. On a day the plaintiff was traveling upon the road, riding a gentle horse, the employes moved a hand-car which they were using, in the direction in which the plaintiff was going, passing her on her way. When they reached the crossing they removed the hand-car from the track and placed it upon the highway. As there was no way for the plaintiff to go except by passing the hand-car, she kept on along the highway. When near the hand-car standing on the highway, her horse took fright at the hand-car, and she was thrown to the ground and injured. In answer to interrogatories the jury found that the hand-car was about ten feet from the centre of the highway, which was about forty-five feet in width, and constituted an obstruction; that the hand-car could be seen at a distance of sixty feet from the place where it was standing, and was seen by the plaintiff; that there was nothing unusual in the appearance of the hand-car, and that it had been standing on the highway about two minutes before the plaintiff was thrown. *Held*, that the obstruction of the highway by the hand-car was unlawful, and the proximate cause of the injury, and that a verdict for the plaintiff was sustained, notwithstanding the answers to interrogatories. *Ohio & M. R. Co. v. Trowbridge*,

126 Ind. 391, 26 N. E. Rep. 64. *Vars v. Grand Trunk R. Co.*, 23 U. C. C. P. 143.

The fact that the plaintiff knew that the hand-car was in the highway did not necessarily prove that she was guilty of contributory negligence in continuing on her way and passing it. *Ohio & M. R. Co. v. Trowbridge*, 126 Ind. 391, 26 N. E. Rep. 64.

A much-traveled street in the town of S. terminated at the defendant's depot grounds. On the other side of the depot grounds, and opposite to the terminus of said street, another street began, but there was no connecting established highway over the depot grounds. The defendant, however, had invited and established travel over its depot grounds by planking its tracks at that point; but the planked track was not as wide as the streets on either side, and was not in a direct line connecting them. *Held*, that defendant was not bound to keep open a passageway other or wider than that upon which it had invited travel by planking it, and that it was not liable for leaving a car standing upon its track adjacent to the plank driveway, whereat plaintiff's horse became frightened, ran away, and caused her personal injury. *O'Donnell v. Chicago, M. & St. P. R. Co.*, 69 Iowa 102, 28 N. W. Rep. 464.—DISTINGUISHING *Young v. Detroit, G. H. & M. R. Co.*, 56 Mich. 430, 23 N. W. Rep. 67.—FOLLOWED IN *Fisk v. Chicago, M. & St. P. R. Co.*, 74 Iowa 424.

(4) *Leaving unsightly objects in highway.*—A company is liable in damages to one injured by the running away of his team, when the horses' fright was caused by the carcass of a steer dragged from the track and left in the highway by the company's section gang. *Baxter v. Chicago, R. I. & P. R. Co.*, 55 Am. & Eng. R. Cas. 138, 87 Iowa 488, 54 N. W. Rep. 350.

A company is liable to a traveler for injuries sustained by him in driving a horse with due care upon a highway, through fright of the horse occasioned by a derrick maintained by the company over the highway so as naturally to frighten passing animals, although it was maintained for the purpose of loading and unloading freight. *Jones v. Housatonic R. Co.*, 107 Mass. 261.

Railroad employes while repairing a cattle-guard took up two old pieces of timber, about ten feet long and twelve inches square, and placed them in a ditch at the side of the track where they were partially

concealed from view, about ten feet from the centre of a highway, which caused the plaintiff's horse to become frightened as he was passing the highway. *Held*, that the question whether such timbers were calculated to frighten an ordinarily gentle horse was for the jury. *Tinker v. New York, O. & W. R. Co.*, 71 Hun 431, 54 N. Y. S. R. 528, 24 N. Y. Supp. 977.—FOLLOWING *Wolfskiel v. Sixth Ave. R. Co.*, 38 N. Y. 49; *Morse v. Richmond*, 41 Vt. 435.

In such case the question whether the company's employes had a right to deposit the timbers temporarily where they did, depends upon whether there was a reasonable necessity for doing so in their work; and whether there was such reasonable necessity is a question of fact depending upon all of the circumstances. *Tinker v. New York, O. & W. R. Co.*, 71 Hun 431, 54 N. Y. S. R. 528, 24 N. Y. Supp. 977.

But proof that the company owned the fee to the ground where the timbers were deposited would not relieve it from liability. *Tinker v. New York, O. & W. R. Co.*, 71 Hun 431, 54 N. Y. S. R. 528, 24 N. Y. Supp. 977.

Baled hay loaded on freight cars took fire, and the company's employes threw it off on station grounds, and part of it within the limits of a highway, at which plaintiff's team became frightened, and he sued the town. *Held*: (1) that the town was liable for not removing it within a reasonable time after notice, if it rendered the road unsafe, though the hay lay on the margin of the road, to the same extent as if it was on the traveled portion of the road; (2) nor was the liability of the town affected by the fact that the injured party might have sued the railway company. If the town had to pay the damages it might recover over against the railroad. *Morse v. Richmond*, 41 Vt. 435.—FOLLOWED IN *Tinker v. New York, O. & W. R. Co.*, 71 Hun (N. Y.) 431.

In such case the duty of the town to remove the bales of hay from the highway is greater than its duty to remove an equally dangerous object incident to the soil and country. *Morse v. Richmond*, 41 Vt. 435.

(5) *Improper blowing of whistle.*—Where a statute requires railroad companies to either blow a whistle or ring a bell as trains approach a crossing, the company is not liable for frightening a horse on a highway running parallel with the track by blowing a whistle. *Batley v. Hartford & C. V. R.*

Co., 37 *Am. & Eng. R. Cas.* 483, 56 *Conn.* 444, 16 *Atl. Rep.* 234.—QUOTING *Lamb v. Old Colony R. Co.*, 140 *Mass.* 79.

A company has no right to continue blowing a locomotive whistle in a city, town, or village, for the purpose of giving a signal of its approach to the station, after the engineer discovers that a blast of the whistle already given has frightened a horse drawing a vehicle along a public road, and that the horse will probably be more frightened by continuing to blow till the signal is completed, the driver seated in the vehicle being engaged in an effort to control the animal. But it is a question for the jury whether the circumstances were such as to apprise the engineer, or put him on notice of the peril which would be occasioned by continuing to blow the whistle. *Akridge v. Atlanta & W. P. R. Co.*, 90 *Ga.* 232, 16 *S. E. Rep.* 81. *Chicago, B. & Q. R. Co. v. Dickson*, 88 *Ill.* 431, 21 *Am. Ry. Rep.* 328.

There being no direct evidence of the plaintiff's want of skill, or that the horse was vicious, and no circumstances from which these facts were fairly inferable, it was not error to charge the jury that if they believed from the evidence "the sole and real cause of the plaintiff's injury was the wild, vicious, and refractory disposition of the horse he drove, and the plaintiff's inability to control him, or the plaintiff's want of care or skill in the management of him, the plaintiff cannot recover." *Akridge v. Atlanta & W. P. R. Co.*, 90 *Ga.* 232, 16 *S. E. Rep.* 81.

Negligently and wantonly sounding the locomotive whistle so that horses lawfully near are caused to run away, renders the company liable to a third person who is injured by the frightened horse. *Billman v. Indianapolis, C. & L. R. Co.*, 6 *Am. & Eng. R. Cas.* 41, 76 *Ind.* 166, 40 *Am. Rep.* 230.

Plaintiff, who was driving a team, found a street crossing obstructed by a train, and a gentleman with plaintiff asked the engineer to move the cars; but he expressed an unwillingness to do so without orders from the yard master, but immediately sounded his whistle four or five times in the manner usually sounded to drive cattle from the track, which frightened plaintiff's team, which was shown to be gentle. The engineer testified that he blew the whistle to call the yard master. *Held*, sufficient evidence to justify a finding that the company was negligent. *Gibbs v. Chicago, M. & St.*

P. R. Co., 26 *Minn.* 427, 4 *N. W. Rep.* 819.

Plaintiff was walking on a street near a passing train, when a sudden blast of the train whistle frightened a horse being led by a third person, which ran against plaintiff, injuring her. A rule of the company forbade the blowing of whistles in cities, except to prevent accidents. In affirming the defendant's point that "plaintiff is not entitled to recover unless the jury also believe from the evidence that the whistle then blown was of an extraordinary and unnecessary character," the court added "that if the blast of the whistle was unnecessarily made at a place where it was likely to frighten horses, when it might have been postponed to another time, that would be negligence." *Held*, no error. *Philadelphia, W. & B. R. Co. v. Brannen*, (Pa.) 2 *Atl. Rep.* 429.

(6) *Undue speed*.—Where a train is run within a city at a speed in excess of that allowed by ordinances, whereby the horses of a person about to cross the track are frightened, and he is injured in person and property, the company will be liable for the penalty provided, although the train may not have struck such party or his horses or carriage. *Chicago & E. I. R. Co. v. People*, 120 *Ill.* 667, 12 *N. E. Rep.* 207, 9 *West. Rep.* 740; *affirming* 24 *Ill. App.* 562.—DISTINGUISHING *Schertz v. Indianapolis, B. & W. R. Co.*, 107 *Ill.* 577.

(7) *Smoke*.—Where a plaintiff is driving on a highway parallel with the railroad he cannot recover against the company for injuries received by his horse taking fright at the additional smoke caused by putting fresh coal on the engine fire, if it was necessary for the ordinary management of the train; and it was not the duty of the train employes to keep a lookout for persons on the highway. *Lamb v. Old Colony R. Co.*, 140 *Mass.* 79, 54 *Am. Rep.* 449, 2 *N. E. Rep.* 932.—APPLIED IN *Leavitt v. Terre Haute & I. R. Co.*, 5 *Ind. App.* 513.

A company is not responsible to travelers on a highway adjoining its railroad for the consequences of noise, vibration, or smoke caused by the prudent running of its trains. *Lamb v. Old Colony R. Co.*, 140 *Mass.* 79, 54 *Am. Rep.* 449, 2 *N. E. Rep.* 932.—QUOTED IN *Bailey v. Hartford & C. V. R. Co.*, 56 *Conn.* 444.

(8) *Proximate cause*.—If a team is frightened by the starting of an engine and the driver is injured—both he and those in

charge of the engine being engaged in a lawful pursuit—the company is liable, if the accident resulted through its negligence without the contributory negligence of the plaintiff proximately contributing thereto; but proof of a failure to ring a bell or sound a whistle, or that the train was running at an excessive speed, will not make the company liable, unless the accident was caused thereby. *Pittsburgh, Ft. W. & C. R. Co. v. Karns*, 13 Ind. 87. *Douglas v. East Tenn. V. & G. R. Co.*, 88 Ga. 282, 14 S. E. Rep. 616.

In an action for injuries received by the plaintiff's team running away after taking fright at the whistling of a train, where it is shown that the engineer of the train knew that the train had frightened the horses and caused them to run away, and that he had control of his train and could check its speed or stop it, and by so doing a serious accident would probably be avoided, a verdict for the plaintiff, in which the jury finds that the injuries resulted from the negligence of the engineer, is sustained by the evidence. *Louisville, N. A. & C. R. Co. v. Stanger*, (Ind. App.) 32 N. E. Rep. 209.

Where a company is charged with negligence both in allowing an engine to remain on a street for an unnecessary length of time, and in negligently discharging steam when plaintiff was passing the engine, causing his horse to be frightened, it cannot be claimed by the company that the escaping steam was the proximate cause of the injury, so as to render evidence of negligence in leaving the cars on the street immaterial. *Andrews v. Mason City & Ft. D. R. Co.*, 77 Iowa 669, 42 N. W. Rep. 513.

Where a city authorizes the laying of a street-car track on a street, and a horse takes fright at a car and runs away and injures the driver, by reason of the negligent manner in which the track is laid, by causing his vehicle to turn over, the obstruction of the street by the track is the proximate cause of the injury, and renders the city liable. *Campbell v. Stillwater*, 32 Minn. 308, 50 Am. Rep. 567, 20 N. W. Rep. 320.—QUOTED IN *Selleck v. Lake Shore & M. S. R. Co.*, 93 Mich. 375.

A pair of horses and sleigh, driven after dark, struck an ash heap negligently left on a township road, and the sleigh was overturned. The horses being frightened thereby, ran off the road and upon a railroad track. Overtaken by a train, they were

driven from the track, changed their course and ran along the track in an opposite direction, when they were struck by another train and killed. In an action against the township—held, that the facts being undisputed, the court should have instructed the jury that the negligent act of the township was the remote cause of the loss, and the township was not liable. *West Mahanoy Tp. v. Watson*, 116 Pa. St. 344, 9 Atl. Rep. 430.

(9) *Question, when for jury.*—A railroad train out of time should give notice of its coming if there are reasonable grounds to apprehend that teams on a turnpike near by would be frightened by the passing train; and whether there was negligence in failing to give warning of the approach of the train was a question for the jury and not for the court. *Hudson v. Louisville & N. R. Co.*, 14 Bush (Ky.) 303. See also *Dugan v. St. Paul & D. R. Co.*, 43 Minn. 414, 45 N. W. Rep. 851.

Where a horse, driven along a highway which ran parallel to a railway track, took fright at a passing train, ran away and was injured, in an action by the owner against the township for damages, whether or not the township supervisors were guilty of negligence in not erecting a barrier between the road and the track is a question for the jury. *Plymouth Tp. v. Graver*, 125 Pa. St. 24, 17 Atl. Rep. 249.

3. At crossings.—(1) *In general.*—The authority to operate a railway includes the right to make the noises incident to the management of its engines and rattling of its cars; and a railway company, while exercising this right in a reasonable and lawful manner and not making any undue and unnecessary noises, is not liable for an injury caused by horses taking fright at noises proceeding from an engine near a crossing. *Abbot v. Kalbus*, 39 Am. & Eng. R. Cas. 594, 74 Wis. 504, 43 N. W. Rep. 367.—QUOTING *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. St. 219.

But if the acts of its servants which caused the fright of the animal were wanton and malicious, and were done in the discharge of their business for the company, it will be liable. *Stanton v. Louisville & N. R. Co.*, 91 Ala. 382, 8 So. Rep. 798.—QUOTING *Whitney v. Maine C. R. Co.*, 69 Me. 208; *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. St. 226.

Where a person succeeds in driving across a track safely before an approaching train,

no recovery can be had for the horse afterwards taking fright at the sounding of the whistle given as the regular warning of the train's approach to the station. *Campbell v. New York C. & H. R. R. Co.*, 4 N. Y. Supp. 265, 21 N. Y. S. R. 685; affirmed in 130 N. Y. 631, mem., 29 N. E. Rep. 150, 40 N. Y. S. R. 982, mem.

Where plaintiff's horse took fright from cars derailed near a crossing, it is error to allow plaintiff to prove that the cars were not removed for several days after the accident. *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. St. 306, 49 Am. Rep. 580.

While servants of a railroad attempted to replace an engine on the track near a highway crossing, but within defendants' grounds, plaintiff, a female, with another woman, approached the crossing with a horse and wagon, and asked the servants if they might cross, when one of them said yes, and then one winked at the other and laughed. While she was crossing, she herself holding on the horse by the head, and the other woman sitting in the wagon holding the reins, steam was let off, and the horse becoming frightened knocked down plaintiff and injured her. Held, an actionable wrong, for which defendants were liable, and that there was no evidence of contributory negligence. *Stott v. Grand Trunk R. Co.*, 24 U. C. C. P. 347.

(2) *Obstructing crossing*.—It seems that stopping an engine and cars on a public street so as to partially block it up is negligence. *Borst v. Lake Shore & M. S. R. Co.*, 4 Hun (N. Y.) 346; affirmed (P) 66 N. Y. 639, mem.

If a car at which plaintiff's horses took fright was placed by defendant at a point upon its track which did not obstruct a highway crossing, and was afterwards moved onto the highway by persons for whom the defendant was not responsible, the company is not liable to plaintiff for injuries sustained, unless it negligently permitted the car to remain upon the highway an unreasonable length of time. *Cleveland, C., C. & I. R. Co. v. Wynant*, 35 Am. & Eng. R. Cas. 328, 114 Ind. 525, 14 West. Rep. 512, 17 N. E. Rep. 118.

*Frightening teams by noises and by obstructions at crossings, see note, 55 AM. & ENG. R. CAS. 134.

Liability of company for frightening team by wrongfully leaving cars over crossing. Sufficiency of pleading, see 37 AM. & ENG. R. CAS. 515, *abstr.*

Where a company permitted one of its cars to remain for several days on a side track, in a public street, in such a position that it projected two feet on a bridge at a public crossing, and was calculated to, and did, frighten plaintiff's horse, whereby plaintiff received injuries, the company was guilty of negligence, although its other side tracks may have been occupied fully with other cars necessary for the prosecution of its business. *Harrell v. Albemarle & R. R. Co.*, 110 N. Car. 215, 14 S. E. Rep. 687.

In an action for leaving cars on a street in violation of a city ordinance, the evidence showed that there was a passage between the cars of some ten or twelve feet in the middle of the street; and that a gentle team might have driven through with safety, but that it was dangerous to attempt to drive a "scary" team through. Held, sufficient evidence of negligence to make the company guilty. *Great Western R. Co. v. Decatur*, 33 Ill. 381.

On a trial for alleged negligence in leaving a freight car standing near the traveled track of a public highway in a village, by reason of which obstruction the plaintiff's horses took fright and he was injured—held, that the question whether the car obstructed the highway was properly submitted to the jury. *Peterson v. Chicago & W. M. R. Co.*, 64 Mich. 621, 31 N. W. Rep. 548.

The defendants left their cars standing across the highway for more than two minutes. While the highway was thus obstructed the plaintiff's horse was driven up to the crossing, and, after being delayed more than two minutes, took fright when the engine was attached and the cars were started, ran, and was killed. Held, that the plaintiff must show actual negligence or fault on the part of the defendants before he could recover. *Hall v. Brown*, 54 N. H. 495. — REVIEWING METALLIC COMPRESSION CASTING CO. v. FITCHBURG R. CO., 109 MASS. 277.

A train was cut in two at a turnpike crossing, and space enough to drive through was left between the parts of the train, but still on part of the pike. Plaintiff on coming near the track stopped his horse and wagon, but was motioned on by a train hand, and while crossing the track his horse took fright from the noise caused by putting on brakes. Held, that the train had no right to occupy the crossing, and the question of the company's negligence was properly left

to the jury. *Pennsylvania R. Co. v. Horst*, 110 Pa. St. 226, 1 Atl. Rep. 217.

Plaintiff's horse, which she was driving along the highway, became frightened, and the vehicle to which it was attached came, in consequence, into collision with one of the posts supporting the "signboard" required by the statute, C. S. C. c. 66, to be erected by railroads across highways, and was damaged. *Held*, that defendants would not be liable, merely for putting posts in the highway, as the law allows them so to do, provided they place them in a reasonably proper manner, with a due regard to all the surrounding circumstances, although the posts necessarily obstruct the use of the road over the spots where they are placed. *Soule v. Grand Trunk R. Co.*, 21 U. C. C. P. 308.

(3) — *by hand-cars*.—Section hands engaged in repairing the track placed a hand-car upon a public crossing. The plaintiff, in attempting to pass the hand-car, collided her wagon with it, whereupon her horse became frightened and ran away. *Held*, that defendant, by placing upon a public crossing an object liable to frighten horses, became liable for any injuries resulting from its act. *Myers v. Richmond & D. R. Co.*, 8 Am. & Eng. R. Cas. 293, 87 N. Car. 345.

In such case it was error to charge the jury on the theory that the only question involved was the right of the company to obstruct the highway. The negligence of the company in placing an object on the highway likely to frighten horses should have been left also to the jury. *Myers v. Richmond & D. R. Co.*, 8 Am. & Eng. R. Cas. 293, 87 N. Car. 345.

The fact that other horses had often been frightened at hand-cars and ties left piled on either side of the railroad before plaintiff's team was frightened, is proper for the consideration of the jury upon the question of negligence, but cannot be said to be gross negligence as a matter of law. *Texas & P. R. Co. v. Hill*, 71 Tex. 451, 9 S. W. Rep. 351.

(4) *Neglect to give warning of approach*.* —Where a railroad track crosses a public highway on a trestle, it is the duty of those in charge of a train approaching the crossing to give some timely warning of its ap-

proach for the protection of those who may be riding or driving on the highway, that they may secure themselves against injury by reason of the frightening of their horses; and the question as to whether or not the failure to give such warnings is negligence should be left to the jury. *Rupard v. Chesapeake & O. R. Co.*, 88 Ky. 280, 11 S. W. Rep. 70. —APPROVING *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 263. NOT FOLLOWING *Favor v. Boston & L. R. Corp.*, 114 Mass. 350.

The failure to give warning of the approach of a train to a highway grade crossing will render the company liable for injury resulting from a team becoming frightened, although there is no actual collision with the train. *Pollock v. Eastern R. Co.*, 124 Mass. 158, 17 Am. Ky. Rep. 402. —DISTINGUISHED IN *Sanborn v. Detroit, B. C. & A. R. Co.*, 91 Mich. 538.

Under the statute imposing a duty upon a railroad company to ring a bell at highway crossings, and making the neglect of such duty a misdemeanor punishable by fine, and declaring that the company shall "be liable for all damages which shall be sustained by any person by reason of such neglect," a person who was unloading corn into a crib on the railroad company's depot grounds near two highway crossings, can recover from the company for injuries received by reason of his horses becoming frightened at an engine which was driven past without the required signal being given, although the plaintiff was not at the time attempting to cross the track. *Loneragan v. Illinois C. R. Co.*, 56 Am. & Eng. R. Cas. 323, 87 Iowa 755, 49 N. W. Rep. 852.

A company does not owe any duty to a person plowing in a field near where its road crosses a public highway, to ring a bell or sound a whistle eighty rods before reaching the crossing with a train; and if such person is injured in consequence of a neglect to give warning, or by frightening his team, he will have no right of action, based on such neglect of duty. *Williams v. Chicago & A. R. Co.*, 135 Ill. 491, 26 N. E. Rep. 661; affirming 32 Ill. App. 339.

Where a highway crosses a track near the entrance to a railroad bridge, the company is not liable in damages to a traveler on the highway, caused by his team taking fright from the noise of a train on the bridge, where it is operated in the customary man-

* Frightening horses at a crossing by train approaching without warning, see 45 Am. & Eng. R. Cas. 206, *abstr.*

those who may
highway, that
against injury
of their horses;
ther or not the
is negligence
Rupard v. Ches-
280, 11 S. W.
sylvania R. Co.
NOT FOLLOW-
R. Corp., 114

ing of the ap-
highway grade
company liable
team becom-
re is no actual
Block v. Eastern
Ry. Rep. 402.
n v. Detroit, B.

g a duty upon
a bell at high-
the neglect of
punishable by
company shall
which shall be
reason of such
unloading corn
company's depot
crossings, can
for injuries re-
horses becoming
ich was driven
l signal being
iff was not at
ross the track.
Co., 56 Am. &
755, 49 N. W.

e any duty to a
r where its road
o ring a bell or
before reaching
d if such person
of a neglect to
ing his team, he
based on such
v. *Chicago &*
N. E. Rep. 661;

a track near the
e, the company
traveler on the
n taking fright
on the bridge,
customary man-

ner, although the corporation have knowl-
edge of the peculiar liability of the happen-
ing of accidents at such a place, and although
the train approached without warning sig-
nals. *Favor v. Boston & L. R. Corp.*, 114
Mass. 350.—DISTINGUISHED *Linfield v.*
Old Colony R. Corp., 10 Cush. 562; *Shaw*
v. Boston & W. R. Corp., 8 Gray 45.—
DISTINGUISHED IN *Hart v. Chicago, R. I.*
& P. R. Co., 56 Iowa 166. NOT FOLLOWED
IN *Rupard v. Chesapeake & O. R. Co.*, 88
Ky. 280.

It appeared that the railroad crossed the
highway on which the plaintiff was travel-
ing; that his horse became frightened when
about five rods from the crossing, by the
approach of two cars about ten rods there-
from; that the cars were coming on a down
grade by the force of gravitation, at the rate of
eight or ten miles an hour, and that no sig-
nal was given of their approach. *Held*, that
these facts would not warrant the jury in
returning a verdict for the plaintiff. *Flint*
v. Norwich & W. R. Co., 110 Mass. 222.—
DISTINGUISHED IN *Norton v. Eastern R.*
Co., 113 Mass. 366.

(5) *Improper sounding of whistle.**—The
Georgia Code, § 710, makes it unlawful for
railroad companies to blow their whistles
before approaching highway crossings with-
in the limits of cities, towns, or villages, but
provides for the ringing of a bell; and a
violation of the above statute by blowing a
whistle in a city, thereby causing a horse to
run away, renders a company liable for the
resulting injury. *Georgia R. Co. v. Carr*, 73
Ga. 557.—DISTINGUISHED IN *Smith v. Cen-*
tral R. & R. Co., 41 Am. & Eng. R. Cas.
490, 82 Ga. 801, 10 S. E. Rep. 111.

Where a railroad track crosses the high-
way by an overhead bridge, and the plain-
tiff's team passing beneath, without the
knowledge of those in charge of the train
passing above, is frightened by the sound-
ing of the whistle and runs away, whereby
the plaintiff is injured, the company, in the
absence of any showing that the whistling
was unnecessary, is not liable, although the
crossing was known to be one of extraor-
dinary danger. *Cincinnati, I., St. L. & C.*
R. Co. v. Gaines, 104 Ind. 526, 54 Am. Rep.

* Liability for frightening a horse at a cross-
ing by blowing the train whistle, see 28 AM. &
ENG. R. CAS. 685, *abstr.*; 39 *Id.* 597, *abstr.*

Frightening horses by signals given by train
standing on crossing. Contributory negligence,
see 45 AM. & ENG. R. CAS. 205, *abstr.*

§ D R. D.—66.

334, 4 N. E. Rep. 34, 5 N. E. Rep. 746 —
DISTINGUISHING *Hill v. Portland & R. R.*
Co., 55 Me. 438; *Pennsylvania R. Co. v.*
Barnett, 59 Pa. St. 259.

Plaintiff was injured by his team becoming
frightened by the sudden blowing of a loco-
motive whistle as the signal for starting a
train from a station. *Held*, that the company
had a right to adopt signals in such case;
but it was a question for the jury whether
there was negligence in the manner of blow-
ing the whistle in this particular case. *Hill*
v. Portland & R. R. Co., 55 Me. 438.—DIS-
TINGUISHED IN *Cincinnati, I., St. L. & C. R.*
Co. v. Gaines, 104 Ind. 526, 54 Am. Rep.
334.

The engine of defendants having given
no notice of its approach, whistled under a
bridge whilst a traveler was passing over
it; his horse took fright, ran off, and in-
jured him. *Held*, that if danger might be
reasonably apprehended, it was the duty of
the company to give some warning. *Penn-*
sylvania R. Co. v. Barnett, 59 Pa. St. 259.

(6) *Escape of steam.**—Where a flagman
is stationed at a crossing and beckons a per-
son to drive on, who has been waiting some
time for an opportunity to cross, he has a
right to assume that there will be nothing
done to increase the danger; and a sudden
escape of steam which causes his horse to
take fright will render the company liable.
Borst v. Lake Shore & M. S. R. Co., 4 Hun
(N. Y.) 346; *affirmed* (?) 66 N. Y. 639, *mem.*

An engineer, while his locomotive was
standing near a crossing at the instant a
person was crossing the track in front of his
engine, negligently or maliciously caused
the steam to escape, whereby the team was
made to run off and injury inflicted. *Held*,
that the company were liable. *Toledo, W.*
& W. R. Co. v. Harmon, 47 Ill. 298.—FOL-
LOWED IN *Chicago, B. & Q. R. Co. v. Dick-*
son, 63 Ill. 151.

While a freight train of the defendant was
standing on the track at a station, near a
public crossing, waiting for telegraphic or-
ders to move, the plaintiff, on horseback,
rode up, saw the flagman by the side of the
crossing with his flag furled, thus indicating
that no danger to persons desiring to cross
the track was to be apprehended from the
movement of the train, and attempted to

* Frightening horses at crossing by escaping
steam, see 45 AM. & ENG. R. CAS. 206, *abstr.*

Admissibility of evidence of frightening other
teams, see note, 49 AM. REP. 613.

cross, and while in the act of crossing there was a sudden escape of steam from an automatic safety-valve attached to the engine, which frightened her horse, and she was thrown to the ground and injured. It was shown that the defendant's engines were gauged to carry a certain pressure of steam, and when this was reached the steam escaped through the safety-valve; and that a full pressure of steam was required for the movement of a train going up the high grade from where it was standing. *Held*, that the defendant was not guilty of negligence, and the plaintiff was not entitled to recover for the injuries she sustained; that the fact that there was no one on the train at the time did not affect the question, it being shown that the point at which the steam escaped was fixed before the engine left the company's shops, and neither the engineer nor the fireman had any control over it. *Duwall v. Baltimore & O. R. Co.*, 49 Am. & Eng. R. Cas. 313, 73 Md. 516, 21 Atl. Rep. 496.

(7) *Undue speed*.—Where a train is run within a city at a speed in excess of that allowed by ordinance, whereby the horses of a person about to cross the track are frightened, and he is injured in person and property, the company will be liable for the penalty provided, although the train may not have struck such party or his horses or carriage. *Chicago & E. I. R. Co. v. People*, 120 Ill. 667, 12 N. E. Rep. 207, 9 West. Rep. 740.—*DISTINGUISHING* *Schertz v. Indianapolis, B. & W. R. Co.*, 107 Ill. 577.

(8) *Proximate cause*.—If the fright of the horses was caused by the default of the defendant in leaving cars standing at a crossing, in the absence of any evidence that they were unusually vicious or excitable, they would not be considered uncontrollable because they shied, or were momentarily beyond the control of the driver. *Peterson v. Chicago & W. M. R. Co.*, 64 Mich. 621, 31 N. W. Rep. 548.

Sounding the whistle under a bridge as a passenger was passing over, which caused the horses to run away through fright and injure him, was a sufficient proximate cause of injury to create a liability on the company. *Pennsylvania R. Co. v. Barnett*, 59

Pa. St. 259.—*DISTINGUISHED IN* *Cincinnati, I., St. L. & C. R. Co. v. Gaines*, 104 Ind. 526, 54 Am. Rep. 334. *QUOTED IN* *Hart v. Chicago, R. I. & P. R. Co.*, 56 Iowa 166.

It is error to admit evidence of the bad condition of a public road where it crossed the railroad track, the company having nothing to do with its condition. *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. St. 306, 49 Am. Rep. 580.

Damages claimed for personal injuries received by plaintiff and for injuries to his horses, carriage, and harness, caused by his horses taking fright at the approach of a train at a crossing, and running away, overturning the carriage and throwing him out, are the direct and proximate result of the fright and are not too remote to be recovered. *Texas & P. R. Co. v. Anderson*, 2 Tex. App. (Civ. Cas.) 161.

A bus driver was obliged to wait at a street crossing near a railroad depot by reason of its being unlawfully obstructed by a freight train, and while thus detained a passenger train passed on a track beyond that occupied by the freight train, and enveloped the freight train at the crossing in smoke and steam. The horses, which were ordinarily gentle, and used to running trains as well as standing cars, and had never taken fright at either, became frightened, backed away, overturned the bus and ran away, throwing the driver out and injuring him. *Held*, that it was for the jury to determine whether the presence of the obstructing train did not give a different color and character to the other operations, and convert otherwise harmless incidents into fear-exciting agencies, and whether the presence of the obstructing cars did not produce the effect which caused the fright, the runaway, and the injury. *Selleck v. Lake Shore & M. S. R. Co.*, 93 Mich. 375, 53 N. W. Rep. 556.—*QUOTING* *Young v. Detroit, G. H. & M. R. Co.*, 56 Mich. 430; *Southwestern T. & T. Co. v. Robinson*, 50 Fed. Rep. 810; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. (U. S.) 52; *Grimes v. Louisville, N. A. & C. R. Co.*, 3 Ind. App. 573, 30 N. E. Rep. 200; *Campbell v. Stillwater*, 32 Minn. 310; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 136.

4. *At stations*.—(1) *In general*.—The blowing of a whistle as a train reaches a sta-

* Whether negligence in delaying engine in the street for an unreasonable time, or the escape of steam, was the proximate cause, see 39 AM. & ENG. R. CAS. 597, *abstr.*

* Frightening horses at station. Measure of damages, see 56 AM. & ENG. R. CAS. 322, *abstr.*

tion is not negligence when it appears to have been the proper and customary warning from the train as it passed the station. *Campbell v. New York C. & H. R. R. Co.*, 21 N. Y. S. R. 685, 51 Hun 642, 4 N. Y. Supp. 265; affirmed in 130 N. Y. 631, mem., 29 N. E. Rep. 150, 40 N. Y. S. R. 982, mem.

If a company, in running its engines and cars on its tracks and within its yards, needlessly or negligently makes such noises as are usually incident to such running, and horses lawfully in the vicinity are thereby caused to run off and injury is inflicted, such company is liable. But whether in a particular case such noises are needlessly or negligently made depends on the circumstances of that case. *Petersburg R. Co. v. Hite*, 81 Va. 767.

Where there was no statutory duty imposed upon a company to place a screen along the side of its tracks at a station, and it was apparent that a screen or fence at that point would be a great inconvenience to the company and to the public generally, the company could not be held liable for injuries caused by a horse becoming frightened at the defendant's engine, although a screen at such a point might have prevented the accident. *Flagg v. Chicago, D. & C. G. T. J. R. Co.*, 56 Am. & Eng. R. Cas. 317, 96 Mich. 30, 55 N. W. Rep. 444. *Simkin v. London & N. W. R. Co.*, 35 Am. & Eng. R. Cas. 487, L. R. 21 Q. B. D. 453.—REVIEWED IN *New Brunswick R. Co. v. Vanwart*, 17 Can. Sup. Ct. 35; *Flagg v. Chicago, D. & C. G. T. J. R. Co.*, 96 Mich. 30.

(2) *Illustrations*.—The petition charged that in attempting to cross a track on the depot grounds of the defendant, the horse which plaintiff was driving became frightened at "an arrangement and scarecrow, caused by the placing of cars and other implements" near the crossing, in such a manner as to present "a horrid and frightful appearance," whereby the plaintiff was thrown from his buggy and injured. *Held*, that the facts stated were insufficient to constitute a cause of action against the company. *Atchinson & I R. Co. v. Loree*, 4 Neb. 446.

Where it appeared in evidence that the public highway was rendered unsafe for travel, by reason of a ditch dug across it by a company, and plaintiff drove up to a crossing on the depot grounds of defendant, near which lay a hand-car bottom upwards, and another car loaded with wood

extended partly over the crossing, but leaving sufficient room to pass, and plaintiff's horse shied at these cars, whereby plaintiff was thrown from his buggy and injured—*held*, that the company was not guilty of negligence in such an arrangement of its cars, and that a motion for a nonsuit should have been sustained, or the jury directed to return a verdict for the company. *Atchinson & N. R. Co. v. Loree*, 4 Neb. 446.

5. Contributory negligence.—(1) *When a defense*.—Where the driver of a team knows that his horses are liable to become frightened at the cars, there can be no recovery for injuries caused by his driving up to a depot to unload freight, where his horses take fright at a passing train, though he is invited to drive up by the station agent, who is ignorant of the fact that his horses are easily frightened. *Morgan v. Central R. Co.*, 77 Ga. 788.

A person who undertakes to drive a team of horses attached to a wagon, across a railroad crossing, immediately in front of an engine that has temporarily stopped on the crossing and is making the usual noise by escaping steam, and who knows and appreciates the danger, cannot recover for personal injuries inflicted by the running away of the frightened team. *Union Pac. R. Co. v. Hutchinson*, 39 Kan. 485, 18 Pac. Rep. 705.

A person who is injured by his horse taking fright and becoming unmanageable upon the approach of a train, cannot recover where the evidence shows that the proper signals were given, but that plaintiff was conversing with a companion and did not notice the train nor hear the signals until the train was too near for him to turn his horse or to cross the track in front of it, the only real evidence tending to show negligence on the part of the company being that the train was running at a dangerous rate of speed. *McCain v. Louisville & N. R. Co.*, (Ky.) 18 S. W. Rep. 537.

One who, with knowledge of the fractious disposition of a horse, drives him within five feet of a moving locomotive from which steam is escaping, is guilty of such contributory negligence as will defeat a recovery for the injuries sustained by reason of the consequent frightening of the horse. *Mahan v. Clee*, 87 Mich. 161, 49 N. W. Rep. 556.

The driver of a four-year-old colt, who tries to hold him by the head after being backed up to the platform at a railway

IN Cincinnati, Gaines, 104 QUOTED IN Co., 56 Iowa

ce of the bad ere it crossed any having ition. Pitts-aylor, 104 Pa.

sonal injuries injuries to his caused by his approach of a g away, over- wing him out, result of the to be recov- Anderson, 2

to wait at a bad depot by obstructed by us detained a track beyond train, and en- the crossing in es, which were running trains ad never taken tened, backed and ran away, injuring him, to determine e obstructing ent color and ions, and con- ents into fear- r the presence ot produce the the runaway, e Shore & M. W. Rep. 556. t, G. H. & M. western T. & T. 310; Louisiana all. (U. S.) 52; & C. R. Co., o. 200; Camp- to; Baltimore . 136.

eneral.*—The reaches a sta-

n. Measure of CAS. 322, absr.

station, and after he has become restless and frightened at the noise of an approaching train, instead of driving away over a smooth driveway, and thus avoiding the threatened danger, is guilty of negligence. *Flagg v. Chicago, D. & C. G. T. J. R. Co.*, 56 Am. & Eng. R. Cas. 317, 96 Mich. 30, 55 N. W. Rep. 444.—FOLLOWING *Geist v. Detroit City R. Co.*, 91 Mich. 448. REVIEWING *Simkin v. London & N. W. R. Co.*, 35 Am. & Eng. R. Cas. 487, 21 Q. B. D. 453.

It was proper to charge the jury that if plaintiff knew that his team was afraid of the engine, and after crossing the track in safety he had time to move on to a safe distance, and stopped voluntarily and unnecessarily, and while he was so standing, the employes of the railway company, for the purpose of backing the train, gave the usual signals and frightened the team, the plaintiff could not recover. *Hargis v. St. Louis, A. & T. R. Co.*, 75 Tex. 19, 12 S. W. Rep. 953.

To leave unhitched and unattended, within nineteen feet of a railroad track, a team of horses, young, high-lifted, and afraid of the cars, is negligence as matter of law. *Olson v. Chicago, M. & St. P. R. Co.*, 81 Wis. 41, 50 N. W. Rep. 412, 1096.

(2) — *illustrations.*—Plaintiff drove to a mill near a railroad crossing, hitched his team and left it, intending to return before a train might pass; but he failed to see or hear the train in time, and the horses ran away and were injured by colliding with the train. *Held*, that he could not recover, though the company failed to give a signal of the approaching train. *St. Louis & S. F. R. Co. v. Payne*, 13 Am. & Eng. R. Cas. 632, 29 Kan. 166.

A company agreed to construct a proper crossing on plaintiff's farm, but with knowledge that it had failed to do so, he undertook to drive a team across, hitched to a wagon with a rack on it, which slipped forward and struck the horses, causing them to take fright and run away. *Held*, that he could not recover. *Artman v. Kansas C. R. Co.*, 22 Kan. 296.

Plaintiff had solicited a ride with two young boys, who were driving a four-year-old colt which had never before been at the railroad station. While the boys were loading trunks into the wagon, the colt became frightened at the noise of an approaching train, and the plaintiff requested the boys to drive him away from the station, as she was

afraid, but remained seated in the wagon, although she had time to alight before the train arrived. Upon the approach of the train the horse broke loose from his drivers and ran away, throwing out the plaintiff and inflicting upon her severe injuries. *Held*, that the plaintiff was guilty of contributory negligence so as to prevent recovery. *Flagg v. Chicago, D. & C. G. T. J. R. Co.*, 56 Am. & Eng. R. Cas. 317, 96 Mich. 30, 55 N. W. Rep. 444.

Plaintiff undertook to drive over a highway, knowing that certain cars were off the track near the highway, and that a neighbor's horse had previously been frightened by them. It appeared that he could have avoided the cars by driving a short distance through his own field. *Held*, that he was guilty of contributory negligence, and could not recover for injuries received by his horse taking fright. *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. St. 306, 49 Am. Rep. 580.

In an action for personal injuries to the wife of the plaintiff, inflicted by his team running away and overturning the wagon they were drawing, thereby injuring his wife, the team being frightened by the whistling of the engine near by, and which was approaching a public crossing, the court properly charged that "the law devolved upon the plaintiff the duty of exercising such ordinary care in approaching said railway with his family, team, and cattle as would be used by a prudent person under the circumstances; and if from the evidence you believe he failed to exercise such care, and that thereby he contributed to a runaway of said team, then the plaintiff would be guilty of what is known in law as contributory negligence; and if you so find you will find a verdict for the defendant, although you may also believe that defendant's employes blew the whistle negligently and wantonly." *Gulf, C. & S. F. R. Co. v. Box*, 81 Tex. 670, 17 S. W. Rep. 375.

In an action for injuries alleged to have been caused by defendant's negligence in leaving a narrow passageway between its depot and a canal undefended by any railing along the canal, such passageway being the only way of access for teams delivering or receiving freight at said depot, and being so narrow as to leave hardly sufficient room for two wagons going in opposite directions to pass each other without forcing the outer one into the canal, the complaint showed that plaintiff, with knowledge of

in the wagon. Fight before the approach of the from his driveway out the plain—severe injuries. guilty of con—to prevent re—*D. & C. G. T. J.* 317, 96 *Mich.*

ive over a high—ars were off the d that a neigh—been frightened t he could have a short distance ld, that he was gence, and could ved by his horse *Southern R. Co.* 9 *Am. Rep.* 580. l injuries to the ed by his team ning the wagon n injuring his wife, y the whistling l which was ap—the court prop—devolved upon rercising such or—said railway with le as would be nder the circum—vidence you be—such care, and to a runaway of would be guilty as contributory and you will find t, although you dant's employés y and wantonly.” *Box*, 81 *Tex.* 670.

alleged to have s negligence in way between its ded by any rail—passageway being eams delivering aid depot, and hardly sufficient in opposite di—without forcing ul, the complaint a knowledge of

the danger, voluntarily attempted to drive his wagon, loaded with goods, along the canal side of such passageway, and past another wagon thereon, and in so doing met the injury complained of, from his horse becoming frightened and backing into the canal. *Held*, that these averments showed contributory negligence. *Goldstein v. Chicago, M. & St. P. R. Co.*, 46 *Wis.* 404, 21 *Am. Ry. Rep.* 391.—FOLLOWED IN *Eisenberg v. Missouri Pac. R. Co.*, 33 *Mo. App.* 85.

(3) *When not a defense.*—A car standing upon a switch track in a highway close to, but not obstructing, the traveled part thereof (which at that point was upon a grade several feet above the ditches on the side of the street), could be seen for a considerable distance by persons passing along the highway. The plaintiff, who was on the top of a load of stave bolts upon a sleigh, attempted to pass the car, when the horses became suddenly frightened at the sight of it and sprang to one side, throwing the sleigh with its load off from the grade, upsetting it, and injuring plaintiff. *Held*, that these facts did not conclusively show negligence on the part of the plaintiff. *Bussian v. Milwaukee, L. S. & W. R. Co.*, 10 *Am. & Eng. R. Cas.* 716, 56 *Wis.* 325, 14 *N. W. Rep.* 452.

An instruction that “the fact that this team may have once before run away, or was easily frightened, was not contributory negligence on the part of the plaintiff unless the jury find that a person of ordinary care and prudence would not drive such a team over his railroad crossing under all the circumstances in this case”—*held*, sufficiently favorable to defendants. *Kalbus v. Abbot*, 77 *Wis.* 621, 46 *N. W. Rep.* 810.

(4) *Question for jury.*—The question of the contributory negligence of the owner of a runaway team, who takes it into a railroad freight yard, and in close proximity to tracks over which cars are liable to pass at any time, is to be determined by the jury. *Kalemach v. Michigan C. R. Co.*, 50 *Am. & Eng. R. Cas.* 15, 87 *Mich.* 509, 49 *N. W. Rep.* 1032.

A plaintiff should not be nonsuited on the ground of contributory negligence, except in very clear cases. *Borst v. Lake Shore & M. S. R. Co.*, 4 *Hun (N. Y.)* 346; *affirmed* (P) 66 *N. Y.* 639, *mem.*—APPROVING *Bridges v. North London R. Co.*, 30 *L. T.* 844.

6. Procedure.—(1) *Pleading.*—A complaint alleging that the defendant's train approached a highway crossing without giving the required statutory signals and without the plaintiff's knowledge, whereby his team was frightened and ran away, and the plaintiff, without any fault on his part, was injured, sufficiently rebuts any presumption of contributory negligence. *Cincinnati, I., St. L. & C. R. Co. v. Gaines*, 104 *Ind.* 526, 54 *Am. Rep.* 334, 4 *N. E. Rep.* 34, 5 *N. E. Rep.* 746.

A complaint for damages caused by plaintiff's horses taking fright at cars alleged to have been “unlawfully, carelessly, and negligently placed upon a public highway” is not bad on demurrer for failing to allege that the cars were permitted to remain upon the highway an unreasonable time. *Cleveland, C., C. & I. R. Co. v. Wynant*, 119 *Ind.* 539, 20 *N. E. Rep.* 730.

Where a party does not allege in his complaint that the blowing of the whistle on an approaching train, which frightened his horse and caused it to run away, was unnecessary and therefore negligent, there can be no recovery on proof that the blowing of the whistle was unnecessary. *McCain v. Louisville & N. R. Co.*, (Ky.) 18 *S. W. Rep.* 537.

In an action for negligently, wrongfully, and unlawfully blowing off steam from an engine, whereby the plaintiff's horses were frightened and ran away, breaking his leg, etc.—*held*, that the words employed implied that steam was blown off needlessly and unnecessarily, and as no objection had been made to the petition by demurrer, it was sufficient after verdict. *Omaha & R. V. R. Co. v. Clark*, 55 *Am. & Eng. R. Cas.* 145, 35 *Neb.* 867, 53 *N. W. Rep.* 970.—DISTINGUISHING *Atchison & N. R. Co. v. Loree*, 4 *Neb.* 446.

(2) *Evidence.*—In order to recover for an injury resulting from frightening a team by blowing a locomotive whistle, it must be shown that the circumstances were such that a prudent regard for the rights of others forbade such use. *Hudson v. Louisville & N. R. Co.*, 14 *Bush (Ky.)* 303.

Where a horse is frightened by steam from an engine, the company cannot escape liability by showing that the engine was provided with an automatic valve. In such case the negligence of the company in permitting the steam to escape, regardless of the kind of valve used, is a question for the

jury. *Presby v. Grand Trunk R. Co.*, 66 N. H. 615, 22 Atl. Rep. 554.

In an action against a railroad company for frightening a horse by escaping steam, it is competent to prove that engines had frequently in the past, while standing at or near the same place, blown off steam and frightened horses, and that the company was in the habit of leaving its cars on its side tracks so as to obstruct the view of approaching trains. *Presby v. Grand Trunk R. Co.*, 66 N. H. 615, 22 Atl. Rep. 554.

Where a company has for several years recognized and maintained a road crossing over its track as a crossing for the public, it is estopped from setting up as a defense in an action for frightening a team that the road was not a public road. *Texas & P. R. Co. v. Anderson*, 2 Tex. App. (Civ. Cas.) 161.

Where a company is sued for negligently leaving box cars on a highway, causing plaintiff's horses to take fright, evidence that other horses had shied at the cars is not admissible, where there is no evidence as to the disposition of such horses. *Cleveland, C. & I. R. Co. v. Wynant*, 35 Am. & Eng. R. Cas. 328, 114 Ind. 525, 14 West. Rep. 512, 17 N. E. Rep. 118.

A judgment for frightening plaintiff and his horse, where no physical injury is done to either, cannot be supported on evidence showing that the engine approached a crossing as plaintiff was about to cross the track, and stopped; that the team safely passed over but was badly frightened; that after the engine was discovered the team could have turned and gone back with safety without crossing the track, and where there is no evidence as to the value of the horse, or as to how much, if any, either plaintiff or the horse was damaged by the fright. *Ft. Worth & D. C. R. Co. v. Burton*, 4 Tex. App. (Civ. Cas.) 292, 15 S. W. Rep. 197.

A company was sued for frightening a horse by blowing off steam from an engine. The proofs showed that the horse while on the crossing was frightened by the escaping steam; that no notice was given of the approaching train by ringing a bell or otherwise; that box cars standing on the track, one of which covered a part of the crossing, obscured the view of the approaching train. *Held*, sufficient to support a verdict against the company. *Presby v. Grand Trunk R. Co.*, 66 N. H. 615, 22 Atl. Rep. 554.

(3) *Damages*.—The proper mode of reach-

ing the amount of injury to the market value of a horse, by becoming frightened and running away, without being wounded or physically injured, is to prove the habits of the animal before the occurrence, the circumstances attending it, and how the horse was then and afterwards affected by it; also the description of the horse and its value prior to the runaway. *Van Wagoner v. New York Cement Co.*, 36 Hun (N. Y.) 552.

Interest cannot be allowed on the damages from the date of the accident to the date of the verdict. *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. St. 306, 49 Am. Rep. 580.—APPROVED in Louisville & N. R. Co. v. Wallace, 91 Tenn. 35.

In an action for injuries to the plaintiff, caused by defendant's servants in blowing the whistle on an engine, at a time and place, however, when and where it was customary to blow it, while too near a team of mules attached to a wagon in which plaintiff was riding—*held*, that compensatory damages only should be given. And the only injury sustained by plaintiff being a sprained ankle, from which with proper care he would have recovered in five or six weeks, a verdict for \$1525 was regarded as excessive. *Chicago, B. & Q. R. Co. v. Dunn*, 52 Ill. 451.

FRIVOLOUS PLEADINGS.

Striking out, see PLEADING, 168.

FROGS.

Duty of company to block, see EMPLOYES, INJURIES TO, 63-66, 230, 564.

Negligence in failing to block, a question for jury, see EMPLOYES, INJURIES TO, 673.

Patents for, see PATENTS FOR INVENTIONS, 44.

FRONT PLATFORM.

Entering car by, or riding on, see STREET RAILWAYS, 407-417.

FRUIT.

Duty to carry, by special train, see CARRIAGE OF MERCHANDISE, 55.

Liability of initial carrier for loss of, by freezing, see CARRIAGE OF MERCHANDISE, 581.

FRUIT TREES.

For delivery to purchaser, special damages for loss of, see CARRIAGE OF MERCHANDISE, 802.

to the market
being frightened
being wounded
prove the habits
urrence, the cir-
d how the horse
ected by it; also
e and its value
in *Wagoner v.*
in (N. Y.) 553.
d on the dam-
accident to the
burgh *Southern*
l. 306, 49 *Am.*
Louisville & N.
35.
to the plaintiff,
nts in blowing
at a time and
here it was cus-
near a team of
in which plain-
compensatory
iven. And the
plaintiff being a
with proper care
in five or six
was regarded as
R. Co. v. Dunn,

DINGS.
108.

ee EMPLOYES, IN-
, 564.
k, a question for
RIES TO, 673.
INVENTIONS, 44.

ORM.
on, see STREET

in, see CARRIAGE
for loss of, by
F MERCHANDISE,

IS.
pecial damages
E OF MERCHAN-

Injuries to, as an element of land damages,
see EMINENT DOMAIN, 706.
Measure of damages for injury to or destruc-
tion of, see DAMAGES, 66; FIRES, 344.

FUNERAL EXPENSES.

When recoverable in action for causing
death, see DEATH BY WRONGFUL ACT,
413, 414.

FURTHER INSTRUCTIONS.

On trial, generally, see TRIAL, 179-188.
As to contributory negligence, see CONTRIB-
UTORY NEGLIGENCE, 120.
In actions for damages caused by fire, see
FIRES, 306.
— — — injury to employees, see EMPLOYES, IN-
JURIES TO, 635, 636.

GAMBLING.

On train, prosecutions for, see CRIMINAL LAW,
25.

GAME.

Unlawful transportation of, see EXPRESS COM-
PANIES, 6.

GARNISHEE.

Who may be sued as, liability, etc., in at-
tachment, see ATTACHMENT, ETC., 11-
19, 38, 44, 52-62.

GAS COMPANIES.

Condemnation of lands of, see EMINENT DO-
MAIN, 121.

GATE-KEEPER.

Liability of company for false imprisonment
by, see FALSE IMPRISONMENT, 7.
— — — negligence of, see CROSSINGS, IN-
JURIES, ETC., AT, 49.

GATES.

Agreements of agents to build, see AGENCY,
48.
At crossings, maintenance and tending of,
see CROSSING OF STREETS AND HIGHWAYS,
40.
— — right of city to erect, see STREETS AND
HIGHWAYS, 299.
— farm crossings, see FARM CROSSINGS, 12.
— — — instructions relating to maintenance
of, see ANIMALS, INJURIES TO, 566.
— street crossings over railways, see CROSS-
ING OF STREETS AND HIGHWAYS, 68.

On assessment of land damages, see EMI-
NENT DOMAIN, 592.
Prayers for, see CARRIAGE OF PASSENGERS,
606.

FUTURE DAMAGES.

Generally, see DAMAGES, 41-49.
Elements to be considered in computation of,
see ELEVATED RAILWAYS, 137, 144.
In actions against carriers of passengers,
see CARRIAGE OF PASSENGERS, 614.
— — for nuisances, see NUISANCE, 39.
Under English compulsory purchase acts,
see EMINENT DOMAIN, 1198.

FUTURES.

Illegality of contracts for, see CONTRACTS,
55.

G

At street crossings, sufficiency of, see CROSS-
ING OF STREETS AND HIGHWAYS, 20.
Burden of proof to show defects in, see ANI-
MALS, INJURIES TO, 504.
Compensation to company for expenses of
erecting, see CROSSING OF STREETS AND
HIGHWAYS, 81.
Damages to abutting owners for erection of,
see CROSSING OF STREETS AND HIGHWAYS,
118.
Duty of company to erect and maintain, see
ANIMALS, INJURIES TO, 174-184.
— — lessee to maintain, see LEASES, ETC.,
74.
— to look and listen as affected by failure to
provide, see CROSSINGS, INJURIES, ETC.,
AT, 267.
— — — — at places where maintained,
see CROSSINGS, INJURIES, ETC., AT, 214,
280.
— — maintain at grade crossings, see ANI-
MALS, INJURIES TO, 191.
Effect of absence of, or confusing directions
of gateman, see DEATH BY WRONGFUL
ACT, 198.
Injuries to passengers by negligence in clos-
ing, see ELEVATED RAILWAYS, 208.
Liability at crossings as dependent upon
maintenance of, see CROSSINGS, INJURIES,
ETC., AT, 45-59.
Ordinances requiring, at crossings, see
STREETS AND HIGHWAYS, 313.
Patents for, see PATENTS FOR INVENTIONS,
31.
Prohibiting going through without tickets,
see CARRIAGE OF PASSENGERS, 76.
Proof of failure to maintain, see DEATH BY
WRONGFUL ACT, 264.

Relevancy of evidence to show defects in, see ANIMALS, INJURIES TO, 398, 399.
 Sufficiency of, see FENCES, 79.

GAUGE.

Of track, change of, see CONSTRUCTION OF RAILWAYS, 7.
 — — construction of charter as to, see STREET RAILWAYS, 70.
 — — ordinance prescribing, see STREET RAILWAYS, 265.

GENERAL.

Agents, implied powers of, see AGENCY, 11.
 Balance, lien of carrier for, see CARRIAGE OF MERCHANDISE, 387, 408.
 Damages, when proper, see CARRIAGE OF PASSENGERS, 611; PLEADING, 63.
 Denial, averment of facts admissible under, see EMPLOYEES, INJURIES TO, 544.
 — effect of, see DAMAGES, 82; SUBSCRIPTIONS TO STOCK, 95.
 — sufficiency of, see ANIMALS, INJURIES TO, 370, 371.
 — when contributory negligence is provable under, see CONTRIBUTORY NEGLIGENCE, 79, 80.
 Instructions, as to contributory negligence, see CONTRIBUTORY NEGLIGENCE, 114.
 Issue, pleading and evidence under, see PLEADING, 45, 94.
 Laws, amendment of charters by, see CHARTERS, 30, 46.
 — construction of cable railways under, see CABLE RAILWAYS, 1.
 — incorporation under, see INCORPORATION, 2.
 — organization of elevated railways under, see ELEVATED RAILWAYS, 1, 2.
 — regulating charges under, see CHARGES, 4-13.
 — reservation in, of power to alter, amend, or repeal charter, see CHARTERS, 43.
 — right of city to vote aid under, see MUNICIPAL AND LOCAL AID, 76.
 — specific charters are controlled by, see CHARTERS, 58.
 Manager, as vice-principal or fellow-servant, see FELLOW-SERVANTS, 391, 392.
 — authority of, to employ physician, see MEDICAL SERVICES, 8.
 — rights, powers, and duties of, see OFFICERS, 11.
 Objections, sufficiency of, see TRIAL, 55.
 Railroad acts, construction of elevated railways under, see ELEVATED RAILWAYS, 1-3.
 Reputation, of servant as proof of incompetency, see FELLOW-SERVANTS, 479.
 Verdict, effect and sufficiency of, see TRIAL, 191, 192.

Verdict inconsistent with special findings, see DEATH BY WRONGFUL ACT, 359, 360; EMINENT DOMAIN, 828; NEW TRIAL, 27; TRIAL, 215-218.

GEORGIA.

Aid to railways by the state, see STATE AID, 17.
 Assessment and levy of taxes in, see TAXATION, 255.
 Constitutionality of statutes of, as to municipal aid for railways, see MUNICIPAL AND LOCAL AID, 28.
 — — — granting remedy for causing death, see DEATH BY WRONGFUL ACT, 7.
 — — tax laws of, see TAXATION, 23.
 Construction of stock laws of, see ANIMALS, INJURIES TO, 21.
 Deductions for benefits under condemnation laws of, see EMINENT DOMAIN, 731.
 Doctrine of comparative negligence, how far applied in, see COMPARATIVE NEGLIGENCE, 21.
 Double damages for killing stock in, see ANIMALS, INJURIES TO, 597.
 Grants by, to railroads, see LAND GRANTS, 114.
 Liability of final carrier under code of, see CARRIAGE OF MERCHANDISE, 646.
 License taxes in, see TAXATION, 394.
 Limitation of liability as between connecting lines in, see CARRIAGE OF MERCHANDISE, 683.
 — — — for negligence as respects injuries to employees in, see EMPLOYEES, INJURIES TO, 181.
 Occupation of streets by steam roads under legislative grants of, see RAILROADS AND HIGHWAYS, 42.
 Operation of statute of, giving right of action for causing death, see DEATH BY WRONGFUL ACT, 16.
 Plaintiff's pleadings need not negative contributory negligence in, see CONTRIBUTORY NEGLIGENCE, 57.
 Right to sue in, for causing death in foreign state, see DEATH BY WRONGFUL ACT, 117.
 Rule as to imputed negligence in, see IMPUTED NEGLIGENCE, 4.
 — in, as to preliminary payments for stock, see SUBSCRIPTIONS TO STOCK, 139.
 Statute of, regulating liability to servant for injuries caused by negligence of fellow-servant, see FELLOW-SERVANTS, 171.
 Statutory provisions in, limiting amount recoverable for causing death, see DEATH BY WRONGFUL ACT, 365.
 Taking land for streets and laying out roads in, see STREETS AND HIGHWAYS, 17.

GIFTS.

Of right of way, see EMINENT DOMAIN, 223.

GOVERNMENT.

Accounting with government, see LAND GRANT RAILROADS, 8.

Control of railroads by, see GOVERNMENT RAILROADS; WAR, 4.

How far bound by statutes of limitations, see LIMITATIONS OF ACTIONS, 7.

Lands held under grants from, when subject to taxation, see TAXATION, 113-124.

Lien of carrier on goods of, see CARRIAGE OF MERCHANDISE, 378.

Relation of Central Pacific R. Co. to, see CENTRAL PACIFIC R. CO., 1.

Statutory contract with, see LAND GRANT RAILROADS, 1, 2.

GOVERNMENT RAILROADS.

I. IN THE UNITED STATES..... 1049

II. IN CANADA..... 1050

I. IN THE UNITED STATES.

1. Powers of canal commissioners respecting.—The Pa. Act of April 16, 1838, § 11, prohibits the erection of buildings on the embankment of the Philadelphia and Columbia railroad without written permission given under the authority of the canal commissioners; and such prohibition is not confined to the original embankments, but extends to the enlargements of the same. *Downing v. McFadden*, 18 Pa. St. 334.

The canal commissioners may cause the removal of any building erected contrary to the terms of said act, and the persons who removed it under their direction are not liable to an action of trespass by the owner of the building, the act of removal not being done maliciously. *Downing v. McFadden*, 18 Pa. St. 334.

2. Right of other roads to run cars over.—The Pennsylvania R. Co., by its acts of incorporation, has no legal rights upon the state works. The power to run cars over the Columbia and Philadelphia railroad has not been given to it by the act of March 13, 1847, which authorizes any railroad company to run cars over another road connected with its own, the Pennsylvania railroad not being so connected with the state road, as the former terminates at Harrisburg. *Pennsylvania R. Co. v. Canal Com'rs*, 21 Pa. St. 9.

Though the word "individuals" in the

act of April 15, 1834, authorizing individuals to place cars on the Columbia road, may include corporations, yet as such privilege is withheld by its act of incorporation, the Pennsylvania R. Co. is not authorized by that act to use the state road. *Pennsylvania R. Co. v. Canal Com'rs*, 21 Pa. St. 9.

Nor is such privilege given to it by the act of April 23, 1852, authorizing it to purchase and hold certain real estate in the county of Philadelphia. Corporate powers are not to be created by implication nor extended by construction. *Pennsylvania R. Co. v. Canal Com'rs*, 21 Pa. St. 9.

Though the act of April 15, 1834, authorizes individuals to place cars on the Columbia and Philadelphia railroad, yet an individual has no right to run thereon a car which has been condemned and was at the time unfit for service. *Miller v. Canal Com'rs*, 21 Pa. St. 23.

The Pennsylvania R. Co., having no right of itself to run cars on the Philadelphia and Columbia railroad, cannot do so in connection with an individual. *Miller v. Canal Com'rs*, 21 Pa. St. 23.

3. Sales of.—A state sold its interest in a railroad and took bonds and stock in payment, which it appropriated for the purposes of a sinking fund. The title that the state attempted to convey subsequently proved defective by reason of a prior lien on the road. Held, that it was proper to decree that the interest and dividends on the bonds and stock should be applied towards the discharge of the lien on the road. *Sinking Fund Com'rs v. Northern Bank*, 1 Metc. (Ky.) 174.

4. Suits against.—The state, by carrying on a railroad, becomes subject to the law of common carriers and liable as such, where, the legislature has provided for a remedy for injuries by suit against the officers of the road. *Western & A. R. Co. v. Carlton*, 28 Ga. 180.

The plaintiff in a suit against the Western and Atlantic railroad may recover more than he claimed at the time he made demand upon the superintendent for settlement. *Western & A. R. Co. v. Carlton*, 28 Ga. 180.

When a state engages in the business of common carriers, and to a certain extent reaps the profit of it, she is bound to furnish a remedy against herself for injuries springing from it. *Ryland v. Peters*, 1 Phila. (Pa.) 264.

The Western & A. R. Co., a corporation created by an act of the legislature of Georgia, and of which Georgia was the exclusive proprietor, was authorized to emit change bills to the amount of \$200,000, redeemable in current bank notes when presented in sums of \$5 and upwards; and for the redemption of these bills the W. & A. R. Co., its fixtures, property, and revenues, together with the faith of the state, were pledged, and said bills were receivable in payment of taxes and all other dues of the state and of the W. & A. R. Co. This suit was brought in Tennessee to enforce payment of bills issued in Georgia. *Held*, the W. & A. R. Co. is liable to be sued, notwithstanding the fact that the state of Georgia may be its sole corporator and proprietor. *Western & A. R. Co. v. Taylor*, 6 Heisk. (Tenn.) 408.

5. Priority of debts due to.—The Western and Atlantic railroad is the property of the state, and a debt due the road is a debt due the public, and is to be paid before "any other debt, lien, or claim whatsoever," except funeral expenses, etc. (Ga. Rev. Code, § 2494.) *State v. Dickson*, 38 Ga. 171.

6. Liability of officers and agents.—The Pa. Act of April 11, 1844, provides that when any damages are sustained upon any of the canals or railroads of the commonwealth by reason of neglect or misconduct on the part of any agent or officer in the employment of the state, he shall be held liable for the amount of such damages, and it shall be the duty of the canal commissioners to discharge such officer or agent from all further employment and retain any balance which may be due him for salary or wages until the amount of his liability for such damages shall be ascertained and paid. *Ryland v. Peters*, 1 Phila. (Pa.) 264.

7. — of persons running cars over.—The owners of passenger cars employed on the Columbia railroad, belonging to the commonwealth, are liable as common carriers for an injury sustained by a passenger from the collision of two of their trains passing in the same direction, though the motive power of the road was furnished by the state and was under the control of the state's agents, and though the accident happened through the negligence of the agent of the state. The carrier contracted with a knowledge of the government of the road,

and is responsible. *Peters v. Rylands*, 20 Pa. St. 497.

The conductor of a train on a railroad belonging to the state has a right to direct all the movements of the train; and the engineers and teamsters employed, whether the motive power is furnished by the commonwealth or not, are regarded as agencies employed by him and are under his control. *Rauch v. Lloyd*, 31 Pa. St. 358.

For an injury resulting to a third person through the negligence of any of the agencies employed in the moving or management of the cars, the conductor and his employers are responsible. *Rauch v. Lloyd*, 31 Pa. St. 358.

Where the conductor permitted the train to stand on the crossing of a public street, and absented himself from it, and the teamster attached the horses to it and moved it, from which the injury ensued—*held*, that it was as much the act of the conductor and his employers as if he had been present and directed it to be done. *Rauch v. Lloyd*, 31 Pa. St. 358.—DISTINGUISHED IN *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210.

In such a case, the doctrine of remote and proximate causes concerned in causing the injury, does not arise, and has no application. *Rauch v. Lloyd*, 31 Pa. St. 358.

8. Joint construction by state and municipality.—A Pa. law provided that the state would build a railroad to the limits of a city if the city would extend it to a fixed point within the city, which was done. Afterward the state built into the city itself. *Held*, that the purpose of the city extension was to give access to the heart of the city, and that the city was bound to maintain the road so long as it was necessary for that purpose; but being unnecessary after the state built in, the extension belonged to the city, and it could remove the track if it so desired. *Philadelphia v. Philadelphia & R. R. Co.*, 58 Pa. St. 253.

II. IN CANADA

9. Construction contracts—Claims for extra work.—In 1879 the respondent filed a petition of right for \$608,000 for extra work and damages arising out of his contract for the construction of section 18 of the Intercolonial railway without having obtained a final certificate from F., who held at the time the position of chief engineer. In 1880, F. having resigned, F. S. was appointed chief engineer, and inves-

v. Rylands, 20

on a railroad right to direct train; and the employed, whether by the committee as agencies under his control.

8. a third person any of the agency or manager-conductor and his *Rauch v. Lloyd*,

mitted the train a public street, and the team and moved it, and—held, that it conductor and been present and *Rauch v. Lloyd*, 31 ED IN *Flower v. St.* 210.

trine of remote rained in causing and has no application. *St.* 358.

by state and provided that ad to the limits extend it to a which was done. to the city itself. e city extension eart of the city, and to maintain necessary for that essary after the on belonged to e the track if it *v. Philadelphia*

acts—Claims the respondent \$608,000 for ex-ising out of his n of section 18 without having from F., who on of chief en- resigned, F. S. eer, and inves-

tigated the respondent's claim, and reported a balance in his favor of \$120,371. There-upon the respondent amended his petition and made a special claim for the \$120,371, alleging that F. S.'s report or certificate was a final closing certificate within the meaning of the contract, which question was submitted for the opinion of the court by special case. This report was never approved of by the Intercolonial railway commissioners or by the minister of railways and canals under 31 Vict. c. 13, § 18. *Held*, that assuming F. S. to have been the chief engineer to give the final certificate under the contract, he could give no certificate for such extra work. *Queen v. McGreevy*, 18 *Can. Sup. Ct.* 371.

10. — forfeitures for non-performance.—In a contract for the construction of a section of a railroad, it was provided that if the contractors failed to perform the works within the time agreed upon, July 1, 1871, the contractors would forfeit all money then due and owing to them under the terms of the contract, and also the further sum of \$2000 per week for all the time during which said work remained incomplete after the said July 1, 1871, by way of liquidated damages for such default. The contract was not completed till the end of August, 1872. *Held*, that if the crown insisted on requiring a decree for the penalties, time being declared the essence of the contract, the damages attached, and the crown was entitled to a sum of \$2000 per week from July 1, 1871, till the end of August, 1872, for liquidated damages. *Jones v. Queen*, 7 *Can. Sup. Ct.* 570, 1 *Can. Exch.* 360.

11. Compensation to abutters.—The defendant was the owner of a dwelling house and property fronting on a public highway. In the construction of a government railway the crown erected a bridge or overhead crossing on a portion of the highway in such a manner as to obstruct access from such highway to defendant's property, which he had theretofore freely enjoyed. *Held*, that the defendant was entitled to compensation under the Government Railways Act and the Expropriation Act. *Queen v. Malcolm*, 2 *Can. Exch.* 357.

The fact that plaintiff was present but took no part in a meeting of other persons interested in the manner in which crossings were to be made by a government railway, did not prevent him from recovering com-

pensation for the construction of a crossing which damaged his property. *Queen v. Malcolm*, 2 *Can. Exch.* 357.

The fact that plaintiff received payment for the expropriation of land for government railway purposes does not prevent his recovering additional compensation for the subsequent construction of overhead crossings injuring his land, where it appeared that there was no intention to construct such overhead crossing at the time of the original assessment of damages. *Queen v. Malcolm*, 2 *Can. Exch.* 357.

12. Government aid.—Contracting for the grading and fencing only of a railroad will not deprive a company of the government aid provided for by the statute 34 Vict. c. 2, by reason of a provision in section 3 thereof, to the effect that no such aid should be given to "any portion of a railway for the construction of which portion a contract had been entered into prior to December 7, 1870." *McRae v. Toronto & N. R. Co.*, 22 *U. C. C. P.* 1.

13. Acts and negligence of managers of, when bind the crown.—The establishment of government railways in Canada, of which the minister of railways and canals has the management, direction, and control, under statutory provisions, for the benefit and advantage of the public, is a branch of the public police created by statute for purposes of public convenience, and not entered upon or to be treated as a private and mercantile speculation; and a petition of right does not lie against the crown for injuries resulting from the non-feasance or misfeasance, wrongs, negligences, or omissions of duty of the subordinate officers or agents employed in the public service on said railways. And the crown is not liable as a common carrier for the safety and security of passengers using said railways. *Queen v. McLeod*, 8 *Can. Sup. Ct.* 1; *reversing* 1 *Can. Exch.* 365.

Where in his petition the suppliant alleged in general terms that the injuries he received in an accident on a government railway in the Province of Quebec, resulted from the negligence of the servants of the crown in charge of the train, and from defects in the construction of the railway, an order was made for the delivery to the respondent of particulars of such negligence and defects. *Dube v. Queen*, 2 *Can. Exch.* 381.

On the trial of a petition claiming dam-

ages for personal injuries sustained in an accident upon a government railway, alleged to have resulted from the negligence of the persons in charge of the train, the burden of proof is upon the suppliant. He must show affirmatively that there was negligence. The fact of the accident is not sufficient to establish a *prima facie* case of negligence. *Dube v. Queen*, 3 *Can. Exch.* 147.

Where the injury occasioned to claimant is one that could have been foreseen at the time when part of his farm was taken for the purposes of the railway, it was discharged by an acquittance given to the company, of all damages resulting from the expropriation. *Simoneau v. Queen*, 2 *Can. Exch.* 391.

The Act 43 Vict. c. 8 does not make the crown liable for the acts or omissions of the Grand T. R. Co., in respect of the construction or management by the company of such portion of its railway in the Province of Quebec as was purchased by the crown. *Simoneau v. Queen*, 2 *Can. Exch.* 391.

The crown is not bound to keep in repair the boundary ditches between farms crossed by the Intercolonial railway in the Province of Quebec. *Simoneau v. Queen*, 2 *Can. Exch.* 391.

Apart from statute the crown is not liable for the loss or injury to goods or animals carried by a government railway, occasioned by the negligence of the persons in charge of the train by which such goods or animals are shipped. *Lavoie v. Queen*, 3 *Can. Exch.* 96.

By virtue of the several acts of the parliament of Canada relating to the government railways and other public works, the crown is in such a case liable, and, under the Act 50-51 Vict. c. 16 a petition of right will lie for the recovery of damages resulting from such loss or injury. *Lavoie v. Queen*, 3 *Can. Exch.* 96.—**DISTINGUISHING** *Queen v. McLeod*, 8 *Can. Sup. Ct.* 1; *Queen v. McFarlane*, 7 *Can. Sup. Ct.* 216.

The publication in the Canada Gazette, in accordance with the provisions of the statute under which they are made, of regulations for the carriage of freight on a government railway, is a notice thereof to all persons having occasion to ship goods or animals by such railway. *Lavoie v. Queen*, 3 *Can. Exch.* 96.

Under and by virtue of R. S. C. c. 38, certain regulations were made by the governor-in-council whereby it was provided

that all live stock carried over the Intercolonial railway were to be loaded and discharged by the owner or his agent, and that he assumed all risk of loss or injury in the loading, unloading, and transportation of the same. The regulations were, by section 44, to be read as part of the act, and by section 50 it was enacted that the crown should not be relieved from liability by any notice, condition, or declaration where damage arose from the negligence, omission, or default of any of its officers, employés, or servants. *Held*, that the regulations did not relieve the crown from liability where such negligence was shown. *Lavoie v. Queen*, 3 *Can. Exch.* 96.

14. Limitation of suits against officers and agents.—Section 109 of the Government Railway Act of 1881 (44 Vict. c. 25) provides that "No action shall be brought against any officer, employé, or servant of the department (railways and canals) for anything done by virtue of his office, service, or employment, except within three months after the act committed, and upon one month's previous notice in writing." *Held*, that a contractor with the minister of railways and canals, as representing the crown, for the construction of a branch of the Intercolonial railway, is not an "employé" of the department within this section. *Kearney v. Oakes*, 18 *Can. Sup. Ct.* 148; *reversing* 20 *Nov. Sc.* 30.

15. Decisions relating to particular railways.—On August 2, 1878, H., C. & F. were contractors for the construction of a portion of the Canada Pacific railway, the contract providing that in case the contract was assigned without the consent of the government, the works could be taken out of the contractors' hands and they should have no further claim for payment in respect to the works performed. H., C. & F. afterwards took S. & R. in as partners in the work, and on June 30, 1879, assigned the contract to them. On July 25, 1879, the contract with H., C. & F. was canceled by order in council, because satisfactory progress had not been made with the work; and on being informed by S. & R. that the contract had been transferred to them, an order was passed stating that the government had never consented to the assignment, and that the contractors be notified that the contract was taken out of their hands and annulled. On a petition of right filed by H., C. & F. and S. & R. for damages for

er the Inter-
ded and dis-
ent, and that
njury in the
portation of
re, by section
act, and by
the crown
bility by any
where dam-
omission, or
employés, or
ulations did
ability where
Lavoie v.

against offi-
9 of the Gov-
(44 Vict. c.
on shall be
ployé, or ser-
railways and
virtue of his
except within
mitted, and
tice in writ-
with the min-
s represent-
struction of a
railway, is not
within this
8 Can. Sup.
30.

o partieu-
1878, H.. C.
struction of
railway, the
the contract
sent of the
e taken out
they should
ment in re-
H., C. & F.
partners in
assigned the
5, 1879, the
canceled by
actory prog-
e work; and
that the con-
em, an order
government
gment, and
ed that the
hands and
ght filed by
damages for

breach of contract—*held*, that there was no evidence of a binding assent on the part of the crown to assignment of the contract to S. & R., who therefore were not entitled to recover; and that H., C. & F., the original contractors, by assigning their contract, put it in the power of the government to rescind the contract absolutely, which was done by the order in council, and under the contract could not recover either for the value of work actually done, the loss of prospective damages, or the reduced value of the plant. *Queen v. Smith*, 10 Can. Sup. Ct. 1; reversing 1 Can. Exch. 376.

The Windsor & A. Ry. Co. leased from the government for twenty-one years the Windsor Branch Ry., together with certain running powers over the trunk line of the Intercolonial. Some five years later B., the government superintendent of railways, claiming authority under act of Canada, 37 Vict. c. 16, passed with reference to the Windsor Branch Ry., ejected the W. & A. Ry. from the possession of the W. Branch Ry. and turned it over to the Western C. Ry. In a suit by the W. & A. Ry. against the W. C. Ry. for recovery of possession, etc., the judicial committee of the privy council held that 37 Vict. c. 16, did not extinguish their right and interest in the Windsor Branch under the lease. On a petition of right being filed claiming indemnity for the damage sustained by the failure of the crown to perform said agreement, the exchequer court held that the taking possession of the road by an officer of the crown under the assumed authority of an act of parliament was a tortious act for which a petition of right did not lie. *Held*, on appeal, that the crown by the answer of the attorney-general did not set up any tortious act for which it claimed not to be liable, but alleged that it had a right to put an end to the contract and did so, and that the action of the crown and its officers, being lawful and not tortious, they were justified. But as the agreement was still a continuous, valid, and binding agreement to which they had no right to put an end, this defense failed. Therefore the crown, by its officers, having acted on a misconception of its rights, and wrongfully, because contrary to the stipulations of their agreement, but not tortiously in law, evicted the suppliants, and so, though unconscious of the wrong, by such breach became possessed of the suppliants' property, the petition of right

would lie for the restitution of such property and for damages. *Windsor & A. R. Co. v. Queen*, 10 Can. Sup. Ct. 335; reversing 1 Can. Exch. 380.

Prior to the filing of the petition of right, the suppliants sued the W. C. Ry. for the recovery of the possession of the Windsor Branch, and for moneys received by them for the freight or passengers on said railway since it came into their possession, and obtained judgment for the same, but were not paid. The judgment in question was not pleaded by the crown, but was proved on the hearing by the record of the case in the supreme court. *Held*, per Ritchie, C.J., and Taschereau, J., that the suppliants could not recover against the crown, as damages for breach of contract, what they claimed and had judgment for as damages for a tort committed by the Western C. Ry., and in this case there was no necessity to plead the judgment; per Fournier and Henry, JJ., that the suppliants were entitled to damages for the time they were by the action of the government deprived of the possession and use of the road to the date of the filing of their petition of right. *Windsor & A. R. Co. v. Queen*, 10 Can. Sup. Ct. 335; reversing 1 Can. Exch. 380.

GOVERNOR.

Approval of statutes by, see STATUTES, 2.
Mandamus to, see MANDAMUS, 22.

GRADE.

Change of, at street crossing, damages to abutting owner, see CROSSING OF STREETS AND HIGHWAYS, 119.
Construction of farm crossings under, see FARM CROSSINGS, 8.
Crossing of railways at, see CROSSING OF RAILROADS, 62-68.
Of street, changing, in construction of steam railway, see STREETS AND HIGHWAYS, 152-166.
Right of company to fix, see ELEVATED RAILWAYS, 27.

GRADE CROSSINGS.

Liability of lessee road for defects in, see LEASES, ETC., 65.
Power of commissioners to abolish, see RAILWAY COMMISSIONERS, 21.
Under statutes of the several states, see CROSSING OF STREETS AND HIGHWAYS, 80-113.

GRAIN.

- Contract as to amount of, to be handled, see ELEVATORS, 11.
 Discrimination in receiving and delivering, see DISCRIMINATION, 52.
 Duty to deliver, by elevator company, see ELEVATORS, 6-9.

GRANTS.

- Generally, see LAND GRANTS.
 Acquiring title to right of way by, see RIGHT OF WAY, 5.
 Distinguished from easements, see EASEMENTS, 2.
 From government, lands held under, when subject to taxation, see TAXATION, 113-124.
 — legislature to lay tracks in streets, see STREET RAILWAYS, 7-15.
 Of charters, see CHARTERS.
 — exemption from taxation must be clear and explicit, see TAXATION, 145.
 — franchise to lay tracks in streets, repeal of, see STREET RAILWAYS, 26-28.
 — land under water, see RIPARIAN RIGHTS, 7.
 — power to exercise right of eminent domain to be strictly pursued, see EMINENT DOMAIN, 63.
 — right of way, see EMINENT DOMAIN, 191-232, 1213.
 — — — by guardian, see GUARDIAN AND WARD, 1.
 — — — over public lands, construction of, see PUBLIC LANDS, 38, 39.
 Power of cities to make, see MUNICIPAL CORPORATIONS, 3.
 To steam roads to occupy streets, see STREETS AND HIGHWAYS, 39-105.
 — use streets for electric railway, see ELECTRIC RAILWAYS, 2, 3.

GRAVEL.

- Reservation of right to dig, see DEEDS, 46.
 Right to enter to dig, under Canadian statutes, see EMINENT DOMAIN, 1216.

GRAVEL ROADS.

- Right of railways to cross, see CROSSING OF STREETS AND HIGHWAYS, 8.

GRAVEL TRAINS.

- Carriage of passengers on, see CARRIAGE OF PASSENGERS, 299.

GRIPMAN.

- Of cable car, care required from, see CABLE RAILWAYS, 14.

GROSS NEGLIGENCE.

- Generally, see NEGLIGENCE.
 Allegation of, see ANIMALS, INJURIES TO, 343.
 Exemplary damages in cases of, see CARRIAGE OF PASSENGERS, 636; DAMAGES, 27.
 Exemption from liability for, in free pass, see PASSES, 34.
 Existence of, when question of fact, see NEGLIGENCE, 68.
 Failure to give signals, when deemed to be, see CROSSINGS, INJURIES, ETC., AT, 135.
 Limitation of liability for, see BILLS OF LADING, 63; CARRIAGE OF MERCHANDISE, 450; CARRIAGE OF PASSENGERS, 334; LIMITATION OF LIABILITY, 29.
 — — — to cases of, see CARRIAGE OF LIVE STOCK, 78.
 Of company, as to stock on track, see ANIMALS, INJURIES TO, 37, 50, 60.
 — fellow-servant, liability for, see FELLOW-SERVANTS, 53.
 — person injured, rule as to, see CONTRIBUTORY NEGLIGENCE, 23.
 — vice-principal, liability of company for, see FELLOW-SERVANTS, 82.
 Punitive damages not recoverable except in cases of, see DEATH BY WRONGFUL ACT, 420.
 Recovery notwithstanding contributory negligence in cases of, see TRESPASSERS, INJURIES TO, 112.
 Sufficiency of evidence to prove, see ANIMALS, INJURIES TO, 453.
 When presumed, see ANIMALS, INJURIES TO, 482.

GROSS RECEIPTS.

- Taxation of, see INTERSTATE COMMERCE, 195-198; REVENUE, 7; TAXATION, 98.

GROUND RENTS.

- Contract for, see LANDLORD AND TENANT, 8.

GROUP RATES.

- When just and reasonable, see INTERSTATE COMMERCE, 49.

GROWING CROPS.

- Opinion of witness as to value of, see WITNESSES, 112.

See also CROPS.

GUARANTY.

- By company, of seller's title to stock, see STOCK, 73.
 — one company of another's lease, see LEASES, ETC., 15.
 Cancellation of contract of, see EQUITY, 13.

Of bonds by directors, see BONDS, 14.

— competency of fellow-servants, see FELLOW-SERVANTS, 140.

— dividends, see DIVIDENDS, 8.

Ultra vires contracts of, see ULTRA VIRES, 12.

What are original undertakings within meaning of statute of frauds, see CONTRACTS, 20.

When raises an estoppel, see ESTOPPEL, 34.

1. Generally.—A company chartered with the usual powers cannot guarantee the payment of the expenses of a musical festival, although it was held under a reasonable belief that it would increase the business of the company and therefore be of pecuniary benefit. *Davis v. Old Colony R. Co.*, 3 Am. & Eng. R. Cas. 543, 131 Mass. 258, 41 Am. Rep. 221.

2. Statute of frauds.—A guaranty of the solvency of notes, made by a party who paid the notes to a contractor for work done for such party by the contractor, on a contract to pay him in the notes of others, to be made good if insolvent, is not a promise to pay the debt of another, and therefore is not within the statute of frauds. *Mobile & G. R. Co. v. Jones*, 57 Ga. 198.

3. Guaranty of payment of dividends.—A railroad company having, under its charter, powers "to do all lawful acts properly incident to a corporation, and necessary and proper to the transaction of the business for which it was incorporated," and "such additional powers as may be convenient for the due and successful execution of the powers granted" in its charter, has not the authority—in the absence of any explicit grant of such power—to guarantee a specified dividend on its stock, as a premium to induce a subscriber to take it, although the guaranty may have been made in part consideration of necessary services to be rendered for the company by the subscriber. *Memphis G. & E. Co. v. Memphis & C. R. Co.*, 30 Am. & Eng. R. Cas. 522, 85 Tenn. 703, 4 Am. St. Rep. 798, 5 S. W. Rep. 52.

Where a land company guarantees a certain annual dividend on the stock of a railroad, and subsequently both companies become insolvent, the holders of such stock are entitled to prove claims against the land company to the amount of the par value of their stock. *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47.

4. — of payment of note.—A bond executed under the seal of a railroad and

purporting to guarantee the payment of a note at a place and time different from that specified in the note, and requiring that the note should only be transferred with the bond, is not such a guaranty of the note as would pass the legal title thereto so as to cut off the equities of the maker. *Peck v. Bligh*, 37 Ill. 317.

A railroad company, through its treasurer, executed a promissory note for the purpose of raising money, payable to the order of the treasurer, which the defendants, certain officers of the company, by an indorsement thereon, guaranteed. *Held*, that the contract of guaranty was not with the payee of the note, but with the first holder for value who took the note with the guaranty upon it; and the contract is to be interpreted as if when plaintiff paid the money to the corporation, all the parties were present, and then signed and delivered the note and guaranteed it. *Jones v. Dow*, 26 Am. & Eng. R. Cas. 98, 142 Mass. 130, 7 N. E. Rep. 839. See also *Baldwin v. Dow*, 130 Mass. 416.

In such cases it is sufficient to satisfy the statute of frauds if the guaranty shows who the parties to the contract are by description instead of by name; and if the promisor or the promisee is described instead of named, parol evidence is admissible to apply the description and identify the person who is meant. *Jones v. Dow*, 26 Am. & Eng. R. Cas. 98, 142 Mass. 130, 7 N. E. Rep. 839. See also *Baldwin v. Dow*, 130 Mass. 416.

5. — of payment of profits.—The directors of a railway company have no power, for the purpose of increasing the traffic, to guarantee certain profits and to secure the capital of an intended steam-packet company, which was to act in connection with the railway. *Colman v. Eastern Counties R. Co.*, 10 Beav. 1, 11 Jur. 74, 16 L. J. Ch. 73.

6. — of payment of subscriptions.—A guaranty to make good, to a certain amount, any deficit in the payment of certain subscriptions to the capital stock of a railroad company, is binding as to the valid subscriptions only, having been based upon the assumption that the subscriptions had been made, and that they were valid. *Sedalia, W. & S. R. Co. v. Smith*, 27 Mo. App. 371. *Wilson v. Adams Exp. Co.*, 27 Mo. App. 360.—*Distinguishing Price v. Oswego & S. R. Co.*, 50 N. Y. 213.

7. Guaranty of payment of bonds, generally.—Where one company guarantees the bonds of another and the guaranty is partly performed, as by the payment of interest for a time, to that extent, at least, a mortgage executed to indemnify the guarantor company cannot be held void on the ground that the guaranty was *ultra vires*. *Macon & A. R. Co. v. Georgia R. Co.*, 1 *Am. & Eng. R. Cas.* 378, 63 *Ga.* 103.

Where one company guarantees the bonds of another, the act of the guarantor is a distinct contract and may be binding independently of the validity of the bonds. *Zabriskie v. Cleveland, C. & C. R. Co.*, 23 *How. (U. S.)* 381.—APPLIED IN *Humphreys v. St. Louis, I. M. & S. R. Co.*, 37 *Fed. Rep.* 307; *Tod v. Kentucky Union Land Co.*, 57 *Fed. Rep.* 47; *Connecticut Mut. L. ins. Co. v. Cleveland, C. & C. R. Co.*, 26 *How. Pr. (N. Y.)* 225. QUOTED IN *Toppa v. Cleveland, C. & C. R. Co.*, 1 *Flipp. (U. S.)* 74.—*Connecticut Mut. L. Ins. Co. v. Cleveland, C. & C. R. Co.*, 26 *How. Pr. (N. Y.)* 225, 41 *Barb.* 9; *affirming* 23 *How. Pr.* 180.

A city issued its bonds in aid of a railway, which the company guaranteed. Subsequently the company consolidated with another, and the part of the road for which the bonds were issued was sold to a third corporation, which in turn sold it to defendant. *Held*, that the liability upon the guaranty became a part of the indebtedness of the first consolidated company, and the defendant did not become liable therefor in purchasing the road. *Wright v. Milwaukee & St. P. R. Co.*, 25 *Wis.* 46.—FOLLOWED IN *Gilman v. Sheboygan & F. du L. R. Co.*, 37 *Wis.* 317.

8. — power to guarantee bonds.—Where a railroad is authorized by the laws of the state to issue its own bonds to raise money to build a road, it may guarantee the bonds of municipal corporations issued to aid the road. *Chicago, R. I. & P. R. Co. v. Howard*, 7 *Wall. (U. S.)* 392.—FOLLOWED IN *Tod v. Kentucky Union Land Co.*, 57 *Fed. Rep.* 47.—*Evans v. Cleveland & P. R. Co.*, 2 *Pittsb. (Pa.)* 483.

A business corporation having the power to execute negotiable paper may obligate itself as a surety or guarantor. If such a corporation receive commercial paper or bonds in due course of business, in trans-

ferring the same it may lawfully obligate itself as indorser or guarantor. Such a contract is a new and independent one and rests upon a sufficient consideration, if entered into as a legitimate means of increasing the value of the paper. *Tod v. Kentucky Union Land Co.*, 57 *Fed. Rep.* 47.—FOLLOWING *Chicago, R. I. & P. R. Co. v. Howard*, 7 *Wall. (U. S.)* 392.

An incorporated land company which has the power to execute negotiable paper, and which has for its object the building of a railroad to develop certain mining and timber lands, may guarantee the bonds and the interest on the stock of the railroad for the purpose of raising money to complete the railway. *Tod v. Kentucky Union Land Co.*, 57 *Fed. Rep.* 47.—APPLYING *Low v. California Pac. R. Co.*, 52 *Cal.* 53; *Smead v. Indianapolis, P. & C. R. Co.*, 11 *Ind.* 104; *Zabriskie v. Cleveland, C. & C. R. Co.*, 23 *How. (U. S.)* 381. APPROVING *Ellerman v. Chicago J. R. & U. S. Co.*, 49 *N. J. Eq.* 217, 23 *Atl. Rep.* 292. QUOTING *Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 *U. S.* 98, 2 *Sup. Ct. Rep.* 221.

Such land company was authorized to form "a temporary or permanent consolidation with any railway company," and while the temporary consolidation existed, the railway company executed and delivered to the land company its second mortgage bonds. Subsequently, the provision in the charter allowing the consolidation was repealed. *Held*, that this did not prevent the land company from continuing the consolidation, or from guaranteeing the bonds of the railroad. *Tod v. Kentucky Union Land Co.*, 57 *Fed. Rep.* 47.

A corporation having power to take and dispose of the securities of another corporation may guarantee their payment if it disposes of them to another party in payment of its own debt; if it buys property subject to a mortgage securing bonds, it may guarantee the payment thereof if said guaranty is taken as payment *pro tanto* of its debt; the two transactions are the same in result, and mere routine of action cannot affect validity. *Ellerman v. Chicago J. R. & U. S. Co.*, 49 *N. J. Eq.* 217, 23 *Atl. Rep.* 287.

Where a statute authorizes two or more connecting roads to enter into any arrangement to aid in the construction of another road by subscribing to its capital stock, or otherwise, it authorizes them to guarantee

* Guaranty of bonds of another company, validity of, see note, 26 *AM. & ENG. R. CAS.* 105.

lawfully obligator. Such dependent one consideration, if the means of in- paper. *Tod v. 7 Fed. Rep. 47.* I. & P. R. Co. 92.

pany which has able paper, and e building of a naining and tim- bonds and the railroad for the o complete the *Union Land Co., G Low v. Cali- 53; Smead v. o., 11 Ind. 104; C. R. Co., 23 ING Ellerman v. 19 N. J. Eq. 217; Green Bay & oat Co., 107 U.*

s authorized to anent consolida- any," and while existed, the rail- delivered to the mortgage bonds. in the charter was repealed. prevent the land the consolida- the bonds of the *Union Land Co.,*

wer to take and another corpo- r payment if it er party in pay- buys property uring bonds, it e thereof if said ent *pro tanto* of ns are the same of action cannot v. *Chicago J. R. 217, 23 Atl. Rep.*

zes two or more nto any arrange- ction of another capital stock, or em to guarantee

the bonds of the aided corporation. *Connecticut Mut. L. Ins. Co. v. Cleveland, C. & C. R. Co., 26 How. Pr. (N. Y.) 225, 41 Barb. 9; affirming 23 How. Pr. 180.*

B., a railroad company, under its corporate seal, and the signature of its president, and the attestation of its secretary, guaranteed the payment of interest upon the bonds issued by C., another railroad company, and for a number of years acquiesced in the guaranty; it then refused to pay further. D., a holder of some of the bonds, brought suit against B. to recover instalments of interest due. On the trial, B. set up the defense that it had never authorized the guaranty; the verdict was in favor of D. *Held*, that the evidence of the authority of the company to make the guaranty was sufficient to justify the finding. *Camden & A. R. Co. v. Cox, (Pa.) 26 Am. & Eng. R. Cas. 102.*

9. — consideration of the guaranty.—If a guaranty be of a prior debt or contract, there must be some good consideration received by the guarantor; but where the guaranty is of the payment of a negotiable coupon railroad bond made before its delivery, the same consideration which upholds the bond upholds the guaranty. *Toppin v. Cleveland, C. & C. R. Co., 1 Flipp. (U. S.) 7.*

And in such case, if the guaranty be general, it is negotiable the same as the bond on which it is indorsed. *Toppin v. Cleveland, C. & C. R. Co., 1 Flipp. (U. S.) 74.*

Where a guaranty of railroad bonds is made by an indorsement thereon using the words, "for value received," it expresses a sufficient consideration on its face. *Connecticut Mut. L. Ins. Co. v. Cleveland, C. & C. R. Co., 26 How. Pr. (N. Y.) 225, 41 Barb. 9; affirming 23 How. Pr. 180.*

Where connecting roads are of different gauges and one guarantees the bonds of the other, an agreement by the guarantee company to change the gauge of its road to that of the guarantors, for the purpose of through traffic, is a sufficient consideration to support the guaranty. *Zabriskie v. Cleveland, C. & C. R. Co., 23 How. (U. S.) 381.*

10. — rights of bona fide holders.—Where a company files a bill to have canceled its guaranty of the bonds of another company on the ground of illegality and fraud, the bill is not demurrable for failing to show that defendants are not bona fide holders for value. In such case it would

5 D. R. D.—67.

devolve upon the defendants, who were indorsors, to show that they were bona fide holders, if fraud or illegality in the inception of the bonds was stated. *Louisville, N. A. & C. R. Co. v. Ohio Valley I. & C. Co., 57 Fed. Rep. 42.*

By the Vermont statute, only bills and notes are negotiable, and not a guaranty of a bond or coupon, although such bond or coupon should be negotiable; and in an action by a bona fide transferee of the bonds or coupons upon the guaranty, the guarantor may make any defense to the action that he could have made if the suit had been brought by the original payee. *Eastern Townships Bank v. St. Johnsbury & L. C. R. Co., 40 Am. & Eng. R. Cas. 566, 40 Fed. Rep. 423.*

One railroad company guaranteed the bonds of a connecting road for the purpose of enabling it to build its road. *Held*, that the contract of guaranty upon its face was such as the company had power to make, and the fact that it was not authorized by its charter could not affect the right of a bona fide holder without notice, it being within the general powers of the company to sell and guarantee bonds where the general agent of the company had represented in the sale of the bonds that it was within its powers. *Madison & I. R. Co. v. Norwith Sav. Soc., 24 Ind. 457. Atchison, T. & S. F. R. Co. v. Fletcher, 24 Am. & Eng. R. Cas. 34, 35 Kan. 236, 10 Pac. Rep. 596.*

11. — pleading in actions.—Where a general statute authorizes a railroad company to guarantee the bonds of another company, but no such power exists in its charter, in suing upon the guaranty it is not necessary to plead the authority of the company to make the guaranty. *Toppin v. Cleveland, C. & C. R. Co., 1 Flipp. (U. S.) 74.*

Where a bondholder sues a company guaranteeing the bonds of another, averments in the declaration "that the guaranty was duly signed by the defendant through its president, who was authorized to execute the same, and was afterward" on a day named "duly ratified and confirmed by the stockholders of the company," are sufficient, where the statute authorizes such guaranty to be made only after assented to by a two-thirds vote of the stockholders at a meeting called for the purpose. *Toppin v. Cleveland, C. & C. R. Co., 1 Flipp. (U. S.) 74.*

12. Guaranty of payment of interest on bonds.—Under the N. Y. Act of

1850, ch. 172, corporations were authorized to contract for the payment of more than 7 per cent. interest; and such contracts being binding on a corporation itself, are binding upon its guarantors. *Rosa v. Butterfield*, 33 N. Y. 665.

Where one company guarantees the bonds of another, and is afterwards sued on the guaranty, a complaint stating that the bonds were indorsed on their face, showing that payment of the interest was guaranteed by the defendant and secured by a lien on the road, and that defendant requested the statement to be made that it had guaranteed the interest, and had leased the road, with full knowledge of the facts, and that the purchase of the bonds had been induced thereby, is sufficient, on demurrer, to show that defendant guaranteed the payment. *Opdyke v. Pacific R. Co.*, 3 Dill. (U. S.) 55.

13. — of payment of interest coupons.—A statute which forbids a railroad company to issue its notes or bonds in sums less than \$100 does not preclude a company from executing a guaranty to "pay the interest upon the within bond as specified in the interest coupons thereto attached," although the interest in each coupon be less than \$100, such guaranty not being a separate promise to pay each coupon, but a guaranty to pay the whole interest to become due on the bond. *Eastern Townships Bank v. St. Johnsbury & L. C. R. Co.*, 40 Am. & Eng. R. Cas. 566, 40 Fed. Rep. 423.—*Distinguishing Thomas v. West Jersey R. Co.*, 101 U. S. 71; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 630, 6 Sup. Ct. Rep. 1094; *Oregon R. & N. Co. v. Oregonian R. Co.*, 130 U. S. 1, 9 Sup. Ct. Rep. 409.

Defendant, in pursuance of an agreement with the B., H. & E. R. Co., guaranteed the payment of the interest coupons to the bonds of the latter corporation, a written guaranty thereof being indorsed upon each bond. Defendant subsequently became possessed of said bonds and transferred a portion of them, with the coupons and guaranties, to plaintiffs' testator for value. In an action upon the guaranties—*held*, (Allen, J., dissenting) that even if the guaranties when made were *ultra vires*, and therefore not binding, defendant having transferred the bonds with the guaranties thereon uncanceled, it was to be presumed that they were intended to be, and were, taken by the purchaser as additional secu-

rity and as part of the purchase; that they were to be treated as if written at the time of the transfer; and so treating them, it was immaterial that the true consideration was not expressed therein. *Arnot v. Erie R. Co.*, 67 N. Y. 315, 15 Am. Ry. Rep. 133; *affirming 5 Hun 608*.

GUARD RAILS.

At street crossings, sufficiency of, see CROSSING OF STREETS AND HIGHWAYS, 19.

Duty of company to block, see EMPLOYES, INJURIES TO, 67.

Effect of notice of unblocked condition of, see EMPLOYES, INJURIES TO, 230.

GUARDIAN AND WARD.

Bond of father suing as guardian, see CHILDREN, INJURIES TO, 156.

Guardians as parties in condemnation proceedings, see EMINENT DOMAIN, 264.

Right of guardian to sue for causing death of ward, see DEATH BY WRONGFUL ACT, 93.

Taking land of ward by consent of guardian, see EMINENT DOMAIN, 195.

1. Donation or grant of right of way by guardian. *—Indiana Rev. St. of 1881, § 3907, does not authorize a court to empower a guardian to donate a right of way for a railroad over his ward's lands; and a deed by the guardian for such right of way, without the prior approval of the court of a price agreed upon by the guardian, is void. *Indiana, B. & W. R. Co. v. Brittingham*, 98 Ind. 294. *Indiana, B. & W. R. Co. v. Allen*, 100 Ind. 409.

2. Validity of the sale and deed.—Cal. Gen. Railroad Act of 1861, as amended in 1863, § 23, authorizing a guardian to sell the real estate of his ward for the purposes of a railroad, subject to the approval of a probate judge, is constitutional. *Hodgdon v. Southern Pac. R. Co.*, 75 Cal. 642, 17 Pac. Rep. 928.

A certificate of the probate judge to the deed of the guardian, which recites that he, as judge, has examined the deed and the sale of the land described therein; that the land is necessary for the purposes of the railroad company; that the consideration paid is fair and equivalent for the land, and

* Eminent domain. Right of guardian to agree to damages to ward's land, see 51 AM. & ENG. R. CAS. 568, *abstr.*

2. phase; that they
then at the time
treating them, it
the consideration
Arnot v. Erie
Ry. Rep. 133;

LS.
cy of, see CROSS-
WAYS, 19.
see EMPLOYEES, IN-
ed condition of,
to, 230.

WARD.
ardian, see CHIL-
ndemnation pro-
OMAIN, 264.
r causing death
WRONGFUL ACT,
ent of guardian,
5.

t of right of
diana Rev. St. of
orize a court to
onate a right of
n ward's lands;
n for such right
approval of the
on by the guar-
& *W. R. Co. v.*
Indiana, B. &
7, 409.
e and deed.—
861, as amended
guardian to sell
for the purposes
ne approval of a
ional. *Hodgdon*
Cal. 642, 17 *Pac.*

ate judge to the
e recites that he,
e deed and the
herein; that the
purposes of the
ne consideration
or the land, and

t of guardian to
nd, see 51 *AM. &*

that the sale is just and proper; and which
thereupon approves and confirms the sale
and deed—is a sufficient approval within the
requirements of section 23. *Hodgdon v.*
Southern-Pac. R. Co., 75 *Cal.* 642, 17 *Pac.*
Rep. 928.

The approval and confirmation of the
probate court, indorsed upon or annexed to
a conveyance by a purported guardian to a
railway company, pursuant to Minn. Gen.
St. 1878, ch. 57, § 36, is no proof that the
person who executed the conveyance was
such guardian. *Burrell v. Chicago, M. &*

St. P. R. Co., 43 *Minn.* 363, 45 *N. W. Rep.*
849.

3. **Guardians ad litem.**—A next
friend is admitted by the court to prosecute
a right for an infant, but he can do nothing
to operate as an injury to the infant's
rights, and therefore cannot compromise a
suit instituted in the infant's behalf to re-
cover damages for personal injuries; nor
will a judgment rendered solely on an agree-
ment between him and the defendant bind
the infant. *Tennessee C., I. & R. Co. v.*
Hayes, 97 *Ala.* 201, 12 *So. Rep.* 98.

H

HABITS.

Of deceased, proof of, on question of dam-
ages, see DEATH BY WRONGFUL ACT,
230, 276.

— person injured, evidence of, on question of
contributory negligence, see CONTRIBU-
TORY NEGLIGENCE, 97.

— servant as evidence of incompetency, see
FELLOW-SERVANTS, 485.

HACKS AND HACK LINES.

Giving exclusive privileges to, at stations,
see also DISCRIMINATION, 30.

1. **Right to grant exclusive privi-
leges to hackmen.***—A rule by which a
railroad company reserves the right to as-
sign places upon its own grounds to the
different hackmen, and to exclude from
such places others not assigned thereto, is
reasonable, and a rule which the company
has a right to enforce. *Cole v. Rowen*, 50
Am. & Eng. R. Cas. 1, 88 *Mich.* 219, 50 *N.*
W. Rep. 138.—**EXPLAINING Kalamazoo H.**
& *B. Co. v. Sootsma*, 84 *Mich.* 194.

Such a rule is not void as against public
policy. *Brown v. New York C. & H. R. R. Co.*,
75 *Hun* 355, 27 *N. Y. Supp.* 69, 56 *N. Y.*
S. R. 748.—**DISAPPROVING Cravens v. Rodg-**
ers, 101 *Mo.* 247; *Montana Union R. Co.*
v. Langlois, 9 *Mont.* 419; *Kalamazoo H.*
& *B. Co. v. Sootsma*, 84 *Mich.* 194.

* Right of railroad companies to exclude
hackmen from station grounds, see note, 50 *AM.*
& *ENG. R. CAS.* 9.

Right of company to admit certain hackmen
or other solicitors, to station grounds, and to
exclude others, see note, 22 *AM. ST. REP.* 699.

Rights of hackmen and other solicitors of pas-
sengerage at depots, wharves, etc., see note, 13 *L.*
R. A. 848.

The following rules adopted by a railroad
company for enforcement upon its own
grounds—*held*, reasonable: "*a.* Location
for omnibuses and hacks will be assigned to
parties, who will occupy them while stand-
ing at the depot to get passengers. *b.*
Drivers must take the stands which are as-
signed to them, and will not be allowed to
take places assigned to others. *c.* The po-
sitions assigned must not be occupied more
than twenty minutes previous to the arriv-
ing time of passenger trains. *d.* Each driver
must remain by his hack or omnibus when
soliciting passengers. *e.* No hacks or om-
nibuses will be allowed to stand in the
porch longer than necessary to load or un-
load passengers. *f.* The drivers of hacks
and omnibuses will not be allowed in wait-
ing rooms except on business. *g.* Profane,
obscene, boisterous language or quarreling
will not be allowed on the depot grounds.
h. Only one transfer wagon will be allowed
to stand at the baggage room, which will be
the baggage wagon that is hired by the
railroad companies to transfer baggage be-
tween the different depots." *Cole v. Rowen*,
50 *Am. & Eng. R. Cas.* 1, 88 *Mich.* 219, 50
N. W. Rep. 138.

The *N. Y. Act* of 1892, ch. 676, providing
that no preference in the transaction of busi-
ness of a common carrier on its cars or in
its depots or buildings, or on its grounds,
shall be granted by any railroad company to
any one of two or more persons, associations,
or corporations competing in the same
business, or in the business of transporting
property for themselves or others, does not
prevent a railroad company from granting
certain hackmen the exclusive privilege of
entering its yards or grounds with their

hacks. *Brown v. New York C. & H. R. R. Co.*, 75 Hun 355, 27 N. Y. Supp. 69, 56 N. Y. S. R. 748. *New York C. & H. R. R. Co. v. Flynn*, 74 Hun 124, 26 N. Y. Supp. 859, 56 N. Y. S. R. 375.—QUOTING *Old Colony R. Co. v. Tripp*, 147 Mass. 35.

Hackmen are not "common carriers" within the meaning of the N. Y. Act of 1890, ch. 565, § 34, providing that railroads should give "no preference for the transaction of business of common carriers on its cars, or in its depots, or on its grounds, to any person competing in the same business," and, under the act, railroads are not required to allow all hack drivers alike to use their grounds as a standing place; neither are railroad companies required to furnish such accommodations by the common law. *New York C. & H. R. R. Co. v. Sheeley*, 27 N. Y. Supp. 185, 57 N. Y. S. R. 766.

The granting of an exclusive privilege to a cab proprietor at a railway station will not warrant an injunction on the application of another proprietor who had been refused, where no inconvenience to the public is shown. *Beadell v. Eastern Counties R. Co.*, 26 L. J. C. P. 250, 2 C. B. N. S. 509, 1 Ry. & C. T. Cas. 56. *Ex parte Painter*, 2 C. B. N. S. 702, 1 Ry. & C. T. Cas. 58. *Ilfracombe Public Conveyance Co. v. London & S. W. R. Co.*, 1 Ry. & C. T. Cas. 61.

An omnibus proprietor who carries passengers and their luggage, for hire, to and from a railway station, cannot maintain an action against the company for refusing to allow him to drive his vehicle into the station yard. *Barker v. Midland R. Co.*, 18 C. B. 46, 25 L. J. C. P. 184, 1 Ry. & C. T. Cas. 17.

2. Exercise of the right and its effect.—The owner of an omnibus line, who has made an approach to a railroad platform under an oral agreement with the agent of the railroad company that he should have its exclusive use, cannot limit the teams of a competing line to other parts of the platform at which the chance of obtaining passengers is not so good, and to which in dry weather vehicles can be driven with some difficulty, while in wet weather it is very hard to do so. *Cravens v. Rodgers*, 42 Am. & Eng. R. Cas. 656, 101 Mo. 247, 14 S. W. Rep. 106.—APPROVED IN *Kalamazoo, H. & B. Co. v. Sootsma*, 84 Mich. 194.

A court will not inquire into the reasonableness of the compensation exacted by a railroad of hackmen for the privilege of

using its grounds, where it offers all the same privileges upon paying a compensation. *New York C. & H. R. R. Co. v. Sheeley*, 27 N. Y. Supp. 185, 57 N. Y. S. R. 766.

A depot master who, acting under the direction of the railroad company, in attempting to enforce a rule, uses no more force than is necessary to eject a hackman from a place to which he has not been assigned, and which he is unlawfully attempting to occupy and hold, is not guilty of an assault and battery. *Cole v. Rowen*, 50 Am. & Eng. R. Cas. 1, 88 Mich. 219, 50 N. W. Rep. 138.

When a passenger orders a carriage to meet him at, and take him from, the terminus of a common carrier, such carriage is so far the private carriage of the passenger that it ceases to be "standing for hire," and to be a "hackney carriage," within the meaning of a rule of the common carrier forbidding hackney carriages to attend in certain specified places. *Griswold v. Webb*, 40 Am. & Eng. R. Cas. 683, 16 R. I. 649, 19 Atl. Rep. 143.—QUOTING *Tobin v. Portland, S. & P. R. Co.*, 59 Me. 183; *Old Colony R. Co. v. Tripp*, 147 Mass. 35. REVIEWING *Barker v. Midland R. Co.*, 18 C. B. 46; *In re Marriott*, 1 C. B. N. S. 499.

A common carrier owning or controlling its terminals may exclude from them persons soliciting trade or hacking or expressing without its license, but cannot deprive a passenger of the privilege of being carried from the terminus in a convenient and usual way, nor can it compel a passenger to take certain carriages or none. *Griswold v. Webb*, 40 Am. & Eng. R. Cas. 683, 16 R. I. 649, 19 Atl. Rep. 143.

Where the owner of a wharf leased to a common carrier of passengers brings an action of trespass against the driver of a hackney carriage, alleging that the defendant, in violation of the rules of the wharf, entered and remained upon the wharf at a place set apart for hackney carriages which had been licensed by the owner, it is a sufficient defense that the defendant went upon the wharf pursuant to a special contract to get a certain passenger who was to arrive at the wharf by boat, and was not there soliciting business. *Griswold v. Webb*, 40 Am. & Eng. R. Cas. 683, 16 R. I. 649, 19 Atl. Rep. 143.

A regulation of a railroad company forbidding hackmen, expressmen, and loafers

offers all the
a compensa-
R. R. Co. v.
7 N. Y. S. R.

ng under the
company, in at-
uses no more
ect a hackman
s not been as-
fully attempt-
ot guilty of an
Rowen, 50 Am.
219, 50 N. W.

a carriage to
from, the ter-
such carriage
of the passen-
ding for hire,"
ge," within the
common carrier
s to attend in
Swold v. Webb,
16 R. I. 649, 19
Robin v. Port-
183; Old Col-
35. REVIEW-
18 C. B. 46;
499.

ing or control-
de from them
acking or ex-
but cannot de-
vilege of being
a convenient
mpel a passen-
or none. *Gris-*
g. R. Cas. 683,

arf leased to a
s brings an ac-
e driver of a
at the defend-
s of the wharf,
the wharf at a
carriages which
ner, it is a suffi-
ant went upon
cial contract to
was to arrive at
ot there solicit-
Webb, 40 Am. &
49, 19 Atl. Rep.

d company for-
en, and loafers

from coming within a passenger depot is reasonable and will be enforced; but a hackman holding a baggage check may enter the baggage room therefor. *Summitt v. State, 9 Am. & Eng. R. Cas. 302, 8 Lea (Tenn.) 413, 41 Am. Rep. 637.*

A person who stands his cab on a thoroughfare owned by a railway company, and refuses to leave when requested to do so, is a wilful trespasser, although such thoroughfare has the appearance of a public street and the company allows certain cabs to stand in it upon payment of a weekly sum. *Foulger v. Steadman, L. R. 8 Q. B. 65, 42 L. J. M. C. 3, 76 L. T. 395.*

3. The right denied.—A railroad company cannot give to the proprietor of a hack line the exclusive right to stand hacks at the platform of its depot for the purpose of soliciting custom from passengers, and exclude others from bringing their vehicles to the platform for the same purpose. *McConnell v. Pedigo, 50 Am. & Eng. R. Cas. 5, 92 Ky. 465, 18 S. W. Rep. 15.*—APPROVING *Montana Union R. Co. v. Langlois, 9 Mont. 419, 18 Am. St. Rep. 755.* CRITICISING *Old Colony R. Co. v. Tripp, 147 Mass. 35, 9 Am. St. Rep. 661.* DISTINGUISHING *Barker v. Midland R. Co., 18 C. B. 46.*—*Montana Union R. Co. v. Langlois, 42 Am. & Eng. R. Cas. 646, 9 Mont. 419, 8 L. R. A. 753, 24 Pac. Rep. 209.*—CRITICISING *Old Colony R. Co. v. Tripp, 147 Mass. 35.*—APPROVED IN *McConnell v. Pedigo, 50 Am. & Eng. R. Cas. 5, 92 Ky. 465; Kalamazoo H. & B. Co. v. Sootsma, 84 Mich. 194.*

A railroad company cannot legally give to one hack and bus company the right to the use and occupancy of a portion of its depot grounds, to the exclusion of others engaged in the like business of the carriage of passengers and freight to and from its depot. *Kalamazoo H. & B. Co. v. Sootsma, 47 Am. & Eng. R. Cas. 445, 84 Mich. 194, 47 N. W. Rep. 667.*—APPROVING *Cravens v. Rodgers, 101 Mo. 247, 14 S. W. Rep. 106; Montana Union R. Co. v. Langlois, 9 Mont. 419, 24 Pac. Rep. 209.* DISAPPROVING *Old Colony R. Co. v. Tripp, 147 Mass. 35.*—EXPLAINED IN *Cole v. Rowen, 88 Mich. 219.*

How. St. § 3355, requiring all railroad companies to grant equal facilities for the transportation of passengers and freight to all persons, companies, or corporations, does not relate entirely to the mere carriage in

the cars of the road, but includes the receiving of such passengers and freight at its depots, and by other "persons, companies, or corporations," at the point upon its road where the carriage ends. *Kalamazoo H. & B. Co. v. Sootsma, 47 Am. & Eng. R. Cas. 445, 84 Mich. 194, 47 N. W. Rep. 667.*

A railroad company can make all needful reasonable rules and regulations concerning the use of its depot and grounds, and can exclude all persons therefrom who have no business with the railroad or passengers going to and coming from its trains or depots, and it probably can prohibit all persons from soliciting business for themselves upon its premises; but it cannot arbitrarily admit one common carrier of passengers or freight to its depots or grounds, and exclude all others, for no other reason than that it is for its own profit or pleasure to do so. *Kalamazoo H. & B. Co. v. Sootsma, 47 Am. & Eng. R. Cas. 445, 84 Mich. 194, 47 N. W. Rep. 667.*

Passengers arriving at or departing from the station of a common carrier are entitled to equal convenience and opportunity to approach said station or depart therefrom, and in so doing are entitled to whatever benefit of competition may grow out of the contests of others to supply the public demands and receive the compensation therefor. *Montana Union R. Co. v. Langlois, 42 Am. & Eng. R. Cas. 646, 9 Mont. 419, 8 L. R. A. 753, 24 Pac. Rep. 209.*

A rule or regulation, as applied to the government of the conduct of persons, or of a class of persons, contemplates uniformity and not discrimination, and the grant by a railroad company of a platform privilege at its depot to one hackman, to the exclusion of all others, is therefore not such a rule or regulation as applied to the right of a common carrier to make and enforce all reasonable rules and regulations necessary to govern persons coming to its station buildings, platform, and grounds. *Montana Union R. Co. v. Langlois, 42 Am. & Eng. R. Cas. 646, 9 Mont. 419, 8 L. R. A. 753, 24 Pac. Rep. 209.*

The granting of an exclusive privilege to an omnibus proprietor at a railway station, in the absence of special circumstances showing it to be reasonable, is an undue and unreasonable preference. *In re Marriott, 1 C. B. N. S. 499, 3 Jur. N. S. 493, 26 L. J. C. P. 154, 1 Ky. & C. T. Cas. 47.* Contra, see *Hole v. Digby, 27 W. R. 884.*

4. Municipal regulations as to hacks at stations.—A city has power to enact an ordinance authorizing police officers to prescribe the places where omnibuses, hacks, and other vehicles shall stand at a railroad depot, and requiring drivers to obey the directions of such officers in regard to the places which their respective vehicles shall occupy. *Veneman v. Jones*, 118 Ind. 41, 20 N. E. Rep. 644.

Where the charter of a city authorizes it to regulate hacks, carts, omnibuses, etc., an ordinance requiring hackmen to take such positions at a railway station as the police may assign, and to be subject to the commands of the police, is reasonable, and will be enforced, although the grounds where the hackmen resort are not the property of the city or public property of any kind. *St. Paul v. Smith*, 27 Minn. 364, 38 Am. Rep. 296, 7 N. W. Rep. 734.

Where the place assigned the owner of a vehicle is taken possession of by another person, who refuses to vacate it upon request, the former is justified in representing the facts to a police officer, and is not liable for inciting an arrest where the officer, upon the continued violation of the ordinance in his presence, arrests the offending party. *Veneman v. Jones*, 118 Ind. 41, 20 N. E. Rep. 644.

City ordinances, so far as they attempt to interfere with the arrangements made between a railroad company and an omnibus company for the delivery of passengers or baggage, are invalid, especially when applied to such arrangements as are made on the company's grounds or in its cars. *Napman v. People*, 19 Mich. 352.

A city whose charter authorizes it to regulate hackmen, porters, etc., may make an ordinance forbidding the solicitation of custom at a depot or platform of a railroad within the corporate limits of the city. *Chillicothe v. Brown*, 38 Mo. App. 609.

In an action by the city for the violation of such ordinance it is no defense that the superintendent of the railroad had drawn a line on the platform, and told defendants that they might stand outside the line and solicit patronage, as the railroad company had no authority to make a regulation that would interfere with the municipal ordinance. *Chillicothe v. Brown*, 38 Mo. App. 609.

The highways of a city are absolutely free for the use of all, unless this general right

be restricted by competent authority. The councils would have power to ordain such ordinances as are necessary for the regulation of omnibuses, independent of the Pa. Act of April 15, 1850, upon that subject. *Com. ex rel. v. Baldwin*, 14 Phila. (Pa.) 93.

5. Nuisance in obstructing streets.—Where railroad authorities, maintaining a station in a large city, claim the right to exclude hackmen from one half of the street along the side of the station, and file a bill to prevent the obstruction of the street, on the ground that it is a nuisance, the bill cannot be maintained, where the evidence shows that there is no special or peculiar injury to the business of the company, but that it does annoy and somewhat interfere with its passengers. *Pittsburgh, Ft. W. & C. R. Co. v. Cheevers*, 44 Ill. App. 118.

HAND-CARS.

Allegation of negligence in management of, see CARRIAGE OF PASSENGERS, 547.

Alleging the furnishing of defective, see EMPLOYEES, INJURIES TO, 531.

Assumption of extra risk in the operation of, see EMPLOYEES, INJURIES TO, 272, 714.

Carriage of passengers on, see CARRIAGE OF PASSENGERS, 51, 300.

Contributory negligence in the operation of, see EMPLOYEES, INJURIES TO, 389-393.

Duty to employes as to safety of, see EMPLOYEES, INJURIES TO, 127.

Evidence of failure to furnish safe, see EMPLOYEES, INJURIES TO, 568.

Injuries to children riding on, see CHILDREN, INJURIES TO, 10.

Negligence as to safety of, a question for jury, see EMPLOYEES, INJURIES TO, 691.

— of vice-principal in operation of, liability of company, see FELLOW-SERVANTS, 100.

Non-liability for negligence of fellow-servants in the operation of, see FELLOW-SERVANTS, 46.

Notice of defects in, assumption of risk after, see EMPLOYEES, INJURIES TO, 243.

Promise by company to repair defects in, see EMPLOYEES, INJURIES TO, 259.

Riding on, by permission of agents, see AGENCY, 64.

Sufficiency of evidence of not properly man-
ning, see EMPLOYEES, INJURIES TO, 613.

HANDWRITING.

Experts in, see WITNESSES, 187, 188.

HARMLESS ERRORS.

- Disregarding on appeal, see APPEAL AND ERROR, 72-74; ELEVATED RAILWAYS, 194; EMINENT DOMAIN, 904, 907.
- In admission of evidence, see EVIDENCE, 12, 45; FIRES, 218.
- instructions to the jury, see ANIMALS, INJURIES TO, 578; CONTRIBUTORY NEGLIGENCE, 124; DEATH BY WRONGFUL ACT, 307; FIRES, 305.

HEADLIGHTS.

- Instructions as to absence of, or failure to show, see DEATH BY WRONGFUL ACT, 320, 340.
- Patents for, see PATENTS FOR INVENTIONS, 40.

HEARSAY EVIDENCE.

- In general, see EVIDENCE, 160-169.
- actions against carriers, see CARRIAGE OF MERCHANDISE, 746.
- — — elevated railways, see ELEVATED RAILWAYS, 109.
- stock-killing cases, see ANIMALS, INJURIES TO, 409.
- Questions to witness, calling for, see WITNESSES, 62.

HEATING.

- Of cars, duty of carrier as to, see CARRIAGE OF PASSENGERS, 190; STATUTES, 58.

HEIRS.

- Right of, to appeal in condemnation proceedings, see EMINENT DOMAIN, 875.
- — to sue for causing death of ancestor, see DEATH BY WRONGFUL ACT, 92.
- When entitled to land damages, see EMINENT DOMAIN, 428.
- may revive suits, see ABATEMENT, 16.
- — sue in their own right, see ELEVATED RAILWAYS, 84.
- proper parties, see PARTIES TO ACTIONS, 4.

HIGHWAYS.

- Adjoining land condemned, company's rights as respects, see EMINENT DOMAIN, 136.
- Compelling restoration of, see MANDAMUS, 13.
- Condemnation of, for railway use, see EMINENT DOMAIN, 99.
- Crossing of, by railways, see CROSSING OF STREETS AND HIGHWAYS.
- Dedication of land for, validity of, see ULTRA VIRES, 18.

- Duty to fence road running parallel with, see ANIMALS, INJURIES TO, 103; FENCES, 63.
- Fright of teams in, see FRIGHTENED TEAMS, 2.
- Injuries to travelers in, by independent contractor, liability for, see INDEPENDENT CONTRACTORS, 26.
- Liability for non-repair of, see TRAMWAYS, 7.
- Location of station in or near, see STATIONS AND DEPOTS, 11.
- Obstruction of access to, see BRIDGES, ETC., 47.
- — as an element of land damages, see EMINENT DOMAIN, 718.
- Obstructions in, when deemed nuisances, see NUISANCE, 9.
- Prosecutions for refusal to work on, see CRIMINAL LAW, 39.
- Regulation of crossing of, by commissioners, see RAILWAY COMMISSIONERS, 20-22.
- Restoration of, after building railroads on, see STREETS AND HIGHWAYS, 176-194; STREET RAILWAYS, 170-175.
- Street railways in, see STREET RAILWAYS.

HOLDERS.

- Of corporate bonds, rights of, see BONDS, 31-50.
- railway aid bonds, rights of, see MUNICIPAL AND LOCAL AID, 351-376.
- stock, rights of, see STOCK, 1-5; STOCK-HOLDERS.

See also BONA FIDE PURCHASERS.

HOMESTEAD.

- Conflict between rights of owner, and land grant, see LAND GRANTS, 88, 95.
- In the public lands, see PUBLIC LANDS, 3-10.
- Owner of, when entitled to land damages, see EMINENT DOMAIN, 444, 663.
- Right of widow occupying, to sue for damages caused by fire, see FIRES, 152.
- 1. Power of husband to convey right of way over.*—The husband can convey a right of way over the homestead, without the concurrence and signature of the wife to the deed, when such conveyance will not defeat the substantial enjoyment of the homestead as such. *Chicago & S. W. R. Co. v. Swinney*, 38 Iowa 182.—CRITICISED IN *Pilcher v. Atchison*, T. & S. F. R. Co., 38 Kan. 516. DISTINGUISHED IN *Kaiser v. Seaton*, 14 Am. & Eng. R. Cas. 405, 62 Iowa 463. FOLLOWED IN *Ottumwa, C. F. & St. P. R. Co. v. McWilliams*, 29 Am. & Eng. R.

*Grant of right of way through homestead. Condemnation of homestead property, see note, 22 AM. & ENG. R. CAS. 105; 39 *Id.* 44.

Cas. 544, 71 Iowa 164, 32 N. W. Rep. 315. REVIEWED IN *Randall v. Texas C. R. Co.*, 22 Am. & Eng. R. Cas. 102, 63 Tex. 586.—*Ottumwa, C. F. & St. P. R. Co. v. McWilliams*, 29 Am. & Eng. R. Cas. 544, 71 Iowa 164, 32 N. W. Rep. 315.—FOLLOWING *Chicago & S. W. R. Co. v. Swinney*, 38 Iowa 182.—*Randall v. Texas C. R. Co.*, 22 Am. & Eng. R. Cas. 102, 63 Tex. 586.—QUOTING *East Tenn. & V. R. Co. v. Love*, 3 Head (Tenn.) 65. REVIEWING *Texas & P. R. Co. v. Durrett*, 57 Tex. 48; *Chicago & S. W. R. Co. v. Swinney*, 38 Iowa 184.—FOLLOWED IN *Chicago, T. & M. C. R. Co. v. Titterington*, 84 Tex. 218.—*Chicago, T. & M. C. R. Co. v. Titterington*, 84 Tex. 218, 19 S. W. Rep. 472.—FOLLOWING *Randall v. Texas C. R. Co.*, 63 Tex. 586.

The husband cannot, without the consent of his wife, grant or alienate the right of way for a railroad across land owned by him and occupied as a homestead by his family. *Pilcher v. Atchison, T. & S. F. R. Co.*, 38 Kan. 516, 16 Pac. Rep. 945.—CRITICISING *Chicago & S. W. R. Co. v. Swinney*, 38 Iowa 182.—*Evans v. Grand Rapids, L. & D. R. Co.*, 68 Mich. 602, 13 West. Rep. 170, 36 N. W. Rep. 687.

The consent of the wife to the grant or alienation of an easement in the homestead for the right of way of a railroad may be shown by such evidence as is necessary to establish any other material fact. *Pilcher v. Atchison, T. & S. F. R. Co.*, 38 Kan. 516, 16 Pac. Rep. 945.

In an action by a railroad company for specific performance of a contract signed by the husband alone, for a right of way over a certain tract of land, a part of which constitutes the homestead, but in which there is nothing to show what particular part of the land agreed to be conveyed is kept as such homestead, specific performance as to the entire tract should not be decreed. *Conboy v. Kansas City & S. W. R. Co.*, 42 Kan. 658, 22 Pac. Rep. 719.

A husband, a part of whose homestead is taken under the law of eminent domain, may dispose of the compensation awarded to him therefor without the consent of his wife. *Canty v. Latterner*, 15 Am. & Eng. R. Cas. 380, 31 Minn. 239, 17 N. W. Rep. 385.

A company claiming under a contract from a husband for a right of way over his homestead, not signed by the wife, of whose rights it will be presumed to be informed,

by entering upon the land early in the morning of the Sabbath day, with a large force of men, and tearing down a barn upon the premises, without reference to what effect the elements might have upon its contents, makes an aggravated assault upon the rights of the wife, for which there can be no excuse, and courts will not hasten, because of a few technical defects in a bill filed to enjoin such trespass, to uphold such a course of proceeding, or to so rule as to open the way for further violence in that direction. *Evans v. Grands Rapids, L. & D. R. Co.*, 68 Mich. 602, 13 West. Rep. 170, 36 N. W. Rep. 687.

2. Liability for injury to—Eminent domain.*—A company which enters upon a homestead and constructs a road thereon without the settler's consent, and without making just compensation, is liable for the injury thereby done to his interest; the extent of which injury is for the jury to determine. *Burlington, K. & S. W. R. Co. v. Johnson*, 33 Am. & Eng. R. Cas. 215, 38 Kan. 142, 16 Pac. Rep. 125.—QUOTED IN *Ellsworth, M., N. & S. E. R. Co. v. Gates*, 39 Am. & Eng. R. Cas. 45, 41 Kan. 574.

The widow of the owner of real estate, who occupied the same as a homestead after the death of her husband, may maintain an action for special damages to her homestead right by the wrongful maintenance and use of a railroad track upon the street in front of the property, although such maintenance and use began during her husband's lifetime. *Cain v. Chicago, R. I. & P. R. Co.*, 54 Iowa 255, 3 N. W. Rep. 736, 6 N. W. Rep. 268, 21 Am. Ry. Rep. 235.

If the heirs of the deceased husband, who are not joined as plaintiffs, had also an interest in the land at the time of the injury, a party sued by her can only avail himself of that fact by plea in abatement, or by way of apportionment of damages. *Houston & T. C. R. Co. v. Knapp*, 51 Tex. 592.

Where the premises appropriated for the right of way are a part of a homestead occupied by the husband and wife as a residence, and the title thereof is in the wife, both husband and wife may join in an appeal from the award of the commissioners, and upon the trial of the appeal in the dis-

* Rights of railroad company entering upon land of settler under homestead law, see 33 AM. & ENG. R. CAS. 224, *abstr.*

Damages paid in condemnation of homestead property, see note, 22 AM. & ENG. R. CAS. 105.

early in the
with a large
a barn upon
nce to what
ave upon its
assault upon
ch there can
not hasten,
ects in a bill
, to uphold
or to so rule
r violence in
ds Rapids, L.
3 West. Rep.

—**Eminent**
enters upon
road thereon
and without
liable for the
rest; the ex-
ury to deter-
V. R. Co. v.
215, 38 Kan.
ED IN Ells-
v. Gates, 39
574.

real estate,
homestead
may main-
nages to her
ngful main-
track upon
ty, although
n during her
Chicago, R. I.
W. Rep. 736,
Rep. 235.

usband, who
also an in-
f the injury,
l himself of
r by way of
ouston & T.

ated for the
homestead oc-
e as a resi-
n the wife,
n in an ap-
missioners,
in the dis-

tering upon
see 33 Am.

homestead
R. CAS. 105.

strict court both are joint parties, and have a joint interest in the action; therefore the husband is a competent witness in the case, to testify under the provisions of section 323 of the Kan. Civ. Code. *Chicago, K. & W. R. Co. v. Anderson*, 39 Am. & Eng. R. Cas. 41, 42 Kan. 297, 21 Pac. Rep. 1059.

Where a bill is filed to prevent a railroad from entering upon a homestead for the purpose of grading a road, statements that complainants are living upon 40 acres of land, which is their homestead, imply that the land does not exceed in value \$1500, within the meaning of Mich. Const., which authorizes a country homestead not exceeding 40 acres and not above the value of \$1500. *Evans v. Grand Rapids, L. & D. R. Co.*, 68 Mich. 602, 13 West. Rep. 170, 36 N. W. Rep. 687.

3. — compensation for improvements.—A homesteader is entitled to compensation for improvements made on land over which a railroad company has afterwards obtained the right of way. *Flint & P. M. R. Co. v. Gordon*, 41 Mich. 420.—NOT FOLLOWED IN *Red River & L. of W. R. Co. v. Sture*, 32 Minn. 95.

Where a husband and wife stand by and see a railroad company make valuable improvements on land held under a deed from the husband, and afterward sue and recover the land as the wife's homestead, there should be a personal judgment against the husband for the cost of such improvements. *Paris & G. N. R. Co. v. Greiner*, 84 Tex. 443, 19 S. W. Rep. 564.

HORSE RAILWAYS.

Generally, see STREET RAILWAYS.
Crossed or paralleled by cable roads, rights of, see CABLE RAILWAYS, 7.

HORSES.

Frightened by fire falling from elevated structure, see ELEVATED RAILWAYS, 219.
Injuries to employees by vicious, see STREET RAILWAYS, 517.
Liability for killing or injuring, see ELECTRIC RAILWAYS, 23.
— **using diseased**, see STREET RAILWAYS, 321.
— **of express company as carrier of**, see EXPRESS COMPANIES, 38.
Proof of value of, see ANIMALS, INJURIES TO, 423-430.

When subject to taxation, see TAXATION, 95.
See also FRIGHTENED TEAMS.

HOSTILITY.

As ground for change of venue, see TRIAL, 15.
Of witness, impeachment for, see WITNESSES, 39, 79.

HOTELS.

Departure of guests from, through fear, see BLASTING, 5.
Power to run, see BALTIMORE & OHIO R. CO., 4.
When exempt from taxes, see TAXATION, 171.

HOUSEHOLD GOODS.

When may be carried as baggage, see BAGGAGE, 35.

HUDSON.

Decisions particularly applicable to, see MUNICIPAL CORPORATIONS, 38.

HUSBAND AND WIFE.

As parties to condemnation proceedings, see EMINENT DOMAIN, 265.
Competency of, as witnesses, see WITNESSES, 19-25.
Delivery of wife's goods to husband, see CARRIAGE OF MERCHANDISE, 282.
Ejectment by widow for land conveyed by husband, see EJECTMENT, 12.
Measure of damages to husband for death of wife, see DEATH BY WRONGFUL ACT, 399-402.
— **wife for death of husband**, see DEATH BY WRONGFUL ACT, 393-398, 430, 431.
Negligence of husband, when imputed to wife, see CROSSINGS, INJURIES, ETC., AT, 217.
Notice of arrival to husband is notice to wife, see CARRIAGE OF MERCHANDISE, 233.
Power of husband to convey right of way over homestead, see HOMESTEAD, 1.
Release by husband of right of action for killing wife, see DEATH BY WRONGFUL ACT, 170.
Right of husband to damages for causing death of wife, see DEATH BY WRONGFUL ACT, 47, 91.
Taking land by consent of husband, see EMINENT DOMAIN, 194.
Which should appeal in condemnation proceedings, see EMINENT DOMAIN, 876.
Wife, when entitled to land damages, see EMINENT DOMAIN, 440.

I. CONTROL OF WIFE'S PROPERTY BY HUSBAND.....	1066
II. PROPERTY RIGHTS OF WIFE.....	1067
III. ACTIONS	1068
1. <i>In General, and for Loss or Injury to Wife's Property.....</i>	1068
2. <i>By Husband, for Injury to Wife's Person.....</i>	1069
3. <i>Separate Actions by Wife, for Injury to her Person or Property.....</i>	1072
4. <i>Joint Actions by Husband and Wife.....</i>	1074

I. CONTROL OF WIFE'S PROPERTY BY HUSBAND.

1. Power of husband to consent to entry on wife's land.— Unless a wife holds land to her sole and separate use a husband has exclusive control of it during marriage, and is the only proper plaintiff in an action to recover possession of it; and if his acts have been such as to estop him from recovering possession against a railroad that has entered on it, neither he nor the wife can recover during the marriage. *Kanaga v. St. Louis, L. & W. R. Co.*, 76 Mo. 207.—DISTINGUISHED AND NOT FOLLOWED IN *Bradley v. Missouri Pac. R. Co.*, 30 Am. & Eng. R. Cas. 379, 91 Mo. 493. OVERRULED IN *Mueller v. Kaessmann*, 84 Mo. 318.

It appearing that the husband conveyed by deed to the railroad company a right of way over the land, without disclosing the interest of his wife, if under such conveyance the company had the right to locate its road and establish wharves and buildings at the place where it did so, neither the vendor in the deed nor the director who holds under him and his wife can complain that this was done by the company for the benefit of any other transportation company. And a contract between the railroad company and other companies relative to freight and wharf arrangements was irrelevant as evidence. *Wrightsville & T. R. Co. v. Holmes*, 43 Am. & Eng. R. Cas. 609, 85 Ga. 668, 11 S. E. Rep. 658.

Land was conveyed in trust for a married woman, the deed providing, however, that it was to remain "in the possession and under the control and management of her husband," who was not held accountable for the rents, issues, and profits "above the support of the family, provided he should abstain from waste and destruction thereof." *Held*, that the husband could authorize the

construction of a railroad on the land, as against interference of the trustee, so long as it did not injuriously affect the duties and limitations imposed upon the husband. *Tutt v. Port Royal & A. R. Co.*, 16 So. Car. 365.

2. Power of husband to convey perpetual easement in wife's land.— A husband has no right to grant a perpetual easement, such as a railroad right of way, in his wife's land. *Gulf, C. & S. F. R. Co. v. Donahoo*, 59 Tex. 128.—FOLLOWING *Texas & P. R. Co. v. Durrett*, 57 Tex. 48.

Such a conveyance cannot be made by the husband alone, under his general power to manage the wife's estate. It can only be made in the manner pointed out by the statute for conveying the wife's separate estate. *Texas & P. R. Co. v. Durrett*, 57 Tex. 48.—REVIEWED IN *Randall v. Texas C. R. Co.*, 22 Am. & Eng. R. Cas. 102, 63 Tex. 586.

When upon the face of such a deed by the husband, it appears that the deed was made without a consideration, the party claiming the easement cannot, as against the wife, defend as an innocent purchaser without notice, there being no evidence that the conveyance from the husband induced the expenditure of money in furtherance of the easement. *Texas & P. R. Co. v. Durrett*, 57 Tex. 48.

3. Husband acting as wife's agent in shipping her goods.—Where the husband, as agent for the wife, attended alone to the shipment of certain household goods owned by the wife, and the goods, after delivery to the defendant for shipment, were seized upon a writ of attachment against the goods of the husband—*held*, that notice of the seizure, given by the defendant to the husband, was notice to the wife. *Furman v. Chicago, R. I. & P. R. Co.*, 62 Iowa 395, 17 N. W. Rep. 598. *Furman v. Chicago, R. I. & P. R. Co.*, 6 Am. & Eng. R. Cas. 280, 57 Iowa 42, 10 N. W. Rep. 272.

Where the husband alone attended to the shipment of household goods belonging to the wife, and the wife was not present, and took no part in the transaction, the defendant, to whom the goods were delivered for shipment, was warranted in considering the husband as the wife's duly authorized agent, unless notified to the contrary. *Furman v. Chicago, R. I. & P. R. Co.*, 62 Iowa 395, 17 N. W. Rep. 598.

The possession of a bill of lading by the

the land, as
steep, so long
at the duties
the husband.
16 So, Car.

to convey
the land.—
t a perpetual
ght of way, in
F. R. Co. v.
WING Texas
48.

made by the
ral power to
can only be
out by the
e's separate
Durrett, 57
ll v. Texas C.
102, 63 Tex.

n a deed by
he deed was
the party
as against
nt purchaser
vidence that
and induced
rtherance of
Co. v. Dur-

life's agent
here the hus-
ended alone
ehold goods
ds, after de-
ment, were
ment against
Z, that notice
ndant to the
e. Furman
62 Iowa 395.
Chicago, R.
R. Cas. 280,

ended to the
belonging to
present, and
the defend-
delivered for
nsidering the
orized agent,
Furman v.
Iowa 395, 17

ading by the

husband of the shipper named therein, and the exhibition thereof by him to the carrier that issued the same, at the time of giving orders in regard to the reshipment of the goods therein described, warrant the presumption that the husband in giving such orders is acting as the agent of the wife, and the carrier will be entitled to act thereon. *Furman v. Chicago, R. I. & P. R. Co.*, 45 *Am. & Eng. R. Cas.* 385, 81 *Iowa* 540, 46 *N. W. Rep.* 1049. *Furman v. Chicago, R. I. & P. R. Co.*, 62 *Iowa* 395, 17 *N. W. Rep.* 598.

4. Power of husband to release claim for personal injuries to wife.—Under the Illinois Married Woman's Act of 1861, giving her the exclusive control of her property, except such as she obtained from her husband, a right of action for personal injuries is her separate property, and her husband cannot, without her consent, compromise or release her suit to recover for such injuries. *Chicago, B. & Q. R. Co. v. Dunn*, 52 *Ill.* 260.—**EXPLAINING** *Burger v. Belsley*, 45 *Ill.* 72.—**REVIEWED IN** *Dimmey v. Wheeling & E. G. R. Co.*, 27 *W. Va.* 32.

Where an action for an injury to a wife had been commenced in the joint names of the husband and wife, and the former compromised the suit upon receiving a certain sum from defendant, it appearing that the husband acted as the agent of the wife—*held*, that such release operated as a bar to a subsequent action brought in her own name. *Chicago, B. & Q. R. Co. v. Dunn*, 52 *Ill.* 260.—**DISTINGUISHED IN** *McFadden v. Santa Ana, O. & T. St. R. Co.*, 87 *Cal.* 464.

5. When wife cannot compel husband to account for income of her separate estate.—Though the legal title of land is in the name of the wife, if she has permitted her husband, without objection, to receive and appropriate to his own use, or to their joint use, the rents and profits thereof for a number of years, she cannot compel him to account therefor while such permission remains unrevoked; and if it be revoked she can only recover thereafter. *Lyon v. Green Bay & M. R. Co.*, 42 *Wis.* 548, 15 *Am. Ry. Rep.* 85.

II. PROPERTY RIGHTS OF WIFE.

6. Power of wife to contract touching her separate estate.—A married woman may, under the laws of Arkansas, make a contract with a non-resident railroad company having a right to do busi-

ness in the state, by which she may convey to it a right of way for its roadbed, car yards, its machine shops, etc. If she takes part in condemnation proceedings which may be illegal, and accepts the damages awarded, and retains the same for over six years, when she brings suit to recover the land, still retaining its value found by the jury in the condemnation proceedings, her conduct will be construed as amounting to an implied contract with the railroad company for the right of way, etc., out of her separate property. It will be held as an acquiescence by her, and in equity she will be estopped. *St. Louis & S. F. R. Co. v. Foltz*, 52 *Fed. Rep.* 627.—**FOLLOWING** *Pryzbylowicz v. Missouri River R. Co.*, 3 *McCrary* (U. S.) 586, 17 *Fed. Rep.* 492.

An agreement of a railroad company to continue to operate its road over the land of the wife is a personal covenant, and not one for the direct benefit of the estate granted, which would run with the land, under section 1462 of the Cal. Civil Code. *Lyford v. North Pac. Coast R. Co.*, 92 *Cal.* 93, 28 *Pac. Rep.* 103.

Though under the Colorado act of eminent domain it is required that the husband shall be joined as a party when the wife's lands are sought to be taken without her consent, this does not preclude her from voluntarily conveying her property to any use, and at any time, the same as if she were sole. Hence, where condemnation proceedings are wholly void, they are powerless to coerce her; but if by such proceedings she voluntarily accepts as the compensation for her property a sum of money equal to the amount of a void award, she must be regarded as acting wholly independent of such proceedings, and she cannot thereafter recover possession of the premises, nor further compensation for the taking. In such case she is bound by the taking and acceptance, but not by the proceedings. *Colorado C. R. Co. v. Allen*, 44 *Am. & Eng. R. Cas.* 193, 13 *Colo.* 229, 22 *Pac. Rep.* 605.

Where a railway company contracted for the purchase of certain land with B., a married woman, in the absence of her husband—*held*, that the company were under no obligation to see that B. had independent advice in the matter; and inasmuch as the price seemed not to be grossly inadequate, and B. appeared to be fully *compos mentis*, and no unfair advantage having been taken of her, the agreement could not be

set aside. *Bryson v. Ontario & Q. R. Co.*, 8 Ont. 380.

7. Right of the wife to subscribe to corporate stock.—When a married woman subscribes to capital stock of a railroad corporation, by which she agrees to take and pay for a certain number of shares, but makes default in payment, and action is brought to charge her separate property with the amount of such subscription—*held*, that in the absence of any proof that either party dealt on the credit of such property, equity will not imply or enforce a charge against the same. *Rice v. Columbus, T. & T. R. Co.*, 32 Ohio St. 380.

A railroad company will be compelled by mandamus to register, under the Married Women's Property Act 1870, the stock of a wife in her own name, unless the company by investigation finds a flaw in the title. *Queen v. Carnatic R. Co.*, L. R. 8 Q. B. 299, 42 L. J. Q. B. 299, 21 W. R. 621, 28 L. T. 413.

8. — to transfer shares of stock.—Prior to the statute allowing married women to hold stock in corporations as if they were unmarried, a transfer of shares of corporate stock belonging to a married woman was made, but she ignorantly failed to comply with Mass. Gen. St. ch. 108, § 3, requiring her husband's written consent; and the shares had passed through the hands of various purchasers, without notice, before she was aware of the fact that the conveyance was not binding on her. *Held*, that she might maintain a bill filed eighteen months after she was informed of her rights, to set aside the conveyance and to have the shares retransferred to herself. *Merriam v. Boston, C. & F. R. Co.*, 117 Mass. 241.

9. Taking wife's property in execution against the husband.—If a married woman suffers her personal property to pass into the possession and under the control of her husband, without having filed notice of her ownership with the recorder of deeds, as provided by the statute, it is liable to be taken in execution for the claims of one who gave credit to the husband while the property was in his possession, and who then had no notice of the wife's ownership. The joint possession of such property by the husband and wife is regarded as his possession. *Mazouck v. Iowa Northern R. Co.*, 31 Iowa 559.

A judgment obtained by a husband and wife against a railway company for inju-

ries sustained by the wife is not embraced within the provisions of sections 1 and 2 of art. 45 of the Md. Code, providing what property a married woman might hold as a *feme sole*, and free from her husband's debts. *Clark v. Wootton*, 63 Md. 113.

III. ACTIONS.

1. In General, and for Loss or Injury to Wife's Property.

10. For recovery of wife's property, or for injury thereto.—In Texas the husband may sue alone for the recovery of the wife's separate property and recover damages occasioned by injury to such property. *Texas & P. R. Co. v. Medaris*, 29 Am. & Eng. R. Cas. 159, 64 Tex. 92.

11. For loss of wife's baggage.—Where a husband presents his wife with diamonds, jewelry, and ornaments in a state where the common law rule is in force relating to the marital rights of a husband in his wife's property, they are deemed her paraphernalia, and are subject to the control of the husband during his life, and he alone can sue for their loss or conversion by a carrier while carrying the same as baggage. *McCormick v. Pennsylvania C. R. Co.*, 49 N. Y. 303, 4 Am. Ry. Rep. 429.

Where husband and wife are traveling together over a railway whose business it is to carry passengers and their baggage, and the husband purchases the tickets representing the fares of himself and wife, and has his own and his wife's baggage checked to the point of their destination, himself receiving the checks representing the railway's receipts for such baggage, and the railway company loses or fails to deliver at the agreed point the trunk thus checked of the wife, containing her wearing apparel and that of her child—*held*: (1) that the husband can, in his own name alone, without joining his wife, maintain an action for damages upon the contract thus made with him for the carriage of himself and wife and their baggage, for the breach thereof by the railway in failing to deliver the baggage of the wife; (2) that although the general ownership of the lost trunk and its contents is in the wife, the husband has such a special ownership therein as will entitle him to recover in his own name alone the value of such lost trunk and its contents, as his damages for the breach of the contract made with him for the safe carriage and

not embraced
ions 1 and 2 of
providing what
might hold as a
husband's debts.

3.

s or Injury to

wife's prop-

to.—In Texas
for the recov-
property and re-
injury to such
Co. v. Medaris,
64 Tex. 92.

s baggage.—

his wife with
ments in a state
is in force re-
of a husband in
re deemed her
ect to the con-
his life, and he
or conversion
he same as bag-
y v. C. R.
Rep. 429.

are traveling
se business it is
r baggage, and
tickets repre-
and wife, and
uggage checked
nation, himself
nting the rail-
uggage, and the
ls to deliver at
hus checked of
earing apparel
7: (1) that the
ne alone, with-
n an action for
hus made with
self and wife
each thereof by
er the baggage
gh the general
t and its con-
and has such a
s will entitle
ame alone the
ts contents, as
f the contract
carriage and

delivery; (3) that a recovery by the husband in such case is a complete bar to any subsequent suit upon the same cause of action that might be instituted by the wife. *Jacksonville, St. A. & H. R. R. Co. v. Mitchell*, 32 Fla. 77, 13 So. Rep. 673.

12. For destruction of wife's property by fire.—A husband brought suit against a company in his own name and right to recover damages to property destroyed by fire through the negligence of the company, some of the damages claimed being for the destruction of fences and trees which were part of the realty. At the trial it appeared that the property belonged to his wife and her children by a former husband, and the same was occupied as a homestead at the time of the fire. *Held*, that the wife and children were not necessary parties. *St. Louis, A. & T. R. Co. v. Ticer*, 3 Tex. App. (Civ. Cas.) 475.—FOLLOWING *International & G. N. R. Co. v. Timmermann*, 61 Tex. 660. **OVERRULING** *Missouri Pac. R. Co. v. Teague*, 2 Tex. App. (Civ. Cas.) 685.

13. For trespass on wife's land.—Where one bought land with money belonging to his wife and took the deed to himself, the formal legal title was in him, while the equitable title was in her, and a trust in her favor resulted; but an action of trespass to the land brought jointly in the name of the husband and the wife would seem not to be basis for recovery, there being no joint title. *Wrightsville & T. R. Co. v. Holmes*, 43 Am. & Eng. R. Cas. 609, 85 Ga. 668, 11 S. E. Rep. 658.

14. For breach of right of way agreement.—Where a company entered into a contract with a husband and wife, by the terms of which they were to convey a right of way to the company along a designated line over separate property belonging to the wife, and the company agreed to construct the road within two years, to maintain a depot and cattle-guards, to continue to operate the railway, and to carry them and all members of their family during the lifetime of either of them free of charge, the husband cannot sue alone to recover damages from the railroad company for its breach of the covenant to continue to operate the railroad, unless he shows an express assignment to himself of his wife's interest in the contract, notwithstanding he may have become the sole owner of the property, and alleges that the property was

greatly damaged by the abandonment of the road along the right of way granted. *Lyford v. North Pac. Coast R. Co.*, 92 Cal. 93, 28 Pac. Rep. 103.

2. By Husband, for Injury to Wife's Person.*

15. Husband's right to sue, generally.—The right to recover damages for a personal injury, as well as the money recovered as damages, is property, and may be regarded as a chose in action; and if acquired by the wife during marriage is community property, which the husband has the right to control. *McFadden v. Santa Ana, O. & T. St. R. Co.*, 87 Cal. 464, 25 Pac. Rep. 681. *Neale v. Depot R. Co.*, 94 Cal. 425, 29 Pac. Rep. 954. *Holzab v. New Orleans & C. R. Co.*, 38 La. Ann. 185. *Texas C. R. Co. v. Burnett*, 61 Tex. 638.—FOLLOWING *San Antonio St. R. Co. v. Helm*, 19 Am. & Eng. R. Cas. 158, 64 Tex. 147.—*Gallagher v. Bowie*, 66 Tex. 265.—FOLLOWING *Ezell v. Dodson*, 60 Tex. 331.

The husband sued for damages for personal injuries inflicted by the negligence of the railway company defendant. Pending suit he became insane. The wife was permitted to prosecute the suit in her own name to judgment in her favor. *Held*, error. The suit could only be prosecuted by a guardian of the husband appointed by the probate court. *Texas & P. R. Co. v. Bailey*, 83 Tex. 19, 18 S. W. Rep. 481.—**DISTINGUISHING** *Jacobs v. Cunningham*, 32 Tex. 774. **QUOTING AND DISTINGUISHING** *Forbes v. Moore*, 32 Tex. 195. **REVIEWING** *Heidenheimer v. Thomas*, 63 Tex. 290.

16. — for loss of services or earnings of wife.—A husband, in suing for an injury received by his wife, is entitled to recover for the loss of her services as the manager of a business which the husband was carrying on. *Citizens' St. R. Co. v. Twi-name*, 41 Am. & Eng. R. Cas. 227, 121 Ind. 375, 7 L. R. A. 352, 23 N. E. Rep. 159.

Ind. Rev. St. 1881, § 5130, providing that a married woman may carry on any trade or business and perform any labor or services for her sole and separate account, in no way changes the relation of husband and wife. It makes the wife the sole owner of her earnings when she performs services for persons other than her husband, and for

* Action for personal injury to wife, see note, 19 AM. & ENG. R. CAS. 165.

profits made from any trade or business carried on by her; but it has no application where the wife is performing services for her husband. *Citizens' St. R. Co. v. Twi-name*, 41 *Am. & Eng. R. Cas.* 227, 121 *Ind.* 375, 7 *L. R. A.* 352, 23 *N. E. Rep.* 159.

A husband may maintain a separate action against a company in his own name, for the loss of the services of his wife and for any expense and loss consequent upon an injury received by her in an accident upon its road, while a passenger on its cars; and it matters not in such case that the injury arose as a consequence of a breach of contract made with the wife. *Blair v. Chicago & A. R. Co.*, 89 *Mo.* 334, 1 *S. W. Rep.* 367.—FOLLOWED IN *Schmitz v. St. Louis, I. M. & S. R. Co.*, 46 *Mo. App.* 380. NOT FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Wilson*, 48 *Fed. Rep.* 57, 4 *U. S. App.* 25, 1 *C. C. A.* 25.

The gravamen of such an action by the husband is the breach of a public duty by the common carrier, which the law imposes independent of contract, and privity of contract is not essential to maintain it. *Blair v. Chicago & A. R. Co.*, 89 *Mo.* 334, 1 *S. W. Rep.* 367.

Under N. Y. Act of 1860, ch. 90, § 2, allowing a married woman to carry on any trade or business, and providing that the earnings therefrom shall be her sole and separate property, money derived from her services to third parties is her own. So where she is injured so that she cannot perform such services she may sue in her own name; but the value of her household services still belongs to her husband and he may sue therefor. *Brooks v. Schwerin*, 54 *N. Y.* 343.—DISTINGUISHED IN *Blaechinska v. Howard Mission*, etc., 130 *N. Y.* 497. FOLLOWED IN *Sloan v. New York C. & H. R. R. Co.*, 1 *Hun* 540, 4 *T. & C.* 135; *Thuringer v. New York C. & H. R. R. Co.*, 71 *Hun* 526.—*Thuringer v. New York C. & H. R. R. Co.*, 71 *Hun* (N. Y.) 526.—FOLLOWING *Filer v. New York C. R. Co.*, 49 *N. Y.* 56; *Brooks v. Schwerin*, 54 *N. Y.* 348. QUOTING *Blaechinska v. Howard Mission*, etc., 130 *N. Y.* 503.

New York Act of 1862, ch. 172, does not enlarge the rights of the wife or detract from the rights of a husband or take from him the right to recover for the loss of services of his wife, caused by the wrongful act of another, unless she is engaged in some trade or business on her own account; and then she cannot recover for consequen-

tial damages for such injury. *Filer v. New York C. R. Co.*, 49 *N. Y.* 47, 3 *Am. Ky. Rep.* 466.—FOLLOWED IN *Thuringer v. New York C. & H. R. R. Co.*, 71 *Hun* (N. Y.) 526. QUOTED IN *Blaechinska v. Howard Mission*, etc., 130 *N. Y.* 497.—*Sloan v. New York C. & H. R. R. Co.*, 1 *Hun* (N. Y.) 540, 4 *T. & C.* 135.—FOLLOWING *Filer v. New York C. R. Co.*, 49 *N. Y.* 42; *Brooks v. Schwerin*, 54 *N. Y.* 343.

17. — for loss of wife's society.—A husband is entitled to compensation for the loss of the society of his wife, caused by the negligence of another. *Furnish v. Missouri Pac. R. Co.*, 102 *Mo.* 669, 15 *S. W. Rep.* 315.—NOT FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Wilson*, 48 *Fed. Rep.* 57, 4 *U. S. App.* 25, 1 *C. C. A.* 25.—*Jones v. Utica & B. R. R. Co.*, 40 *Hun* (N. Y.) 349. *Ainley v. Manhattan R. Co.*, 47 *Hun* 206, 13 *N. Y. S. R.* 557.

The husband can recover for loss of his own time in attending upon his wife, and for loss of his wife's society. *Blair v. Chicago & A. R. Co.*, 89 *Mo.* 334, 1 *S. W. Rep.* 367.

18. Right of husband's administrator to sue.—A right of action which accrues to a husband under the New York statute, for an injury to his wife, depriving him of her services, survives to the personal representative of the husband. *Cregin v. Brooklyn Cross Town R. Co.*, 56 *How. Pr.* (N. Y.) 465.

Under Wis. Rev. St. ch. 135, §§ 12, 13, providing, *inter alia*, that the amount of damages recoverable for the death of a wife shall be paid to the husband, if there be one; if not, to her lineal descendants or ancestors, as the case may be, where the wife leaves a surviving husband the right to the damages vests in him, and the right of action does not survive to his administrator, if he dies before they are recovered. *Woodward v. Chicago & N. W. R. Co.*, 23 *Wis.* 400.

19. Pleading and evidence.—In an action by the husband for injuries to his wife in a railway wreck the petition set out the injuries received, and stated that they rendered his wife unable to attend to the ordinary affairs of life, and for this sought damages. No special exceptions were urged to the petition. *Held*, that under the pleadings it was relevant to show the value of the services of the wife. *Texas C. R. Co. v. Burnett*, 80 *Tex.* 536, 16 *S. W. Rep.* 320.

y. Filer v. New
3 Am. Ky. Rep.
ager v. New York
un (N. Y.) 526.
Howard Mission,
v. New York C.
(Y.) 540, 4 T. &
v. New York C.
oks v. Schwerin,

wife's society.
 compensation for
 his wife, caused
 her. *Furnish v.*
Mo. 669, 15 S. W.
IN Atchison, T.
48 Fed. Rep. 57,
A. 25.—Jones v.
Hun (N. Y.) 349.
, 47 Hun 206, 13

er for loss of his
 on his wife, and
 y. *Blair v. Chi-*
34, 1 S. W. Rep.

and's adminis-
 of action which
 er the New York
 is wife, depriving
 es to the personal
 and. *Cregin v.*
Co., 56 How. Pr.

35. §§ 12, 13, pro-
 amount of dam-
 ath of a wife shall
 there be one; if
 ants or ancestors,
 the wife leaves a
 t to the damages
 t of action does
 erator, if he dies
Woodward v.
3 Wis. 400.

vidence.—In an
 injuries to his
 petition set out
 stated that they
 to attend to the
 for this sought
 tions were urged
 under the plead-
 ow the value of
Texas C. R. Co.
16 S. W. Rep.

20. Burden of proof.—Where a husband sues a company for carrying his wife beyond her station, and compelling her to walk back, thereby causing a severe illness, the burden is on the plaintiff to show that the illness was caused by the act of the company. *Gulf, C. & S. F. R. Co. v. Head, 4 Tex. App. (Civ. Cas.) 313, 15 S. W. Rep. 504.*—FOLLOWING *St. Louis, A. & T. R. Co. v. Burns, 71 Tex. 479, 9 S. W. Rep. 467.*

It is not necessary for the husband to offer direct proof of the value of the wife's society. *Furnish v. Missouri Pac. R. Co., 102 Mo. 669, 15 S. W. Rep. 315.*

21. Judgment for injury to plaintiff no bar.—Where a husband and wife are injured as passengers on a railroad, the husband may embrace in one suit both the injuries to himself and to the wife, but he is not bound to do so; and where he brings separate suits the company cannot set up a judgment against it in a suit for injuries to the husband as a bar to the suit for injuries to the wife. *St. Louis, I. M. & S. R. Co. v. Edwards, 3 Tex. App. (Civ. Cas.) 415. Skoglund v. Minneapolis St. R. Co., 45 Minn. 330, 47 N. W. Rep. 1071.*—DISAPPROVING *Cincinnati, H. & D. R. Co. v. Chester, 57 Ind. 297. QUOTING Todd v. Redford, 11 Mod. 264.*

22. Instructions to the jury.—There being no allegation of mental suffering by the husband, it was not error to instruct upon the measure of damages as follows: "For the injury to his wife, the pain and suffering, including mental anguish, and expenses occasioned by such injury." *Gulf, C. & S. F. R. Co. v. Box, 81 Tex. 670, 17 S. W. Rep. 375.*

An unqualified instruction which substantially permits the jury to give damages for injuries to the physical strength of the wife, which disabled her from performing her necessary affairs and business, will be erroneous, when it appears that the jury have been allowed to take into consideration testimony as to the wife's disability to pursue her business, the earnings of which, in law, belong to the husband. *Scott v. Metropolitan R. Co., 4 Mackey (D. C.) 152.*

23. Damages recoverable.—A husband is entitled to recover the damages sustained by the loss of the services of his wife, but the damages must depend on the character and value of the services which she is capable of performing, and was accus-

tomed to perform for the husband. So where she was the manager of a business carried on by the husband her services were to be valued in connection with such business. *Citizens' St. R. Co. v. Twiname, 41 Am. & Eng. R. Cas. 227, 121 Ind. 375, 23 N. E. Rep. 159, 7 L. R. A. 352.*

The measure of damages in an action by a husband for injuries to his wife is limited to loss of services and expenses which he personally incurs. *Mooney v. Third Ave. R. Co., 2 City Ct. (N. Y.) 366. Neier v. Missouri Pac. R. Co., 12 Mo. App. 35. Hopkins v. Atlantic & St. L. R. Co., 36 N. H. 9. Henry v. Klopfer, 147 Pa. St. 178, 23 Atl. Rep. 337.*

In such case the actual expenses incurred by the husband, after the commencement of the suit, may be given in evidence to show the amount of his damage. *Hopkins v. Atlantic & St. L. R. Co., 36 N. H. 9.*—FOLLOWING *Dearborn v. Boston, C. & M. R. Co., 24 N. H. 179.*

If the condition of the wife is such at the time of the trial as to disable her for the future, and require further expenses for medical and surgical treatment, the jury may give damages for prospective expenses and loss of service. *Hopkins v. Atlantic & St. L. R. Co., 36 N. H. 9.*

Even if a husband may in extreme cases recover for his services in nursing his wife where her injuries have been caused by the negligence of another, the recovery must be for the value of his services as a nurse, and not for the amount of wages lost by abstaining from other employment. *Salida v. McKinna, 16 Colo. 523, 27 Pac. Rep. 810.*

There is no exact standard by which to measure the value of a wife's society. The amount to be recovered must be left to the enlightened judgment of the jury, who must, under the evidence before them, fix upon a reasonable sum. *Brown v. Hannibal & St. J. R. Co., 31 Mo. App. 661.*

The husband is entitled to his wife's society as she was at the time when the negligence of another impaired her health, strength, and usefulness as a helpmate; and any diminution of her capacity for usefulness, aid, and comfort as a wife constitutes a basis for compensation for damages. *Furnish v. Missouri Pac. R. Co., 102 Mo. 669, 15 S. W. Rep. 315.*

The claim comprehends and includes the loss which will continue during her life. *Allen v. Manhattan R. Co., 28 J. & S. (N.*

Y.) 230; *affirmed in* 137 N. Y. 561, 33 N. E. Rep. 338.

The injury to the wife brought on a miscarriage; the trial judge said to the jury that plaintiff had a right to recover damages arising from the injury and resulting in depriving him of prospective offspring. *Held*, that the instruction was proper. *Butler v. Manhattan R. Co.*, 4 Misc. (N. Y.) 401; *affirming* 3 Misc. 453, 52 N. Y. S. R. 498.

Pain and mental anguish suffered by the husband on account of injuries inflicted upon the wife cannot be considered as an element of damages in a suit by the husband for the wife, to recover damages flowing from such injuries sustained by her. *Missouri Pac. R. Co. v. Martino*, 2 Tex. Civ. App. 634, 18 S. W. Rep. 1066, 21 S. W. Rep. 781.—FOLLOWING *Western Union Tel. Co. v. Cooper*, 71 Tex. 507.

Nominal damages only can be recovered by a husband suing for breach of a contract to carry his wife, averring special damage to him, which is not proved; and this is so, although the wife had suffered great personal inconvenience. *Collier v. Dublin, W. & W. R. Co.*, 8 Ir. R., C. L. 21.

3. *Separate Actions by Wife for Injury to her Person or Property.*

24. *When wife may sue alone.*—*

A married woman who has supported herself for nine years, and who has not seen her husband for seven years, may sue for personal injuries without joining her husband. *Seymour v. Chicago, B. & Q. R. Co.*, 3 Biss. (U. S.) 43.

The impairment of a married woman's capacity to labor, by physical injury by a railroad, is classified with pain and suffering, and is not to be measured by pecuniary earnings, which belong to the husband, but may be sued for by the wife. *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. Rep. 49.—APPROVING *Atlanta St. R. Co. v. Jacobs*, 88 Ga. 647.

Kentucky Gen. St. ch. 52, art. 2, § 10, providing that a married woman who shall come into the state without her husband, he residing elsewhere, may acquire property, contract, and bring and defend actions as an unmarried woman, applies to a married woman who came to the state before the

* Action by wife for personal injuries, see note, 8 L. R. A. 680.

statute was enacted, as well as to one since. *Maysville & L. R. Co. v. Herrick*, 13 Bush (Ky.) 122, 17 Am. Ky. Rep. 53.

After the passage of N. Y. Act of 1880, ch. 245, § 1, and before the passage of the act of 1890, ch. 248, amending the Code of Civ. Pro. § 450, a married woman might maintain an action in her own name for an injury personal to herself without joining her husband, as she could before, and may since that period. *Weld v. New York, L. E. & W. R. Co.*, 52 N. Y. S. R. 184, 22 N. Y. Supp. 974.

Where a wife sues a carrier for the loss of her baggage, which was her separate property under the statute, it is not necessary to join her husband. *Spies v. Accessory Transit Co.*, 5 Duer (N. Y.) 662.

25. *When wife must sue alone.—*

Under recent statutory provisions in several of the states an action for personal injuries to a married woman must be brought in her name alone. *Barker v. Anniston, O. & O. St. R. Co.*, 92 Ala. 314, 8 So. Rep. 466, *Chicago, B. & Q. R. Co. v. Dickson*, 67 Ill. 122. *Chicago & N. W. R. Co. v. Button*, 68 Ill. 409. *Tuttle v. Chicago, R. I. & P. R. Co.*, 42 Iowa 518.—FOLLOWED IN *Nichols v. Dubuque & D. R. Co.*, 68 Iowa 732.—*Michigan C. R. Co. v. Coleman*, 28 Mich. 440, 12 Am. Ry. Rep. 59. *Plummer v. Ossipee*, 59 N. H. 55.

Whether, where husband and wife have sued jointly for such a cause of action, the error may be remedied by amendment, *quare*. *Michigan C. R. Co. v. Coleman*, 28 Mich. 440, 12 Am. Ry. Rep. 59.—NOT FOLLOWED IN Ohio & M. R. Co. v. Cosby, 27 Am. & Eng. R. Cas. 339, 107 Ind. 32.

26. *When wife cannot sue alone.*

—The Married Woman's Act does not give the wife capacity to sue in her own name for personal injuries or to make a contract releasing the wrong-doer from liabilities for such injuries. *Snashall v. Metropolitan R. Co.*, 8 Mackey (D. C.) 399.

A married woman engaged in the ordinary duties of a housewife, and not in any independent employment, cannot recover for loss of time occasioned by a personal injury, but the husband must join in the action. *Nichols v. Dubuque & D. R. Co.*, 27 Am. & Eng. R. Cas. 183, 68 Iowa 732, 28 N. W. Rep. 44.—FOLLOWING *Tuttle v. Chicago, R. I. & P. R. Co.*, 42 Iowa 518.

Personal apparel furnished by a husband to his wife, or purchased by the wife, with

to one since.
Rich, 13 Bush

Act of 1880,
assage of the
g the Code of
oman might
a name for an
hout joining
ore, and may
New York, L.
R. 184, 22 N.

for the loss of
eparate prop-
t necessary to
ecessary Tran-

ue alone.—
isions in sev-
r personal in-
st be brought
Anniston, O.
So. Rep. 466.
Nickson, 67 Ill.
v. Button, 68
R. I. & P. R.
IN Nichols v
Iowa 732.—
an, 28 Mich.
ummer v. Ossi-

and wife have
of action, the
amendment,
v. Coleman, 28
9.—NOT FOL-
v. Cosby, 27
nd, 32.

sue alone,
does not give
er own name
ke a contract
liabilities for
Metropolitan R.

d in the ordi-
nd not in any
annot recover
by a personal
st join in the
& D. R. Co.,
8 Iowa 732, 28
Tuttle v. Chi-
wa 518.

by a husband
the wife, with

the consent of her husband, with money given her by him from a fund formed by their joint earnings, remains the property of the husband, and the wife cannot maintain an action against a carrier for the loss thereof. *Hawkins v. Providence & W. R. Co., 119 Mass. 596.*

27. Deserted wife carrying on business.—Under Cal. Code Civ. Pro. § 370, a married woman whose husband has deserted her may sue for a personal injury without joining him. *Baldwin v. Second St. Cable R. Co., 77 Cal. 390, 19 Pac. Rep. 644.*

Where a husband deserts his wife, and she is carrying on a trade or business in her own name, and using the issues and profits thereof for the support of herself and her children, she may maintain an action for personal injuries, and may recover the damages in her own name. *Griffith v. Utica & M. R. Co., 43 N. Y. S. R. 835, 63 Hun 626, 17 N. Y. Supp. 692; affirmed in 137 N. Y. 566, mem., 50 N. Y. S. R. 933, mem., 33 N. E. Rep. 339, mem.*

28. Right of wife to sue alone for injuries to her separate estate.—For an injury to or conversion of a wife's paraphernalia during coverture, the husband was at common law the proper party to sue. But under the New York statute relating to the separate property of married women, an action against a carrier for the loss or conversion of the wife's wearing apparel and personal ornaments, which are shipped as baggage, may be brought in her name without joining the husband. *Rawson v. Pennsylvania R. Co., 48 N. Y. 212, 3 Am. Ry. Rep. 528; affirming 2 Abb. Pr. N. S. 220.*

Where a married woman is domiciled in Maryland, where the law allows her to hold personal property owned at the time of marriage, or acquired afterward, to her separate use as if she were a *feme sole*, and she sues in New York for a loss or injury thereto occurring in the latter state, her right of action is governed by the law of her domicile, and she may sue in her own name. *Stoneman v. Erie R. Co., 52 N. Y. 429, 4 Am. Ry. Rep. 446; affirming 1 Sheld. 286.*

Under the provisions of the W. Va. Code, ch. 66, a married woman, living with her husband, may maintain an action at law for injuries done to her separate real estate by the construction and operation of a railroad,

5 D. R. D.—68.

without uniting her husband in the action. *McKenzie v. Ohio River R. Co., 27 W. Va. 306.*

And in such action it is not error for the trial court to permit the plaintiff to read to the jury a deed made to plaintiff by her husband for such real estate. *McKenzie v. Ohio River R. Co., 27 W. Va. 306.*

Where a married woman has for a number of years allowed her husband to receive the income from her real estate, she is deemed out of possession, and cannot recover for an injury to the crops, though she might maintain an action for an injury to the reversion. In any case where the husband has the right to receive the crops as against his wife, he alone must bring an action for an injury thereto. *Lyon v. Green Bay, & M. R. Co., 42 Wis. 548, 15 Am. Ry. Rep. 85.*

29. Pleading and evidence.—Where a married woman sues alone to recover for a personal injury, there can be no recovery for loss of earnings, unless such loss is specially pleaded. *Melkowitz v. Manhattan R. Co., 43 N. Y. S. R. 354, 62 Hun 622, 17 N. Y. Supp. 112.—QUOTED IN Bloom v. Manhattan El. R. Co., 43 N. Y. S. R. 378.*

Where her complaint contains no allegation either of a loss of earnings, or that she was carrying on business for her sole and separate account, or that she was allowed by her husband to apply to her own use any wages or earnings in any separate business, it is error to allow her to testify as to the amount of her earnings just prior to the injury. *Bloom v. Manhattan El. R. Co., 43 N. Y. S. R. 378, 63 Hun 629, 17 N. Y. Supp. 812.—QUOTING Melkowitz v. Manhattan R. Co., 43 N. Y. S. R. 354.—Uransky v. Dry Dock, E. B. & B. R. Co., 118 N. Y. 304, 23 N. E. Rep. 451, 28 N. Y. S. R. 711; reversing 44 Hun 119, 7 N. Y. S. R. 395.*

Presumptively, damages for negligently diminishing the earning capacity of a married woman belong to her husband, and when she seeks to recover such damages, her complaint must allege that for some reason she is entitled to the fruits of her own labor; or if she seeks to recover damages for an injury to her business, she must allege that she was engaged in business on her own account and by reason of the injury was injured therein as specifically set forth. *Uransky v. Dry Dock, E. B. & B. R. Co., 118 N. Y. 304, 23 N. E. Rep. 451, 28 N. Y. S. R. 711; reversing 44 Hun 119, 7 N.*

Y. S. R. 395.—**DISTINGUISHING** *Ehrgott v. Mayor, etc.*, 96 N. Y. 275.

A complaint by a married woman alleged that defendant, a common carrier, undertook to carry her and her baggage from San Francisco to New York, but the baggage, which was her separate property, was stolen and damaged while in the hands of defendant, to which defendant demurred. *Held*, that the demurrer admitted that the property was her separate property, and the legal presumption would prevail that a wife in California might hold separate property. If the defendant was entitled to be informed of the particular facts which constituted the baggage her separate property, the remedy was by motion for a bill of particulars, under N. Y. Code, § 160, and not by demurrer. *Spies v. Accessory Transit Co.*, 5 *Duer* (N. Y.) 662.

30. Extent and limits of wife's recovery.—Where a married woman sues for a personal injury she cannot recover for money expended in procuring medical attendance and other expenses growing out of her injury, nor for loss of time caused by the injury, unless she is engaged in a separate, independent business, which thereby suffers loss. *Tuttle v. Chicago, R. I. & P. R. Co.*, 42 *Iowa* 518.

She cannot recover for "lost time," for "medical attendance," nor for "impaired capacity to labor." Her services belong to her husband, and he must furnish her with medical attention; hence he alone suffers pecuniary damages because of "loss of time," "medical attention," and "impaired capacity to labor" of the wife, and the action for such damages must be in his name. *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 *Kan.* 109, 26 *Pac. Rep.* 453. *Klein v. Jewett*, 26 *N. J. Eq.* 474; *affirmed in 27 N. J. Eq.* 550. *Blaechinska v. Howard Mission, etc.*, 130 *N. Y.* 497, 29 *N. E. Rep.* 755, 42 *N. Y. S. R.* 387.—**DISTINGUISHING** *Brooks v. Schwerin*, 54 *N. Y.* 343; *Reynolds v. Robinson*, 64 *N. Y.* 589. **QUOTING** *Filer v. New York C. R. Co.*, 49 *N. Y.* 47.—**QUOTED IN** *Thuringer v. New York C. & H. R. R. Co.*, 71 *Hun* 526.

In an action by a married woman living with her husband, for personal injuries sustained by her, she is entitled to recover for the diminution of her capacity to labor, resulting from the injuries. *Jordan v. Middlesex R. Co.*, 138 *Mass.* 425.

The marriage of a woman after injuries

received in a railroad accident cannot affect her right to recover damages for the loss of her capacity to earn money. The question of the loss of the capacity to earn money is properly left to the jury. *Reading v. Pennsylvania R. Co.*, 52 *N. J. L.* 264, 19 *Atl. Rep.* 321.

4. Joint Actions by Husband and Wife.

31. Joinder, when necessary or proper.—An action to recover damages for injuries to the wife should be brought in the names of the husband and wife. *Snashall v. Metropolitan R. Co.*, 8 *Mackey* (D. C.) 399. *McFadden v. Santa Ana, O. & T. St. R. Co.*, 87 *Cal.* 464, 25 *Pac. Rep.* 681.

In an action for damages for personal injuries to the wife, the husband must be made a party plaintiff; but the recovery cannot extend to any matters for which the husband must sue alone, as loss of service and the like. *Matthew v. Central Pac. R. Co.*, 63 *Cal.* 450.

In all cases where the cause of action will survive to the wife, she may join with her husband in a suit upon it. *Fuller v. Nauvatonuck R. Co.*, 21 *Conn.* 557.

Georgia Code, § 2960, providing that a husband may recover damages for torts committed on his wife, does not change the common law rule that the wife should be joined in the action. *East Tenn., V. & G. R. Co. v. Cox*, 57 *Ga.* 252.

Where a married woman acquired land prior to the passage of the Illinois Married Woman's Act of 1861, and it was occupied jointly by the husband and wife, they must join in an action for an injury thereto. Or if the land be acquired by the wife after the passage of the above statute, and is occupied jointly by the husband and wife, then also both may join in an action for an injury to the land. *Illinois C. R. Co. v. Grable*, 46 *Ill.* 445.

The gravamen of an action by husband and wife to recover for personal injuries to the wife while a passenger is the negligence of defendant. The right to maintain the action does not depend upon contract, but the action is founded upon the common law duty to carry safely; and the negligent violation of that duty to the damage of the plaintiff is a tort or wrong which gives rise to the right of action. *Baltimore City Pass. R. Co. v. Kemp*, 61 *Md.* 619, 48 *Am. Rep.* 134.

It is proper to join the husband and wife as plaintiffs in an action against a common

dent cannot af-
damages for the
rn money. The
capacity to earn
e jury. *Reading*
N. J. L. 264, 19

and and Wife.

necessary or
recover damages
ould be brought
band and wife.
Co., 8 Mackey
Santa Ana, O.
25 Pac. Rep. 681.
s for personal in-
usband must be
the recovery can-
s for which the
s loss of service
Central Pac. R.

use of action will
ay join with her
Fuller v. Nau-

providing that a
images for torts
es not change the
e wife should be
t Tenn., V. & G.

an acquired land
Illinois Married
it was occupied
t wife, they must
ury thereto. Or
the wife after the
e, and is occupied
d wife, then also
for an injury to
v. Grable, 46 Ill.

tion by husband
sonal injuries to
is the negligence
to maintain the
on contract, but
the common law
the negligent vio-
damage of the
which gives rise
timore City Pass.
48 Am. Rep. 134.
usband and wife
against a common

carrier, for a violation of his general duty to the public, in failing to comply with his engagement to stop at a particular place, whereby the wife was unable to take passage. *Heirn v. M'Caughan*, 32 Miss. 17.—QUOTED IN *Purcell v. Richmond & D. R. Co.*, 108 N. Car. 414.

Where a bill alleges that one of the directors of a company charged with the acts of misappropriation and embezzlement had fraudulently conveyed his property to his wife, and seeks to have the conveyance set aside, that the property may be subjected to his debt, making the wife a party for this purpose—held, that she was a proper party to the bill. *Shea v. Knoxville & K. R. Co.*, 6 Baxt. (Tenn.) 277.

In a suit originally brought for damages to land which was alleged to be the separate property of the wife, the wife was not improperly joined in the original suit as plaintiff. *Texas & St. L. R. Co. v. Reid*, 1 Tex. App. (Civ. Cas.) 120.

Husband and wife may join in a suit for damages for a personal injury to both while passengers on a train. *Texas & P. R. Co. v. Gwaltney*, 2 Tex. App. (Civ. Cas.) 602.—DISAPPROVING *Texas C. R. Co. v. Burnett*, 61 Tex. 638. FOLLOWING *San Antonio St. R. Co. v. Helm*, 64 Tex. 147.

32. Husband proper though not necessary party.—In an action to recover damages for personal injuries to the wife, the husband is a proper but not a necessary party. *Ohio & M. R. Co. v. Cosby*, 27 Am. & Eng. R. Cas. 339, 107 Ind. 32, 7 N. E. Rep. 373.—NOT FOLLOWING *Michigan C. R. Co. v. Coleman*, 28 Mich. 440.

33. Wife proper though not necessary party.—A wife's interest in the lands of her husband has been so enlarged by section 2508, Ind. Rev. St. 1881, that while she may not be a necessary party plaintiff, she is nevertheless a proper party plaintiff with her husband in an action to compel a railroad company to maintain a crossing over its right of way, and to maintain cattle-guards, fences, etc., in accordance with a provision in a deed, by the husband and wife, of the land, for the right of way. *Lake Erie & W. R. Co. v. Priest*, 131 Ind. 413, 31 N. E. Rep. 77.

An action for injury to the wife, caused by the negligence of another, must be brought in the name of the husband, and the wife, while not a necessary is a proper party to such action; and there may be a

recovery therein for the pain, suffering, wounded feelings, etc., of the wife, and, on the part of the husband, the cost of her nursing, medical attendance, and medicines, together with the loss of her services in the household. *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Pac. Rep. 1021.

34. Adding husband's name by amendment—Limitation.—When the wife sues as sole plaintiff, on a cause of action which can only be prosecuted by husband and wife jointly, for the benefit of the husband, and his name is added by amendment after the statutory bar is complete, the statute of limitations is a bar to the action. *Barker v. Anniston, O. & O. St. R. Co.*, 92 Ala. 314, 8 So. Rep. 466.—FOLLOWING *King v. Avery*, 37 Ala. 169.

35. Non-joinder or misjoinder, how objected to.—Where a husband and wife join in an action against a railroad, charging that through the negligence of the company the wife has been greatly injured and has suffered great pain, and by reason thereof the husband has lost her services and been put to great expense, and otherwise injured, and the company goes to trial without objecting to a joinder of husband and wife as co-plaintiffs, plaintiffs are entitled to a joint recovery, including damages to the wife as well as the loss of services and expenses incurred by the husband. *Little Rock & Ft. S. R. Co. v. Harkey*, (Ark.) 15 S. W. Rep. 456.

Where a married woman sues for a personal injury received while leaving a street-car, a motion for a nonsuit on the ground of the non-joinder of the plaintiff's husband is properly denied, when the fact of the coverture appears on the face of the complaint. In such case the defect can be reached only by demurrer, under the N. Y. Code of Civ. Pro. §§ 480, 499. *Chase v. Jamestown St. R. Co.*, 15 N. Y. Supp. 35.

Whether or not it be proper for husband and wife to join in an action against a railroad company, for personal injuries to the wife, yet to be available the misjoinder must be taken advantage of by special exception, and not by general demurrer. *Texas & P. R. Co. v. Pollard*, 2 Tex. App. (Civ. Cas.) 424.

Where a wife purchases stock out of her own earnings, and is registered as the owner, she and her husband may sue jointly for dividends; if the wife sues alone, a plea in abatement is the only manner in which the

non-joinder of the husband can be taken advantage of. *Dalton v. Midland Counties R. Co.*, 13 C. B. 474, 17 Jur. 719, 22 L. J. C. P. 177.

In an action by a husband and wife for injuries to the wife, the company cannot assign for error in fact, that before the marriage of the plaintiffs the wife had married another man, who was then alive. *Metropolitan R. Co. v. Wilson*, 40 L. J. C. P. 208, L. R. 6 C. P. 376, 21 L. T. 550, 19 W. R. 775.

36. Pleading and evidence.—Where a husband and wife sue for a personal injury to the wife, and the evidence shows that her injuries are permanent, so that it is necessary for the husband to employ another to do the work that she had been doing, the Carlisle tables of mortality may be introduced in evidence for the purpose of showing the wife's life expectancy. *McDonald v. Chicago & N. W. R. Co.*, 26 Iowa 124.—FOLLOWED IN *Knapp v. Sioux City & P. R. Co.*, 71 Iowa 41, 32 N. W. Rep. 18.

Where the declaration, by husband and wife, for a personal injury to the wife, after stating the nature and extent of the injury complained of, proceeded to allege that by means of such injury she became sick, and was prevented from attending to her necessary affairs, and that the plaintiffs were thereby forced to, and did, necessarily expend two hundred dollars in endeavoring to effect a cure—*held*, that although the plaintiffs could not recover, in the same action, for the wife's personal injury, and also for the expenses of her cure, yet in this case the ground of damages was the wife's personal injury alone, and the statement regarding the expenses of her cure was to be considered as descriptive of the extent of her injury, and not as a distinct and substantive ground of damages, and in that aspect, though unnecessary, still it was very proper; but if otherwise, yet as the gist of the action was the breach of contract in not carrying the wife safely, and this was a ground on which the plaintiffs could recover, it will be presumed after verdict that the court confined the evidence to that ground. *Fuller v. Naugatuck R. Co.*, 21 Conn. 557.

In a joint action for a personal injury to the wife the evidence was that the wife had been an invalid for two years before the injury complained of, but that during that

period she had been gradually recovering her health, and that prior to such injury the indications were that she would soon recover. *Held*, that there was no error in refusing to submit for a special verdict the question, "What was the value of her services per month during those two years?" *Meese v. Foud du Lac*, 48 Wis. 323, 4 N. W. Rep. 406.

After a count by husband and wife for injury done by a railway to the wife during coverture, a second count, by the husband alone, after setting out the fact of the horse and cutter, in which both plaintiffs at the time were, having been precipitated over a bridge with the wife, and that she was thereby greatly injured, and laid up for a long time in consequence of the injuries sustained by her, and endured great suffering, proceeded to allege that the husband was put to great trouble and expense by reason of the loss of his wife's society and her services, and was compelled to pay large sums of money, on account of her illness, to nurses and medical men, etc., and also lost said horse and cutter, and was otherwise put to great expense. The jury found for plaintiffs, and assessed damages generally on both counts. *Held*, that after verdict the second count must be treated as a count only for the damage of the husband, for which he alone could sue; and that treating it as such, it was well joined with the first count, under the Common Law Procedure Act, although damages were sought by it for the injury to the horse and cutter, as well as for that resulting to the husband from the injury to the wife. *Campbell v. Great Western R. Co.*, 20 U. C. C. P. 345; *affirmed in 20 U. C. C. P. 563*.

Defendants were not entitled to arrest the judgment on the ground that the damages had been separately assessed upon each count. *Campbell v. Great Western R. Co.*, 20 U. C. C. P. 345; *affirmed in 20 U. C. C. P. 563*.

37. Damages recoverable.—Where a husband is joined as a nominal party in an action for personal injuries to the wife, only such damages as are personal to the wife can be recovered; and instructions to the jury should contain a full and complete statement of the true measure of damages. *Brown v. Hannibal & St. J. R. Co.*, 23 Mo. App. 209; *affirmed in 99 Mo. 310*. *Johnson v. Baltimore & P. R. Co.*, 6 Mackey (D. C.) 232.—APPROVING *Minick v. Troy*, 19 Hun

lly recovering
such injury the
ould soon re-
no error in re-
ial verdict the
ue of her ser-
se two years?"
s. 323, 4 N. W.

and wife for in-
ne wife during
by the husband
ct of the horse
plaintiffs at the
ipitated over a
t that she was
laid up for a
of the injuries
ed great suffer-
t the husband
nd expense by
e's society and
pelled to pay
ount of her ill-
men, etc., and
utter, and was
ense. The jury
essed damages
Held, that after
st be treated as
of the husband,
sue; and that
ell joined with
Common Law
damages were
o the horse and
resulting to the
he wife. *Camp-*
20 U. C. C. P.
P. 563.
ttled to arrest
that the dam-
assessed upon
eat Western R.
ffirmed in 20 U.

able.—Where a
inal party in an
o the wife, only
nal to the wife
ructions to the
and complete
are of damages.
R. Co., 23 Mo.
p. 310. *Johnson*
Mackey (D. C.)
Troy, 19 Hun

(N. Y.) 253. REVIEWING *Scott v. Metropolitan R. Co.*, 4 Mackey 153.

In a joint action by husband and wife for injuries received by the wife, recovery cannot be had for the loss of the wife's services to the husband, nor for the loss of the wife's society, nor for the expenses of her cure, nor for her attendance while sick; these belong to the husband alone. *Scott v. Metropolitan R. Co.*, 4 Mackey (D. C.) 152.—REVIEWED IN *Johnson v. Baltimore & P. R. Co.*, 6 Mackey 232.—*Ohio & M. R. Co. v. Cosby*, 27 Am. & Eng. R. Cas. 339, 107 Ind. 32, 7 N. E. Rep. 373. *Baltimore City Pass. R. Co. v. Kemp*, 18 Am. & Eng. R. Cas. 220, 61 Md. 74, 47 Am. Rep. 381, n. *Northern C. R. Co. v. Mills*, 19 Am. & Eng. R. Cas. 160, 61 Md. 355.—APPROVED IN *Bunyca v. Metropolitan R. Co.*, 8 Mackey 76.

In an action by husband and wife for personal injuries sustained by the wife, the jury were properly instructed that in estimating the damages they were to consider the health and condition of the female plaintiff before the injury, as compared with her condition at the time of the trial, *in consequence* of the injury; "and whether the injury in its nature was permanent, and how far it was calculated to disable her from engaging in those household pursuits and employments for which, in the absence of such injury, she would be qualified; and also the physical and mental suffering to which she was subjected by reason of the injury; and to allow such damages as in the opinion of the jury would be a fair and just compensation for the injury which she sustained." *Baltimore City Pass. R. Co. v. Kemp*, 18 Am. & Eng. R. Cas. 220, 61 Md. 74, 47 Am. Rep. 381, n.

38. Judgment, generally.—In an action by husband and wife to recover damages for personal injury to the wife, judgment may properly be rendered in favor of the husband and wife jointly. *Neale v. Depot R. Co.*, 94 Cal. 425, 29 Pac. Rep. 954.

39. — as a bar to further litigation.—Under the New Jersey laws a judgment in assumpsit, in a suit by a husband and wife against a railroad for a failure to safely carry the wife, is not a bar to another action of assumpsit by the husband alone for the same cause of action. *Pollard v. New Jersey R. & T. Co.*, 101 U. S. 223.

When, in a suit for damages to the wife, husband and wife are joined, and no objection is made to the joinder, and judgment is given for plaintiffs, the judgment is as complete a bar to any subsequent suit by husband and wife, as in a case where the husband alone was plaintiff. *San Antonio St. R. Co. v. Helm*, 19 Am. & Eng. R. Cas. 158, 64 Tex. 147.—FOLLOWING *Texas C. R. Co. v. Burnett*, 61 Tex. 639.

40. Effect of death of wife pending suit.—The joint action by husband and wife for personal injuries to the wife abates by her death; and the husband may then bring a separate action for loss of services, etc. *Meese v. Fond du Lac*, 48 Wis. 323, 4 N. W. Rep. 406.

41. Consolidation of actions.—An action by a husband and wife for an injury done to the wife may be consolidated with an action by the husband for an injury to himself at the same time and place. *Morley v. Midland R. Co.*, 3 F. & F. 961.

Section 40 of the Common Law Procedure Act of 1852, providing that in any actions by a man and wife for injury to the wife, the husband may add claims in his own right, and that separate actions brought in respect of such claims may be consolidated, and that in case of the death of either plaintiff a suit, so far as relates to the causes of action, if any, which do not survive, shall abate—is permissive only and not imperative. *Brockbank v. Whitehaven Junction R. Co.*, 7 H. & N. 834, 31 L. J. Ex. 349.

HYPOTHETICAL QUESTIONS.

Opinions of experts based upon, see WITNESSES, 156, 189-194.

I

ICE AND SNOW.

Duty to remove from car platform, see CARRIAGE OF PASSENGERS, 210.

— — — cattle-guards, see ANIMALS, INJURIES TO, 169.

Heaping up, on street, rights of adjoining owner, see STREET RAILWAYS, 201.

Injury to employe by, liability of company, see EMPLOYEES, INJURIES TO, 82.

On platform at station, liability for, see STATIONS AND DEPOTS, 88, 121.

Ordinances relative to, see MUNICIPAL CORPORATIONS, 19.

IDAHO.

Assessment and levy of taxes in, see TAXATION, 256.

IDENTIFICATION.

- Of consignee, see CARRIAGE OF MERCHANDISE, 277, 311.
- deponent, with person named in commission to take testimony, see EVIDENCE, 260.
- passenger, stipulation in mileage ticket as to, see TICKETS AND FARES, 99.

IGNORANCE.

- Of contents of release, impeachment for, see RELEASE, 14.
- defects, allegation and proof of, see EMPLOYEES, INJURIES TO, 543, 574.
- established usage, burden of proof to show, see EMPLOYEES, INJURIES TO, 597.
- shipper, as to contents of special contract, effect of, see CARRIAGE OF LIVE STOCK, 95.

ILLEGALITY.

- Affidavit of, see EXECUTION, 24; TAXATION, 333.
- In tax assessment, injunction for, see TAXATION, 350.
- Of contracts, see CONTRACTS, 52-67.
- — prevents specific performance, see SPECIFIC PERFORMANCE, 18.
- corporate bonds, see BONDS, 25.
- creditor's claim against corporation, as a defense to stockholder, see STOCKHOLDERS, 70.

ILLINOIS.

- Actions for penalty in, for failure to give signals, see CROSSINGS, INJURIES, ETC., AT, 156.
- Application of fellow-servant rule in, to servants of different departments, see FELLOW-SERVANTS, 109.
- Assessment and levy of taxes in, see TAXATION, 257.
- Constitutional provisions in, relative to condemnation proceedings, see EMINENT DOMAIN, 9.
- Constitutionality of statutes of, as to condemnation proceedings, see EMINENT DOMAIN, 28.
- — — — — municipal aid for railways, see MUNICIPAL AND LOCAL AID, 29.
- — tax laws of, see TAXATION, 24.

Construction of statutes of, as to right of way for steam roads in streets, see STREETS AND HIGHWAYS, 73.

Crossing of streets and highways under statutes of, see CROSSING OF STREETS AND HIGHWAYS, 2.

Deductions for benefits under condemnation laws of, see EMINENT DOMAIN, 732.

Doctrine of comparative negligence in, see COMPARATIVE NEGLIGENCE, 1-20; FIRES, 120.

Duty to locate stations under statutes of, see STATIONS AND DEPOTS, 18.

— — — stop at county seats under statutes of, see CARRIAGE OF PASSENGERS, 215.

Federal grants to, see LAND GRANTS, 21.

Grade crossings under statutes of, see CROSSING OF RAILROADS, 66.

Grants by, to railroads, see LAND GRANTS, 115.

Injuries to animals running at large in, see ANIMALS, INJURIES TO, 246, 265.

Jurisdiction of appellate courts of, see JURISDICTION, 19.

Laying out streets across railways under statutes of, see CROSSING OF STREETS AND HIGHWAYS, 43.

Local assessments upon steam railways in, for repairs, paving, etc., see STREETS AND HIGHWAYS, 343.

Occupation of streets by steam roads under legislative grants of, see STREETS AND HIGHWAYS, 43.

Operation of statute of, giving right of action for causing death, see DEATH BY WRONGFUL ACT, 17.

Pleadings under statute of, to recover penalty for discrimination, see DISCRIMINATION, 79.

Review of town bonding proceedings by mandamus in, see MUNICIPAL AND LOCAL AID, 443.

Rule in, as to imputed negligence, see IMPUTED NEGLIGENCE, 5.

— — — — — limitation of liability for negligence, see CARRIAGE OF MERCHANDISE, 478.

Statute of, regulating liability for injuries caused by fire, see FIRES, 3.

Statutes of, relative to connecting lines, see CONNECTING LINES, 2.

— — — — — distribution of damages for causing death, see DEATH BY WRONGFUL ACT, 57.

— — — — — drains, see DRAINS, 1.

— — — — — intersection of railways, see CROSSING OF RAILROADS, 8.

Statutory duty to fence in, see FENCES, 21.

— provisions in, limiting amount recoverable for causing death, see DEATH BY WRONGFUL ACT, 366.

to right of
streets, see
B.
highways under
STREETS AND
condemnation
IN, 732.
gence in, see
1-20; FIRES,
statutes of, see

er statutes of,
s, 215.
ANTS, 21.
of, see CROSS-

LAND GRANTS,
large in, see
205.
of, see JURIS-

highways under
STREETS AND

in railways in,
STREETS AND

in roads under
STREETS AND

g right of ac-
see DEATH BY

o recover pen-
e DISCRIMINA-

ndings by man-
ND LOCAL AID,

gence, see IM-

ity for negli-
MERCHANDISE,

y for injuries

ing lines, see

ages for caus-
RONGFUL ACT,

.

ys, see CROSS-

FENCES, 21.

ount recover-
ee DEATH BY

Statutory regulation of grade crossings in,
see CROSSING OF STREETS AND HIGHWAYS,
86.

Taking land for streets and laying out roads
in, see STREETS AND HIGHWAYS, 18.

Taxation in aid of railways in, see MUNICI-
PAL AND LOCAL AID, 410.

— of land grants in, see TAXATION, 110.

Transportation of diseased cattle in, see
CARRIAGE OF LIVE STOCK, 110.

What amounts to discrimination under statu-
te of, see DISCRIMINATION, 2.

IMMIGRATION.

Detention and disinfection of immigrants,
see QUARANTINE, 2.

Interstate Commerce Act does not extend
to, see INTERSTATE COMMERCE, 25.

Rates for immigrants, see INTERSTATE COM-
MERCE, 47.

IMPANELING.

Of jurors, see EMINENT DOMAIN, 534-545;
TRIAL, 27-35.

IMPEACHMENT.

Of accord, see ACCORD AND SATISFACTION, 6.
— awards of arbitrators, see ARBITRATION
AND AWARD, 30-33.

— judgments against corporation, by stock-
holder, see STOCKHOLDERS, 82.

— collaterally, see JUDGMENT, ETC., 32-
36.

— public sales, see JUDICIAL SALE, 5.

— releases, see RELEASE, 13-15.

— witnesses, see WITNESSES, 31-41.

— evidence for, not ground for new trial,
see NEW TRIAL, 95.

— written instrument, by parol, see EVIDENCE,
189.

IMPLIED.

Contracts, generally, see CONTRACTS, 24.

— for construction of railways, see CON-
STRUCTION OF RAILWAYS, 20.

Covenants, see COVENANTS, 1.

Powers, see AGENCY, 10-19; CARRIAGE OF
MERCHANDISE, 381; CHARTERS, 52;
CORPORATIONS, 5.

Repeal of charter, see CHARTERS, 37.

— statutes, see MUNICIPAL AND LOCAL AID,
61; STATUTES, 67.

IMPRISONMENT.

For contempt, see CONTEMPT, 10.

See FALSE IMPRISONMENT.

IMPROVEMENTS.

Allowance for, in ejectment, see EJECTMENT,
35.

Compensation for, by purchaser at foreclos-
ure sale, see MORTGAGES, 265.

— to owner of homestead for, see HOME-
STEAD, 3.

Evidence of contemplated, in assessment of
land damages, see EMINENT DOMAIN,
602, 639.

In engine, duty to adopt, see FIRES, 37.

— machinery, duty to employes to adopt, see
EMPLOYES, INJURIES TO, 98.

Inspection and approval of, by mortgage
trustee, see MORTGAGES, 146.

Made by company before condemnation, value
of, when allowed to landowner, see EM-
INENT DOMAIN, 656, 657.

Of property taken, evidence of cost of, see
EMINENT DOMAIN, 618, 619.

— public lands, rights of settlers making,
see PUBLIC LANDS, 20.

Right to recover for, in estimating land dam-
ages, see EMINENT DOMAIN, 470.

— to remove after abandonment of road, see
EMINENT DOMAIN, 976.

IMPUTED NEGLIGENCE.

In actions for injuries to employes, see EM-
PLOYES, INJURIES TO, 337; FELLOW-SER-
VANTS, 468.

— — — passengers on street-car, see
STREET RAILWAYS, 381.

Negligence of bailee when imputed to owner,
see FIRES, 118.

— driver, to owner of wagon, see STREET
RAILWAYS, 498.

— — — passenger injured at crossing, see
CROSSINGS, INJURIES, ETC., AT, 216, 285.

— manufacturer of cars, to carrier, see CAR-
RIAGE OF PASSENGERS, 196.

— parents, to child, see CHILDREN, INJURIES
TO, 119-126.

See also CARRIAGE OF PASSENGERS, 365;
CONTRIBUTORY NEGLIGENCE, 18.

I. DOCTRINE OF THOROGOOD VS. BRY-

AN 1079

II. DOCTRINE IN THE UNITED STATES. 1080

I. DOCTRINE OF THOROGOOD VS. BRYAN.

1. Rule stated.* — The contributory
negligence of a carrier should be imputed to
a passenger. *So held*, where a passenger in an
omnibus was injured by the joint negligence

* Doctrine of imputed negligence, generally,
see notes, 4 L. R. A. 126; 8 *Id.* 494.

Imputed contributory negligence of third per-
sons, see note, 23 AM. & ENG. R. CAS. 206.

of the driver of another omnibus, and that of the one in which he rode; the reason being given that the passenger was voluntarily in the carriage identified therewith to such a degree that the want of care on the part of the driver would bar his action; and that he was in the position of a master and responsible for the acts of his servants or agents. *Thorogood v. Bryan*, 8 C. B. 115.—EXPLAINED AND FOLLOWED IN *Armstrong v. Lancashire & Y. R. Co.*, L. R. 10 Ex. 47. NOT FOLLOWED IN *Little v. Hackett*, 116 U. S. 366, 54 Am. Rep. 135. OVERRULED IN *The Bernina*, L. R. 12 P. D. 58, which is affirmed in L. R. 13 App. Cas. 1.

Plaintiff, a passenger on a train, was injured, as the jury found, by the joint negligence of those in charge of the train on which he was a passenger and those in charge of the defendant's train. *Held*, that plaintiff was so far identified with the train on which he rode that he could not recover. *Armstrong v. Lancashire & Y. R. Co.*, L. R. 10 Ex. 47.—FOLLOWING *Thorogood v. Bryan*, 8 C. B. 115.—*Bridge v. Grand Junction R. Co.*, 3 M. & W. 244.

2. To what extent approved and followed.*—If a person who is driving a wagon and team, and, as such driver, has control of the movements of the wagon and fails to exercise proper care, skill, or watchfulness, and thereby aids in causing an accident, whereby the occupants of the wagon are injured, such negligence on the part of the driver is the negligence of the injured occupants, and defeats their right of recovery. *So held*, where plaintiff, as administrator, sued for the death of his wife and two children who were in a wagon that he was driving and which collided with a train. *Morris v. Chicago, M. & St. P. R. Co.*, 26 Fed. Rep. 22.

Where one ships goods on a steamboat and takes passage on the same boat himself, and it is sunk by a collision with another

boat, and the carelessness or unskilful management of the sunken boat contributes to the loss, the shipper cannot recover for the loss of the goods. *Duggins v. Watson*, 15 Ark. 118, 60 Am. Dec. 560.

In such case the shipper is bound by the same principle of law as would be applicable to an action by the owners of the sunken boat, and could only recover in case they would be entitled to recover. *Duggins v. Watson*, 15 Ark. 118, 60 Am. Dec. 560.

Where the plaintiff voluntarily rides in a private carriage with others, one of whom drives, the negligence of the driver contributing to an injury to plaintiff is imputed to the latter so as to defeat a recovery. *Otis v. Janesville*, 47 Wis. 422. *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558.

The rule which imputes the negligence of the driver of a private conveyance to one who rides in it, so as to defeat a recovery, does not apply to passengers in railway cars or steamboats, even though they have chartered the conveyance. *Cuddy v. Horn*, 46 Mich. 596, 41 Am. Rep. 178.

II. DOCTRINE IN THE UNITED STATES.*

3. Thorogood vs. Bryan denied—Alabama.—The concurring negligence of two railway companies whereby a collision is brought about, and a passenger on one of the cars of the street railway company is injured, may create a joint and several liability on the part of the two companies, but it does not exonerate either of them as against the plaintiff. *Georgia Pac. R. Co. v. Hughes*, 39 Am. & Eng. R. Cas. 674, 87 Ala. 610, 6 So. Rep. 413.

In an action for personal injuries sustained by plaintiff by being thrown from a vehicle in which he was riding, as it attempted to cross the defendant's street railway track, which was not in proper condition and repair, the contributory negligence of the driver of the vehicle cannot be imputed to the plaintiff, who had no control over him and did not select him. *Elyton Land Co. v. Mingea*, 43 Am. & Eng. R. Cas. 309, 89 Ala. 521, 7 So. Rep. 666.—APPROVING *Little v. Hackett*, 116 U. S. 366. DISAPPROVING *Thorogood v. Bryan*, 8 C. B. 115; *Armstrong v. Lancashire & Y. R. Co.*, L. R. 10 Ex. 47.

The fact that plaintiff and the driver of

* When carrier's negligence is imputed to passenger, see notes, 37 AM. & ENG. R. CAS. 44; 22 *Id.* 355; 18 *Id.* 148; 23 AM. REP. 4.

Negligence of train hands cannot be imputed to passenger who is injured by collision between trains of different roads, see note, 54 AM. REP. 135.

Imputing negligence of carriage driver to one riding with him, see notes, 45 AM. & ENG. R. CAS. 180; 57 AM. REP. 488; 1 L. R. A. 152; 9 *Id.* 157.

Injury at crossings. Imputed negligence of third party, see 49 AM. & ENG. R. CAS. 455, *abstr.*; 55 *Id.* 221, *abstr.*

Imputed negligence in cases of injuries to infants, see note, 36 AM. & ENG. R. CAS. 68.

* States in which rule of imputed negligence is rejected, see note, 6 L. R. A. 546.

unskillful man-
contributes to
recover for the
v. *Watson*, 15

is bound by
would be ap-
owners of the
recover in case
ver, *Duggins*
n. Dec. 560.

arily rides in a
one of whom
driver contrib-
is imputed to
covery. *Otis v.*
aux v. Mineral
p. 558.

negligence of
eyance to one
at a recovery,
rs in railway
ugh they have
Buddy v. Horn,
8.

ED STATES.*

an denied—
negligence of
by a collision
nger on one of
company is
and several lia-
companies, but
r of them as
ia Pac. R. Co.
Cas. 674, 87

injuries sus-
rown from a
ling, as it at-
t's street rail-
proper condi-
negligence
cannot be im-
ad no control
him. *Elyton*
Eng. R. Cas.
566.—APPROV-
S. 366. DIS-
ryan, 8 C. B.
& Y. R. Co.,

the driver of

ted negligence
16.

the vehicle were both firemen in the employ-
ment of the city, and were going to a fire in
answer to an alarm, as required by their com-
mon business and duty, does not take the
case out of the principle above stated, nor
render the plaintiff liable for the careless or
reckless driving of the driver. *Elyton Land*
Co. v. Mingea, 43 *Am. & Eng. R. Cas.* 309,
89 *Ala.* 521, 7 *So. Rep.* 666.

4. — *Georgia*.—If the plaintiff herself
was free from negligence, and her injury
was due to the concurrent negligence of
the railroad company and the person with
whom she was riding in a wagon, he not
being her servant, and it not appearing that
she was the owner of the horse and wagon,
or that she had any agency or concern in
procuring or in driving the same, and noth-
ing appearing which tends to show that she
was aware of any incompetency in the
driver, the company is liable to her for all
the damages consequent upon the injury.
Metropolitan St. R. Co. v. Powell, 89 *Ga.*
601, 16 *S. E. Rep.* 118. *East Tenn., V. & G.*
R. Co. v. Markens, 88 *Ga.* 60, 13 *S. E. Rep.*
855.

But if the negligence of the driver was
the sole cause and the real cause of the col-
lision she cannot recover, because the com-
pany not being negligent, no action would
lie. *East Tenn., V. & G. R. Co. v. Markens*,
88 *Ga.* 60, 13 *S. E. Rep.* 855.

A female passenger in a public hack is
under no duty to supervise the driver at a
public crossing, nor to look or listen for
approaching trains, unless she has some rea-
son to distrust the diligence of the driver
himself in respect to these matters. *East*
Tenn., V. & G. R. Co. v. Markens, 88 *Ga.*
60, 13 *S. E. Rep.* 855.

5. — *Illinois*.—Where a railway pas-
senger is injured by a collision of his train
and the train of another company, through
the mutual negligence of both, and he has
no contract relations with such other com-
pany, he may maintain an action against
either company; or if he be killed his rep-
resentative may maintain such action. *Wa-*
bash, St. L. & P. R. Co. v. Shacklet, 105 *Ill.*
364, 44 *Am. Rep.* 791. *Union R. & T. Co.*
v. Shacklett, 19 *Ill. App.* 145.—QUOTING
Wabash, St. L. & P. R. Co. v. Shacklet, 105
Ill. 364.

But in such case if no contract relation
exist between the passenger and the other
company, he cannot maintain an action *ex*
contractu against the other company, but

he may maintain an action *ex delicto*. *Wa-*
bash, St. L. & P. R. Co. v. Shacklet, 105 *Ill.*
364, 44 *Am. Rep.* 791.

6. — *Indiana*.—If a man is riding
with another, and is injured by a collision
occurring through the concurrent negli-
gence of the driver of the vehicle and the
servants of a railroad train engaged in run-
ning it, he may recover, notwithstanding
the contributory negligence of the driver of
the vehicle in which he was riding. *Terre*
Haute & I. R. Co. v. McMurray, 22 *Am. &*
Eng. R. Cas. 371, 98 *Ind.* 358, 49 *Am. Rep.*
752. *Michigan City v. Boeckling*, 122 *Ind.*
39, 23 *N. E. Rep.* 518.

7. — *Iowa*.—A passenger in a hired
conveyance is not precluded from recover-
ing for injuries received at a railway cross-
ing, where the accident was due to the neg-
ligent action of the driver furnished by the
owner of the conveyance. The negligence
of the driver prevents recovery only when
he is under the control or direction of the
party injured. *Larkin v. Burlington, C. R.*
& N. R. Co., 85 *Iowa* 492, 52 *N. W. Rep.*
480.

Plaintiff was driving with three of his
neighbors, with a team which did not belong
to any of the parties, but was under the con-
trol of one of the neighbors. Through the
negligence of one of the party, who was
driving, plaintiff was injured by a train in
crossing the track. *Held*, that the negli-
gence of the driver would defeat an action
by plaintiff for the injury received. *Payne*
v. Chicago, R. I. & P. R. Co., 39 *Iowa* 523,
9 *Am. Ry. Rep.* 176.—DISAPPROVED IN *Dean*
v. Pennsylvania R. Co., 39 *Am. & Eng. R.*
Cas. 697, 129 *Pa. St.* 514. NOT FOLLOWED
IN *Noyes v. Boscawen*, 64 *N. H.* 361.

If the driver and the plaintiff were at the
time of the accident engaged in the pursuit
of a common purpose, the negligence of the
driver might be imputed to plaintiff; and
whether they were so engaged was a ques-
tion for the jury under the evidence. *Nes-*
bit v. Garner, 75 *Iowa* 314, 39 *N. W. Rep.*
516.

The negligence of plaintiff's son, eleven
years old, who was on a wagon driven by
his father, and saw a car coming, but failed
to notify his father of the fact, could not be
imputed to the father. *Watson v. Wabash*,
St. L. & P. R. Co., 19 *Am. & Eng. R. Cas.*
114, 66 *Iowa* 164, 23 *N. W. Rep.* 380.

The plaintiff, a boy of about twelve years,
was riding with his mother in a carriage

driven by his mother's servant. While attempting to cross the defendant's track the carriage was struck by a passing locomotive and the plaintiff was seriously injured. The driver was careless in not stopping at a proper place and looking for an approaching train, and the mother was careless in not requiring the driver so to stop and look. *Held*, that this carelessness must be imputed to the plaintiff, and that a judgment in his favor must be reversed, although the train was running at a dangerous rate of speed, and did not give warning of its approach. *Slater v. Burlington, C. R. & N. R. Co.*, 71 Iowa 209, 32 N. W. Rep. 264.

8. — Kentucky.—Where the life of a passenger in a street railway car is lost by the concurrent negligence of the driver of the car and other persons, such negligence of the driver is no defense in an action against the other persons, such driver not being the agent or servant of the decedent, nor subject to his government or control. *Louisville, C. & L. R. Co. v. Case*, 9 Bush (Ky.) 728.—FOLLOWED IN *Noyes v. Boscawen*, 64 N. H. 361.

9. — Louisiana.—The doctrine that a passenger in a public conveyance is in some way identified with the owner or the driver of it so that he cannot recover of the owner of another public conveyance for injuries caused by a collision of the two, when he has exercised no control over the conduct of the driver of the vehicle in which he is riding, is unjust, illogical, and indefensible. *Holzap v. New Orleans & C. R. Co.*, 38 La. Ann. 185.—CRITICISING *Thorogood v. Bryan*, 8 C. B. 115. FOLLOWING *Little v. Hackett*, 116 U. S. 366.—See also *Westerfield v. Levis*, 43 La. Ann. 63, 9 So. Rep. 52.

10. — Maine.—The negligence of a driver is not imputed to a passenger carried gratuitously, who has no control over the driver. *State v. Boston & M. R. Co.*, 35 Am. & Eng. R. Cas. 356, 80 Me. 430, 15 Atl. Rep. 36.—DISTINGUISHING *Brown v. European & N. A. R. Co.*, 58 Me. 384; *Leslie v. Lewiston*, 62 Me. 468. NOT FOLLOWING *Dickey v. Maine Tel. Co.*, 43 Me. 492. OVERRULING *Thorogood v. Bryan*, 8 C. B. 115.

11. — Maryland.—The contributory negligence of a driver of a public or private vehicle not owned or controlled by the passenger, and who is himself without fault, will not constitute a bar to the right of the

passenger to recover against a railroad company for injuries received by a collision of its trains with the vehicle. *Philadelphia, W. & B. R. Co. v. Hogeland*, 66 Md. 149; 7 Atl. Rep. 105.—OVERRULING *Thorogood v. Bryan*, 8 C. B. 115.

12. — Massachusetts.—Where a railroad passenger sues his company for a personal injury sustained through its negligence and the negligence of those in charge of another train, which was running on the same track, it is no defense that the negligence of the other train contributed to the injury, although such other train acted independently of defendant. *Eaton v. Boston & L. R. Co.*, 11 Allen (Mass.) 500.

13. — Michigan.—The rule by which one who rides in a private conveyance presumed to control or be identified the driver and to have no right of action for any injury done to him by a collision caused by the driver's negligence, cannot apply to passengers in public conveyances, such as railway cars or steamboats, even though they have chartered the conveyance. *Cuddy v. Horn*, 46 Mich. 596, 10 N. W. Rep. 32.

The doctrine that the negligence of the driver of a vehicle will, in some cases, be imputed to the person riding with him, does not apply where the evidence clearly shows gross and wanton negligence on the part of the defendant. *Schindler v. Milwaukee, L. S. & W. R. Co.*, 87 Mich. 400, 49 N. W. Rep. 670.—DISTINGUISHING *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 277; *Waite v. North Eastern R. Co.*, El. Bl. & El. 719. NOT FOLLOWING *Thorogood v. Bryan*, 8 C. B. 115.

14. — Minnesota.—In an action against two companies for the killing of a passenger in a train of one of them, in a collision with a train of the other, a complaint alleging negligence in the operation of both trains is sufficient. The negligence of the carrier in whose train deceased was a passenger is not imputable to him. *Flaherty v. Minneapolis & St. L. R. Co.*, 39 Minn. 328, 40 N. W. Rep. 160, 1 L. R. A. 680.—DISAPPROVING *Thorogood v. Bryan*, 8 C. B. 115; *Armstrong v. Lancashire & Y. R. Co.*, L. R. 10 Ex. 47.

15. — Mississippi.—The contributory negligence of a driver in venturing upon a crossing before an approaching train, whereby his vehicle is struck, is not imputable to a temporary occupant of the vehicle,

railroad
a collision of
Philadelphia,
66 Md. 149; 7
Thorogood v.

Where a
company for a
ough its negli-
those in charge
nning on the
that the negli-
tributed to the
rain acted in-
aton v. Boston
) 500.

rule by which
conveyanc
identified
ght of action
by a collision
gence, cannot
conveyances,
boats, even
e conveyance,
o N. W. Rep.

igence of the
ome cases, be
with him, does
clearly shows
on the part of
Milwaukee, L.
oo, 49 N. W.
ake Shore &
h. 277; Waite
Bl. & El. 719.
v. Bryan, 8 C.

In an action
e killing of a
of them, in a
other, a com-
the operation
the negligence
ceased was a
im. *Flaher-*
Co., 39 Minn.
R. A. 680.—
Bryan, 8 C. B.
& Y. R. Co.,

the contribu-
in venturing
eaching train,
not imputa-
the vehicle,

who is being driven in it by a mere invitation of its owner, and who has no control over the driver, and no reason to believe that he is imprudent. *Alabama & V. R. Co. v. Davis*, 69 Miss. 444, 13 So. Rep. 693.

16. — Missouri.—A passenger on the vehicle of a common carrier, who is injured by the concurrent negligence of the driver and a third person, is not precluded from recovery against the latter because of the concurring negligence of the driver. *Becke v. Missouri Pac. R. Co.*, 45 Am. & Eng. R. Cas. 174, 102 Mo. 544, 13 S. W. Rep. 1053.—FOLLOWING *Little v. Hackett*, 116 U. S. 366. FOLLOWING AND QUOTING "The Bernina," L. R. 12 P. D. 58. NOT FOLLOWING *Thorogood v. Bryan*, 8 C. B. 115; *Armstrong v. Lancashire & Y. R. Co.*, L. R. 10 Ex. 47; *Lockhart v. Lichtenthaler*, 46 Pa. St. 151.

The negligence of the driver of a vehicle, he not being in the employment or under the control of the person injured while riding thereon, cannot be imputed to the latter. *Dickson v. Missouri Pac. R. Co.*, 104 Mo. 491, 16 S. W. Rep. 381.

17. — New Hampshire.—The negligence of the driver of the carriage in which plaintiff was riding at the time of the injury is no defense to an action against a town for damages from a defective highway, by a passenger guilty of no personal negligence and having no control over the driver. *Noyes v. Boscawen*, 64 N. H. 361, 10 Atl. Rep. 690.—EXPLAINING *Smith v. Smith*, 2 Pick. (Mass.) 621; *Allyn v. Boston & A. R. Co.*, 105 Mass. 77. FOLLOWING *Robinson v. New York C. & H. R. R. Co.*, 66 N. Y. 11; *Dyer v. Erie R. Co.*, 71 N. Y. 238; *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161; *Covington Transfer Co. v. Kelly*, 36 Ohio St. 86; *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 364; *Danville, L. & N. Turnpike Road Co. v. Stewart*, 2 Metc. (Ky.) 119; *Louisville, C. & L. R. Co. v. Case*, 9 Bush (Ky.) 728; *Little v. Hackett*, 116 U. S. 366; *The Bernina*, 12 P. D. 58. NOT FOLLOWING *Thorogood v. Bryan*, 8 C. B. 115; *Armstrong v. Lancashire & Y. R. Co.*, L. R. 10 Ex. 47; *Houfe v. Fulton*, 29 Wis. 296; *Prideaux v. Mineral Point*, 43 Wis. 513; *Lockhart v. Lichtenthaler*, 46 Pa. St. 151; *Forks Tp. v. King*, 84 Pa. St. 230; *Payne v. Chicago, R. I. & P. R. Co.*, 39 Iowa 523.

18. — New Jersey.—The hiring of a coach and driver for a particular journey

does not create the relation of master and servant, so as to impute the driver's negligence to the hirer. *New York, L. E. & W. R. Co. v. Steinbrenner*, 23 Am. & Eng. R. Cas. 339, 47 N. J. L. 161.—DISAPPROVING *Thorogood v. Bryan*, 8 C. B. 115. EXPLAINING *Waite v. North Eastern R. Co.*, El. Bl. & El. 719. FOLLOWING *Bennett v. New Jersey R. & T. Co.*, 36 N. J. L. 125. NOT FOLLOWING *Armstrong v. Lancashire & Y. R. Co.*, L. R. 10 Ex. 47. REVIEWING *Quarman v. Burnett*, 6 M. & W. 499; *Laughter v. Pointer*, 5 B. & C. 547.—FOLLOWED IN *Noyes v. Boscawen*, 64 N. H. 361.

19. — New York.—One riding in a wagon, which is driven by another over whom he has no control, is not chargeable with the negligence of the latter in negligently causing a collision with a train at a crossing. *Cosgrove v. New York C. & H. R. R. Co.*, 13 Hun (N. Y.) 329; see 87 N. Y. 88.—REVIEWING *Johnson v. Hudson River R. Co.*, 20 N. Y. 73; *Wilds v. Hudson River R. Co.*, 24 N. Y. 430.—DISTINGUISHED IN *Masterson v. New York C. & H. R. R. Co.*, 3 Am. & Eng. R. Cas. 408, 84 N. Y. 247, 38 Am. Rep. 510.—*Dyer v. Erie R. Co.*, 71 N. Y. 228.—DISTINGUISHING *Beck v. East River Ferry Co.*, 6 Robt. (N. Y.) 82. FOLLOWING *Robinson v. New York C. & H. R. R. Co.*, 66 N. Y. 11.—APPLIED IN *Gray v. Philadelphia & R. R. Co.*, 22 Am. & Eng. R. Cas. 351, 24 Fed. Rep. 168, 23 Blatchf. (U. S.) 265. APPROVED IN *Little v. Hackett*, 116 U. S. 366. DISTINGUISHED IN *Donnelly v. Brooklyn City R. Co.*, 34 Am. & Eng. R. Cas. 103, 109 N. Y. 16, 15 N. E. Rep. 733, 14 N. Y. S. R. 29, 11 Cent. Rep. 875; *Callahan v. Sharp*, 27 Hun (N. Y.) 85; *Smith v. New York C. & H. R. R. Co.*, 38 Hun 33. FOLLOWED IN *Noyes v. Boscawen*, 64 N. H. 361; *Masterson v. New York C. & H. R. R. Co.*, 3 Am. & Eng. R. Cas. 408, 84 N. Y. 247, 38 Am. Rep. 510.—*Masterson v. New York C. & H. R. R. Co.*, 3 Am. & Eng. R. Cas. 408, 84 N. Y. 247, 38 Am. Rep. 510.—DISTINGUISHING *Cosgrove v. New York C. & H. R. R. Co.*, 13 Hun 329; *Barringer v. New York C. & H. R. R. Co.*, 18 Hun 398. FOLLOWING *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Robinson v. New York C. & H. R. R. Co.*, 66 N. Y. 11.—DISTINGUISHED IN *Donnelly v. Brooklyn City R. Co.*, 34 Am. & Eng. R. Cas. 103, 109 N. Y.

* New York cases on imputed negligence, see note, 28 AM. REP. 565.

16, 15 N. E. Rep. 733, 14 N. Y. S. R. 29, 11 Cent. Rep. 875; *Callahan v. Sharp*, 27 Hun 85. REVIEWED IN *Cahill v. Cincinnati*, N. O. & T. P. R. Co., 92 Ky. 345.—*Robinson v. New York C. & H. R. R. Co.*, 66 N. Y. 11; *affirming* 65 Barb. 146.—APPLIED IN *Gray v. Philadelphia & R. R. Co.*, 22 Am. & Eng. R. Cas. 351, 24 Fed. Rep. 168, 23 Blatchf. 265; *Brickell v. New York C. & H. R. R. Co.*, 42 Am. & Eng. R. Cas. 107, 120 N. Y. 290, 24 N. E. Rep. 449, 30 N. Y. S. R. 932. APPROVED IN *Cahill v. Cincinnati*, N. O. & T. P. R. Co., 92 Ky. 345. DISTINGUISHED IN *Donnelly v. Brooklyn City R. Co.*, 34 Am. & Eng. R. Cas. 103, 109 N. Y. 16, 15 N. E. Rep. 733, 14 N. Y. S. R. 29, 11 Cent. Rep. 875; *Callahan v. Sharp*, 27 Hun 85; *Smith v. New York C. & H. R. R. Co.*, 38 Hun 33. FOLLOWED IN *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Masterson v. New York C. & H. R. R. Co.*, 3 Am. & Eng. R. Cas. 408, 84 N. Y. 247, 38 Am. Rep. 510; *Hoag v. New York C. & H. R. R. Co.*, 111 N. Y. 199, 18 N. E. Rep. 648, 19 N. Y. S. R. 80. QUOTED AND FOLLOWED IN *Noyes v. Boscawen*, 64 N. H. 361. REVIEWED IN *St. Clair St. R. Co. v. Eadie*, 23 Am. & Eng. R. Cas. 269, 43 Ohio St. 91.—*Bennett v. New York C. & H. R. R. Co.*, 40 N. Y. S. R. 948, 16 N. Y. Supp. 765; *affirmed* in 133 N. Y. 563, *mem.*, 30 N. E. Rep. 1149, 44 N. Y. S. R. 930. *McCaffrey v. Delaware & H. Canal Co.*, 41 N. Y. S. R. 221, 62 Hun 618, 16 N. Y. Supp. 495; *affirmed* in 137 N. Y. 568, *mem.*, 33 N. E. Rep. 339, *mem.*, 50 N. Y. S. R. 934.

Where one takes passage in a public stage, and is injured through the joint negligence of a town in leaving an obstruction in a highway, and that of the driver in driving on it, the negligence of the driver cannot be imputed to the passenger. *Chamberlain v. Wheatland*, 4 Silv. Sup. Ct. 165, 7 N. Y. Supp. 190. Contra, *Brown v. New York C. R. Co.*, 32 N. Y. 597; *affirming* 31 Barb. 385.

Where a lady is a mere passenger with the driver of a horse, his negligence in causing her to be injured in passing a railroad is not imputable to her, though the driver is her father. *Phillips v. New York C. & H. R. R. Co.*, 127 N. Y. 657, *mem.*, 3 Silv. App. 467, 27 N. E. Rep. 978, 38 N. Y. S. R. 675; *affirming* 53 Hun 634, 25 N. Y. S. R. 91, 3 Silv. Sup. Ct. 5, 6 N. Y. Supp. 621.

Plaintiff, a female, was driving with a lady

how employed her, the latter being on the front seat and driving, while plaintiff was on the back seat in charge of an infant. *Held*, under such circumstances, that she was not chargeable with the negligence of her employer in contributing to an injury while passing a railroad. *Crawford v. Delaware, L. & W. R. Co.*, 13 N. Y. S. R. 298.

Where a railway passenger is injured by a collision of trains he may recover against the company owning the other train, though the train on which he rode was not free from negligence. *Chapman v. New Haven R. Co.*, 19 N. Y. 341.—REVIEWING *Thoroughgood v. Bryan*, 8 C. B. 115.—APPLIED IN *Busch v. Buffalo Creek R. Co.*, 29 Hun (N. Y.) 112. APPROVED IN *Little v. Hackett*, 116 U. S. 366; *Covington Transfer Co. v. Kelly*, 36 Ohio St. 86. DISAPPROVED IN *Lockhart v. Lichtenthaler*, 46 Pa. St. 151; *Callahan v. Sharp*, 27 Hun 85. FOLLOWED IN *Bennett v. New Jersey R. & T. Co.*, 36 N. J. L. 225; *Brown v. New York C. R. Co.*, 32 N. Y. 597; *Webster v. Hudson River R. Co.*, 38 N. Y. 260; *Macer v. Third Ave. R. Co.*, 15 J. & S. (N. Y.) 461. NOT FOLLOWED IN *Mooney v. Hudson River R. Co.*, 5 Robt. (N. Y.) 548. REVIEWED IN *Brehm v. Great Western R. Co.*, 34 Barb. (N. Y.) 256; *The Bernina*, 12 P. D. 58.—*Webster v. Hudson River R. Co.*, 38 N. Y. 260.—DISTINGUISHING *Brown v. New York C. R. Co.*, 32 N. Y. 597. FOLLOWING *Sheridan v. Brooklyn & N. R. Co.*, 36 N. Y. 39; *Chapman v. New Haven R. Co.*, 19 N. Y. 341; *Colegrove v. New York & N. H. R. Co.*, 20 N. Y. 492. NOT FOLLOWING *Thoroughgood v. Bryan*, 8 C. B. 115.—APPROVED IN *Quill v. New York C. & H. R. R. Co.*, 16 Daly (N. Y.) 313. DISTINGUISHED IN *Callahan v. Sharp*, 27 Hun 85. FOLLOWED IN *Bennett v. New Jersey R. & T. Co.*, 36 N. J. L. 225; *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628. REVIEWED IN *New York, P. & N. R. Co. v. Cooper*, 37 Am. & Eng. R. Cas. 33, 85 Va. 939; *The Bernina*, 12 P. D. 58.—Contra, *Mooney v. Hudson River R. Co.*, 5 Robt. (N. Y.) 548.—FOLLOWING *Brown v. New York C. R. Co.*, 32 N. Y. 597. NOT FOLLOWING *Chapman v. New Haven R. Co.*, 19 N. Y. 341; *Colegrove v. New York & N. H. R. Co.*, 20 N. Y. 492.—DISAPPROVED IN *Perry v. Lansing*, 17 Hun 34 (dissenting opinion of Bockes, J.).—REVIEWED IN *The Bernina*, 12 P. D. 58.—*Beck v. East River Ferry Co.*, 6 Robt. (N. Y.) 82.

20. — Ohio.—In an action for personal injury against a defendant whose negligence directly and proximately concurred with the negligence of the railroad company in producing the injury, the concurrent negligence of the company cannot be imputed to plaintiff. *Covington Transfer Co. v. Kelly*, 3 Am. & Eng. R. Cas. 335, 36 Ohio St. 86, 38 Am. Rep. 558.—APPROVING *Chapman v. New Haven R. Co.*, 19 N. Y. 341; *Colegrove v. New York & N. H. R. Co.*, 20 N. Y. 492; *Bennett v. New Jersey R. & T. Co.*, 36 N. J. L. 225. DISAPPROVING *Thorogood v. Bryan*, 8 C. B. 115; *Armstrong v. Lancashire & Y. R. Co.*, L. R. 10 Ex. 47.—FOLLOWED IN *Noyes v. Boscawen*, 64 N. H. 361; *St. Clair St. R. Co. v. Eadie*, 23 Am. & Eng. R. Cas. 269, 43 Ohio St. 91, 54 Am. Rep. 144.

21. — Pennsylvania.—The negligence of the driver of a vehicle, whereby it collides with a railroad train at a highway crossing, cannot be imputed to one whom he has invited to ride with him, merely as an act of kindness, and whom he carries without any compensation. *Dean v. Pennsylvania R. Co.*, 39 Am. & Eng. R. Cas. 697, 129 Pa. St. 514, 18 Atl. Rep. 718.—DISAPPROVING *Bridge v. Grand Junction R. Co.*, 3 M. & W. 247; *Cattlin v. Hills*, 8 C. B. 123; *Armstrong v. Lancashire & Y. R. Co.*, 44 L. J. Ex. 89, L. R. 10 Ex. 47; *Carlisle v. Sheldon*, 38 Vt. 440; *Houfe v. Fulton*, 29 Wis. 296; *Prideaux v. Mineral Point*, 43 Wis. 513; *Otis v. Janesville*, 47 Wis. 422; *Payne v. Chicago, R. I. & P. R. Co.*, 39 Iowa 523. OVERRULING *Thorogood v. Bryan*, 8 C. B. 115; *Lockhart v. Lichtenthaler*, 46 Pa. St. 151; *Philadelphia & R. R. Co. v. Boyer*, 97 Pa. St. 91.—DISTINGUISHED IN *Cahill v. Cincinnati, N. O. & T. P. R. Co.*, 92 Ky. 345. FOLLOWED IN *Bunting v. Hogsett*, 139 Pa. St. 363. LIMITED IN *Miller v. Louisville, N. A. & C. R. Co.*, 128 Ind. 97.

Where a carrier's passenger is injured by a collision between his vehicle and another, the carrier is liable, if the mutual negligence of the two produced the collision; but if the negligence of the carrier only indirectly contributed to the injury, and the negligence of the other was the proximate cause, then the latter will be answerable. *Lockhart v. Lichtenthaler*, 46 Pa. St. 151.

In an action by the widow and children of an employé of a firm, who, when in charge of their coal cars, drawn by an en-

gine of a railroad company and upon their track, was killed in consequence of a collision with oil barrels of the defendants, placed too near the rail—held, that it was competent for defendants to prove by experts the rate of speed at which the cars were running at the time of the accident; that this speed, in connection with the bad condition of the track at the place, was dangerous; and that the train of cars was improperly made up, etc.; but the evidence, to be effectual, must tend to show the actual concurring negligence on the part of those in charge of the train. *Lockhart v. Lichtenthaler*, 46 Pa. St. 151.—DISAPPROVING *Chapman v. New Haven R. Co.*, 19 N. Y. 341; *Colegrove v. New York & H. R. Co.*, 20 N. Y. 492.—DISTINGUISHED IN *Bunting v. Hogsett*, 139 Pa. St. 363. NOT FOLLOWED IN *Tompkins v. Clay St. R. Co.*, 66 Cal. 164; *Becke v. Missouri Pac. R. Co.*, 102 Mo. 544; *Noyes v. Boscawen*, 64 N. H. 361; *Bennett v. New Jersey R. & T. Co.*, 36 N. J. L. 225. OVERRULED IN *Dean v. Pennsylvania R. Co.*, 39 Am. & Eng. R. Cas. 697, 129 Pa. St. 514.

Where a railroad company is sued to recover for the death of a person, caused by a collision between its train and a street-car on which deceased was riding, in order to recover plaintiff must show (1) that the death resulted directly from defendant's negligence; (2) that the servants of the street-car company were not guilty of negligence; but this is on the hypothesis that the street-car company alone must be liable, if there was mutual negligence, unless the negligence of the railroad contributed proximately to the injury. *Philadelphia & R. R. Co. v. Boyer*, 2 Am. & Eng. R. Cas. 172, 97 Pa. St. 91.

22. — Texas.—The negligence of another person not participated in by the plaintiff will not be attributed to him, unless he has some right of control over such person, or they are on terms of equality, engaged in a joint enterprise. *Garteiser v. Galveston, H. & S. A. R. Co.*, 2 Tex. Civ. App. 230, 21 S. W. Rep. 631.

A passenger on a steam tug is not responsible for the negligence of its managers, and can maintain a joint action against the carrier and a third party by proving that both were negligent. *Markham v. Houston Direct Nav. Co.*, 73 Tex. 247; 11 S. W. Rep. 131.—REVIEWING *Central Pass. R. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. Rep. 441; Ben-

nett v. New Jersey R. & T. Co., 36 N. J. L. 225.

23. — Virginia.—Where, by the concurrent negligence of a carrier and a third person, a passenger is injured, the negligence of the former cannot be attributed to the passenger so as to prevent him from recovering damages of the third person. *New York, P. & N. R. Co. v. Cooper*, 37 Am. & Eng. R. Cas. 33, 85 Va. 939, 9 S. E. Rep. 321.—NOT FOLLOWING *Webster v. Hudson River R. Co.*, 38 N. Y. 260; *Thorogood v. Bryan*, 8 C. B. 115. QUOTING *Noyes v. Boscawen*, 64 N. H. 361.

24. — federal decisions.—Where a person rides in a public hack and exercises no control over the driver, except telling him the place to which he wishes to be driven, he is not chargeable with the negligence of such driver, so as to prevent him from recovering for an injury by colliding with a train, caused both by the negligence of such driver and those in charge of the train. *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. Rep. 391.—APPROVING *Bennett v. New Jersey R. & T. Co.*, 36 N. J. L. 225; *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161; *Chapman v. New Haven R. Co.*, 19 N. Y. 341; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 364.—APPROVED IN *Elyton Land Co. v. Mingea*, 89 Ala. 521. FOLLOWED IN *Missouri Pac. R. Co. v. Texas Pac. R. Co.*, 41 Fed. Rep. 316; *Union Pac. R. Co. v. Lapsley*, 51 Fed. Rep. 174, 4 U. S. App. 542, 2 C. C. A. 149; *Holzab v. New Orleans & C. R. Co.*, 38 La. Ann. 185; *Becke v. Missouri Pac. R. Co.*, 102 Mo. 544; *Noyes v. Boscawen*, 64 N. H. 361. REVIEWED IN *The Bernina*, 12 P. D. 58.—*Missouri Pac. R. Co. v. Texas Pac. R. Co.*, 41 Fed. Rep. 316.—FOLLOWING *Little v. Hackett*, 116 U. S. 366. NOT FOLLOWING *Thorogood v. Bryan*, 8 C. B. 115.—*Union Pac. R. Co. v. Lapsley*, 51 Fed. Rep. 174, 4 U. S. App. 542, 2 C. C. A. 149; affirming 50 Fed. Rep. 172.—FOLLOWING *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. Rep. 391.

A passenger on a train injured by a collision with a train of another road, may recover against the company owning the other train, though the managers of both trains are negligent. *Parshall v. Minneapolis & St. L. R. Co.*, 35 Fed. Rep. 649.

Where the trains of different roads collide and a fireman on one is injured, he is not prevented from recovering against the

other company, because the engineer on his train was negligent, which in part produced the injury. The negligence of the engineer cannot be imputed to the fireman. *Gray v. Philadelphia & R. R. Co.*, 23 Blatchf. (U. S.) 263, 24 Fed. Rep. 168.—APPROVING *Busch v. Buffalo Creek R. Co.*, 29 Hun (N. Y.) 112. DISAPPROVING *Thorogood v. Bryan*, 8 C. B. 115; *Armstrong v. Lancashire & Y. R. Co.*, L. R. 10 Ex. 47. REVIEWING *Robinson v. New York C. & H. R. R. Co.*, 66 N. Y. 11; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Paulmier v. Erie R. Co.*, 34 N. J. L. 151.

25. Where plaintiff has control over negligent person.*—To render one liable for the negligence of the driver of a vehicle in which he is traveling, either the relation of master and servant or principal and agent must exist, or the parties must be engaged in a joint enterprise whereby responsibility for each other's acts exists. *Cahill v. Cincinnati, N. O. & T. P. R. Co.*, 49 Am. & Eng. R. Cas. 390, 92 Ky. 345, 18 S. W. Rep. 2.—APPROVING *Robinson v. New York C. & H. R. R. Co.*, 66 N. Y. 11. DISTINGUISHING *Dean v. Pennsylvania R. Co.*, 129 Pa. St. 514. REVIEWING *Masterson v. New York C. & H. R. R. Co.*, 84 N. Y. 247; *St. Clair St. R. Co. v. Eadie*, 43 Ohio St. 91.—*Toledo & W. R. Co. v. Goddard*, 25 Ind. 185.

When the negligence of a gripman of a street railway car in the operation thereof and the negligence of a third person concur in causing injury to the conductor of the car, and the gripman is under the direction and control of the conductor, his negligence will be imputed to the conductor so as to debar the latter from recovering for the injury from such third person. *Minster v. Citizens' R. Co.*, 53 Mo. App. 276.

As to whether a servant riding with his master, who is driving, is chargeable with his master's negligence, *quare*. *Massoth v. Delaware & H. Canal Co.*, 64 N. Y. 524; affirming 6 Hun 314.

The rule that the negligence of a driver of a vehicle may not be imputed to a passenger in an action to recover damages for injuries alleged to have been occasioned by

* Who are servants whose negligence will be imputed to their master or fellow-servants so as to defeat his or their action against a third person for negligent injury, see note, 22 AM. & ENG. R. CAS. 354.

For negligence of parents, etc., imputed to children, see CHILDREN, INJURIES TO.

engineer on his part produced of the engineer fireman. *Gray Co.*, 23 *Blatchf.* 8.—APPROVING 29 *Hun* (N. Y.), 8 *Wood v. Bryan*, 8 *Cashire & Y. R.* 11 *Robinson* 66 *N. Y.* 228; *Paul* 151.

has control *—To render of the driver of eling, either the nt or principal e parties must rprise whereby r's acts exists. *T. P. R. Co.*, 92 *Ky.* 345, 18 *Robinson v.* 66 *N. Y.* 11, *Pennsylvania R.* 11 *Robinson v.* 66 *N. Y.* 11, *Eadie*, 43 *Ohio v. Goddard*, 25

a gripman of a eration thereof person concur nductor of the r the direction tor, his negli e conductor so recovering for person. *Min-* *App.* 276.

riding with his nargeable with e. *Massoth v.* 64 *N. Y.* 524;

nice of a driver uted to a pas- er damages for occasioned by

gligence will be v-servants so as nst a third per- note, 22 *Am. &*

e., imputed to s to.

defendant's negligence, is only applicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver, or is separated from him by an inclosure and is without opportunity to discover danger and to inform the driver of it. *Brickell v. New York C. & H. R. R. Co.*, 42 *Am. & Eng. R. Cas.* 107, 120 *N. Y.* 290, 24 *N. E. Rep.* 449, 30 *N. Y. S. R.* 932; *affirming* 46 *Hun* 678, *mem.*, 12 *N. Y. S. R.* 450.—APPLYING *Robinson v. New York C. & H. R. R. Co.*, 66 *N. Y.* 11; *Hoag v. New York C. & H. R. R. Co.*, 111 *N. Y.* 199.

Where a person is injured at a crossing while riding in a hired carriage, where the liveryman furnishes the driver, and there is a conflict of evidence as to whose control the driver was under, the negligence of the driver can only be imputed to the person injured if the jury believe that the driver was under the control of the person injured. *Larkin v. Burlington, C. R. & N. R. Co.*, 85 *Iowa* 492, 52 *N. W. Rep.* 480.

Plaintiff's wife hired a coach and driver from a livery stable and went driving with her four children, the coach and driver being under her control. In crossing a railroad track a collision occurred in which one of the children was killed. The evidence tended to show negligence on the part of the driver, contributing to the injury. *Held*, that the negligence of the driver may be imputed to the wife, and she being engaged in a joint enterprise in which she acted for herself and children, the negligence imputed to her may be ascribed to the deceased child, so as to defeat a recovery. *Callahan v. Sharp*, 27 *Hun* (N. Y.) 85; *affirmed in* 95 *N. Y.* 672, *mem.*—DISTINGUISHING *Dyer v. Erie R. Co.*, 71 *N. Y.* 228; *Robinson v. New York C. & H. R. R. Co.*, 66 *N. Y.* 11; *Masterson v. New York C. & H. R. R. Co.*, 84 *N. Y.* 247; *Chapman v. New Haven R. Co.*, 19 *N. Y.* 341; *Webster v. Hudson River R. Co.*, 38 *N. Y.* 262; *Colegrove v. New York & N. H. R. Co.*, 20 *N. Y.* 492.

26. Where plaintiff is wife of negligent person.*—(1) Negligence imputable.—Contributory negligence of the husband is imputable to the wife, and will prevent a recovery by her for injuries sustained by the alleged negligence of a third party.

* Negligence of husband imputable to wife, see note, 14 *Am. & Eng. R. Cas.* 639, 14 *L. R. A.* 733; 22 *Id.* 460.

McFadden v. Santa Ana, O. & T. St. R. Co., 87 *Cal.* 464, 25 *Pac. Rep.* 681.—DISTINGUISHING *Flori v. St. Louis*, 3 *Mo. App.* 231; *Platz v. Cohoes*, 24 *Hun* (N. Y.) 101; *Chicago, B. & Q. R. Co. v. Dunn*, 52 *Ill.* 260, 4 *Am. Rep.* 606.

Where a husband and wife are driving, both the wife and the team are deemed to be in his care, and his negligence contributing to an injury to her at a railroad station will defeat a recovery the same as if she was negligent herself, unless the injury was wilful. *Toledo, St. L. & K. C. R. Co. v. Crittenden*, 42 *Ill. App.* 469. *Peck v. New York, N. H. & H. R. Co.*, 14 *Am. & Eng. R. Cas.* 633, 50 *Conn.* 379.

In such case the question whether the husband was negligent, which contributed to the injury, is for the jury. *Toledo, St. L. & K. C. R. Co. v. Crittenden*, 42 *Ill. App.* 469.

(2) *Negligence not imputable.*—If the injury which produces the death of a wife, who was driving with her husband, is caused solely by the negligence of the husband, there can be no recovery; but if the husband's negligence only contributes to the injury, then his negligence cannot be attributed to the wife so as to defeat an action against defendant, whose negligence directly contributed to the injury. *Shaw v. Craft*, 37 *Fed. Rep.* 317. *Louisville, N. A. & C. R. Co. v. Creek*, 49 *Am. & Eng. R. Cas.* 451, 130 *Ind.* 139, 29 *N. E. Rep.* 481.—FOLLOWING *Knightstown v. Musgrove*, 116 *Ind.* 121.—*Hoag v. New York C. & H. R. R. Co.*, 37 *Am. & Eng. R. Cas.* 479, 111 *N. Y.* 199, 18 *N. E. Rep.* 648, 19 *N. Y. S. R.* 80; *reversing* 36 *Hun* 646, *mem.*—FOLLOWING *Platz v. Cohoes*, 26 *Hun* 391, 89 *N. Y.* 219; *Robinson v. New York C. & H. R. R. Co.*, 66 *N. Y.* 11.—APPLIED IN *Brickell v. New York C. & H. R. R. Co.*, 42 *Am. & Eng. R. Cas.* 107, 120 *N. Y.* 290, 24 *N. E. Rep.* 449, 30 *N. Y. S. R.* 932. REVIEWED IN *Miller v. Louisville, N. A. & C. R. Co.*, 128 *Ind.* 97; *McCaffrey v. Delaware & H. Canal Co.*, 41 *N. Y. S. R.* 221, 62 *Hun* 618, 16 *N. Y. Supp.* 495.

It was proper to refuse to instruct the jury that because plaintiff, riding in the wagon with her husband, was under his control and protection, he being in control of the team, she should be charged with his negligence. *Chicago, St. L. & P. R. Co. v. Spilker*, 55 *Am. & Eng. R. Cas.* 200, 134 *Ind.* 380, 33 *N. E. Rep.* 280.

The wife and companion of the driver of a vehicle is responsible only for her own negligence, and her recovery of damages for injuries sustained by her cannot be defeated by the negligence of the driver. *Hennessey v. Brooklyn City R. Co.*, 73 Hun 569, 26 N. Y. Supp. 321, 56 N. Y. S. R. 151.—FOLLOWING *Hoag v. New York C. & H. R. R. Co.*, 111 N. Y. 199; *Brickell v. New York C. & H. R. R. Co.*, 120 N. Y. 290.

(3) *Rule in Texas*.—In a suit for damages by husband and wife for injuries inflicted by a passing railway train on the latter, while she with her husband was passing over a railway crossing, and in a vehicle driven by the husband—*held*, that the wife would be bound by the negligence of the husband. *Gulf, C. & S. F. R. Co. v. Greenlee*, 23 Am. & Eng. R. Cas. 322, 62 Tex. 344.

The action was for killing the plaintiff's mother in a collision between defendant's train and the wagon in which she was riding. The company requested the court to charge that if the jury believed that the husband of the deceased was in the wagon with his wife, in a position to have prevented the collision by ordinary care, and failed to do so, and that such failure contributed proximately to the death of his wife, then she would be charged with said negligence, if living, and there could be no recovery. *Held*, that the instruction was properly refused. *Galveston, H. & S. A. R. Co. v. Kutac*, 37 Am. & Eng. R. Cas. 470, 76 Tex. 473, 13 S. W. Rep. 327.

27. Effect of concurring negligence of plaintiff.—The negligence of the driver of a wagon cannot be imputed to one who is riding in the wagon with him; but the latter cannot recover unless it affirmatively appears that he was free from contributory negligence. *Miller v. Louisville, N. A. & C. R. Co.*, 128 Ind. 97, 27 N. E. Rep. 339.—DISAPPROVING *Thorogood v. Bryan*, 8 C. B. 115.—*Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex. 643, 11 S. W. Rep. 127.

A passenger in a hired coach may, by words or conduct at the time, so sanction or encourage a special act of rash or careless driving as to commit an act of negligence which will debar him from a suit against a third person for an injury resulting from the co-operating negligence of both parties. But for whatever purpose the negligence is invoked—whether as a cause of action for an injury done by the driver, or as contributory negligence to bar

an action by the passenger against a third person for an injury sustained—the negligence, to be imputed to the passenger, must be such as arises in some manner from his own conduct. *New York, L. E. & W. R. Co. v. Steinbrenner*, 23 Am. & Eng. R. Cas. 330, 47 N. J. L. 161.—APPROVED IN *Little v. Hackett*, 116 U. S. 366.

If the plaintiff knew the bad condition of the street at the crossing, caused by the defects in the railway track, his failure to notify the driver of that fact, or to warn him against fast driving at that point, does not amount to contributory negligence as matter of law, but is properly submitted to the jury as a question of negligence in fact. *Elyton Land Co. v. Mingea*, 43 Am. & Eng. R. Cas. 309, 89 Ala. 521, 7 So. Rep. 666.

28. Plaintiff and negligent person engaged in joint undertaking.—Where two persons are engaged in a joint undertaking, the negligence of each will be imputed to the other; and where one of them, of his own volition, confides himself to the care of the other, the negligence of such custodian should be imputed to him. *Johnson v. Gulf, C. & S. F. R. Co.*, 2 Tex. Civ. App. 139, 21 S. W. Rep. 274.

The negligence of a joint enterpriser or servant is imputable to the other joint enterpriser or to the master; but where the relation of guest and host exists the rule has no application, for the negligence of the one cannot be imputed to the other. *Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex. 643, 11 S. W. Rep. 127.

INADEQUACY.

Of consideration, as a defense to suit for specific performance, see SPECIFIC PERFORMANCE, 25.

— burden of proof to show, see RELEASE, 21.

— price, setting aside foreclosure sale for, see MORTGAGES, 287.

INADEQUATE DAMAGES.

As ground for new trial, see NEW TRIAL, 87-89.

For injuries at crossings, see CROSSINGS, INJURIES, ETC., AT, 306.

Increasing on appeal, see APPEAL AND ERROR, 128.

Setting aside award for, see EMINENT DOMAIN, 810, 1269.

— verdict for, see APPEAL AND ERROR, 127; EMINENT DOMAIN, 839, 928.

against a third
ed—the negli-
ssenger, must
anner from his
E. & W. R.
Eng. R. Cas.
VED IN Little

d condition of
caused by the
his failure to
ct, or to warn
at point, does
negligence as
submitted to
gence in fact.
Am. & Eng.
Rep. 666.
lligent per-
ertaking.—
ged in a joint
each will be
where one of
nfides himself
negligence of
puted to him.
R. Co., 2 Tex.
274.
enterpriser or
er joint enter-
where the rela-
he rule has no
ce of the one
er. Galveston,
2 Tex. 643, 11

se to suit for
SPECIFIC PER-
see RELEASE,
sure sale for,

NEW TRIAL, 87-

CROSSINGS, INJU-

AL AND ERROR,

EMINENT DO-

AND ERROR,
39, 928.

INCAPACITY.

- Of railway company to contract, as a defense to action on aid bonds, see MUNICIPAL AND LOCAL AID, 360.
- To attend to business, as an element of damages, see CARRIAGE OF PASSENGERS, 627.
- sue, as a defense, see DEATH BY WRONGFUL ACT, 164.
- — — ground of abatement, see ABATEMENT, 1.
- work, damages for, see EMPLOYES, INJURIES TO, 771, 772.
- — excessive damages for, see CARRIAGE OF PASSENGERS, 648.

INCOME.

- Charges against, by mortgage trustees, see MORTGAGES, 145, 230.
- In hands of receiver, application of, see MORTGAGES, 227.
- Of deceased, proof of, on question of damages, see DEATH BY WRONGFUL ACT, 282.
- Operating expenses a first charge on, see RECEIVERS, 76.
- Percentage of, payable by elevated railway to city, see ELEVATED RAILWAYS, 5.
- Right to mortgage, see MORTGAGES, 29.
- When exempt from taxes, see TAXATION, 179.
- passed by deed of trust, see DEEDS OF TRUST, 6.

INCOME TAXES.

- Constitutionality and enforcement of, see TAXATION, 400-403.

INCOMPETENCY.

- Of employees, admissibility of evidence of, see EVIDENCE, 63; FELLOW-SERVANTS, 477-491.
- fellow-servants, allegation of, see EMPLOYES, INJURIES TO, 541.
- — — notice to or knowledge of company of, see EMPLOYES, INJURIES TO, 455, 539.
- — duty to report to company, see FELLOW-SERVANTS, 158.
- — liability of company for injuries caused by, see FELLOW-SERVANTS, 132-192.
- — whether question of law or fact, see FELLOW-SERVANTS, 509.
- jurors, when ground for new trial, see NEW TRIAL, 10.
- physician employed by deceased, as a defense in action for causing death, see DEATH BY WRONGFUL ACT, 165.

5 D. R. D.—69.

Of street-car driver, liability for, see STREET RAILWAYS, 472.

INCONSISTENCY.

- Between general verdict and special findings, see EMINENT DOMAIN, 828; NEW TRIAL, 27; TRIAL, 215-218.

INCORPORATION; ORGANIZATION.

- Averment as to, in action on stock subscription, see SUBSCRIPTIONS TO STOCK, 88.
- of facts showing, see EMINENT DOMAIN, 312.
- Burden of proof as to fact of, see EVIDENCE, 135.
- Contracts made prior to, see LEASES, ETC., 36; ULTRA VIRES, 11.
- Effect of irregularity in, upon liability of stockholders to creditors, see STOCKHOLDERS, 50.
- — — or fraud in, on validity of railway aid bonds, see MUNICIPAL AND LOCAL AID, 325.
- Estoppel to question, see SUBSCRIPTIONS TO STOCK, 156.
- Must precede petition for railway aid, see MUNICIPAL AND LOCAL AID, 95.
- Of petitioner in condemnation proceedings, how questioned, see EMINENT DOMAIN, 343.
- tramways, see TRAMWAYS, 1.
- Presumption as to legality of, see EVIDENCE, 124.
- Proof of, see CORPORATIONS, 20; SUBSCRIPTIONS TO STOCK, 102.
- Questioning, in condemnation proceedings, see STREETS AND HIGHWAYS, 132.
- Under rapid transit acts, rights acquired by, see RAPID TRANSIT ACTS, 7.
- Validity of subscriptions prior to, see SUBSCRIPTIONS TO STOCK, 29.
- When need not be proved, see ANIMALS, INJURIES TO, 444.

See also CHARTERS.

1. In general.—Two things are necessary to be shown in order to establish the existence of a *de facto* corporation: (1) the existence of a charter or some law under which a corporation with the powers assumed might lawfully be created; (2) a user by the party to the suit, of the rights claimed to be conferred by such charter or law. *Welch v. Old Dominion M. & R. Co.*, 31 N. Y. S. R. 916, 10 N. Y. Supp. 174. —APPLYING Methodist Episcopal Union Church *v.* Pickett, 19 N. Y. 485.

Where an attempt is made in good faith

to organize a corporation under general laws, followed by actual user, a defect in the proceedings, or an irregularity in the organization, will not avail parties who have contracted with it; but user alone is not sufficient. People cannot create corporations merely by acting as such. There must at least be an organization under some existing charter or law; and such organization must be in good faith. *Welch v. Old Dominion M. & R. Co.*, 31 N. Y. S. R. 916, 10 N. Y. Supp. 174.

Parties cannot take a charter with which they have no concern and which belongs to other people, and effect a corporation *de facto* by pretense of user thereunder. *Welch v. Old Dominion M. & R. Co.*, 31 N. Y. S. R. 916, 10 N. Y. Supp. 174.

Where all the requirements of a charter are observed in the organization of a corporation, it will be deemed sufficient, though not in the order prescribed. *Eakright v. Logansport & N. I. R. Co.*, 13 Ind. 404.

2. Under general railway laws.—

A railroad company may organize under the Illinois general railroad law to construct its road exclusively within the limits of a city, for the purpose of transferring, in railroad cars, freight between the different depots, warehouses, elevators, manufactories, etc., that are or may be on its line, or may be reached by its lateral branches. Such business is such as is usually done by railway companies. If such company elect to carry freight only, it will be under no obligation to carry passengers, and *vice versa*. And so if it holds itself out as a carrier of a particular kind of freight, or of freight generally, prepared for carrying in a particular way, it will only be bound to carry to the extent and in the manner proposed. *Wiggins Ferry Co. v. East St. Louis Union R. Co.*, 20 Am. & Eng. R. Cas. 9, 107 Ill. 450.

Under the N. J. act to authorize the formation of railroad corporations and regulate the same, approved April 2, 1873 (Rev. p. 925), and its supplements, a railroad less than a mile in length may be built, and an independent company may be organized to build a railroad which will connect two existing railroads. *National Docks & N. J. Connecting R. Co. v. State*, 53 N. J. L. 217, 21 Atl. Rep. 570.

The General Corporation Act gives general powers to all corporations organized under the laws of New Jersey; the certificate of incorporation required by that act

is the charter of the company, and the equivalent of a special act of the legislature before the amendments to the constitution. *Ellerman v. Chicago, J. R. & U. S. Co.*, 49 N. J. Eq. 217, 23 Atl. Rep. 287.

A general law authorizing any number of persons not less than seven to form a corporation to construct a railroad, does not exclude non-residents as incorporators. *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; reversed on another point in 32 N. J. Eq. 755.

Corporations for transporting passengers or freight by horses as a motive power over railroads in the streets of cities in the state, except the city of New York, may be formed under the general railroad act of 1850 (ch. 140, laws of 1850) and its amendments. *In re Washington St., A. & P. R. Co.*, 40 Am. & Eng. R. Cas. 588, 115 N. Y. 442, 22 N. E. Rep. 356, 26 N. Y. S. R. 504; affirming 52 Hun 311, 23 N. Y. S. R. 444, 5 N. Y. Supp. 355. — DISTINGUISHING New York Cable Co. v. Mayor, etc., of N. Y., 104 N. Y. 1; *In re New York Dist. R. Co.*, 107 N. Y. 42; *People v. Newton*, 112 N. Y. 396. — DISTINGUISHED *IN* *People's Rapid Transit Co. v. Dash*, 125 N. Y. 93.

The fact that said act of 1850 contains provisions which can only be applied to railroads using some other motive power than horses furnishes no argument against the application of its other sections to horse railroads. *In re Washington St., A. & P. R. Co.*, 40 Am. & Eng. R. Cas. 588, 115 N. Y. 442, 22 N. E. Rep. 356, 26 N. Y. S. R. 504; affirming 52 Hun 311, 23 N. Y. S. R. 444, 5 N. Y. Supp. 355.

In Oregon the evidence of the powers of a corporation is now to be found in the general law and its articles of incorporation, as formerly this was contained in the charter. *Oregon Cascade R. Co. v. Bailly*, 3 Oreg. 164, 7 Am. Ry. Rep. 416.

After a tunnel company had filed its certificate under the general railroad law, the legislature passed an act recognizing its due incorporation, and granting it four years to complete its entire work. *Held*, that this enactment healed any errors or informalities which might have existed in the mode of its formation, and gave it power to build the road between the points designated in the certificate filed under the general law, as fully as if those terminal descriptions had been incorporated in the legislative act. *State (Morris & E. R. Co., Pros.) v. Hudson*

Tunnel R. Co., 38 *N. J. L.* 548, 13 *Am. Ry. Rep.* 82; *affirming* 38 *N. J. L.* 17, 13 *Am. Ry. Rep.* 27.

3. Under special acts.—(1) *Alabama.*

—A statute authorizing a railroad company to purchase the property and franchises of another company, and afterwards to change its own name, is not in violation of a provision of the Ala. constitution providing that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes."

Wallace v. Loomis, 97 *U. S.* 146.—FOLLOWED IN *Vanderbilt v. Central R. Co.*, 43 *N. J. Eq.* 669. QUOTED IN *Quincy, M. & P. R. Co. v. Humphreys*, 28 *Abb. N. Cas.* (N. Y.) 332; *Karn v. Rorer Iron Co.*, 86 *Va.* 754.

(2) *California.*—Under the provision of Const. art. 4, § 31, prohibiting the creation of corporations, except for municipal purposes, otherwise than by general laws, a railroad corporation cannot be created by legislative recognition, as by an act recognizing the existence of the corporation, and authorizing a county to subscribe to its capital stock. *Oroville & V. R. Co. v. Plumas County*, 37 *Cal.* 354.

(3) *Colorado.*—Under the acts of congress of March 2, 1867, providing that the territorial legislature of Colorado is prohibited from granting private charters or special privileges, and the further act of June 10, 1872, providing that it may permit the formation of corporations by general laws, such legislature has no power to grant the right to construct and operate a street railway except by general law. *Denver & S. R. Co. v. Denver City R. Co.*, 2 *Colo.* 673, 20 *Am. Ry. Rep.* 339.

(4) *Illinois.*—Notwithstanding the constitutional provision prohibiting the creation of corporations by special acts when the same can be done by general laws, a special act of incorporation will be valid without any recital, by way of preamble, that the object cannot be accomplished by a general law. *Johnson v. Joliet & C. R. Co.*, 23 *Ill.* 202.

An act of 1865, confirming an ordinance of Chicago granting permission to a company, chartered by special act, to lay a track on and over certain streets from a certain point to the city limits, and authorizing the company to build a bridge over the Chicago river, the grant of which privileges had been accepted, is held to be a legislative

recognition that the company then had a corporate existence, and had taken corporate action in the way of carrying out the purpose of its charter. *McCartney v. Chicago & E. R. Co.*, 29 *Am. & Eng. R. Cas.* 326, 112 *Ill.* 611.

(5) *Maine.*—The constitutional amendment which took effect in 1875, requiring the formation of corporations to be under general statutes, does not apply to a charter granted by the legislature before the amendment, although amended by it afterwards. *Farnsworth v. Lime Rock R. Co.*, 47 *Am. & Eng. R. Cas.* 64, 83 *Me.* 440, 22 *Atl. Rep.* 373.

(6) *Maryland.*—The act of 1865, ch. 206, was a competent exercise of legislative power and discretion at the time of its passage; and conceding that it had not been accepted before the adoption of the constitution of 1867, it was not repealed by the 48th section of the 3d article of said constitution, which declares that corporations shall not be created by special act, except in particular cases, and that any act of incorporation passed in violation of such section shall be void; such provision being merely intended to prohibit future legislation of the character described, and not to repeal previous legislative acts. And the act of 1872, ch. 50, passed as an amendment to the act of 1865, ch. 206, was a valid act. *New Central Coal Co. v. George's Creek C. & I. Co.*, 37 *Md.* 537.

(7) *Michigan.*—The legislative council of the territory of Michigan, prior to its mission into the Union as a state, had power to incorporate a railroad company, which act would be valid unless disapproved of by congress. *Mercer v. Williams, Walk. Ch. (Mich.)* 85.

(8) *Missouri.*—The provision of Const. art. 4, § 27, providing that "the general assembly shall pass no special law for any case for which provision can be made by a general law," is only intended to have a prospective operation, and does not render invalid a special act amending a charter granted prior to the adoption of the constitution. *State ex rel. v. Cape Girardeau & S. L. R. Co.*, 48 *Mo.* 468.—APPROVED IN *Judson v. Plattsburg*, 3 *Dill. (U. S.)* 181; *Callaway County v. Foster*, 93 *U. S.* 567. FOLLOWED IN *St. Joseph & I. R. Co. v. Shambaugh*, 106 *Mo.* 557.

Under section 2, article 8, of the constitution of 1865, providing that "no law shall

be passed reviving or re-enacting any act theretofore passed creating any private corporation where such corporation shall not have been organized and commenced business within one year from the time such act took effect, or within such other time as may have been prescribed in such act for such organization and commencement of business," the act of March 19, 1866, reviving the St. Joseph & Iowa R. Co., created before the adoption of said constitution, will be presumed to be valid, in the absence of evidence that the corporation did not organize and commence business within the time specified in said section of the constitution. *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. Rep. 581.

(9) *New York*.—The provision of the constitution, providing that corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, "and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws," does not prevent the legislature from creating a railroad corporation by special act, whenever, in its judgment, it is necessary. *Moster v. Hilton*, 15 Barb. (N. Y.) 657. *In re Kingston*, 40 How. Pr. (N. Y.) 444.

Upon filing the certificate and articles of association as prescribed by the N. Y. Rapid Transit Act of 1875, § 9, the complainant company becomes a corporation. *In re Kings County El. R. Co.*, 105 N. Y. 97, 13 N. E. Rep. 18, 7 N. Y. S. R. 186, 7 Cent. Rep. 232; reversing 41 Hun 425, 1 N. Y. S. R. 512.

(10) *Ohio*.—The act of February 23, 1860, authorizing the purchasers of a certain railroad at judicial sale, to reorganize, issue new stock, and to elect another board of directors, is in effect an attempt to create a new corporation by a special act, and is in conflict with the state constitution, art. 13, §§ 1, 2. *Atkinson v. Marietta & C. R. Co.*, 15 Ohio St. 21.

(11) *South Carolina*.—An act entitled "An act to incorporate the Green Pond, Waterboro & Branchville R. Co." is not in conflict with that provision of the constitution that "every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title," because the act goes on and authorizes a county to subscribe to the capital stock of the road, and providing for the

method of voting bonds in payment of such stock, and taxing the people to pay them. *Connor v. Green Pond, W. & B. R. Co.*, 23 So. Car. 427.—DISTINGUISHED IN *Ex parte Bacot*, 36 So. Car. 125.

(12) *Tennessee*.—The act of December 4, 1851, entitled, "An act to incorporate the Louisville & Nashville R. Co.," did not create a new corporation in that state, where the act itself shows that it was only intended to convey a right of way, and to allow an existing Kentucky corporation of the same name to exercise in Tennessee "all the rights, powers, and privileges" it exercised in the other state. *Callahan v. Louisville & N. R. Co.*, 11 Fed. Rep. 536.—FOLLOWING *Baltimore & O. R. Co. v. Harris*, 12 Wall. (U. S.) 66.

(13) *Canada*.—When a company is incorporated by a special act, and there are provisions in the special act as well as in the general act on the same subject which are inconsistent, if the special act gives in itself a complete rule on the subject, the expression of that rule amounts to an exception of the subject-matter of the rule out of the general act. *Ontario & S. Ste. M. R. Co. v. Canadian Pac. R. Co.*, 14 Ont. 432.—QUOTING *Attorney-General v. Great Eastern R. Co.*, L. R. 7 Ch. 482.

When the rule given by the special act applies only to a portion of the subject, the special act may apply to one portion and the general act to the other. *Ontario & S. Ste. M. R. Co. v. Canadian Pac. R. Co.*, 14 Ont. 432.

4. *Under English statutes*.—A railway company may be registered under the Companies Act 1862, and a certificate of registration under Part VII. of such act is conclusive evidence that the company is one authorized to be registered. *In re Ennis & W. C. R. Co.*, L. R. 3 Ir. Ch. 94.

Railway acts are to be construed liberally in favor of the public, but strictly against the companies. *Parker v. Great Western R. Co.*, 7 Scott N. R. 835, 7 M. & G. 253, 3 Railw. Cas. 563, 13 L. J. C. P. 105, 8 Jur. 194.—COMMENTED ON IN *Finnie v. Glasgow & S. W. R. Co.*, 2 Macq. H. L. Cas. 177. QUESTIONED IN *Parker v. Great Western R. Co.*, 15 Jur. 109.

In an act of parliament granting special powers to a railway company, everything is prohibited which is not permitted. *Attorney-General v. Great Eastern R. Co.*, L. R. 5 App. Cas. 473, 49 L. J. Ch. D. 545, 42

in payment of
people to pay
d, W. & B. R.
INGUISHED IN
125.

of December 4,
incorporate the
o," did not cre-
state, where
only intended
nd to allow an
on of the same
essee "all the
s" it exercised
n v. Louisville
336.—FOLLOW-
v. Harris, 12

pany is incor-
there are pro-
well as in the
ject which are
act gives in it-
subject, the ex-
ts to an excep-
the rule out of
S. Ste. M. R.
14 Ont. 432.—
Great Eastern

the special act
the subject, the
e portion and
Ontario & S.
Pac. R. Co., 14

tes.—A rail-
under the
certificate of
of such act is
company is one
In re Ennis
Ch. 94.

trued liberally
strictly against
Great Western
& G. 253, 3
P. 105, 8 Jur.
nnie v. Glas-
H. L. Cas.
Great West-

nting special
everything is
mitted. At-
n R. Co., L.
h. D. 545, 42

L. T. 810, 28 W. R. 769; affirmed in L. R. 11 Ch. D. 449, 48 L. J. Ch. D. 428, 40 L. T. 265, 27 W. R. 759.—CONSIDERED IN Attorney-General v. Shrewsbury Bridge Co., L. R. 21 Ch. D. 752, 51 L. J. Ch. 746, 46 L. T. 687, 30 W. R. 916.

Railway acts merely give conditional powers which, if acted upon, carry with them duties; but which, if not acted upon, are not imperative on the companies. They cannot be considered as contracts. *York & N. M. R. Co. v. Reg.*, 7 Railw. Cas. 459, 1 El. & Bl. 858, 17 Jur. 690, 22 L. J. Q. B. 225. *Scottish N. E. R. Co. v. Stewart*, 3 Macq. H. L. Cas. 382, 5 Jur. N. S. 607.

The intention of parliament in incorporating a railway company and conferring powers upon it is not to be measured by the more guarded powers given to public trading companies. *North London R. Co. v. Metropolitan Board of Works*, 5 Jur. N. S. 1121, 28 L. J. Ch. 909.

Where an undertaking for a railway, signed by subscribers, authorizes the directors to apply to parliament for carrying into operation all or any of the purposes named, or any portion thereof, the directors are authorized to apply for and accept an act empowering the company to purchase a canal, and binding it to maintain it for the purpose of navigation. *Midland G. W. R. Co. v. Gordon*, 5 Railw. Cas. 76, 16 M. & W. 804, 11 Jur. 440, 16 L. J. Ex. 165.

The costs of a solicitor incurred in getting up a railway company, and after its incorporation in obtaining subsequent acts, are costs incurred on account of the promotion of the company, under section 5 of the Railways Abandonment Act 1869, and ought not to be paid out of a bond which had been given for the completion of the railway and which by the warrant of the board of trade was made assets of the company. *In re Barry R. Co.*, L. R. 4 Ch. D. 315, 46 L. J. Ch. D. 206, 25 W. R. 201, 37 L. T. 125.

5. Under Canadian statutes.—The Buffalo, B. & G. R. Co. are to be treated as acting under 16 Vict. c. 45, and not under the joint stock road acts, at all events as regards shareholders who have taken their stock since the 16 Vict. was passed. *Buffalo, B. & G. R. Co. v. Parke*, 12 U. C. Q. B. 607.

Under the 9th Vict. c. 82, entitled "An act to incorporate the Montreal & Lachine R. Co.," it is the duty of the clerk or secretary of the company to make an entry

of the names and places of residence of owners of stock in the company, and the superior court has jurisdiction to enforce such duty under the provisions of the 12th Vict. c. 41. *McDonald v. Montreal & N. Y. R. Co.*, 6 Low. Can. 232.

By the statute 12 Vict. c. 84, a railroad company was to consist of not less than five persons, who must each subscribe for a sufficient quantity of stock, execute an instrument, pay to the treasurer six per cent. on the capital stock subscribed, and register such instrument, together with a receipt from the treasurer for such instalment of six per cent. with the registrar of the county, before making calls. The directors having given to the treasurer a promissory note for a sum amounting to six per cent. on the capital stock, who gave a receipt as for so much money, forty per cent. on the stock subscribed was then called in, and a memorial of the instrument of incorporation afterwards registered. In an action of debt for calls, defendant pleaded that at the time the cause of action accrued there was no such corporation as in declaration mentioned. *Held*, that 16 Vict. c. 190, § 55, passed to aid irregularities in the formation, etc., of such company, put an end to objections to the irregular way in which the first six per cent. was paid, or the instrument registered, and that plaintiffs were entitled to recover. *Nelson & N. R. Co. v. Bates*, 4 U. C. C. P. 507.

The Provincial Act of 1867, c. 36, passed previous to the union of the provinces, incorporating the plaintiff company, confirmed a contract between the provincial government and the promoters of the company, by which it was mutually agreed that prior to the opening of the road a traffic arrangement should be made for the mutual use and employment of their respective lines of railway, including running powers for the joint operation thereof on equitable terms. The Dominion government, the successor of the Nova Scotia government as proprietor of the line from Halifax to Windsor, called the Windsor Branch, entered into an agreement with plaintiff company, in which there was no provision for a traffic arrangement over both lines, or for the mutual use of the respective lines. *Held*, that the agreement was nevertheless valid and binding upon the Dominion government, public interests having been protected by its provisions to the satisfaction

of the government. *Windsor & A. R. Co. v. Western Counties R. Co.*, 14 Nov. Sc. 280.

The Dominion government, by minute of council in October, 1873, reciting among other things that the plaintiffs had failed to operate the Windsor Branch, canceled the agreement of 1871, and transferred the branch in 1877 to the defendant company, under the authority of the act of the Dominion parliament, 1874, c. 16. Evidence was given of negotiations between the companies for amicable settlement of their respective claims, conducted chiefly by De Pass, who styled himself a commissioner of the plaintiff company, but who had no power to settle anything definitely without the consent of the directors. *Held*, that plaintiffs were not estopped from disputing the validity of the cancellation of the agreement of 1871. *Windsor & A. R. Co. v. Western Counties R. Co.*, 14 Nov. Sc. 280.

6. Rights and liabilities of promoters.*—(1) *Who are promoters.*—To constitute one a promoter of a corporation it must affirmatively appear that he was acting for and in behalf of the proposed corporation, or that he assumed to so act, and that on the strength of this authority or assumption the party complaining so dealt with him. *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 40 Am. & Eng. R. Cas. 525, 37 Kan. 606, 15 Pac. Rep. 544.

One who signs the charter of a contemplated corporation some time before it is filed does not, by that act alone, assume a fiduciary relation towards such projected corporation. *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 40 Am. & Eng. R. Cas. 525, 37 Kan. 606, 15 Pac. Rep. 544.

If an act of incorporation be granted to persons therein named, "their associates and assigns," the persons named may exercise the corporate rights and functions, without taking to themselves associates. *Hughes v. Parker*, 20 N. H. 58.

(2) *Adoption of contracts of.*—The promoters of a corporation are not identical with the corporation. The corporation is at liberty to refuse to sanction contracts made by them, and if its sanction is obtained by the act or co-operation of directors who have a private interest, the corporation may resist an action for specific performance, where it has not accepted the consideration

or taken the benefit. *Munson v. Syracuse, G. & C. R. Co.*, 3 N. Y. S. R. 31; *affirming* 29 Hun 76.

The promotion by one corporation of the organization of another in no way affects the absolute independence of the latter, and it is not in any manner bound to, and is at entire liberty to disregard, an agreement made by such promoter before it came into existence. *Stanton v. Missouri Pac. R. Co.*, 15 Civ. Pro. 296, 2 N. Y. Supp. 298.

A railway company which receives the benefit of an agreement made in its behalf by the projectors of the road, in consequence of which a threatened opposition to a bill in parliament to incorporate the company was withdrawn, is bound by it. *Edwards v. Grand Junction R. Co.*, 7 Sim. 337; *affirmed on appeal in* 1 M. & C. 650, 6 L. J. Ch. 47. —*QUESTIONED IN* *Preston v. Liverpool, M. & N. J. R. Co.*, 5 H. L. Cas. 605, 2 Jur. N. S. 241, 25 L. J. Ch. 421.

A contract of the promoters of a railway company to pay a sum of money to a peer of parliament for his countenance and support in obtaining the special act, and the ratification of such contract by the directors after the formation of the company, are *ultra vires*, and cannot be enforced against the company as payment of expenses of obtaining its act. *Shrewsbury v. North Staffordshire R. Co.*, L. R. 1 Eq. 593, 12 Jur. N. S. 63, 35 L. J. Ch. 156, 14 W. R. 220, 13 L. T. 648.

(3) *Expenses—Compensation—Costs.*—A company is liable for the expenses of persons acting as promoters in procuring a subscription, where, after organization, the company accepts the benefit of the subscription, with knowledge that the promoters had incurred the expense. *Weatherford, M. W. & N. W. R. Co. v. Granger*, (Tex. Civ. App.) 22 S. W. Rep. 70.

Those persons only who are acting directly for a company which is to be formed, without being employed by any one else for hire or reward, are entitled to look to the company, when formed, for payment of the costs and expenses of the work of which the company has got the benefit; and those persons who are employed by any one else to do the work for hire or reward must look to the person who employed them. *In re Skegness & St. L. Tramways Co.*, L. R. 41 Ch. D. 215.

Where a number of persons not incorporated, but associated for a common object,

* Promoters of corporations and their relations thereto, see note, 17 AM. ST. REP. 161.

son v. Syracuse,
R. 31; *affirming*

poration of the
no way affects
of the latter, and
ad L.; and is as
an agreement
ore it came into
uri Pac. R. Co.,
pp. 298.

h receives the
de in its behalf
in consequence
tion to a bill in
e company was
Edwards v.
n. 337; *affirmed*
6 L. J. Ch. 47.
v. Liverpool,
Cas. 605, 2 Jur.

ers of a railway
money to a peer
inance and sup-
al act., and the
by the directors
company, are
enforced against
expenses of ob-
v. North Staf-
593, 12 Jur. N.
R. 220, 13 L.

on—Costs.—A
penses of per-
procuring a sub-
ation, the com-
e subscription,
promoters had
erford, M. W.
Tex. Civ. App.)

are acting di-
to be formed,
y one else for
o look to the
yment of the
c of which the
and those per-
one else to do
must look to
them. *In re*
Co., L. R. 41

not incorpo-
mmon object,

intending to procure a charter, authorize acts to be done in furtherance of their object by one of their number, with the understanding that he should be compensated, if such acts were necessary to the organization and its objects, and are accepted by the corporation, and the benefits enjoyed, they must be taken *cum onere* and be compensated for. But the promoters of the enterprise must be a majority of them; a minority could not bind the association or corporation. *Bell's Gap R. Co. v. Christy*, 79 Pa. St. 54.—DISTINGUISHING *Erie & W. Plank-Road Co. v. Brown*, 25 Pa. St. 156; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *Burton v. Liverpool, M. & N. J. R. Co.*, 7 Eng. L. & Eq. 124; *Low v. Connecticut & P. R. R. Co.*, 45 N. H. 370.

Promoters cannot sue a company after its formation, in respect of expenditures necessary for its establishment, although a provision in the articles of association under the Companies Acts of 1862 and 1867 provides that preliminary expenses shall be defrayed by the company. *Melhado v. Porto Alegre, N. H. & B. R. Co.*, 43 L. J. C. P. 253, L. R. 9 C. P. 503, 23 W. R. 57, 31 L. T. 57.

Where a company is sued on a contract whereby it agreed to pay a certain sum of money out of the first calls on the shares, a plea that the deed of settlement under which the company was formed, mentioned in the declaration, was obtained by fraud and misrepresentation of the plaintiff and others in collusion with him, is bad on general demurrer; and likewise a plea that the registration and incorporation of the company, recited in the agreement were obtained by the fraud and misrepresentation of the plaintiff and others in collusion with him, is bad. *Pilbrow v. Pilbrow's Atmospheric R. & C. P. Co.*, 5 C. B. 440, 5 D. & L. 551, 5 Railw. Cas. 89, 17 L. J. C. P. 166.

Under the Companies Act 1845, where a company is sued for work bestowed and money spent in obtaining a special act, it is no answer for the company to plead that it has not raised or received, nor been able to raise or receive, any money which it might apply to the payment of such expenses. *Manning v. London, W. & S. W. R. Co.*, 17 L. T. 68.

One who induces others to become the promoters of a company, expressly agreeing to pay all the costs of obtaining an act of incorporation, is bound by his agreement,

and cannot recover the costs of the company, although the act, when passed, provides that the cost of obtaining and passing it shall be paid by the company. *Savin v. Hoylake R. Co.*, 4 H. & C. 67, L. R. 1 Ex. 9, 35 L. J. Ex. 52, 11 Jur. N. S. 934, 14 W. R. 109, 13 L. T. 374.—DISTINGUISHED IN *Re Brampton & L. R. Co.*, L. R. 10 Ch. 177, 44 L. J. Ch. 670, 33 L. T. 5, 23 W. R. 813.

Where the promoters of a railway company are among the directors after the company is formed, the company is clearly liable for the costs and expenses of obtaining the special act. *In re Tilleard*, 3 DeG., J. & S. 519, 23 L. J. Ch. 765, 8 L. T. 587, 11 W. R. 764.—DISTINGUISHED IN *Re Rotherham A. & C. Co.*, L. R. 25 Ch. D. 103, 53 L. J. Ch. 290, 50 L. T. 219, 32 W. R. 131.

Where by the special act of a company the costs and expenses of obtaining the act are to be paid by the company, it is bound to pay the costs of its solicitors incurred in relation to certain projected lines originally intended to have formed part of the undertaking, but abandoned in parliament by the promoters. *In re Tilleard*, 3 DeG., J. & S. 519, 23 L. J. Ch. 765, 8 L. T. 587, 11 W. R. 764.—DISTINGUISHED IN *Re Rotherham A. & C. Co.*, L. R. 25 Ch. D. 103, 53 L. J. Ch. 290, 50 L. T. 219, 32 W. R. 131.

Under the Companies Clauses Act, the statute of limitations does not run against creditors of a company in respect of the costs of obtaining the act of incorporation until the company has assets to meet the claim. *In re Kensington Station Act*, L. R. 20 Eq. 197, 23 W. R. 463, 32 L. T. 183.

Where the special act incorporating a company gives a right to sue the company for the costs of obtaining the act, and incorporates the Companies Clauses Act, the remedy so given is an addition to, and not in substitution for, the right given by the Companies Clauses Act to payment out of the first assets of the company. *In re Kensington Station Act*, L. R. 20 Eq. 197, 23 W. R. 463, 32 L. T. 183.

(4) *Parliamentary deposit*.—The object of a parliamentary subscription contract required before applying for an act to make a railway is to provide means for paying parliamentary expenses in case the scheme should be abandoned, and such object is not rendered illegal by any enactment. *Altham v. Brown*, 7 El. & Bl. 164, 3 Jur. N. S. 158; *affirmed on appeal in 6 Jur. N. S.* 41, 2 El. & Bl. 398, 29 L. J. Q. B. 33.

Railway parliamentary deposits may be invested in India stock, although such stock is not one of the securities mentioned in 9 Vict. c. 20, § 4, or in the Lands Clauses Act 1845, § 70. *In re Southwold R. Co.'s Bill*, L. R. 1 Ch. D. 697, 45 L. J. Ch. 800, 24 W. R. 293.

Parliamentary deposits paid into court under 9 Vict. c. 20 will be directed to be invested by the brokers of the petitioners, if it is shown that thereby expense will be saved. *Ex parte West Riding & L. R. Undertaking*, 34 L. T. 168.

The court denied a promoter's application that the parliamentary deposit might be invested by a private broker, who offered more advantageous terms than the paymaster-general's broker. *Ex parte Bolton Junction R. Co.*, 24 W. R. 451. S. P., *In re Bolton Tramways Act*, 34 L. T. 230.

Upon the production of a certificate signed by the deputy speaker of the House of Commons in the speaker's absence, an order can be made for the return of a deposit on the withdrawal of a railway bill under 9 & 10 Vict. c. 20, § 5. *Ex parte Stocksbridge Railway Bill*, L. R. 2 Eq. 364.

Where a bill introduced into parliament for the construction of several railways is withdrawn as to some of the railways, a court of equity will not order a proportional part of the money paid into court under the standing orders to be paid out to the promoters. *In re Aberystwith R. Co.*, 7 Jur. N. S. 510, 564, 30 L. J. Ch. 674, 4 L. T. 537.

(5) *Liability of promoters.*—Where the real purpose for which a corporation was formed is to use it as an instrumentality in the accomplishment of an illegal purpose, the fact of incorporation will not avail the promoters as a defense in a suit against them to recover money obtained from the plaintiff by such methods. *Brundred v. Rice*, 54 Am. & Eng. R. Cas. 446, 49 Ohio St. 640, 32 N. E. Rep. 169.

Material misstatements or concealment should not be made in a company's prospectus. The promoters should give the public opportunity of judging everything which has a material bearing on the project, and the suppression of a fact may amount to a misrepresentation. *Central R. Co. v. Kisch*, 36 L. J. Ch. 849, 15 W. R. 821, 16 L. T. 500, L. R. 2 H. L. Cas. 99.

One who becomes an engineer of a projected railway company, and consents to be paid out of such funds as shall be properly

applicable toward satisfying his claim, cannot recover, where the project is abandoned and there are no funds of that description, in an action against a provisional committeeman. *Landman v. Entwistle*, 7 Ex. 632, 21 L. J. Ex. 208.

The promoters of a company purchased houses beyond the limits of deviation from the line of the railway, in order to obtain the withdrawal of the opposition of the owners of such houses to the passing of the special act. Some of the houses were unoccupied when acquired by the promoters. On a special case stated to ascertain the liability of the promoters in respect of the deficiency in poor-rates—*held*, that as the promoters could only hold land under the powers given them by statute, they could not be heard to say that they had become possessed of the houses otherwise than by virtue of their acts, and that they were, consequently, liable to make good the deficiency. *Putney Overseers v. London & S. W. R. Co.*, [1891] 1 Q. B. 440; *affirming* [1891] 1 Q. B. 182.

As the statute directed that the deficiency should be computed according to the rental at which the houses were valued or rated at the time of the passing of the special act, the fact that some of them were then unoccupied was immaterial in estimating the amount of the deficiency. *Putney Overseers v. London & S. W. R. Co.*, [1891] 1 Q. B. 440; *affirming* [1891] 1 Q. B. 182.

7. *Conditions precedent.*—Where the act of incorporation does not itself confer corporate capacity, but provides for the doing of certain things, upon the doing of which the company shall become a body corporate, the performance of such things constitutes a condition precedent, and until performed, the company has no corporate existence. *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. Rep. 581.

8. *Taking subscriptions and distribution of stock.**—(1) *California.*—The provisions of the Gen. Railroad Act of May 20, 1861, requiring at least \$1000 per mile to be subscribed, and 10 per cent. thereof in cash to be actually and in good faith paid in before incorporation, are not merely directory, but are conditions precedent to organization. So payment of the

* See also SUBSCRIPTIONS TO STOCK, 131-142.

g his claim, can-
nect is abandoned
that description,
visional commit-
wistle, 7 Ex. 632.

pany purchased
f deviation from
order to obtain
position of the
the passing of
the houses were
by the promot-
ated to ascertain
ers in respect of
es—held, that as
hold land under
by statute, they
that they had be-
ouses otherwise
s, and that they
to make good
rseers v. London
B. 440; affirm-

at the deficiency
ing to the rental
valued or rated at
the special act,
were then unoc-
estimating the
Putney Overseers
., [1891] 1 Q. B.
B. 182.

dent. Where
of and in
y, but pro-
a things, upon
company shall be-
performance of
condition prece-
l, the company
St. Joseph &
Mo. 557, 17 S.

ons and dis-
i) California.—
Railroad Act of
least \$1000 per
d 10 per cent.
lly and in good
poration, are not
ditions prece-
payment of the

Stock, 131-

10 per cent. could not be made by a check on a bank where the drawer had no money on deposit, though it subsequently appears that it would have been honored if presented. *People v. Chambers*, 42 Cal. 201, 4 Am. Ry. Rep. 49.—DISTINGUISHING *Com. v. West Chester R. Co.*, 3 Grant's Cas. (Pa.) 200.

(2) *Connecticut*.—A company was incorporated with an authorized capital of \$500,000, with power to call a meeting of the stockholders when \$100,000 was subscribed to choose directors and perfect the organization, "and when so organized to proceed to the construction of the railroad." *Held*, that the word "organized," as used in the charter, embraced merely the choice by the stockholders of the necessary officers of the company, after at least \$100,000 had been subscribed, and the company might then begin to exercise corporate functions. *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56, 4 Am. Ry. Rep. 1.—REVIEWING *Sage v. Dillard*, 15 B. Mon. (Ky.) 340.—REVIEWED IN *People v. National Sav. Bank*, 129 Ill. 618.

In such case the first meeting of the stockholders was called and the directors chosen when \$216,700 was subscribed, but subsequently the company's charter was amended so as to allow a certain city to subscribe \$200,000, and to appoint two directors, which it did. *Held*, that the amendment to the charter, and the subsequent act of the company and the city in making its subscription to the capital stock, did not impair the rights of persons who had subscribed to the original stock before the charter was amended, or relieve them from liability on their subscriptions. *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56, 4 Am. Ry. Rep. 1.

(3) *Illinois*.—The persons named as incorporators in a charter met within a few days after its passage, and by resolution adopted the same, and on the following day elected a president, vice-president, secretary and treasurer, and afterwards authorized the president to survey routes and locate the road, and to make contracts for the right of way and depot grounds; and books were opened for subscription to the capital stock, which was all taken, and the company obtained permission of the commissioners of highways to locate and operate tracks along and across all roads and highways upon its route, and permission was obtained from

the city of Chicago to locate and operate a track through a portion of the city and to build a bridge over the Chicago river, which grants were duly accepted, and the capital stock increased and subscribed for, though it did not appear that any of the subscriptions had been paid, and the company exercised other corporate acts. The charter under which these acts were performed was granted, and the steps toward an organization were taken, prior to the adoption of the constitution of 1870. *Held*, that the charter of the company was in operation at the time the constitution took effect, and was not abrogated by section 2 of article 11 of that instrument. *McCartney v. Chicago & E. R. Co.*, 29 Am. & Eng. R. Cas. 326, 112 Ill. 611.—REVIEWED IN *People v. National Sav. Bank*, 129 Ill. 618.

(4) *Indiana*.—Under the statute providing for the formation of railroad corporations, and requiring stock to the amount of at least fifty thousand dollars to be first subscribed, the subscriptions must be made in good faith, by persons who have a reasonable expectation of ability to pay. *Holman v. State ex rel.*, 24 Am. & Eng. R. Cas. 6, 105 Ind. 569, 5 N. E. Rep. 702.

(5) *Kansas*.—The existence of a corporation organized under the general laws of the state dates from the time of filing its charter, and it is not prerequisite that all the capital stock of the corporation be subscribed, for it to transact business. *Chicago, K. & W. R. Co. v. Stafford County Com'rs*, 36 Kan. 121, 12 Pac. Rep. 593.

(6) *Maryland*.—Under the act of 1872, ch. 284, which provided for the incorporation of the stockholders of the Baltimore, Hampden & Lake Roland R. Co., and named certain persons as commissioners to take subscription to the capital stock of the company, and required that the company should commence said railroad within three years from the passage of the act, and complete the same in ten years, the company never acquired a lawful corporate existence, the commissioners having delayed taking subscriptions to the stock until nearly ten years after the expiration of the ten years limited for completing the road. *Bonaparte v. Baltimore, H. & L. R. Co.*, 49 Am. & Eng. R. Cas. 198, 75 Md. 340, 23 Atl. Rep. 784.—DISTINGUISHING *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. (Md.) 1.

The act of 1872, ch. 284, did not create a

corporation *eo instanti*. It provided for the formation of a corporation. The corporators were to be future subscribers to the stock, and before there could be a corporation *in esse* there must be the requisite legal subscribers capable of accepting, and who should accept, the charter as offered, within a reasonable time. *Bonaparte v. Baltimore, H. & L. R. R. Co.*, 49 Am. & Eng. R. Cas. 198, 75 Md. 340, 23 All. Rep. 784.

(7) *Missouri*.—The provisions of Rev. St. 1879, §§ 711, 764, and 766, contemplate the organizing of associations upon the subscription of an amount less than the whole of the capital stock; and upon the filing of the articles of association in compliance with the provisions of the statute, the corporate existence is complete, and the corporate powers and privileges conferred upon it are full and complete. *Sedalia, W. & S. R. Co. v. Abell*, 17 Mo. App. 645.

(8) *New York*.—Where a statute declares that "A., B., and C., and such other persons as shall hereafter become stockholders of said company, are hereby constituted a body corporate and politic by the name of," etc., no corporation exists if there be no stock distributed; the distribution of the stock is a condition precedent to the existence of the corporation. *Crocker v. Crane*, 21 Wend. (N. Y.) 211. *Walker v. Devereaux*, 4 Paige (N. Y.) 229.

The commissioners appointed to receive subscriptions to the stock of the Utica & S. R. Co., and to apportion the same, were not prevented from taking a reasonable portion of it themselves. *Walker v. Devereaux*, 4 Paige (N. Y.) 229.

The commissioners did not hold the stock, previous to its distribution, in the character of agents or trustees of the corporation, but as the agents of the state; and if they had neglected to open books for subscriptions, or had not proceeded to apportion the stock as directed by the act, they might be compelled to do so by mandamus. *Walker v. Devereaux*, 4 Paige (N. Y.) 229.

In the apportionment of stock among the subscribers, if any part of the stock is apportioned to a subscriber when he is not entitled to receive the same, and under circumstances which amount to a fraud, the apportionment is not absolutely void, but the subscriber will, in equity, hold it in trust or for the benefit of some or all of the subscribers who did not receive stock to the extent of

their subscriptions. *Walker v. Devereaux*, 4 Paige (N. Y.) 229.

But in such case a subscriber to such stock who complains of an inequitable distribution of the same, and who is seeking to reach stock which has been improperly assigned or apportioned to others, should file his bill in behalf of himself and all other subscribers standing in the same situation. *Walker v. Devereaux*, 4 Paige (N. Y.) 229.

The provision of the Gen. Railroad Act of 1850, providing that, as a condition precedent to organization, at least \$1000 for every mile of road to be constructed shall be subscribed, and 10 per cent. thereof paid in good faith, is sufficiently satisfied if 10 per cent. in the aggregate of such amount is made in cash payments, no matter by whom made. *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451.—QUOTED IN *Beattys v. Solon*, 45 N. Y. S. R. 899.—*Beattys v. Solon*, 45 N. Y. S. R. 899, 64 Hun 120, 19 N. Y. Supp. 37.—QUOTING *Eastern Plankroad Co. v. Vaughan*, 14 N. Y. 546; *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451; *Black River & U. R. Co. v. Barnard*, 31 Barb. 260. REVIEWING *Schenectady & S. Plankroad Co. v. Thatcher*, 11 N. Y. 111; *Buffalo & P. R. Co. v. Hatch*, 20 N. Y. 161.

A statement filed showing that the railroad to be constructed was about seventy-five miles long, and that \$84,100 had in good faith been subscribed, and 10 per cent. thereof paid in, is a sufficient compliance with the above provision of the general Railroad Act of 1850. *Buffalo & P. R. Co. v. Hatch*, 20 N. Y. 157.—REVIEWED IN *Beattys v. Solon*, 45 N. Y. S. R. 899.

The delivery of a certified check by a subscriber to stock in payment of 10 per cent. thereof is a sufficient compliance with the statute, though such check may not be deposited to the credit of the association until after articles of association are filed. *In re Staten Island R. T. R. Co.*, 38 Hun (N. Y.) 381.

Where the subscriptions to the capital stock of a proposed railroad corporation were less than the amount required, and the subscribers paid no portion of their subscriptions in cash, but some of them gave their notes for 10 per cent. of their subscriptions and others gave checks—some upon banks in which they had no accounts or deposits, it being understood between them that the notes and checks were not to

be collected, but were to be returned—and three of their number, who were named as directors in the articles of association, made and annexed to said articles an affidavit as required by the act, to wit, that the amount of stock had been subscribed and 10 per cent. in good faith paid thereon in cash, which articles, with the affidavit, were filed in the office of the secretary of state—*held*, that no corporation was in fact organized. *Farnham v. Benedict*, 107 N. Y. 159, 13 N. E. Rep. 784, 11 N. Y. S. R. 450; *reversing* 39 Hun 22.

(9) *Oregon*.—Conditional subscriptions cannot be counted in determining whether the requisite amount of stock has been subscribed to authorize the organization of a corporation, as conditional subscribers cannot become shareholders until the conditions upon which the subscription was made have been performed, and these conditions cannot be accepted until after the organization of the company (Hill's Code, § 3222), providing that one half of the capital stock of a private corporation must be subscribed before the corporation can be organized or an assessment be lawfully made upon its subscribed stock. *Fairview R. Co. v. Spillman*, 23 Oreg. 587, 32 Pac. Rep. 688.

(10) *South Carolina*.—Where one section of a charter creating a railroad company declared it to be created a "body politic and corporate," a further provision in a subsequent section, providing that the company might organize and proceed to work when \$100,000 were subscribed "and \$1 on each share shall have been paid in," is sufficiently complied with when the above amount is subscribed, and a gross sum paid in equal to \$1 on every share subscribed. *Spartanburg & A. R. Co. v. Ezell*, 14 So. Car. 281.—*QUOTING* Charlotte & S. C. R. Co. v. Blakeley, 3 Strobb. (So. Car.) 245. *REVIEWING* Minneapolis & St. L. R. Co. v. Bassett, 20 Minn. 535, 18 Am. Rep. 376.

In such case a failure to comply strictly with these requirements would not affect the corporate existence, but would be an irregularity only, which could not defeat the right of the corporation to recover a stock subscription. *Spartanburg & A. R. Co. v. Ezell*, 14 So. Car. 281.

D. Articles of association.—The articles of incorporation of a railroad must fully set forth the amounts subscribed, and by whom. The liability of stockholders at the date of the filing is limited to those

named in the articles, and to the amounts therein mentioned. *Monterey & S. V. R. Co. v. Hildreth*, 53 Cal. 123.

A provision in a railroad charter requiring directors to be named in the articles of association is only directory, and it is a sufficient compliance therewith to adopt the articles at the time of electing the directors. *Eakright v. Logansport & N. I. R. Co.*, 13 Ind. 404.

Where articles of association are defective in not sufficiently specifying the terminus of the road, but they are properly filed in the office of the secretary of state, such filing is notice to the state, and the right of the state to take advantage thereof by *quo warranto* is lost by silence for more than eight years. *State ex rel. v. Bailey*, 19 Ind. 452.

A party signing what is intended as final articles of association for the organization of a street railway company, but which are defective, does not thereby authorize the first meeting of stockholders for the election of directors and effecting an organization, to make new or perfect articles of association, so as to bind him. *Richmond St. R. Co. v. Reed*, 9 Am. & Eng. R. Cas. 697, 83 Ind. 9.

The statement in the articles of association of a railroad company formed "for the purpose of constructing, operating, and maintaining a railroad, etc.," that its road shall be operated as a transfer road, and that no discrimination shall be made in favor of or against any other railroad, and that uniform rates for the same service shall be charged either to persons or railroad companies, does not exclude it from the carriage of passengers as well as freight. *Bay City Belt-Line R. Co. v. Hitchcock*, 90 Mich. 533, 51 N. W. Rep. 808.

Under the N. Y. General Railroad Act, a corporation is not formed and does not become a legal body, until all the requirements of the statute have been complied with and the articles filed in the office of the secretary of state. Until this is done a subscription to stock is a mere proposition to take the number of shares indicated in a corporation thereafter to be formed, and not a binding promise to take and pay. As an obligation it is inchoate, and cannot become of any force unless the articles are filed and the corporation created. *Burt v. Farrar*, 24 Barb. (N. Y.) 518. *Farnham v. Benedict*, 107 N. Y. 159, 13 N. E. Rep. 784, 11 N. Y. S. R. 450; *reversing* 39 Hun 22.—

DISTINGUISHED IN *Bybee v. Oregon & C. R. Co.*, 139 U. S. 663.

In such case, where the articles remain in the hands of the subscribers, or either of them, an individual subscriber may erase his subscription altogether, or modify it as he sees fit; but if not done before the corporation is created, the subscription takes effect and becomes binding, and not before. *Burt v. Farrar*, 24 Barb. (N. Y.) 518.

A provision of the N. Y. General Railroad Act requiring the articles of association of a railroad company to be filed with the secretary of state when a certain amount of the stock has been subscribed and paid in is sufficiently complied with by filing several sheets signed by numerous but different persons, each being a copy of the other, where the subscribers seem to have understood that the several papers should be regarded as one instrument. *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451. —**DISTINGUISHED IN** *People ex rel. v. Sawyer*, 52 N. Y. 296; *Erie & N. Y. C. R. Co. v. Owen*, 32 Barb. (N. Y.) 616.

It seems that the provision of the N. Y. Gen. Railroad Act (§ 3, ch. 140, Laws 1850) making the copy of articles of association filed "presumptive evidence of the incorporation of such company" dispenses with the necessity in the first instance of proof of the genuineness of the signatures to the articles, or of the authority of agents who have signed for their principals, even when the incorporation is expressly denied. *In re New York, L. & W. R. Co.*, 23 Am. & Eng. R. Cas. 43, 99 N. Y. 12, 1 N. E. Rep. 27; *affirming* 35 Hun 220.

Where the articles provided that subscribers of stock should have the privilege of taking jobs of grading the road, furnishing ties, etc., at the estimate of the engineer, and lettings of such work were publicly advertised to take place on a certain day, and the subscribers did not before or on that day offer to take jobs, etc.—*held*, that they could not afterwards claim the right to do so. *Johnson v. Crawfordsville, F., K. & F. W. R. Co.*, 11 Ind. 280.

Defendant subscribed to articles of association under the provisions of the N. Y. General Railroad Act. At the time of the signing, the names of the directors were left in blank. *Held*, that the instrument was incomplete and inoperative as against defendant; that there was no implied consent upon his part to the insertion of the

names of any persons as directors; and that by the insertion of such names without his consent, the instrument was not made binding upon him. *Dutchess & C. County R. Co. v. Mabbett*, 58 N. Y. 397, 7 Am. Ky. Rep. 339.—**FOLLOWING** *Troy & B. R. Co. v. Tibbits*, 18 Barb. 297; *Troy & B. R. Co. v. Warren*, 18 Barb. 310; *Poughkeepsie & S. L. Plankroad Co. v. Griffin*, 24 N. Y. 150.

10. Certificate and affidavits.—A provision of N. Y. Gen. Railroad Act providing that articles of association of a railroad shall not be filed and recorded in the office of the secretary of state until at least \$1000 of stock for every mile of railroad to be constructed is subscribed, and 10 per cent. paid thereon "in good faith to the directors named in the articles of association," is sufficiently complied with by an affidavit that the above amount has been subscribed and 10 per cent. paid in cash in good faith, without alleging that it has been paid to the directors. *Buffalo & P. R. Co. v. Hatch*, 20 N. Y. 157.

Such an affidavit is sufficient, although omitting the words "in good faith." *People v. Stockton & V. R. Co.*, 45 Cal. 306, 5 Am. Ry. Rep. 1.

The certificate of organization need not specify the places of *termini* of a branch line within the state, nor the counties through which the same will pass. *Trester v. Missouri Pac. R. Co.*, 33 Neb. 171, 49 N. W. Rep. 1110.—**DISTINGUISHING** *Attorney-General v. West Wis. R. Co.*, 36 Wis. 466.

In the statutory certificate a description of one terminus of the proposed road as "in or near" a place named in the certificate, and on the line of a specified road terminating at that place, is sufficiently certain. The want of a seal to such certificate is one of the defects or omissions which may be remedied or supplied by the court so as to give effect to the instrument according to the intention of the parties, where equity may require it, agreeably to the provisions of the curative Ohio act of March 10, 1859 (S. & C. 1172). *Warner v. Callender*, 20 Ohio St. 190.

The following description of a road—"To commence at some point to be hereafter designated in the township of Hudson, in the county of Summit, passing through the county of Portage or Cuyahoga, also through the counties of Geauga and Lake, to terminate at some point to be designated in the township of Painesville,

in the county of Lake"—the same having been recorded, and a copy thereof given by the secretary of state, and the company having organized and acted under it, did not render the certificate void for uncertainty. *Callender v. Painesville & H. R. Co.*, 11 *Ohio St.* 516.

By the general railroad law of Maryland it is required that the certificate of incorporation shall state the names of the *termini* of the road, and the county or counties, city or cities, through which it is to pass. *Held*, that it is a sufficient compliance with the requirements of the law that the *termini* be fixed in the state of Maryland with reasonable certainty, and the cities, etc., through which the road is to pass be specified; and the fact that the certificate describes the route of the road as running partly through the state of West Virginia does not invalidate the incorporation of the company under the general law of Maryland, its *termini* being in that state. *Piedmont & C. R. Co. v. Speelman*, 30 *Am. & Eng. R. Cas.* 316, 67 *Md.* 260, 9 *Cent. Rep.* 71, 10 *Atl. Rep.* 77, 293.

11. Right to question corporate status.—(1) *In general.*—The question whether an incorporated company has been regularly organized, so as to give it power to act, cannot be inquired into collaterally. It must be by a direct proceeding by the state. *Wight v. Sheely R. Co.*, 16 *B. Mon. (Ky.)* 4. *Goodrich v. Reynolds*, 31 *Ill.* 490. *Cincinnati, L. & C. R. Co. v. Danville & V. R. Co.*, 75 *Ill.* 113.—FOLLOWED IN *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 *U. S.* 568.—*Aurora & C. R. Co. v. Lawrenceburgh*, 56 *Ind.* 80, 18 *Am. Ry. Rep.* 136.—FOLLOWED IN *Aurora & C. R. Co. v. Miller*, 56 *Ind.* 88.—*Wilcox v. Toledo & A. R. Co.*, 9 *Am. & Eng. R. Cas.* 518, 43 *Mich.* 584, 5 *N. W. Rep.* 1003. *Garrett v. Dillsburg & M. R. Co.*, 78 *Pa. St.* 465.

The legality of the incorporation of a railroad company can only be attacked by the state, and is not open to inquiry as between the parties in a collateral action by it upon a transferable aid contract of which it is the equitable assignee. *Toledo & A. R. Co. v. Johnson*, 55 *Mich.* 456, 21 *N. W. Rep.* 888.

If a turnpike company has made a preliminary organization and adopted by-laws in good faith, it is a *de facto* corporation, and a railroad company cannot justify a trespass on its road on the ground that it

was not a company *de jure*. *Stockton & L. Gravel Road Co. v. Stockton & C. R. Co.*, 45 *Cal.* 680.—FOLLOWING *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 *U. S.* 568.

In the case of a company organized under a special charter, proof of the charter and of user under it is sufficient to establish a *prima facie* right in the plaintiff to sue; and this *prima facie* case an individual could not dispute in an action where the question comes up collaterally, and where the state, as the party chiefly concerned, cannot be heard by its counsel; and the ruling should be the same where an attempt has been made to organize a corporation under a general law, and the question is one of exact regularity and compliance with the law. *Swartwout v. Michigan Air Line R. Co.*, 24 *Mich.* 389, 4 *Am. Ry. Rep.* 63.

Where there is sufficient to show at least the organization of a *de facto* railroad corporation, and that the company has for a number of years held corporate meetings regularly, and has built and operated a railroad, and exercised the usual functions of a railroad corporation, persons contracting with it cannot call its corporate existence into question, when sued upon such contract. *Douglas County Com'rs v. Bolles*, 94 *U. S.* 104.—QUOTED IN *Lewis v. Clarendon*, 5 *Dill. (U. S.)* 329.

The obligors on a bond given to a corporation, by making and signing the instrument, admit the corporate capacity of the obligee, and in suit on the bond cannot plead *null tiel* corporation. If a corporation be acting under color of law, and be recognized as such by the state, its corporate character cannot be questioned collaterally. Such a question should be raised by *quo warranto*. And the rule prevails even although its incorporation may be affected by constitutional provisions. *St. Louis v. Shield*, 62 *Mo.* 247.—FOLLOWED IN *Rails County v. Douglass*, 105 *U. S.* 728.

Where a state authorizes the sale of a railroad, requiring the purchasers to form themselves into a corporation, and the legislature, by various subsequent statutes, has recognized the existence of such corporation, such corporate existence cannot be questioned by third parties. *Atlantic & P. R. Co. v. St. Louis*, 66 *Mo.* 228; reversing 3 *Mo. App.* 315.

The provision of Cal. General Incorporation Act of 1862, § 6, providing that "the due incorporation of any company, claim-

ing in good faith to be a corporation, * * * and doing business as such corporation, or its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such *de facto* corporation may be a party," does not prevent a private person from denying the existence *de jure* or *de facto* of an alleged corporation. *Oroville & V. R. Co. v. Plumas County*, 37 Cal. 354.

In such case the mere allegation that a party is a corporation does not put the question whether it is such a corporation beyond the reach of inquiry in a suit with a private person. It must be a corporation either *de jure* or *de facto*, or it has no legal capacity to sue or be sued, or any capacity of any kind. Where the corporation is the plaintiff, it is an indispensable allegation that plaintiff is a corporation, and the defendant may always deny such allegation. *Oroville & V. R. Co. v. Plumas County*, 37 Cal. 354.

The question as to whether a company ever had a corporate existence may be inquired into collaterally in a proceeding to set aside a conveyance; and in such case, if the company has acquired property in its corporate name and transferred the same, the sufficiency of such transfer may be inquired into collaterally. *Carey v. Cincinnati & C. R. Co.*, 5 Iowa 357.

(2) *Stockholders cannot question it.*—It is not competent for a stockholder to deny the existence of the corporation. *Rockville & W. Turnpike-Road v. Van Ness*, 2 Cranch (U. S. C. C.) 449.

A person who has subscribed to the capital stock of a railroad company, and has had the benefit of such subscription, cannot question the existence of the corporation at the time he subscribed. *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435.

Where an organization has been effected as a corporation, and contracts entered into in the name of the corporation, neither the corporation itself, nor its members, can deny the corporate existence when sued on such contracts. *Callender v. Painesville & H. R. Co.*, 11 Ohio St. 516.

The existence of a railroad company chartered and organized under the Tenn. General Incorporation Act 1875 cannot be "collaterally questioned" in any legal proceeding—e. g., in suit to recover subscriptions of stock—after its completed charter has been duly registered in the county where

the "principal office" of the corporation is situated, although its charter has not been, as required by the act, registered in other counties traversed by the proposed line of road. *Anderson v. Middle & E. T. C. R. Co.*, 52 Am. & Eng. R. Cas. 149, 91 Tenn. 44, 17 S. W. Rep. 803.

12. Proof of incorporation.*—Proof of corporate capacity is not necessary unless it be challenged by an affirmative allegation of no corporation. *Dry Dock, etc., R. Co. v. North & E. R. R. Co.*, 3 Misc. (N. Y.) 61.

But in an action against a railroad for a penalty for the violation of an ordinance, where the answer of the defendants expressly denies that they are a corporation, it is a failure of proof on the plaintiff's part in not proving their incorporation. *Jamaica v. Long Island R. Co.*, 37 How. Pr. (N. Y.) 379.

INCUMBRANCES.

Covenants against, see COVENANTS, 11.

INDEBTEDNESS.

Failure to meet, as ground for receiver, see RECEIVERS, 13.

Tax on, see REVENUE, 4; TAXATION, 108, 109.

INDEMNITY.

Agent, when entitled to, see AGENCY, 36.

To conductor, for obeying orders, see CONDUCTOR, 13.

—directors, for expenses incurred, see DIRECTORS, ETC., 47.

Ultra vires contracts for, see ULTRA VIRES, 12.

What required from street railway company, see STREET RAILWAYS, 83.

INDEMNITY BONDS.

1. By company, to bank, to protect against overdrafts.—The defendant gave a bond to the plaintiff bank to secure it against loss by reason of its dealings with a certain railroad company. The condition of the bond recited that the railroad company were "depositors of money in and customers of and dealers with said bank, and have made and are expected to make their checks and drafts upon the

* Presumption as to incorporation in both civil and criminal cases, see note, 22 L. R. A. 276.

bank, and their account had been and is expected to be from time to time overdrawn, and said railroad company has been and may hereafter be indebted to said bank by reason of the payment by it of such drafts or overdrafts; the obligors then agreeing, "in consideration of such dealing," that the railroad company should upon demand pay "any balance and interest which had been or should at any time be due from them to the bank, and in default thereof that the obligors would save the bank harmless from all loss by reason of such drafts or overdrafts and such indebtedness." *Held*, that the operation of the bond was not limited to technical overdrafts, but included any indebtedness of the railroad company growing out of the return to the bank of paper indorsed by the railroad company, and which had been discounted by the bank, and the proceeds drawn out by the railroad company. *Aetna Nat. Bank v. Hollister*, 55 Conn. 188, 10 Atl. Rep. 550.

The bond was dated in 1870. The railroad company became insolvent in 1876. The bank had soon after paid to the receiver of the company a small balance standing at the time to the credit of the company. *Held*, that this did not bar the bank of its right of recovery upon the bond. *Aetna Nat. Bank v. Hollister*, 55 Conn. 188, 10 Atl. Rep. 550.

2. — to city, to protect against claims for damages.—A bond of indemnity taken by a city to indemnify it against all claims for damages to private property, and the appointment of a superintendent to take care of public interests in the execution of work under Mass. Rev. St. ch. 39, § 67, with reference to raising the grade of a street by a railroad company, are prudent measures, which do not change the character of the work or the general liability of the railroad company. *Gardiner v. Boston & W. R. Corp.*, 9 Cush. (Mass.) 1.

3. — to receiver, to protect him against debts incurred.—In the absence of an express agreement to do so, a railroad company is not bound to honor or redeem tickets issued by a receiver while he was operating the road. And the fact that the company, on receiving possession of the road, executes a bond to indemnify the receiver against all debts and liabilities incurred by him is not such an express agreement as to compel it to honor such tickets. *Godfrey v. Ohio & M. R. Co.*, 37 Am. &

Eng. R. Cas. 8, 116 *Ind.* 30, 15 *West. Rep.* 533, 18 *N. E. Rep.* 61.

4. To company, as indemnity for moneys paid for right of way.—In an action on a bond conditioned for the payment to a railroad company of all reasonable sums of money by it paid out in securing a right of way, depot grounds, and terminal facilities for a line of railway between two points—*held*: (1) that the obligors are not liable for a certain sum in gross for the whole right of way, etc., but only for such several sums as are reasonable in each instance where it was necessary to expend them for that purpose; (2) that the award of the arbitrators in contested cases about the right of way is competent evidence of the reasonableness of the amounts paid in those cases; and (3) that the bond does not indemnify the company for money expended in criminal prosecutions arising out of disputes about the right of way. *Oregon R. & N. Co. v. Swinburne*, 22 *Oreg.* 574, 30 *Pac. Rep.* 322.

5. — as indemnity against employee's defaults.—A bond given to a railway company, conditioned that an agent appointed by it for the purpose of selling coal should account for all moneys received by him, is valid, although the company has no power to deal in coal. *North Western R. Co. v. Whinray*, 10 *Ex.* 77, 2 *C. L. R.* 1207, 23 *L. J. Ex.* 261.

A surety of an indemnity bond of a clerk employed by a railway company is liable for breaches committed after the union of such company with another, where the amalgamation is made by a statute providing that all bonds made or entered into with, in favor of, or by the dissolved companies should "be and remain as good, valid, and effectual, in favor of and against and with reference to the new company," etc. *Eastern Union R. Co. v. Cochran*, 9 *Ex.* 197, 17 *Jur.* 1103, 23 *L. J. Ex.* 61.

A surety on a bond of a sales agent of a railway company is not liable where the company changes the method of compensating such agent from a fixed salary to commissions on sales. *North Western R. Co. v. Whinray*, 10 *Ex.* 77, 2 *C. L. R.* 1207, 23 *L. J. Ex.* 261.

6. — as indemnity against accidents.—A contractor for the construction of a station platform giving a bond to indemnify the company against "all loss, cost, or damages arising from injuries sustained

by mechanics, laborers, or other persons, by reason of accidents or otherwise," is not bound to pay the company the damages it has had to pay by reason of negligently running an engine against a laborer employed by the contractor. *Manhattan R. Co. v. Cornell*, 54 Hun 292, 27 N. Y. S. R. 300, 7 N. Y. Supp. 557; affirmed in 130 N. Y. 637, mem., 29 N. E. Rep. 151, mem., 40 N. Y. S. R. 982, mem.

7. To landowner, in place of enjoining construction of road.—A court of equity, instead of enjoining a company from constructing its road until damages to property owners are paid, may substitute a bond of indemnity, where the ends of justice will thereby be promoted. *Campbell v. Point Pleasant & O. R. R. Co.*, 20 Am. & Eng. R. Cas. 157, 23 W. Va. 448.—REVIEWING *Northern Pac. R. Co. v. St. Paul, M. & M. R. Co.*, 1 Am. & Eng. R. Cas. 15, 2 McCrary (U. S.) 260.

Where a prompt assessment of damages cannot, in all probability, be had in a condemnation proceeding, and where the right of complainant to any damages is matter of dispute, depending for its solution upon doubtful questions of law and fact, instead of stopping the progress of a great work of internal improvement, a bond of indemnity will be required and the work allowed to go on. *Northern Pac. R. Co. v. St. Paul, M. & M. R. Co.*, 1 Am. & Eng. R. Cas. 15, 2 McCrary (U. S.) 260, 4 Fed. Rep. 688.—FOLLOWED IN *Jones v. Florida, C. & P. R. Co.*, 41 Fed. Rep. 70. REVIEWED IN *Campbell v. Point Pleasant & O. R. R. Co.*, 23 W. Va. 448.

8. To the crown, to secure completion of road.—Where a person who has given bond to the crown as a guaranty that a certain railway will be completed within a given time applies to the board of trade to authorize the abandonment of the railway and to cancel the bond, which is ordered upon condition that the money secured thereby shall be applied as assets of the company, the payment made by such person to obtain the canceling of the bond is a liability incurred by him in giving the bond for which the parties who agreed to indemnify him are liable, although the Railway Companies Act of 1867, enabling the party giving the bond to take proceedings to cancel it, was not passed when the indemnity was given. *Webster v. Petre, L. R. 4 Ex. D. 127, 27 W. R. 662.*

INDEMNITY LANDS.

Selection and grant of, to railroads, see LAND GRANTS, 51-56, 77.

INDEPENDENT CONTRACTORS.

Liability for acts of servants of, see CARRIAGE OF PASSENGERS, 130.

— **injury to employe of, see EMPLOYEES, INJURIES TO, 488.**

— **station ground left unguarded by, see STATIONS AND DEPOTS, 95.**

— **of, for killing stock, see ANIMALS, INJURIES TO, 643.**

Servants of, not fellow-servants with employes of company, see FELLOW-SERVANTS, 129.

I. WHO ARE DEEMED INDEPENDENT CONTRACTORS..... 1104

II. LIABILITY FOR ACTS OF INDEPENDENT CONTRACTOR OR HIS SERVANTS..... 1105

I. WHO ARE DEEMED INDEPENDENT CONTRACTORS.

1. Definition.—One to whom a railway company has let a contract for the performance of work, without reserving control over those employed in the work, is an independent contractor. *St. Louis, I. M. & S. R. Co. v. Yonley*, 45 Am. & Eng. R. Cas. 578, 53 Ark. 503, 14 S. W. Rep. 800.

An employment is regarded as independent when the person renders service in the course of an occupation representing the will of an employer only as to the result of the work, and not as to the means by which it is accomplished. *Chicago, R. I. & P. R. Co. v. Ferguson*, 3 Colo. App. 414. *Fink v. Missouri Furnace Co.*, 82 Mo. 276; reversing 10 Mo. App. 61. *Powell v. Virginia Constr. Co.*, 88 Ten. 692, 13 S. W. Rep. 691. *Cunningham v. International R. Co.*, 51 Tex. 503. *Libb v. Norfolk & W. R. Co.*, 47 Am. & Eng. R. Cas. 651, 87 Va. 711, 14 S. E. Rep. 163.

The reservation to the employer of the privilege of inspecting and supervising the work of the contractor does not destroy or impair his character as an independent contractor. *Bibb v. Norfolk & W. R. Co.*, 47 Am. & Eng. R. Cas. 651, 87 Va. 711, 14 S. E. Rep. 163.

Where a contractor is but exercising the usual corporate powers of the company, he must be regarded as its agent and not an independent contractor, making the company

liable, so far as the public is concerned, for his acts. *So held*, where plaintiff was injured while engaged in reconstructing defendant's track, under a contractor. *Toledo, St. L. & K. C. R. Co. v. Conroy*, 39 Ill. App. 351.

2. Distinguished from servants.—If a company contracts for the construction of its road in such a manner that the contractor has a right to direct the details of construction, and to control the mode in which the work shall be done and the agencies employed, the company only reserving the right to insist that the work shall conform to the terms of the contract, it is not liable for an injury caused by the negligence of the contractor or of his employes. *Rome & D. R. Co. v. Chasteen*, 40 Am. & Eng. R. Cas. 559, 88 Ala. 591, 7 So. Rep. 94. *Arasmith v. Temple*, 11 Ill. App. 39.

A person who contracts to grade a roadbed at a stipulated price, the work to be done entirely by himself or persons employed by him, is an independent contractor, and not an agent or employé of the company, though the contract provides for the work being done to the satisfaction of the company's engineer. *Rogers v. Florence R. Co.*, 39 Am. & Eng. R. Cas. 348, 31 So. Car. 378, 9 S. E. Rep. 1059.

Such contractor is not the company's "authorized agent or employé" within the meaning of So. Car. Gen. St. § 1511, providing that railroad companies shall be liable for injuries to property by fire "in consequence of the act of any of its authorized agents or employes." *Rogers v. Florence R. Co.*, 39 Am. & Eng. R. Cas. 348, 31 So. Car. 378, 9 S. E. Rep. 1059.

When the details of the contract are to be completed under the orders of the company employing the other, and according to their direction, and the contractor undertakes, in general terms, and the company reserves the right and power not only to direct what shall be done, but how it shall be done, and to control the doing of it while it is being done, then the contractor is not an independent contractor, but is the agent, servant, or employé of the party for whom he is doing the work. *Texas & P. R. Co. v. Dudley*, 1 Tex. App. (Civ. Cas.) 271.

3. Illustrations.—Where a railroad company contracts with a construction company to survey and locate its line, procure its right of way, build its roadbed, tracks,

bridges, side tracks, etc., and equip the same with engines and cars, in accordance with certain specifications, such provisions of the construction contract make the construction company an independent contractor, in the sense that the railroad company is not liable for injuries occasioned by a defective track, or the negligence of employes on a train laden with construction materials, on a part of the line constructed by the contracting company, and remaining under its control, and not inspected and accepted or operated by the railroad company. It is error to render a judgment against the railroad company for such injury. *St. Louis, Ft. S. & W. R. Co. v. Willis*, 33 Am. & Eng. R. Cas. 397, 38 Kan. 330, 16 Pac. Rep. 728.—QUOTING *Kansas C. R. Co. v. Fitzsimmons*, 18 Kan. 34.

A contractor for the construction of the mason work of a round house agreed to build his own scaffolding, the company to furnish the materials. Afterward the company's master mechanic told the contractor that he would build a scaffold for the carpenters, which would be too light for the masons, but that he could use it if he would strengthen it, if he desired to do so, but on his own responsibility as to safety; but the contractor used it without strengthening it, and it fell and injured an employé. *Held*, that no relation of master and servant existed between the company and the contractor, or between the company and the injured employé, and therefore it was not liable. *Larock v. Ogdensburg & L. C. R. Co.*, 26 Hun (N. Y.) 382.—FOLLOWING *King v. New York C. & H. R. R. Co.*, 66 N. Y. 181.

4. Question of law for the court.—The question whether a person is an independent contractor or not is a question of law, where it depends upon the construction of a written contract between the person and the company. *Rogers v. Florence R. Co.*, 39 Am. & Eng. R. Cas. 348, 31 So. Car. 378, 9 S. E. Rep. 1059.

II. LIABILITY FOR ACTS OF INDEPENDENT CONTRACTOR OR HIS SERVANTS.*

5. Rule of non-liability, generally.

—The doctrine is settled that the relation

* As to how far employer is liable for acts of contractor or subcontractor, see notes, 51 AM. DEC. 200; 15 Id. 110; 18 Id. 113; 19 Id. 641; 29 Id. 589; 14 L. R. A. 828.

of principal and agent and master and servant does not subsist in the case of an independent employé or contractor who is not under the immediate direction of the employer, and that the railroad company is not therefore liable for injuries occasioned by them. *Gulf, C. & S. F. R. Co. v. Flake*, 1 *Tex. App. (Civ. Cas.)* 99.

The liability of a master for the acts of his servants grows out of, and is measured by, the control of the former over the latter; and for the want of such control the principal will not ordinarily be liable for the acts or neglects of the employés of a subcontractor under a contractor employed by him to do a specified work. *Pawlet v. Rutland & W. R. Co.*, 28 *Vt.* 297.—APPROVING *Knight v. Fox*, 5 *Ex.* 721. DOUBTING *Bush v. Steinman*, 1 *B. & P.* 404. REVIEWING *Reedie v. London & N. W. R. Co.*, 4 *Ex.* 244.

6. Tortious acts.*—No duty is imposed upon the company, either by contract or by statute, to build its road or to do it in a particular way. It may contract with others for the construction of its road, and such contract is not such a delegation of its chartered rights as to render it liable for unauthorized wrongs committed by the contractor or his servants while engaged in the work. *Atlanta & F. R. Co. v. Kimberly*, 47 *Am. & Eng. R. Cas.* 307, 87 *Ga.* 161, 13 *S. E. Rep.* 277.—DISTINGUISHING *Houston & G. N. R. Co. v. Meadow*, 50 *Tex.* 77; *Wilson v. White*, 71 *Ga.* 506; *Gray v. Pullen*, 5 *B. & S.* 970; *Hole v. Sittingbourne & S. R. Co.*, 6 *H. & N.* 488; *Chicago, St. P. & F. du L. R. Co. v. McCarthy*, 20 *Ill.* 388; *Hinde v. Wabash Nav. Co.*, 15 *Ill.* 72.

Where defendant had purchased a strip of land through the plaintiffs' property, and agreed to put in a passageway under the track at a certain place, and it afterwards appeared that the road leading to the proposed passageway was cut off, and that a passageway at that point would be flooded by tide water, and the defendant therefore failed to perform its agreement, and the plaintiffs brought suit for specific performance; and it also appeared that the subcontractors who constructed the defendant's road had trespassed upon and wasted the land of the plaintiffs adjacent to the strip

purchased, and the plaintiffs also joined claims of damages therefor—*held*, that where the owner of property lets a contract for work thereon to an independent contractor, and that contractor in the performance of the work commits torts which are not necessary to the performance of the work, the owner is not liable therefor. *Murfieldt v. New York, W. S. & B. R. Co.*, 25 *Am. & Eng. R. Cas.* 144, 102 *N. Y.* 703, 1 *Silo. App.* 93, 7 *N. E. Rep.* 404, 2 *N. Y. S. R.* 444; *affirming* 34 *Hun* 632.

7. Negligence.*—A party is not chargeable with the negligent acts of another in doing work upon his lands, unless he stands in the character of employer to the one guilty of the negligence, or unless the work as authorized by him would necessarily produce the injuries complained of, or they are occasioned by the omission of some duty incumbent upon him. *McCafferty v. Spuyten Duyvil & P. M. R. Co.*, 61 *N. Y.* 178, 12 *Am. Ry. Rep.* 105, 48 *How. Pr.* 44. *Rome & D. R. Co. v. Chasteen*, 40 *Am. & Eng. R. Cas.* 559, 88 *Ala.* 591, 7 *So. Rep.* 94. *Wabash, St. L. & P. R. Co. v. Farver*, 31 *Am. & Eng. R. Cas.* 134, 111 *Ind.* 195, 9 *West. Rep.* 621, 12 *N. E. Rep.* 296. *Roddy v. Missouri Pac. R. Co.*, 104 *Mo.* 234, 15 *S. W. Rep.* 1112. *Carter v. Berlin Mills Co.*, 58 *N. H.* 52.—DISTINGUISHING *Lowell v. Boston & L. R. Corp.*, 23 *Pick. (Mass.)* 24; *Chicago, St. P. & F. du L. R. Co. v. McCarthy*, 20 *Ill.* 388; *Detroit v. Corey*, 9 *Mich.* 165. *DISAPPROVING* *Stone v. Cheshire R. Co.*, 19 *N. H.* 427.

There is no distinction in this respect between an owner of real and of personal property; and the former is held to no stricter liability for the negligent use and management of his real estate, or of negligent acts upon it by others, than is the latter as to a similar use of his property. *McCafferty v. Spuyten Duyvil & P. M. R. Co.*, 61 *N. Y.* 178, 12 *Am. Ry. Rep.* 105, 48 *How. Pr.* 44.

Where one lets a contract to another to do a particular work, reserving to himself no control over such work except the right to require it to conform to a particular standard when completed, he is not liable for the negligence of the party to whom the con-

* Liability for torts of contractor, see note, 19 *AM. & ENG. R. CAS.* 641.

* Company not liable for negligence of independent contractor, see note, 9 *L. R. A.* 604.

Failure to maintain cattle-guards. Neglect of contractor no defense, see 45 *AM. & ENG. R. CAS.* 488, *abstr.*

also joined
ld, that where
contract for
ent contractor,
performance of
are not neces-
the work, the
Murfeldt v.
o., 25 Am. &
3, 1 Silv. App.
S. R. 444; af-

is not charge-
of another in
less he stands
r to the one
less the work
necessarily prop-
of, or they are
of some duty
Ferty v. Spuy-
61 N. Y. 178,
How. Pr. 44.
n. 40 Am. &
7 So. Rep. 94.
Farver, 31 Am.
195, 9 West.
Roddy v. Mis-
15 S.W. Rep.
Co., 58 N. H.
v. Boston &
Chicago, St.
Carthy, 20 Ill.
165. DISAP-
Co., 19 N. H.

this respect
d of personal
held to no
rent use and
r, or negli-
n is the latter
property. Mc-
P. M. R. Co.,
105, 48 How.

o another to
o himself no
the right to
cular stand-
liable for the
om the con-

ence of inde-
R. A. 604.
Neglect of
I. & ENG R.

tract is left. *New Albany F. & R. Mill v. Cooper*, 131 Ind. 363, 30 N. E. Rep. 294. *O'Rourke v. Hart*, 7 Bosw. (N. Y.) 511.—
FOLLOWING *Pack v. Mayor*, etc., of N. Y., 8 N. Y. 222; *Kelly v. Mayor*, etc., of N. Y., 11 N. Y. 432; *Storrs v. Utica*, 17 N. Y. 104.—
Gardner v. Bennett, 6 J. & S. (N. Y.) 197.—
FOLLOWING *Blake v. Ferris*, 5 N. Y. 48.—
FOLLOWED IN *Burmeister v. New York El. R. Co.*, 15 J. & S. 264.—*Hughes v. Cincinnati & S. R. Co.*, 15 Am. & Eng. R. Cas. 100, 39 Ohio St. 461.—QUOTED IN *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207. RE-
VIEWED IN *Hitte v. Republican Valley R. Co.*, 29 Am. & Eng. R. Cas. 586, 19 Neb. 620.

Where work over the line of a railway is intrusted to independent contractors, it is not the duty of the company to take precautions against possible negligence on their part. *Daniel v. Metropolitan R. Co.*, L. R. 5 H. L. Cas. 45, 20 W. R. 37, 40 L. J. C. P. 121, 24 L. T. 815.

8. When a competent contractor has been selected.—Where the principal, using due care in the selection of the person, enters into a contract with the person exercising an independent employment, by virtue of which the latter undertakes to accomplish a given result, being at liberty to select and employ his own means and methods, and the principal retains no right or power to control or direct the manner in which the work shall be done, the contract does not create the relation of principal and agent or master and servant, and the person contracting for the work is not liable for the negligence of the contractor, his agents or servants, in the performance of the work. *Chicago, R. I. & P. R. Co. v. Ferguson*, 3 Colo. App. 414, 33 Pac. Rep. 684.

Where an employer selects with due care a competent contractor, and to him commits a work that is lawful, and such as may be done without injury to third persons, and to be done in a workmanlike manner, at a stipulated price, such employer cannot be held liable for injuries caused by the negligence of such contractor or his servants to third persons, nor servants of such employer nor passengers on his cars. *Bibb v. Norfolk & W. R. Co.*, 47 Am. & Eng. R. Cas. 651, 87 Va. 711, 14 S. E. Rep. 163.—
APPROVING *Hilliard v. Richardson*, 3 Gray (Mass.) 349; *Butler v. Hunter*, 7 H. & N. 826; *Scammon v. Chicago*, 25 Ill. 424. DIS-
APPROVING *Bush v. Steinman*, 1 B. & P. 404; *Hole v. Sittingbourne & S. R. Co.*, 6

H. & N. 488; *Chicago v. Robbins*, 2 Black (U. S.) 418.—*Powell v. Virginia Constr. Co.*, 88 Tenn. 692, 13 S. W. Rep. 691.

9. Acts of contractor's servants.—The rule of *respondet superior* applies only to cases where the relation of master and servant exists, and does not apply as between an employer and the servants of an independent contractor. And the same is true of the rule of *qui facit per alium, facit per se*. *Bibb v. Norfolk & W. R. Co.*, 47 Am. & Eng. R. Cas. 651, 87 Va. 711, 14 S. E. Rep. 163. *Carter v. Berlin Mills Co.*, 58 N. H. 52.

A person is not liable for injuries occasioned by the acts or neglect of the servants of one who has contracted to do a piece of work for him by the job. *Clark v. Vermont & C. R. Co.*, 28 Vt. 103.

Where the master employs an independent contractor to perform a specified piece of work, and furnishes his own general servant, being a competent person, to aid the contractor and be under his exclusive control and direction in that particular work, the contractor, and not the general master, is responsible for the acts and negligence of the servant while thus engaged. *Powell v. Virginia Constr. Co.*, 88 Tenn. 692, 13 S. W. Rep. 691.—
APPROVING *Miller v. Minnesota & N. W. R. Co.*, 38 Am. & Eng. R. Cas. 234, 76 Iowa 655; *Cunningham v. International R. Co.*, 51 Tex. 503; *Central R. & B. Co. v. Grant*, 46 Ga. 417; *Vary v. Burlington, C. R. & M. R. Co.*, 42 Iowa 246. DISAPPROVING *New Orleans, B. R. & M. R. Co. v. Norwood*, 62 Miss. 565; *Burton v. Galveston, H. & S. A. R. Co.*, 61 Tex. 526.

A company is not liable for injuries to a passenger owing to the fall of a girder through the negligence of workmen employed by a contractor unconnected with the railway company. *Daniel v. Metropolitan R. Co.*, L. R. 3 C. P. 591, 37 L. J. C. P. 280.

Plaintiff's horse and wagon were injured by a collision with a car of defendant company which was being moved by horse power in a city. The evidence showed that the company had let a contract to two persons to haul its cars in this way, the contractors to furnish the horses and drivers, and to assume the entire control. *Held*, that the company was not liable. *Schular v. Hudson River R. Co.*, 38 Barb. (N. Y.) 653.

10. Extent and limits of the rule, generally.—One injured by the direct re-

sult of the construction of water works for a city by contractors may sue either the city or the contractors. *St. Paul Water Co. v. Wars*, 16 Wall. (U. S.) 566.—REVIEWED IN *McCafferty v. Spuyten Duyvil & P. M. R. Co.*, 61 N. Y. 178, 48 How. Pr. 44.

A railroad company cannot, by contracting for the moving of its cars by horse power over its own tracks from one of its depots to the various consignees, relieve itself from liability for injuries caused by the negligence of the contractor, although such contractor employed the horses and men engaged in such work, and exercised an independent control over them. *Philadelphia, W. & B. R. Co. v. Hahn*, (Pa.) 32 Am. & Eng. R. Cas. 24, 12 Atl. Rep. 479.

The principle that the railroad company cannot delegate to an employé its chartered rights and privileges so as to exempt it from liability does not extend to the use of the ordinary ways and means for the construction of the road, but to the use of such extraordinary powers only as the company itself could not exercise without having first complied with the conditions of the legislative grant of authority. *Cunningham v. International R. Co.*, 51 Tex. 503.

11. Where company retains control or supervision.—A railroad corporation is responsible for the negligence of workmen, although they are employed by an individual who has contracted to construct a portion of the road for a stipulated sum, the work being done by the direction of the corporation. *Lowell v. Boston & L. R. Corp.*, 23 Pick. (Mass.) 24.—DISAPPROVED IN *Clark v. Hannibal & St. J. R. Co.*, 36 Mo. 202. DISTINGUISHED IN *Carter v. Berlin Mills Co.*, 58 N. H. 52. QUOTED AND DISTINGUISHED IN *Eaton v. European & N. A. R. Co.*, 59 Me. 520. REVIEWED IN *Stone v. Cheshire R. Corp.*, 19 N. H. 427.

Retention of supervision of a work, without interfering with the independent action of a contractor therefor, does not render the owner liable for the acts of the contractor. *Larson v. Metropolitan St. R. Co.*, 110 Mo. 234, 19 S. W. Rep. 416.

But if the corporation retain control over the mode and manner of doing the work, the relation of independent contractor does not exist, and the employer is liable for an injury to third persons from the carelessness or wilful wrong of the contractor while engaged in the performance of the work. *Hughes v. Cincinnati & S. R. Co.*, 15 Am.

& Eng. R. Cas. 100, 39 Ohio St. 461. *McMasters v. Pennsylvania R. Co.*, 3 Pittsb. (Pa.) 1.

When an employer retains control over the mode and manner of doing a specified portion of the work only, and an injury results to a third person from the doing of some other portions of the work, the contractor alone is liable. *Hughes v. Cincinnati & S. R. Co.*, 15 Am. & Eng. R. Cas. 100, 39 Ohio St. 461.

Provisions of a construction contract that the work shall be performed under the supervision of the company's chief engineer, at whose direction objectionable employes shall be discharged, do not make the contractor and his employes the servants of the company, so as to make it liable for their negligence. *McKinley v. Chicago, S. F. & C. R. Co.*, 40 Mo. App. 449. *Cuff v. Newark & N. Y. R. Co.*, 35 N. J. L. 17; affirmed in 35 N. J. L. 574. *Burmeister v. New York El. R. Co.*, 15 J. & S. (N. Y.) 264.—FOLLOWING *Blake v. Ferris*, 5 N. Y. 48; *Pack v. Mayor, etc., of N. Y.*, 8 N. Y. 222; *Kelly v. Mayor, etc., of N. Y.*, 11 N. Y. 432; *Gardner v. Bennett*, 6 J. & S. 197; *Clare v. National City Bank*, 8 J. & S. 104.

Where the owner of property contracted for an excavation upon it by another "to such general depth" and "extent as may be indicated by the engineer" (or his agent) representing the owner, the latter is responsible for negligent acts of a subcontractor for such work, done under direction of the owner's agent, in respect to the depth and extent of the excavation. *Larson v. Metropolitan St. R. Co.*, 110 Mo. 234, 19 S. W. Rep. 416.

Where an employer reserves the right to direct the manner of performance in any particular, or where he undertakes to provide any of the instrumentalities, he owes to the contractor and his employes the exercise of care in that regard. *Roddy v. Missouri Pac. R. Co.*, 104 Mo. 234, 15 S. W. Rep. 1112.

If a company employed another corporation to construct for it a railroad under a contract by the terms of which, if strictly carried out, the other corporation would be an independent contractor, and consequently the railroad company would not be liable for injuries occasioned by defects in the construction of a roadbed, but if afterwards the parties abandoned this contract, and the railroad, by its own officers and

servants, took charge of and supervised the work, gave directions as to how the roadbed should be constructed, and assumed general management and control of the enterprise, the railroad company could not relieve itself of liability for injuries occasioned by negligent or improper construction, but it would be primarily responsible. *Savannah & W. R. Co. v. Phillips*, 90 Ga. 829, 17 S. E. Rep. 82. — *APPLYING Atlanta & F. R. Co. v. Kimberly*, 87 Ga. 161.

Where a contractor undertook to lay the track upon a newly constructed railroad for the company owning or leasing the same, the company to furnish the construction train and the men necessary to operate it, they to be employed and paid by the company, and to whom alone they are responsible while running the train, the contractor having no authority to control them in that behalf—*held*, that if, by the carelessness of those in charge of the train while passing over the track, an employé of the contractor, lawfully on the train, and without fault or negligence on his part, was injured, the railroad company owning and controlling the movements of the train would be liable for the damages sustained. *Chicago, B. & Q. R. Co. v. Clark*, 38 Am. & Eng. R. Cas. 192, 26 Neb. 645, 42 N. W. Rep. 703. — *DISTINGUISHING Hite v. Republican Valley R. Co.*, 19 Neb. 620.

12. Company interfering with work.—Plaintiff owned land in N., through which the defendants constructed their railway. Portions of their work of construction, including the cutting, grubbing, and clearing of the track of trees, etc., to be done to the satisfaction of the defendants' engineer, were let to M. & G., who sublet it to others. The engineer, who had the power to urge on the work, but no control over the men, directed the workmen, servants of the subcontractor, to hurry on, and told them to burn the brush and timber in the centre of the track, not on either side. The fire was lit in July, and spread into the plaintiff's land. In October the fire, having smouldered meanwhile, as the plaintiff alleged, broke out afresh, and did the greater part of the damage. *Held*, that the contractors, not the defendants, were *prima facie* responsible for the injury, if caused by negligence on the part of those who set out the fire; and that the evidence did not show such interference by the engineer as would make the defendants liable. *Gillson*

v. North Grey R. Co., 35 U. C. Q. B. 475. — *APPLYING Steel v. Southeastern R. Co.*, 16 C. B. 550. *REVIEWING Daniel v. Metropolitan R. Co.*, L. R. 5 H. L. Cas. 45.

13. Unlawful acts or work inherently dangerous.—The rule that a company is not liable for the negligence of an independent contractor does not apply where a resulting injury is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. *Southern Ohio R. Co. v. Morey*, 43 Am. & Eng. R. Cas. 97, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. Rep. 269. — *QUOTING Hughes v. Cincinnati & S. R. Co.*, 39 Ohio St. 476. — *St. Louis, I. M. & S. R. Co. v. Vonley*, 45 Am. & Eng. R. Cas. 578, 53 Ark. 503, 14 S. W. Rep. 800.

When a contractor is employed to do an unlawful act, a person injured by such unlawful act, or by any result of it, may recover damages from either the contractor or the employer, or both. *Houston & G. N. R. Co. v. Van Bayless*, 1 Tex. App. (Civ. Cas.) 247.

14. Work resulting in creation of nuisance.—As a general rule a railroad company is not liable for an injury resulting from a nuisance created by the negligence of an independent contractor in constructing its railroad, where it retains no control over the contractor except to see, by its superintendent, that the railroad is built according to the contract *Atlanta & F. R. Co. v. Kimberly*, 47 Am. & Eng. R. Cas. 307, 87 Ga. 161, 13 S. E. Rep. 277. — *APPLIED IN Savannah & W. R. Co. v. Phillips*, 90 Ga. 829.

The proper construction of a railroad, under the authority given by the charter of the company, will not result in a nuisance; and the contract for its construction implies that the contractor shall do the work properly, the contrary not appearing. *Atlanta & F. R. Co. v. Kimberly*, 47 Am. & Eng. R. Cas. 307, 87 Ga. 161, 13 S. E. Rep. 277.

If a particular size of sewer pipe were placed at a certain point by direction of the company, or according to the specifications in the contract, and this part of the plan were inherently defective, and the nuisance were thus caused, the company would be liable for the injury thereby sustained; but if the company did not direct such pipe to be placed, and the contract specifications

did not require it, and it was so placed by the contractor according to his own judgment, and negligently, the company would not be liable, although it had notice from the plaintiff that, in his opinion, the pipe was too small. Such independent contractor is not the servant or agent of the company; and for his negligence in performing, for the company, work lawful in itself, he, and not the company, is liable. *Atlanta & F. R. Co. v. Kimberly*, 47 Am. & Eng. R. Cas. 307, 87 Ga. 161, 13 S. E. Rep. 277.

The company not being in possession of the railroad at the time the injury from the nuisance was received, and not appearing to have known that there was a nuisance, no ratification by it of any act of the contractor which created the nuisance is shown. *Atlanta & F. R. Co. v. Kimberly*, 47 Am. & Eng. R. Cas. 307, 87 Ga. 161, 13 S. E. Rep. 277.

When the owner of lands undertakes to do a work which, in the ordinary mode of doing it, is a nuisance, he is liable for any injury which may result from it to third persons, though the work is done by a contractor exercising an independent employment, and employing his own servants; but when the work is not in itself a nuisance, and the injury results from the negligence of such contractor or his servants in the manner of executing it, the contractor alone is liable, unless the owner is in default in employing an unskilful or improper person as the contractor. *Cuff v. Newark & N. Y. R. Co.*, 35 N. J. L. 17; affirmed in 35 N. J. L. 574. — DISTINGUISHED IN *Topf v. West Shore & O. Terminal Co.*, 19 Am. & Eng. R. Cas. 7, 46 N. J. L. 34. — *Wabash, St. L. & P. R. Co. v. Farver*, 31 Am. & Eng. R. Cas. 134, 111 Ind. 195, 9 West. Rep. 621, 12 N. E. Rep. 296. *Hughes v. Cincinnati & S. R. Co.*, 15 Am. & Eng. R. Cas. 100, 39 Ohio St. 461.

When the laying of a track necessitates the digging up of a highway and the obstruction of it with earth and materials, the obstruction so formed is a nuisance, unless properly guarded against, and the railroad company is liable for injuries caused thereby when the work is done under a permit issued to it, although the work had been let out by it to an independent contractor. *Woodman v. Metropolitan R. Co.*, 38 Am. & Eng. R. Cas. 484, 149 Mass. 335, 4 L. R. A. 213, 21 N. E. Rep. 482.

If a railway upon a public street be a

nuisance, then the party building it would be liable for damages suffered from it, although trains operated thereon were run and owned by an independent contractor. If the structure be lawful, such independent contractor would alone be liable. *Taylor v. Dunn*, 80 Tex. 652, 16 S. W. Rep. 732.

The plaintiff's horse was frightened at a steam shovel, and ran, throwing the plaintiff out of his carriage, who thereby received the injury complained of. The shovel was located on the defendant's land, used to obtain gravel to ballast its roadbed, near the highway in which the plaintiff was traveling. The defendant's evidence tended to show that the shovel was operated and wholly controlled by one M., an independent contractor, and his servants, although its use was contemplated when the contract was made; and the question being whether the defendant or M. was liable, the court charged in effect that the defendant's liability was coextensive with that of M. if it was part of the agreement that the shovel should be used in doing the work. *Held*, error; that the work being lawful, and the shovel not a nuisance until it became such by negligent use, the defendant was not liable unless the relation of master and servant existed between it and those operating the shovel, unless it not only prescribed the end, but directed the means and methods; and that the inquiry was, whether the defendant or M. was the principal or master in operating the shovel: if M., and it became a nuisance through his negligence, he alone was liable, although it was understood by the defendant in making the contract that the shovel was to be used. *Bailey v. Troy & B. R. Co.*, 57 Vt. 252. — REVIEWING *Murray v. Currie*, L. R. 6 C. P. 24; *Rourke v. White Moss Colliery Co.*, L. R. 2 C. P. D. 205.

15. Injuries occasioned while road is being constructed, generally.

A company is not liable for injuries to adjoining land or live stock caused by the negligence of its independent contractor in the construction of the road, or of a subcontractor who has exclusive control and direction. *Clark v. Hannibal & St. J. R. Co.*, 36 Mo. 202. — DISAPPROVING *Lowell v. Boston & L. R. Corp.*, 23 Pick. (Mass.) 24. — DISTINGUISHED IN *Ullman v. Hannibal & St. J. R. Co.*, 67 Mo. 118.

Defendant, in building its road on its right of way near plaintiff's house, raised

an embankment eighteen feet high in order to cross another railroad at grade, thus leaving the house in an angle formed by the two embankments. A pond of water was formed by reason of a heavy rain storm, in another angle formed by the embankments opposite the house, and a day or two afterwards plaintiff's eight-year-old boy climbed over defendant's embankment, fell into the water, and was drowned. The pool was not guarded in any way, and no means were provided to carry off the water if thus suddenly accumulated. An independent contractor was in possession of the work at the time of the accident, his contract not being completed. *Held*, that the defendant was not guilty of negligence. *Charlebois v. Gagebie & M. R. R. Co.*, 91 *Mich.* 59, 51 *N. W. Rep.* 812.

J. & Co. had contracted with the Grand Trunk R. Co. to obtain the land required by them and to construct their road; the line was laid out so as to cross the Bath macadamized road several times, which being considered dangerous, the contractors agreed to make a new line for the road company, and in doing so they encroached upon the plaintiff's land. *Held*, that the railway company were not liable. *Purdy v. Grand Trunk R. Co.*, 15 *U. C. Q. B.* 571.

16. Liability for trespass.—A railroad company is liable for trespasses on adjoining lands committed by contractors who, as the servants of the company, are engaged in constructing its road. *St. Louis & C. R. Co. v. Drennan*, 26 *Ill. App.* 263.

Where the complaint shows a wrongful appropriation of plaintiff's land in the construction of a road, an answer that the appropriation was made by a contractor, or by the receiver of such contractor, is bad on demurrer. If the company adopts the acts of the contractor or the receiver, it is liable. *Bloomfield R. Co. v. Grace*, 112 *Ind.* 128, 11 *West. Rep.* 368, 13 *N. E. Rep.* 680.

Where a railway company directs and procures a trespass to be committed by a contractor and his employes constructing its roadbed, it is liable with those who committed it. *Chicago K. & W. R. Co. v. Watkins*, 40 *Am. & Eng. R. Cas.* 499, 43 *Kan.* 50, 22 *Pac. Rep.* 985.—**DISTINGUISHING** *Kansas C. R. Co. v. Fitzsimmons*, 18 *Kan.* 34.

If a company employs a contractor to enter upon land and do certain work, and it turns out that the entry is a trespass, the

company is liable for a trespass thus committed by a subcontractor. *Leber v. Minneapolis & N. W. R. Co.*, 29 *Minn.* 256, 13 *N. W. Rep.* 31.

Where a subcontractor goes outside of the company's right of way to obtain earth for an embankment, the company is not liable for the trespass, unless it appears that it assented thereto, or had such knowledge as that assent might be presumed. *Waltmeyer v. Wisconsin, I. & N. R. Co.*, 30 *Am. & Eng. R. Cas.* 384, 71 *Iowa* 626, 33 *N. W. Rep.* 140.

A railroad corporation is not liable under the Maine Rev. St. of 1857, ch. 51, § 25 (R. S. § 22), for trespasses and injuries to lands and buildings adjoining or in the vicinity of its road, committed by contractors or the servants of contractors. *Eaton v. European & N. A. R. Co.*, 59 *Me.* 520.

A railroad company is not liable for a trespass committed by its contractors in building its road over plaintiff's land, if it appears that the road might have been built without interfering with the plaintiff's land or trespassing thereon. *Murtfeldt v. New York, W. S. & B. R. Co.*, 25 *Am. & Eng. R. Cas.* 144, 1 *Silo. App.* 93, 102 *N. Y.* 703, *mem.*, 7 *N. E. Rep.* 404, 2 *N. Y. S. R.* 444; *affirming* 34 *Hun* 632, *mem.*

Even though its engineer supervised the work of opening the right of way so far as to see that it was performed according to contract. *St. Louis, A. & T. R. Co. v. Knott*, 54 *Ark.* 424, 16 *S. W. Rep.* 9.

17. — taking construction materials from lands of another.—Where a company lets a contract for the supply of timbers necessary for its roadbed, it is not liable for the trespass of a subcontractor in entering upon adjoining lands and cutting timber, where there is no evidence that it has ratified the trespass. *Parker v. Waycross & F. R. Co.*, 81 *Ga.* 387, 8 *S. E. Rep.* 871.

If the party acted as agent or employé of the company, it would be liable. *New Orleans & N. E. R. Co. v. Reese*, 18 *Am. & Eng. R. Cas.* 110, 61 *Miss.* 581.

Where a railroad company is engaged in constructing a telegraph line on its right of way, and for that purpose employs a general superintendent, who instructs the men to cut poles only on the company's right of way, the company is not liable for the trespass of the men in cutting poles on the lands of another. *Fairchild v. New Or-*

leas & N. E. R. Co., 60 *Miss.* 931, 45 *Am. Rep.* 427.

But where a company's engineer and several of its directors have knowledge that contractors entered upon plaintiff's premises and took material to be used in the construction of a road, the company is liable. *McClanathan v. New York & O. M. R. Co.*, 1 *T. & C. (N. Y.)* 501.

18. Management of trains and operation of road.—While a railroad is being constructed, and is in the exclusive possession of, and operated by, the contractor, and the company has no control thereof, it is not liable for injuries committed by the contractor in operating the road. *Kansas C. R. Co. v. Fitzsimmons*, 18 *Kan.* 34, 15 *Am. Ry. Rep.* 220.—DISTINGUISHED IN *Chicago, K. & W. R. Co. v. Watkins*, 40 *Am. & Eng. R. Cas.* 499, 43 *Kan.* 50, 22 *Pac. Rep.* 985. QUOTED IN *St. Louis, Ft. S. & W. R. Co. v. Willis*, 33 *Am. & Eng. R. Cas.* 397, 38 *Kan.* 330, 16 *Pac. Rep.* 728.

A company is not liable for an injury sustained while its road is being built and operated by contractors who own the cars and engine by which the injury is committed, and over which the company had, at the time, no control. *Meyer v. Midland Pac. R. Co.*, 2 *Neb.* 319.

A railroad company which has entered into an agreement with a contractor to build a portion of its railroad, and whose locomotives, cars, etc., used in such construction, are run exclusively under the direction and control of the contractor, will not be liable for damages occasioned prior to the completion of the road by reason of the negligence of the persons running such locomotives and cars. *Hille v. Republican Valley R. Co.*, 29 *Am. & Eng. R. Cas.* 586, 19 *Neb.* 620, 28 *N. W. Rep.* 284.—REVIEWING *Hughes v. Cincinnati & S. R. Co.*, 39 *Ohio St.* 461.—DISTINGUISHED IN *Chicago, B. & Q. R. Co. v. Clark*, 38 *Am. & Eng. R. Cas.* 192, 26 *Neb.* 645.—*Miller v. Minnesota & N. W. R. Co.*, 38 *Am. & Eng. R. Cas.* 234, 76 *Iowa* 655, 39 *N. W. Rep.* 188.—APPROVED IN *Powell v. Virginia Constr. Co.*, 88 *Tenn.* 692, 13 *S. W. Rep.* 691.—*Cunningham v. International R. Co.*, 51 *Tex.* 503.—APPROVING *Reedie v. London & N. W. R. Co.*, 4 *Ex.* 244. QUOTING *Houston & G. N. R. Co. v. Meador*, 50 *Tex.* 87.—APPROVED IN *Powell v. Virginia Constr. Co.*, 88 *Tenn.* 692, 13 *S. W. Rep.* 691. DISTINGUISHED IN *Lakin v. Willa-*

mette Valley & C. R. Co., 26 *Am. & Eng. R. Cas.* 611, 13 *Oreg.* 436, 57 *Am. Rep.* 25.—*Union Pac. R. Co. v. Hause*, 1 *Wyon.* 27.

And the above rule would apply though the contractor is an incorporated company, and operating the road for traffic. The liability of the railroad company would not attach until it comes into possession and control of the road. *Kansas C. R. Co. v. Fitzsimmons*, 18 *Kan.* 34, 15 *Am. Ry. Rep.* 220. *St. Louis, Ft. S. & W. R. Co. v. Willis*, 33 *Am. & Eng. R. Cas.* 397, 38 *Kan.* 330, 16 *Pac. Rep.* 728.

19. Injuries caused by defective machinery and appliances.—Where a company lets a contract for the construction of a cable railway, leaving it entirely to the contractor as to the machinery and materials to be used, the company is not liable for an injury to a child while playing on the street about a machine used by the contractors for the making of concrete. *Chicago City R. Co. v. Hennessy*, 16 *Ill. App.* 153.—QUOTING *Kepperly v. Ramsden*, 83 *Ill.* 354.—REVIEWING *Scammon v. Chicago*, 25 *Ill.* 424; *Pfau v. Williamson*, 63 *Ill.* 16; *West v. St. Louis, V. & T. H. R. Co.*, 63 *Ill.* 545.—FOLLOWED IN *Fitzpatrick v. Chicago & W. I. R. Co.*, 31 *Ill. App.* 649.

The inference from *Mass. St.* of 1887, ch. 270, § 4, plainly is that the employer shall be liable when a contractor does part of his work and an employé of the contractor is injured by reason of a defect in the condition of the ways, works, machinery, or plant furnished by the employer to the contractor which has not been discovered or remedied through the negligence of the employer, or of some person intrusted by him with the duty of seeing that they were in proper condition. By the negligence of the employer is meant his own negligence, in distinction from that of his servant or superintendent, which is included in the latter part of the same sentence in which the negligence of the employé is spoken of. *Toomey v. Donovan*, 158 *Mass.* 232, 33 *N. E. Rep.* 396.

A railroad corporation made a contract with a person to build a culvert under a highway alongside of its railroad. By the terms of the contract the corporation furnished a derrick for use in the work. The derrick, while in use in the highway, fell, in consequence of the parting of a guy, which was old and obviously defective when the derrick was delivered by the corporation to

the contractor. By the fall the plaintiff, who was not a servant of the corporation or of the contractor, was injured. *Held*, that these facts would warrant the jury in returning a verdict for the plaintiff against the corporation. *Conlon v. Eastern R. Co.*, 15 *Am. & Eng. R. Cas.* 99, 135 *Mass.* 195.

One D. contracted with defendant to unload from vessels onto cars all the railroad iron brought to the dock at A. for a specified time and for a specified price, defendant to furnish a derrick to be used for the purpose. Defendant furnished a derrick suitable and safe at the time for use. Plaintiff was employed by D. to assist, and was injured by a fall of the derrick. *Held*, that if D. was chargeable with negligence in omitting to inspect and repair the derrick, defendant was not responsible therefor; that in the absence of a contract to that effect no duty on the part of defendant to keep the derrick in repair could be implied; that the rule requiring a master to furnish safe and suitable machinery for the use of his servants did not apply, as plaintiff was not the servant of defendant; and that therefore a charge that in the absence of a special agreement defendant was bound to keep the derrick in repair was error. *King v. New York C. & H. R. Co.*, 66 *N. Y.* 181, 23 *Am. Rep.* 37; *reversing* 4 *Hun* 769. — *FOLLOWED IN* *Larock v. Ogdensburg & L. C. R. Co.*, 26 *Hun* 382. *QUOTED IN* *Hexamer v. Webb*, 1 *N. Y. S. R.* 46.

Defendant's evidence tended to show that it was to make repairs when notified by D. that repairs were necessary. The court charged that if this was so and no notice was given, if the agreement was not known to plaintiff, and the accident occurred from neglect to repair without negligence on the part of the plaintiff, defendant was liable. *Held*, error. *King v. New York C. & H. R. Co.*, 66 *N. Y.* 181, 23 *Am. Rep.* 37; *reversing* 4 *Hun* 769.

20. Blasting.—A corporation which has let by contract the entire work of constructing its road, and has no control over those employed in the work, is not liable for injuries to a third person, occasioned by negligent acts in doing the work of those thus employed, such as blasting in such a way as to throw rocks upon the lands of another. *McCafferty v. Spuyten Duyvil & P. M. R. Co.*, 61 *N. Y.* 178, 48 *How. Pr.* 44, 12 *Am. Ry. Rep.* 105. — *DISTINGUISHING* *Hay v. Cohoe Co.*, 2 *N. Y.* 159. *FOLLOWING*

Pack v. Mayor, etc., of *N. Y.*, 8 *N. Y.* 222; *Kelly v. Mayor, etc.*, of *N. Y.*, 11 *N. Y.* 432; *Storrs v. Utica*, 17 *N. Y.* 104. *REVIEWING* *St. Paul Water Co. v. Ware*, 16 *Wall.* (U. S.) 566; *Butler v. Hunter*, 7 *H. & N.* 826; *Reedie v. London & N. W. R. Co.*, 4 *Ex.* 244. — *QUOTED IN* *Blumb v. Kansas City*, 84 *Mo.* 112. — *Edmundson v. Pittsburgh, M. & Y. R. Co.*, 23 *Am. & Eng. R. Cas.* 423, 111 *Pa. St.* 316, 2 *Atl. Rep.* 404.

One who is the general manager of a contractor for the construction of a railroad is not liable for the negligence of an employé under him in injuring a person while blasting rock, where he has only given general directions to such negligent person, and where he was not present when the accident happened. *Brown v. Lent*, 20 *Vt.* 529.

A railroad company agreed with certain contractors for the construction of a part of its road. Among the other work provided for was that of removing, at a stipulated price, solid rock, which, it was said in the contract, "must be removed by blasting." In removing such rock, without carelessness on the part of the contractors, a large quantity of fragments was thrown against the dwelling of an adjoining proprietor, causing an injury, for which he brought an action against the company. *Held*, that the maxim, *respondet superior*, does not apply to the case of employer and contractor, where the latter executes an independent employment, but that in this case the contractors had done only what they were authorized by the company to do; and as the company must be held to have assented to the unlawful act by which the plaintiffs were injured, it was liable as a joint wrongdoer. *Carman v. Steubenville & I. R. Co.*, 4 *Ohio St.* 399. — *QUOTING* *Reedie v. London & N. W. R. Co.*, 4 *Ex.* 244.

21. Explosions.—The N. railroad company contracted with F. for the grading of their roadbed, who, with their consent, subcontracted for the rock excavation with S. Before the subcontract was made it was understood by F. and the company that S. should remove the rock by blasting with nitro-glycerine, a magazine for storing which was located on their land under the direction of their engineer. By the contract between the company and F. he was forbidden to sublet without their consent, and was required to discharge incompetent workmen when required to do so by their engineer. S., without the knowledge or consent of the com-

pany, stored in the magazine certain cans of nitro-glycerine belonging to a blasting company, which he kept there for sale on their orders. An order for glycerine being sent to S. by the blasting company, his foreman directed B., one of his employes, to fill the order. B., in doing so, removed one of the cans a distance of one hundred and fifty yards from the magazine, but not off the railroad company's land, and there, by his negligence, an explosion occurred, killing the deceased. B. was employed by S. specially to take charge of the nitro-glycerine, and was incompetent for that business. In an action for damages against the railroad and F. by the administratrix of the deceased—*held*, that the agreement between the railroad company and F. as to subcontracting, and the removal of incompetent employes, did not create the relation of master and servant between the company or F. and the servants of the subcontractor; that the company's permission to S. to use their lands for a magazine in which to store oil necessary for blasting on their work did not authorize him to use them for the purpose of engaging in a traffic in oil which belonged to others; and that the company was not answerable for injuries to third persons, which happened through the negligence of a servant of S. in the management of nitro-glycerine belonging to another, and which had been clandestinely stored in the magazine by S. without the knowledge of the company. *Cuff v. Newark & N. Y. R. Co.*, 35 N. J. L. 17; *affirmed in* 35 N. J. L. 574.—REVIEWING *Reedie v. London & N. W. R. Co.*, 4 Ex. 244.

22. Fires.*—Where a contractor agrees in grading a road to burn such inflammable materials as the company's engineer might direct, the company is not liable for a loss by fire to an adjoining landowner, caused by a subcontractor carelessly failing to burn certain material which communicated the fire. *Callahan v. Burlington & M. R. R. Co.*, 23 Iowa 562.—QUOTED IN *Eaton v. European & N. A. R. Co.*, 59 Me. 520.

A corporation engaged a contractor to construct, "under the general supervision of the chief engineer of the company," a specific portion of its railroad, located across the plaintiffs' timber tract; and the

subcontractor and his employes cut a tote road through the plaintiffs' premises, outside of the location, and set fires which, through their negligence, spread and burned the plaintiffs' timber. *Held*, that the company, not having directed the acts complained of, and having no such control over the persons who committed them as to direct or remove them, was not liable for the damages occasioned thereby. *Eaton v. European & N. A. R. Co.*, 59 Me. 520.—DISAPPROVING *Bush v. Steinman*, 1 B. & P. 404. DISTINGUISHING *Wyman v. Penobscot & K. R. Co.*, 46 Me. 162. MODIFYING *Veazie v. Penobscot R. Co.*, 49 Me. 119. QUOTING *Cuff v. Newark & N. Y. R. Co.*, 35 N. J. L. 17; *Callahan v. Burlington & M. R. R. Co.*, 23 Iowa 562; *Gilbert v. Halpin*, 3 Ir. Jur. N. S. 300; *Pack v. Mayor*, etc., of N. Y., 8 N. Y. 222; *Hobbett v. London & N. W. R. Co.*, 4 Ex. 254. QUOTING AND DISTINGUISHING *Lowell v. Boston & L. R. Corp.*, 23 Pick. (Mass.) 24. REVIEWING *Overton v. Freeman*, 11 C. B. 867; *Peachey v. Rowland*, 13 C. B. 182; *Blake v. Ferris*, 5 N. Y. 48; *Steel v. South Eastern R. Co.*, 16 C. B. 550; *Kelly v. Mayor*, etc., of N. Y., 11 N. Y. 435.—FOLLOWED IN *Tibbets v. Knox & L. R. Co.*, 62 Me. 437.

23. Destruction of crops.—If the damages were not occasioned by failure to erect cattle-guards, but were occasioned by the wanton or intentional destruction of the crop by an independent contractor, his agents or servants, then the company employing such independent contractor would not be liable. *Texas & P. R. Co. v. Dudley*, 1 Tex. App. (Civ. Cas.) 271.

24. Frightening teams.—A company is not liable for an injury to a traveler on a highway through the fright of his horse, caused by the negligence of the owner of a portable steam engine in operating it near the highway, under a contract with the company to pump water out of the way of a reservoir which is being constructed by the latter, where he has exclusive control of the engine and of the manner of using it. *Wabash, St. L. & P. R. Co. v. Farver*, 31 Am. & Eng. R. Cas. 134, 111 Ind. 195, 9 West. Rep. 621, 12 N. E. Rep. 296.

Where an elevated railway company lets a contract for the painting of its structure, it is not liable for the negligence of an employe under the contractor, in so hanging a canvas to prevent paint from dropping be-

* Liability for fires caused by contractors, see note, 39 AM. & ENG. R. CAS. 351.

low as to frighten plaintiff's horse and cause it to run away and injure him. *McCann v. Kings County El. R. Co.*, 46 N. Y. S. R. 327, 19 N. Y. Supp. 668.

25. Personal injuries to passengers.—An action does not lie against a railroad company at the suit of a person traveling on a construction train, for damages on account of personal injuries caused by a collision with another train, when it appears that the plaintiff was traveling on a pass furnished by the contractor for the construction of part of the road, for whom he had been working, and that the injuries occurred on a part of the road which had never been completed and accepted, though trains were running on it furnished by the railroad company for use by the construction company and contractors, with engineers subject entirely to their orders. *Scarborough v. Alabama Midland R. Co.*, 94 Ala. 497, 10 So. Rep. 316.

A company was in the habit of selling tickets good for a ride over its road to a certain station, and then for an omnibus ride to a village a mile beyond; but the fare for the whole distance was the sum of the two separate fares, and both the company and the omnibus owners accounted to the other for the fares received, the tickets being issued on a card with separate parts for each ride. *Held*, that this did not render the company liable for an injury to a passenger through the negligence of the driver of the omnibus. *Poole v. Delaware, L. & W. R. Co.*, 35 Hun (N. Y.) 29.—REVIEWING *Kessler v. New York C. & H. R. R. Co.*, 61 N. Y. 538; *Isaacson v. New York C. & H. R. R. Co.*, 94 N. Y. 278; *Buxton v. North Eastern R. Co.*, L. R. 3 Q. B. 523.

Where a construction company uses a road before completion for the purpose of general traffic, the corporation owning the road is liable for an injury to a passenger resulting from the negligence of the employees of the construction company. *Lakin v. Willamette Valley & C. R. Co.*, 26 Am. & Eng. R. Cas. 611, 13 Oreg. 436, 11 Pac. Rep. 68, 57 Am. Rep. 25.—DISTINGUISHING *Cunningham v. International R. Co.*, 51 Tex. 503.

A railroad company is liable for an injury to a passenger, caused by rock being piled by the side of the track so as to roll on it either by the jarring of the train or a slight interference by a workman, where the evidence shows that the rock was for the bal-

lasting of the track, which was not really necessary for the security of passengers, but was made for the preservation of the track. *Virginia C. R. Co. v. Sanger*, 15 Gratt. (Va.) 230.

In such case the questions of whether the company adopted a dangerous mode of doing the work, and whether the exercise of proper diligence would have shown that it was dangerous, and whether it exercised due care to avoid the danger, are for the jury. *Virginia C. R. Co. v. Sanger*, 15 Gratt. (Va.) 230.—REVIEWING *Grote v. Chester & H. R. Co.*, 2 Ex. 251.

And it is no defense to show merely that they had placed the work in the hands of a contractor, and that the obstruction was caused by the carelessness of one of his employees. *Virginia C. R. Co. v. Sanger*, 15 Gratt. (Va.) 230.

A railway company is not liable for the negligence of contractors employed by a municipality to execute certain works over the line of the company, whereby an iron girder falls upon a passing train and injures a passenger. The company is not bound to take precautions against such an injury. *Daniel v. Metropolitan R. Co.*, L. R. 5 H. L. Cas. 45, 20 W. R. 37, 40 L. J. C. P. 121, 24 L. T. 815.

26. Injuries to travelers in street or highway.—Where a street railway company, having authority under its charter to construct a railway in the public street, does the work by an independent contractor, and an injury to a person passing along the street is caused by the negligence of a servant of the contractor, which negligence consisted in unnecessarily and improperly laying down loose iron rails in advance of the workmen engaged in constructing the track, the contractor is liable for the consequences of such negligence, but the railway company is not, the latter company not having reserved any control over the conduct of the former in executing the work. *Fulton County St. R. Co. v. McConnell*, 87 Ga. 756, 13 S. E. Rep. 828.

The defendants contracted with P. & E. to construct certain sections of their railroad, and they subcontracted with C. to erect certain abutments thereon. A servant of C., in drawing stone for such abutments, left one in the highway, by reason of which one P. was injured, and recovered of the plaintiffs for the damage sustained by him. In an action to recover of the de-

fendants the damages to which the plaintiffs were so subjected—*held*, that the defendants had no control over the servant of C., and that no privity existed between them; and that the defendants were therefore not liable. *Pawlet v. Rutland & W. R. Co.*, 28 Vt. 297.

In the construction of a telegraph line for the defendant, a post-hole dug in a public street was left unguarded at night, and the plaintiff fell therein and was injured. The line was being built by a railroad company as an independent contractor, and it furnished all the materials and labor, and employed the foreman, who had full charge of the work. The contract did not require any holes to be dug in the street. *Held*, that defendant was not liable. *Hackett v. Western Union Tel. Co.*, 80 Wis. 187, 49 N. W. Rep. 822.

27. Injuries to servants of contractor.—A railroad will not be liable for an injury to a laborer hired by one who has contracted with the road to fill in an embankment, caused by the negligent running of a car by such contractor over a track furnished by the road for the use of the contractor in completing the work. *Central R. & B. Co. v. Grant*, 46 Ga. 417, 11 Am. Ry. Rep. 427.—APPROVED IN *Powell v. Virginia Constr. Co.*, 88 Tenn. 692, 13 S. W. Rep. 691.

A company contracted with certain parties to construct its road and its appurtenances. The contractors hired the plaintiff to work upon a freight house they were building for the company. A poisonous mixture, in which corrosive sublimate was an ingredient, was applied to the timber to prevent decay. The plaintiff was injured by breathing the exhalations of this substance, and by handling the timber to which it had been applied. *Held*, that the railway company was not liable to the plaintiff for the injury he received, but that the contractors were solely responsible, and were not in this respect the servants of the company. *West v. St. Louis, V. & T. H. R. Co.*, 63 Ill. 545, 7 Am. Ry. Rep. 50.—DISTINGUISHING *Leshner v. Wabash Nav. Co.*, 14 Ill. 85; *Hinde v. Wabash Nav. Co.*, 15 Ill. 72; *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 623; *Chicago, St. P. & F. du L. R. Co. v. McCarthy*, 30 Ill. 385; *Illinois C. R. Co. v. Finnigan*, 21 Ill. 646; *Illinois C. R. Co. v. Kanouse*, 39 Ill. 272; *Toledo, P. & W. R. Co. v. Rumbold*, 40 Ill. 143; *Chicago & R. I. R. Co. v. Whipple*, 22

Ill. 105.—REVIEWED IN *Chicago City R. Co. v. Hennessy*, 16 Ill. App. 153, *East Line & R. R. Co. v. Culberson*, 38 Am. & Eng. R. Cas. 225, 72 Tex. 375, 3 L. R. A. 567, 10 S. W. Rep. 706.

A railroad company made a contract with a builder to erect a building. During the progress of the work one of the workmen was killed by the falling of timbers. *Held*, that the railroad was not liable, unless it be shown that he was employed by the company, instead of by the contractor. *Hunt v. Pennsylvania R. Co.*, 51 Pa. St. 475.

A company employed, for an agreed price, a skilful contractor to repair, according to specifications and with privilege reserved of supervision by its engineer, a bridge in such a manner that the passing of its trains should not be prevented; but they were not to pass except upon signal from the contractor's foreman. On the day of the accident, upon such signal, a train was proceeding across the bridge, when the engine broke down one of the spans, and, falling, killed the plaintiff's intestate, who was a servant of the contractor and engaged at the time in working on the bridge. *Held*, that the railroad company was not liable for the injury. *Bibb v. Norfolk & W. R. Co.*, 47 Am. & Eng. R. Cas. 651, 87 Va. 711, 14 S. E. Rep. 163.

28. Liability for purchase price of cross-ties.—In an action for railroad ties sold and delivered to the defendant, if there is no evidence whatever of any sale or delivery, or that the defendant ever received or used any of the ties referred to, but it appears that the same were removed by an independent contractor, a judgment for the plaintiff must be reversed. *Robbins v. St. Louis, I. M. & S. R. Co.*, 34 Mo. App. 609.

INDEPENDENT COVENANTS.

Generally, see COVENANTS, 2.

How construed, see CONTRACTS, 20.

In contracts for railway construction, see CONSTRUCTION OF RAILWAYS, 21.

INDIANA.

Assessment and levy of taxes in: see TAXATION, 258.

Conditions exempting carrier from liability to person riding on free pass in, see PASSENGERS, 24.

Constitutionality of statutes of, as to con-

City R. Co.
East Line &
Am. & Eng.
R. A. 567, 10

contract with
During the
the work-
of timbers.
not liable, un-
employed by
the contractor.
Pa. St. 475.
agreed price,
according to
be reserved of
ridge in such
of its trains
they were not
from the com-
of the acci-
was proceed-
the engine
and, falling,
who was a
engaged at
ridge. *Held*,
not liable for
W. R. Co.,
Pa. 711, 14
use price
for railroad
defendant, if
of any sale
ant ever re-
referred to,
ere removed
a judgment
ed. *Robbins*
34 Mo. App.

WANTS.

29.
struction, see
21.

see TAXA-
om liability
ass in, see
as to con-

- demnation of land, see EMINENT DOMAIN, 20.
Constitutionality of statutes of, as to municipal aid for railways, see MUNICIPAL AND LOCAL AID, 30.
— tax laws of, see TAXATION, 25.
Construction of stock laws of, see ANIMALS, INJURIES TO, 22.
Crossing of streets and highways under statutes of, see CROSSING OF STREETS AND HIGHWAYS, 3.
Deductions for benefits under condemnation laws of, see EMINENT DOMAIN, 733.
Doctrine of comparative negligence denied in, see COMPARATIVE NEGLIGENCE, 27.
Double damages for killing stock in, see ANIMALS, INJURIES TO, 598.
Injuries to animals running at large in, see ANIMALS, INJURIES TO, 240, 266.
Laying out streets across railways under statutes of, see CROSSING OF STREETS AND HIGHWAYS, 44.
Liability of company to laborers employed by contractors in, see CONSTRUCTION OF RAILWAYS, 88.
Local assessments upon steam railways in, for repairs, paving, etc., see STREETS AND HIGHWAYS, 344.
Operation of statute of, giving right of action for causing death, see DEATH BY WRONGFUL ACT, 18.
Plaintiff's pleadings must negative contributory negligence in, see CONTRIBUTORY NEGLIGENCE, 53; FIRES, 190, 191.
Review of town bonding proceedings by mandamus in, see MUNICIPAL AND LOCAL AID, 444.
Rule as to imputed negligence in, see IMPUTED NEGLIGENCE, 6.
Statutes of, relative to distribution of damages for causing death, see DEATH BY WRONGFUL ACT, 58.
— — — drains, see DRAINS, 2.
Statutory duty of company in construction of street across railway in, see CROSSING OF STREETS AND HIGHWAYS, 56.
— to fence in, see FENCES, 22.
Taking land for streets and laying out roads in, see STREETS AND HIGHWAYS, 19.
Taxation in aid of railways in, see MUNICIPAL AND LOCAL AID, 411.
When parent's negligence imputable to child in, see CHILDREN, INJURIES TO, 121.

INDIANS.

- Grants of Indian lands, see LAND GRANTS, 10.
Indian lands, generally, see EMINENT DOMAIN, 100; PUBLIC LANDS, 11-16.
Killing stock in Indian Territory, see ANIMALS, INJURIES TO, 388.

Taxation of Indian lands, see TAXATION, 84.
When entitled to land damages, see EMINENT DOMAIN, 442.

INDICTMENT.

- Enforcement of commissioners' orders by, see RAILWAY COMMISSIONERS, 32.
For causing death, sufficiency of, see DEATH BY WRONGFUL ACT, 445.
— nuisance, see NUISANCE, 17.
— offenses by or against railways, see CRIMINAL LAW, 6.
Under long and short haul clause of Interstate Commerce Act, see INTERSTATE COMMERCE, 128.
Variance between proof and, in prosecutions for causing death, see DEATH BY WRONGFUL ACT, 448.

INDIVIDUAL LIABILITY.

- Of partners, see PARTNERSHIP, 9.
— receivers, see RECEIVERS, 74.
— stockholders to creditors, see STOCKHOLDERS, 48-50.

INDORSEMENT.

- Necessity of, to transfer of bill of lading, see BILLS OF LADING, 112.
Of commercial paper, see BILLS, ETC., 14-18.
— notice limiting liability, on receipt or bill of lading, see LIMITATION OF LIABILITY, 14.
— railroad bonds by state, see STATE AID, 3-12.
— railway aid bonds and its effect, see MUNICIPAL AND LOCAL AID, 349.
— void bonds, liability of company on, see BONDS, 19.
On ticket, by conductor, giving right to stop over, see TICKETS AND FARES, 50.

INEVITABLE ACCIDENT.

- Fire, when deemed to be, see FIRES, 31.
To animals on track, see ANIMALS, INJURIES TO, 51, 52.
When excuses carrier, see BAGGAGE, 12; CARRIAGE OF MERCHANDISE, 12-24, 104, 289; CARRIAGE OF PASSENGERS, 151, 158, 177; EXPRESS COMPANIES, 24.

INFANCY.

- As a defense to action on subscription, see SUBSCRIPTIONS TO STOCK, 90, 161.
Disability of, under statute of limitations,

see DEATH BY WRONGFUL ACT, 104;
LIMITATIONS OF ACTIONS, 67.

Loss of support during, as measure of damages for death of parent, see DEATH BY WRONGFUL ACT, 390.

Of landowner, effect of, on necessity of effort to agree before condemnation, see EMINENT DOMAIN, 276.

— notice of condemnation in cases of, see EMINENT DOMAIN, 290.

INFANTS.

Employed by company, liability for injuries to, see EMPLOYEES, INJURIES TO, 457-477.

Fellow-servant rule as applied to, see FELLOW-SERVANTS, 9.

Validity of releases by, see RELEASE, 6.

When entitled to land damages, see EMINENT DOMAIN, 430.

INFRINGEMENT.

Of patents, and remedies therefor, see PATENTS FOR INVENTIONS, 14-23.

INITIAL CARRIER.

Benefit of limited liability when confined to, see CARRIAGE OF MERCHANDISE, 608, 609.

Duty of, to transmit instructions, see CARRIAGE OF MERCHANDISE, 680.

Is liable to place of destination unless there be express limitation, see CARRIAGE OF MERCHANDISE, 605.

Liability of, for baggage, see BAGGAGE, 18-21.

Limitation of liability to line of, in bill of lading, see BILLS OF LADING, 67.

Right of, to limit liability to its own line, see CARRIAGE OF LIVE STOCK, 104.

Rights and liabilities as such, generally, see CARRIAGE OF LIVE STOCK, 101-104;
CARRIAGE OF MERCHANDISE, 555-623;
CARRIAGE OF PASSENGERS, 501-511.

Subsequent carriers as agents of, see CARRIAGE OF LIVE STOCK, 107.

When liability of, ceases, see CARRIAGE OF MERCHANDISE, 615-620.

— liable as insurer until delivery to next carrier, see CARRIAGE OF MERCHANDISE, 208, 374.

— beyond his own line, see CARRIAGE OF MERCHANDISE, 573-592; EXPRESS COMPANIES, 76, 77.

— may store goods at end of line, see CARRIAGE OF MERCHANDISE, 378.

See also CONNECTING LINES.

INJUNCTION.

As a remedy for unlawful taxation, see TAXATION, 342-362.

By abutting owner to restrain construction of railway, see ELECTRIC RAILWAYS, 16;
ELEVATED RAILWAYS, 63-76; STREETS AND HIGHWAYS, 221-233, 245-248.

Determination of damages in lieu of, see ELEVATED RAILWAYS, 172.

Enforcement of judgment by, see EMINENT DOMAIN, 859.

For want of consent of abutting owner, see STREET RAILWAYS, 205.

— wrongful interference with property, see EMINENT DOMAIN, 1032-1051.

Indemnity to landowner in lieu of granting, see INDEMNITY BONDS, 7.

Judgment awarding, with alternative damages, see ELEVATED RAILWAYS, 182.

Mandatory, to compel repair of highway crossing, see CROSSING OF STREETS AND HIGHWAYS, 34.

Remedy by, for discrimination, see DISCRIMINATION, 74, 75.

— of landowner by, in Canadian expropriation proceedings, see EMINENT DOMAIN, 1277.

Restraining suit, when removes bar of statute, see LIMITATIONS OF ACTIONS, 71.

Stay of proceedings in, pending condemnation proceedings, see ELEVATED RAILWAYS, 36.

To compel restoration of highway, see STREETS AND HIGHWAYS, 191.

— restrain acts ultra vires, see STOCKHOLDERS, 102.

— change of grade of street, see STREETS AND HIGHWAYS, 164.

— company from crossing another's track, see CROSSING OF RAILROADS, 70-73.

— proceeding without consent of abutting owner, see STREET RAILWAYS, 111.

— construction of competing lines, see PARALLEL AND COMPETING LINES, 4.

— crossing or paralleling of track, see STREET RAILWAYS, 250.

— diversion or obstruction of water, see WATERS AND WATERCOURSES, 21.

— enforcement of judgment, see JUDGMENT, ETC., 50.

— ordinance, see MUNICIPAL CORPORATIONS, 15.

— entry on land before compensation made, see EMINENT DOMAIN, 418.

— excavation under right of way, see MINES, ETC., 8.

— execution sale, see EXECUTION, 22, 23.

— exercise of corporate franchise, see STOCKHOLDERS, 89.

To restrain flowing of land, see FLOODING LANDS, 54.

— fraudulent acts of directors, see STOCKHOLDERS, 99.

— granting of free passes, see STOCKHOLDERS, 94.

— holding of election on question of railway aid, see MUNICIPAL AND LOCAL AID, 162, 163.

— illegal assessments or calls, see STOCKHOLDERS, 90.

— infringement of patents, see PATENTS FOR INVENTIONS, 18-23.

— interference with, or obstruction of, private ways, see PRIVATE WAYS, 17.

— issuance of railway aid bonds, see MUNICIPAL AND LOCAL AID, 298-304.

— local assessments, see MUNICIPAL CORPORATIONS, 9.

— misapplication of funds, see BONDS, 37; STOCKHOLDERS, 92, 100.

— nuisances, see NUISANCE, 18-25.

— obstruction of highway, see STREETS AND HIGHWAYS, 422.

— — navigation, see BRIDGES, ETC., 87; WATERS AND WATERCOURSES, 5.

— operation of street railway, see STREET RAILWAYS, 4, 5.

— overcharges, see CHARGES, 46.

— payment of dividends, see DIVIDENDS, 15; STOCKHOLDERS, 93.

— proceedings to lay out street over railway, see CROSSING OF STREETS AND HIGHWAYS, 74.

— — under English compulsory purchase acts, see EMINENT DOMAIN, 1207.

— sale in foreclosure, see MORTGAGES, 205.

— state tax on interstate commerce, see INTERSTATE COMMERCE, 189.

— strikes and boycotts, see STRIKES, 6.

— suit brought against receiver without leave, see RECEIVERS, 130.

— tearing up pavement in constructing road, see STREET RAILWAYS, 145.

— unauthorized sale of railroad, see SALES OF RAILROADS, 9.

— — use of land, when barred by lapse of time, see LIMITATIONS OF ACTIONS, 54.

— use of steam on street, see STREET RAILWAYS, 204.

— vacation of highway, see STREETS AND HIGHWAYS, 35.

— waste of corporate property, see STOCKHOLDERS, 101.

— stay, until easements can be bought or condemned, see ELEVATED RAILWAYS, 165.

Trial by jury in injunction suits, see ELEVATED RAILWAYS, 170-173.

When lies on construction contract, see CONSTRUCTION OF RAILWAYS, 102.

I. GRANTING THE WRIT..... 1119

1. *In General*..... 1119

2. *Procedure*..... 1132

II. USE OF THE WRIT IN PARTICULAR

CASES..... 1141

1. *In General*..... 1141

2. *To Stay Proceedings*..... 1152

III. CONTINUING; DISSOLVING..... 1156

IV. VIOLATION OF THE WRIT..... 1159

V. INJUNCTION BONDS..... 1162

I. GRANTING THE WRIT.

1. *In General*.

1. When the writ will be granted, generally.*—Where plaintiff claims an equitable title to land as a pre-emptor, over which a railroad is about to be built, and it is in dispute whether he has such title, a federal court may require the company to give an indemnity bond, and grant an injunction until the same is executed. *Jones v. Florida, C. & P. R. Co.*, 41 *Fed. Rep.* 70.— FOLLOWING *Stewart v. Raymond R. Co.*, 17 *Miss.* 568; *Floyd v. Turner*, 23 *Tex.* 292; *Northern Pac. R. Co. v. St. Paul, M. & M. R. Co.*, 2 *McCrary (U. S.)* 260.

Where a mortgage trustee is proceeding to sell a railroad on behalf of bondholders, and the evidence raises a grave doubt as to whether they are *bona fide* holders, a temporary injunction ought to be awarded. *North Carolina R. Co. v. Drew*, 3 *Woods (U. S.)* 674.

Where a corporation has ceased to exist and is absolutely dead in law, a court of equity has jurisdiction to enjoin threatened acts by persons assuming to act on behalf and in the name of the dead corporation. *Attorney-General v. Chicago & E. R. Co.*, 26 *Am. & Eng. R. Cas.* 428, 112 *Ill.* 520.

Equity has jurisdiction, and for that purpose may enjoin the further prosecution of suits at law, in a case which involves the relative rights, under their charters, of two corporations to the use of the waters of the same stream or streams; and such jurisdiction exists on the ground of both public and private necessity. In such cases equity is not only the appropriate forum, but the only one where adequate relief in the prem-

* Special injury which will entitle lot owner to injunction, see note, 20 *AM. & ENG. R. CAS.* 30.

ises can be administered. *Lehigh Valley R. Co. v. Society, etc.*, 30 N. J. Eq. 145; affirmed in 33 N. J. Eq. 329.—QUOTING *Boston Water Power Co. v. Boston & W. R. Corp.*, 16 Pick. (Mass.) 512. REVIEWING *Delaware, L. & W. R. Co. v. Erie R. Co.*, 21 N. J. Eq. 298.

In order to give a plaintiff a right to injunctive relief, it is necessary to establish a substantial injury, and not merely a technical wrong calling for nominal damages; and this whether the injury be single or continuous, and whether it be the subject of only one or of successive actions. *Purdy v. Manhattan El. R. Co.*, 36 N. Y. S. R. 43, 13 N. Y. Supp. 295.—QUOTING *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489; *Drake v. Hudson River R. Co.*, 7 Barb. (N. Y.) 508; *Troy & B. R. Co. v. Boston, H. T. & W. R. Co.*, 86 N. Y. 107.

On a bill brought by a corporation the plaintiff is entitled to relief against wrongs committed before the issuing of letters patent, if there was no such tardiness in organizing as forfeited the privilege given by the charter. *Packer v. Sunbury & E. R. Co.*, 19 Pa. St. 211.—QUOTED IN *Deschamps v. Second & T. St. Pass. R. Co.*, 3 Phila. (Pa.) 279.

To justify the granting of a temporary injunction it must appear that the defendants will, unless restrained, commit some act during the pendency of the action which would produce injury to plaintiff, or that defendants threatened to do some act in violation of plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual. Where this is not shown, it is not necessary to determine whether or not there is any cause of action. *So held*, where the action was to dissolve a syndicate formed for the construction of a railroad, and plaintiff prayed for a temporary injunction and a receiver. *Bagaley v. Vanderbilt*, 16 Abb. N. Cas. (N. Y.) 359.

A company that had received a grant of lands brought suit to recover certain of the lands, which were divided into three classes, one of the classes being within the limit of the grant, and the other classes being indemnity lands. Pending the litigation, and by stipulation of the parties, the court appointed a special commissioner to sell the lands in dispute, or so much as might be sold under order of the court, the proceeds to be held subject to the final decree of the court. Subsequently the suit was dismissed

as to one of the classes "without prejudice," and subsequently a new suit was brought. *Held*, that it was proper to allow a preliminary injunction to restrain the commissioner from paying over the proceeds of lands still in dispute. *St. Paul, M. & M. R. Co. v. Northern Pac. R. Co.*, 49 Fed. Rep. 306, 4 U. S. App. 149, 1 C. C. A. 246.—FOLLOWED IN *Southern Minn. R. Extension Co. v. St. Paul & S. C. R. Co.*, 55 Fed. Rep. 690.

2. Irreparable injury.—(1) *General rules.*—A preliminary injunction to stay the progress of a public work will not be allowed unless the act threatened to be done will cause irreparable injury. *Booraem v. North Hudson County R. Co.*, 40 N. J. Eq. 557, 5 Atl. Rep. 106; affirming 39 N. J. Eq. 465.—FOLLOWING *Citizens Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 299.

It is not competent for a chancery court to award an injunction to stay the proceedings of the company in the prosecution of its works of any kind, unless it be manifest both that it is transcending the authority given by its charter, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages. The two circumstances must concur to warrant a court in awarding such process. *James River & K. Co. v. Anderson*, 12 Leigh (Va.) 278.—FOLLOWING *Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co.*, 11 Leigh 43.—*Norfolk & W. R. Co. v. Smoot*, 81 Va. 495.

Nothing short of the threatened destruction of property of great value, by acts of wanton lawlessness, inflicting injuries which must result in irreparable damage, will justify the granting of an injunction staying an important public work. *Dodge v. Pennsylvania R. Co.*, 36 Am. & Eng. R. Cas. 180, 43 N. J. Eq. 351, 10 Cent. Rep. 655, 11 Atl. Rep. 751; affirmed in 45 N. J. Eq. 366.

If the damage is irreparable, it presents a state of case where the party, in the sense of section 723 Rev. St. of the United States, does not have a plain, adequate, and complete remedy at law; for if he has such remedy, the damage is not irreparable. *Payne v. Kansas & A. V. R. Co.*, 47 Am. & Eng. R. Cas. 228, 46 Fed. Rep. 546.—FOLLOWING *Com. v. Pittsburgh & C. R. Co.*, 24 Pa. St. 159; *Northern Pac. R. Co. v. St. Paul, M. & M. R. Co.*, 1 McCrary (U. S.) 302, 3 Fed. Rep. 702.

A mere allegation of irreparable injury

will not suffice to warrant an injunction; but if this be the only ground for asking the injunction, the facts must appear on which the allegation of irreparable injury is predicated, in order that the court may be satisfied as to the nature of the injury. *Hale v. Point Pleasant & O. R. R. Co.*, 20 *Am. & Eng. R. Cas.* 162, 23 *W. Va.* 454.

Where there is no irreparable injury alleged beyond a general averment of a breach of contract, a court of equity will not interfere. *Western Union Tel. Co. v. Philadelphia & R. R. Co.*, 9 *Phila. (Pa.)* 494.

Where the evidence shows that the awarding of a temporary injunction cannot result in injury to the defendant, but that the refusing of it may result in great injury to plaintiff, it should be allowed. *Pullan v. Cincinnati & C. A. L. R. Co.*, 4 *Biss. (U. S.)* 35.

There was no abuse of discretion in granting an interlocutory injunction restraining proceedings for condemning land for railroad purposes on another railroad company's right of way, where the grounds alleged for such relief were that the act incorporating defendant company was unconstitutional, that the lands were not needed by defendant, but already needed and used by plaintiff, and that the plaintiff would suffer irreparable damages, etc. *Hoke v. Georgia R. & B. Co.*, 89 *Ga.* 215, 15 *S. E. Rep.* 124.

The jurisdiction of chancery has been so extended as to grant relief to prevent the deprivation of rights connected with real estate—as the right to easements and the like—possibly upon the ground that such injuries are irreparable, and cannot be fully compensated for by damages recoverable in an action at law. *Swan v. Burlington, C. R. & N. R. Co.*, 72 *Iowa* 650, 34 *N. W. Rep.* 457.

To justify allowance of a preliminary injunction to prevent laying an oil pipe across the railway track at a bridge, there must be shown irreparable injury, either from leakage of the oil to be transported, which is highly inflammable, or interference with the elevation of the bridge, if complainants desire to raise it. *Central R. Co. v. Standard Oil Co.*, 1 *Am. & Eng. R. Cas.* 36, 33 *N. J. Eq.* 127.—REVIEWING *Citizens Coach Co. v. Camden Horse R. Co.*, 29 *N. J. Eq.* 299.

The fact that one railroad occupies land which is claimed by another road as its right of way is not in itself an irreparable injury. 5 *D. R. D.*—71.

tort which will justify restraining the defendant from using the land until the question of title can be tried, especially when it is not alleged that the defendant is insolvent, and where it appears that there is room on the disputed territory for the construction of both roads. *Raleigh & W. R. Co. v. Glendon & G. M. & M. Co.*, 112 *N. Car.* 661, 17 *S. E. Rep.* 77.—FOLLOWING *Durham v. Richmond & D. R. Co.*, 104 *N. Car.* 261.

(2) *Illustrations.*—A proceeding was commenced in a state court against a company, growing out of the grading of a street. The company filed a petition for a removal of the proceeding to a United States circuit court, but the state court decided against the company's right to a removal, and rendered judgment, which was affirmed by the highest court of the state, and a writ of error taken therefrom to the supreme court of the United States. Pending such writ of error a bill was filed in the federal circuit court for an injunction to restrain the enforcement of the judgment of the state court. It appeared that the writ of error acted also as a supersedeas, and that the same questions growing out of the right to an injunction must be determined by the supreme court on the writ of error. *Held*, that a preliminary injunction should be refused, where there does not seem to be present danger of injury to the company. *New York & N. E. R. Co. v. Woodruff*, 42 *Fed. Rep.* 468.

Where the members of an organization of locomotive engineers have a rule that whenever any of their comrades leave the employ of one railroad company because the terms of employment are unsatisfactory the members employed by companies operating connecting lines will inflict an injury on the first company by preventing it, so far as possible, from doing any business as a common carrier, involving the interchange of freight, and threaten to refuse to handle the freight of an offending company, and if necessary to quit the service to avoid handling it, a court of equity will enjoin the chief executive officer of such organization from issuing or continuing to enforce such rule or order, and from in any way endeavoring to persuade the employes of connecting roads not to extend equal facilities for the interchange of traffic. *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.*, 53 *Am. & Eng. R. Cas.* 307, 54 *Fed. Rep.* 730.—FOLLOWING

Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co., 34 Fed. Rep. 481; Coe v. Louisville & N. R. Co., 3 Fed. Rep. 775.

A court of equity will not enjoin an offense against the public at the instance of an individual, unless he suffers some private, direct, and material damage beyond the public at large, as well as damage otherwise irreparable. Mere diminution of the value of his property by a nuisance, such as laying a railroad in a street, without irreparable mischief, will not furnish a foundation for equitable relief. *So held*, where relators in a bill filed by the attorney-general to restrain a railroad only charged that the laying of another track in the street would have the effect of depreciating the value of their property, and cause them annoyance from the running of trains, and endanger their buildings, and cause them irreparable injury by narrowing the street. *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530.

Plaintiff and defendant both derived title from the city of New York to certain lands under water on the west side of the city, the plaintiff's title being to a pier at the foot of a street, subject to the right of the city to fill up the dock so as to cut off access to the pier, defendant acquiring title to adjoining property. Defendant, under authority from the city, began to fill the dock so as to cut off plaintiff from one side of his pier. *Held*, that plaintiff was entitled to an injunction to restrain defendant from making the fill. *Knickerbocker Ice Co. v. Forty-second St. & G. S. F. R. Co.*, 16 J. & S. (N. Y.) 489, 65 How. Pr. 210.

3. Multiplicity of suits.—Where a state board of railroad commissioners has prepared a schedule of rates, and advertised that it would put it in force on a certain date, the rule that allows a court of equity to grant an injunction to prevent a multiplicity of suits gives it power to award an injunction before the expiration of the time for putting the schedule in force. *Chicago & N. W. R. Co. v. Dey*, 35 Fed. Rep. 866, 1 L. R. A. 744, 2 Int. Com. Rep. 325.

If such a schedule would probably have the effect of destroying all dividends from the operation of the road, if put in force, a preliminary injunction should issue, especially where the statute allows shippers to recover treble damages for an overcharge. *Chicago & N. W. R. Co. v. Dey*, 35 Fed. Rep. 866, 1 L. R. A. 744, 2 Int. Com. Rep. 325.

Where a bill filed by a company shows that a regular shipper of lumber claims an overcharge thereon, and that the state law allows him to bring a separate suit before a justice of the peace on every shipment, the company may restrain the prosecution of such suits on the ground that it has no adequate remedy at law. *Texas & P. R. Co. v. Kute-man*, 54 Fed. Rep. 547, 4 C. C. A. 503.—*FOLLOWING* Galveston, H. & S. A. R. Co. v. Dowe, 70 Tex. 5, 7 S. W. Rep. 368.

In such case, where the bill alleges that the company's rates are necessary and just, and that it has a good defense to the various actions which defendant, as a shipper, might institute in the state courts, it is sufficient on demurrer, except as to such actions as have already been brought, and presents an issue of fact which must be determined by the proofs. *Texas & P. R. Co. v. Kute-man*, 54 Fed. Rep. 547, 4 C. C. A. 503.—*FOLLOWING* Galveston, H. & S. A. R. Co. v. Dowe, 70 Tex. 5, 7 S. W. Rep. 368.

Where a bill filed by an insolvent railroad corporation shows that the road extends through several states, and that a small portion of it in one state is advertised for sale to satisfy the debts of sundry judgment creditors, an injunction is properly issued to prevent a multiplicity of suits, as well as to prevent irreparable injury to the creditors of the company in selling the road piecemeal. *Noble v. Alabama*, 43 Ga. 466.

Where a company is authorized to lay a branch track on a city street, a court of equity has jurisdiction to grant an injunction to restrain a multiplicity of suits by abutting property owners who claim damages by reason of certain cuts and embankments which will be made along the street, and for the soot and cinders that will be thrown off by the engines. *Guess v. Stone Mountain G. & R. Co.*, 67 Ga. 215.

Where a company may sue in damages for an injury to its highway, it may go into equity to prevent the injury when it is constantly recurring. *Greenup County v. Maysville & B. S. R. Co.*, 88 Ky. 659, 11 S. W. Rep. 774.

An injunction may be awarded at the suit of the corporation alone—at all events in the absence of a demurrer in the trial court for a defect of parties—when the corporation is threatened with a multiplicity of vexatious garnishment proceedings. *Wabash Western R. Co. v. Siefert*, 41 Mo. App. 35.

ny shows that
aims an over-
ate law allows
efore a justice
ent, the com-
ation of such
no adequate
R. Co. v. Kute-
C. A. 503.—
S. A. R. Co.
ep. 368.

l alleges that
sary and just,
e to the vari-
as a shipper,
urts, it is suf-
s to such ac-
brought, and
hich must be
Texas & P. R.
547, 4 C. C. A.
H. & S. A. R.
V. Rep. 368.

nsolvent rail-
the road ex-
s, and that a
e is advertised
sundry judg-
n is properly
ity of suits, as
injury to the
elling the road
43 Ga. 466.

orized to lay a
et, a court of
ant an injunc-
y of suits by
to claim dam-
and embank-
ng the street,
s that will be
Guess v. Stone
215.

e in damages
t may go into
hen it is con-
ounty v. Mays-
659, 11 S. W.

arded at the
—at all events
r in the trial
when the cor-
a multiplicity
eedings. Wa-
41 Mo. App.

Where a bill for an injunction shows that defendants have brought seventy-seven actions against a company to recover certain penalties for running cars without a license, in violation of a city ordinance, an injunction should be issued to restrain all but one action until that one is prosecuted to final judgment. *Third Ave. R. Co. v. Mayor, etc., of N. Y.*, 54 N. Y. 159.—APPROVED IN *Galveston, H. & S. A. R. Co. v. Dowe*, 70 Tex. 5, 7 S. W. Rep. 368.

Although the general rule is that an injunction will not be granted to restrain a mere trespass, without special equitable features in the case, it is well settled that such equitable features exist when there is vexation from repeated or continued trespass in the nature of a nuisance, or when the wrongful acts, continued or threatened to be continued, might become the foundation of adverse rights, and would occasion a multiplicity of suits to recover damages. *Johnson v. Rochester*, 13 Hun (N. Y.) 285.—APPLYING *Mohawk & H. R. R. Co. v. Archer*, 6 Paige (N. Y.) 83; *Williams v. New York C. R. Co.*, 16 N. Y. 97.

To authorize an injunction to prevent the operation of an elevated railway in the street, on the ground of preventing a multiplicity of suits, it must be alleged and proved that a number of suits are pending or expected. *Purdy v. Manhattan El. R. Co.*, 36 N. Y. S. R. 43, 13 N. Y. Supp. 295.—QUOTING *Troy & B. R. Co. v. Boston*, H. T. & W. R. Co., 86 N. Y. 107.—QUOTED IN *Brush v. Manhattan R. Co.*, 44 N. Y. S. R. 111, 17 N. Y. Supp. 540.

Where one party holds several claims against another, growing out of the same or similar transactions, and depending for their determination upon the same questions of law and fact, equity will enjoin separate suits upon the demands, provided one suit has been tried and determined in favor of the complainant in the bill; but this rule does not apply where the action was brought in a justice's court, where by reason of the amount in controversy there can be no appeal from his decision. *Galveston, H. & S. A. R. Co. v. Dowe*, 70 Tex. 5, 7 S. W. Rep. 368.—APPROVING *Third Ave. R. Co. v. Mayor, etc., of N. Y.*, 54 N. Y. 159.

To give a court of equity jurisdiction to enjoin the prosecution of actions at law to prevent a multiplicity of suits, there must be a right affecting many persons. If the right is disputed between two persons

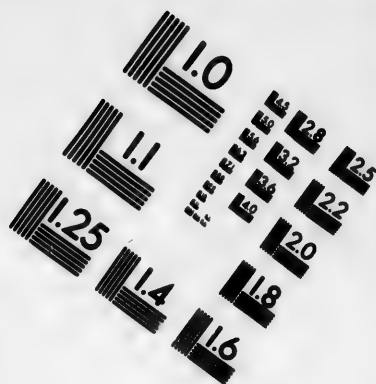
only, not for themselves and all others in interest, but for themselves alone, the bill will not lie, unless the complainant's right has been established at law. *Chicago, B. & Q. R. Co. v. Ottawa*, 148 Ill. 397, 36 N. E. Rep. 85; affirming 47 Ill. App. 73.

Where a number of independent property owners have brought separate actions at law to recover damages of a railroad company for the burning of their property, it cannot enjoin them in equity on the ground of preventing a multiplicity of suits, although the burning of all resulted from the same alleged negligent act, and all the actions involve the same question of law and fact. *Tribette v. Illinois C. R. Co.*, 70 Miss. 182, 12 So. Rep. 32.

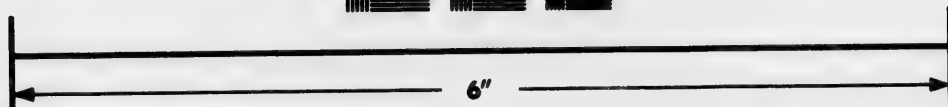
Where several plaintiffs brought different suits at law against one defendant, some for diminishing their supply of water, and another for backing water on his mill wheel—held, that no ground for interference to prevent a multiplicity of suits was shown, although the alleged injuries were done in the use by the defendant of one stream. *Lehigh Valley R. Co. v. McFarlan*, 30 N. J. Eq. 135; reversed in 31 N. J. Eq. 706.

A railroad contractor issued time checks to his laborers for small amounts, which were negotiated, and a number of them became the property of defendant, most of them being for less than \$20. The railway company filed a bill for an injunction, alleging that defendant had brought separate suits on similar claims, and that it was liable on none of them; that the justice of the peace refused to consolidate the suits, and if consolidated the amount would be above his jurisdiction, but separate judgments were rendered against the company, and that the defendant was threatening to bring separate suits again. Held, that an injunction to restrain the multiplicity of suits, which seemed to be for the purpose of vexing and harassing the company, was the proper remedy. *Galveston, H. & S. A. R. Co. v. Dowe*, 70 Tex. 5, 7 S. W. Rep. 368.

When a company by consent of a town council is building its road through the streets of a town, and the owner of an adjoining lot seeks an injunction till a court of equity ascertain the damages he will sustain, giving as a reason for such injunction that the court of common law will furnish no adequate remedy, as the plaintiff would have to bring repeated suits to recover for the damages he might sustain, as he would re-



Resolution test chart showing patterns of vertical and horizontal lines with numerical values ranging from 1.0 to 2.5.



Photographic Sciences Corporation

**23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4303**

1.8 2.0 2.2 2.5
2.8 3.2 3.6 4.0

10
01

cover in any one suit only the damages which he might have sustained prior to the institution of such suit, and on its termination would have to bring a like suit for his damages subsequently sustained, and so on for an indefinite period, this reason furnishes no ground for the interposition of a court of equity, as all damages of a permanent character may be recovered in such case in the first suit at law; and there is not only no necessity for such repeated suits at law, but after such first suit, in which the entire damages are recovered, no second suit could be brought, except to recover damages which did not necessarily result from the building and proper use by the company of its track in such street. A second suit could only be brought for the careless running of cars in such street, or for other wrongs done by the company, not including the injury necessarily resulting from the running of its cars in such street, which is the right of the company. *Smith v. Point Pleasant & O. R. R. Co.*, 20 *Am. & Eng. R. Cas.* 160, 23 *W. Va.* 451.

4. When the writ will be refused, generally.—It is the general rule that when the equity of the complainant is disproved by the answer and affidavits, a preliminary injunction is not proper. *Citizens Coach Co. v. Camden Horse R. Co.*, 29 *N. J. Eq.* 299; *reversing* 28 *N. J. Eq.* 145.

A wrong which is a mere technical invasion of complainant's rights, and does not threaten serious injury, will not lay a ground for a preliminary injunction. *Wake-man v. New York, L. E. & W. R. Co.*, 10 *Am. & Eng. R. Cas.* 342, 35 *N. J. Eq.* 496.

A preliminary injunction which cannot be granted without dissenting from the opinion of one of the other courts of common pleas will ordinarily be refused. *Gyger v. Philadelphia City Pass. R. Co.*, 17 *Phila. (Pa.)* 86.—*REVIEWING Shipley v. Continental R. Co.*, 13 *Phila.* 128.

A preliminary injunction cannot be used to take property out of the possession of one party and put it into the possession of another. *Gummere v. Lehigh Valley R. Co.*, 1 *Pa. Dist.* 585. *New Orleans & N. E. R. Co. v. Mississippi, T. & L. R. Co.*, 36 *La. Ann.* 561.

An injunction should not be granted for an act done and completed, though contrary to law, unless under peculiar circumstances. *Chesapeake & O. R. Co. v. Patton*, 5 *W. Va.* 234.

A schedule of freight rates fixed by a railroad commission, and about to be put in force, will not be enjoined, at the suit of the company, on the ground that the rate is so low that it will not leave the company any profits, where the evidence shows that only a small part of the local traffic may be affected by the rate, and the evidence is conflicting as to whether the rate would require the road to be operated at a loss; but if subsequent experience develops that the rate leaves no dividends, the injunction may be awarded. *Chicago, B. & Q. R. Co. v. Dey*, 38 *Fed. Rep.* 656.

Where a railroad company is sued in a justice's court, and the summons is served properly, equity will not enjoin the collection of a judgment against the company on the ground that the return on the summons was not properly made. *Peoria, D. & E. R. Co. v. Duggan*, 32 *Ill. App.* 351.

The supreme court has no power to restrain a railroad company from occupying and using land sought to be condemned for a right of way, pending proceedings by *certiorari* to review the condemnation proceedings. *Traverse City, K. & G. R. Co. v. Seymour*, 81 *Mich.* 378, 45 *N. W. Rep.* 826.

One railroad company cannot obtain an injunction to restrain another from grading and laying down its track through a gap where the complainant's route has also been surveyed, and to which it has an alleged prior right, when it appears that the work of construction on complainant's line has not reached the locality, and probably will not reach it for a long time to come, and it appears that no irreparable injury will follow from a failure to grant the injunction. *Western N. C. R. Co. v. Georgia & N. C. R. Co.*, 17 *Am. & Eng. R. Cas.* 28, 88 *N. Car.* 79.

The court of chancery, in the exercise of its discretion with reference to the interests of the public, will withhold its interference when called upon by either party to act in aid of an agreement attempting to carry into effect without the intervention of parliament what cannot be lawfully done except by parliament. *Great Northern R. Co. v. Eastern Counties R. Co.*, 31 *L. J. Ch.* 837, 1 *Ry. & C. T. Cas.* 19.

Several railroad companies entered into an agreement with a car company, giving it the exclusive right for fifteen years to furnish them with sleeping and drawing-room cars, with certain conditions as to the divi-

sion of profits, keeping the accounts, etc. The defendant company never acted upon the contract, and was excluded from all benefit thereunder by the joint action of the car company and the other railroads. *Held*, that a preliminary injunction should not issue to prevent the defendant company from entering into another similar contract with another car company. *Pullman Palace Car Co. v. Missouri, K. & T. R. Co.*, 55 *Fed. Rep.* 138.

5. Cases of doubt.—Where a doubt as to the right to an injunction exists in the mind of the court, the prayer of the complainant will not be granted. *Cooper v. Second & T. St. Pass. R. Co.*, 3 *Phila. (Pa.)* 262.—FOLLOWING *Moore v. Green & C. St. Pass. R. Co.*, 3 *Phila.* 210.

Where a court is asked to restrain the erection of a railroad bridge on the ground that it will be an obstruction to navigation, and the testimony offered is so clearly balanced as not to incline the scale on either side, an injunction should be refused. *Works v. Junction R. Co.*, 5 *McLean (U. S.)* 425.

A preliminary injunction is never granted unless the act threatened to be done will inflict an irreparable injury on the complainant; nor will the writ be issued where the right of the complainant depends on an unsettled question of law. *Citizens Coach Co. v. Camden Horse R. Co.*, 29 *N. J. Eq.* 299; *reversing* 28 *N. J. Eq.* 145.—FOLLOWED IN *Booraem v. North Hudson County R. Co.*, 40 *N. J. Eq.* 557. REVIEWED IN *Central R. Co. v. Standard Oil Co.*, 1 *Am. & Eng. R. Cas.* 36, 33 *N. J. Eq.* 127; *Muir v. Howell*, 37 *N. J. Eq.* 39.—*Long Branch Com'rs v. West End R. Co.*, 29 *N. J. Eq.* 566. *National Docks R. Co. v. Central R. Co.*, 32 *N. J. Eq.* 755; *reversing* 31 *N. J. Eq.* 475.—DISTINGUISHING *Flower v. London, B. & S. C. R. Co.*, 11 *Jur. N. S.* 406; *Delaware, L. & W. R. Co. v. Erie R. Co.*, 21 *N. J. Eq.* 299. REVIEWING *Stockton & D. R. Co. v. Brown*, 9 *H. L. Cas.* 246.—*Delaware, L. & W. R. Co. v. Central S. Y. & T. Co.*, 43 *N. J. Eq.* 77, 10 *Atl. Rep.* 602.

A complainant, to entitle himself to a preliminary injunction to protect a right which he claims in land, must show that on the undisputed facts of his case, and according to the established law of the state, he possesses the right which he claims. *Dodge v. Pennsylvania R. Co.*, 36 *Am. & Eng. R.*

Cas. 180, 43 *N. J. Eq.* 351, 10 *Cent. Rep.* 655, 11 *Atl. Rep.* 751; *affirmed in* 45 *N. J. Eq.* 366, 19 *Atl. Rep.* 622.

In a suit by one railroad to enjoin another from the use of streets over which it claims an exclusive right to run its road, depending upon the performance of conditions annexed to such right, when the evidence of the performance of such conditions is conflicting, the court will not grant an injunction until final hearing. *Savannah, S. & S. R. Co. v. Coast Line R. Co.*, 49 *Ga.* 202.

A preliminary injunction will not be granted on a bill to restrain a railroad company from interfering with a street railway company constructing a crossing over the railroad, in a case in which the plaintiff's lawful corporate existence is attacked, and in which its authority to build its railroad is denied, and in which the facts are in controversy. *Lebanon & M. St. R. Co. v. Philadelphia & R. R. Co.*, 2 *Pa. Dist.* 835.—QUOTING *Minnig's Appeal*, 82 *Pa. St.* 373.

6. Where title is in dispute.*—Though a railroad company may persist in maintaining a wooden depot in violation of a city's fire ordinances, and in violation of a permit allowing such depot to be erected, yet the city may be enjoined when proceeding to demolish the building without due process of law. But where a part of the land on which the depot is erected is in dispute, the city claiming it as a part of a street, an injunction should not be awarded restraining the city from interfering with the company in erecting a new depot on the site of the old one pending suit. In such case the injunction should simply preserve the *status quo* during the pendency of the litigation, and should give neither party any advantage in the alteration of the property, so long as the title to the land is in dispute. *Northern Pac. R. Co. v. Spokane*, 52 *Fed. Rep.* 428.

An injunction against a party holding his own possession of land is equivalent to turning him out of possession, and utterly illegal before final decree. *Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.*, 61 *Mich.* 9, 27 *N. W. Rep.* 715.

An injunction will not issue where the right of the complainant which it is designed to protect depends upon a disputed

* Enjoining interference with construction of railroad where title to the land is in doubt, see 46 *AM. & ENG. R. CAS.* 580, *abstr.*

question of law, about which there may be a doubt which has not been settled by the courts. So whether the owner of land along the shore on tide waters has any right in the shore, or the lands under water, by reason of adjacency, or by the provisions of New Jersey Wharf Act of March 18, 1851, is a disputed question, not settled by the courts of law, and an injunction will not be granted to protect the shore owners in such rights. *Stevens v. Paterson & N. R. Co.*, 20 N. J. Eq. 126.—DISTINGUISHING *Stockham v. Browning*, 18 N. J. Eq. 390. REVIEWING *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530; *Thompson v. Paterson & H. R. R. Co.* 9 N. J. Eq. 526; *Newark P. R. & F. Co. v. Elmer*, 9 N. J. Eq. 754.—FOLLOWED IN *Pratt v. Roseland R. Co.*, 50 N. J. Eq. 150.

When the title to the lands the use of which the complainants seek to enjoin is in dispute, this court has no jurisdiction. In such case an injunction is never granted to prevent the enjoyment of the property in dispute by either party who happens to be in possession of it. *Erie R. Co. v. Delaware, L. & W. R. Co.*, 21 N. J. Eq. 283.

On a bill in equity filed by a railroad company to enjoin the defendant from the erection of a building within the company's right of way, the plaintiff's title being legal and disputed by the defendant, it is error to award a preliminary injunction until the disputed right shall be tried at law. *Delaware, L. & W. R. Co. v. Newton Coal Min. Co.*, 137 Pa. St. 314, 21 Atl. Rep. 171.

After a small part of a railroad was built the contractors obtained judgments and proceeded to sell the road, and the plaintiff claimed title under the purchasers at the judicial sale. After the sale the original directors made a lease of the road under which defendant claimed possession, but neither party was in actual possession of the road. Held, that a court would not interfere by injunction. *St. Louis, K. C. & C. R. Co. v. Dewees*, 23 Fed. Rep. 691.

7. Complainant having remedy at law.—(1) *General rules.*—Where a federal court in New York is asked to enjoin the construction of a street railroad, and the court has no jurisdiction except by reason of the fact that the plaintiff is a non-resident, and the evidence shows that the track is partially constructed, and that no serious detriment is likely to result from its completion, and the presence of the track in its

unfinished condition would cause as much injury during the pendency of the action as the completed track, and serious inconvenience to the public, the court will refuse an injunction, where it appears that plaintiff can obtain perfect relief on a final decree, especially where the supreme court of the state has decided that a street railroad is not a new servitude, and where the court of appeals has not passed upon the question. *Van Bokelen v. Brooklyn City R. Co.*, 5 Blatchf. (U. S.) 379.

Where a complaint shows that the construction and maintenance of a railroad in front of plaintiff's premises will result in special injury to him—not a mere injury which he will sustain in common with the public at large—his remedy is at law for damages, and not by injunction. *Lorie v. North Chicago City R. Co.*, 32 Fed. Rep. 270.

Where a company is proceeding to construct a railroad on a street, by the authority of the city, and an abutting property owner files a bill for equitable relief, but does not apply for a temporary injunction until after the track is in daily use, and the evidence shows that the damage to the plaintiff would not be large, but the restraining of the operation of the road might put third parties to great inconvenience, an injunction on a final hearing should be refused, and plaintiff left to his remedy at law for damages. *Osborne v. Missouri Pac. R. Co.*, 37 Fed. Rep. 830; affirmed in 147 U. S. 248, 13 Sup. Ct. Rep. 299.

Where one company is proceeding to condemn the lands of another, and the defendant company sets up facts by way of cross-bill, which would be a legal defense upon hearing on the merits, such facts constitute no ground for enjoining the plaintiff company from entering upon the property. If they show that the petitioner has no power to condemn lands, or that they are not necessary for the purposes named in the petition, they can be used on the trial without the necessity for an injunction. *California Pac. R. Co. v. Central Pac. R. Co.*, 47 Cal. 549, 7 Am. Ry. Rep. 536.

But in such case, if the facts set up in defense give the defendant company a cause of action in equity to restrain the other company, then they must be asserted in an independent action, and not by cross-complaint. *California Pac. R. Co. v. Central Pac. R. Co.*, 47 Cal. 549, 7 Am. Ry. Rep. 536.

cause as much of the action as serious inconvenience will refuse an order that plaintiff in a final decree, the court of the street railroad is here the court of on the question. *City R. Co.*, 5

that the construction of a railroad in these cases will result in a mere injury common with the injury is at law for injunction. *Lorie v. Co.*, 32 *Fed. Rep.*

proceeding to construct, by the author putting property in a mere injury, but a temporary injunction in daily use, and the damage to be large, but the injury of the road great inconvenience, a final hearing plaintiff left to his damages. *Osborne v. Co.*, 830; *aff. Sup. Ct. Rep.* 299. Proceeding to construct and the defendant by way of cross-judgment defense upon facts constitute the plaintiff cannot have the property. If the plaintiff has no power they are not needed in the petition without injunction. *California R. Co.*, 47 *Cal.*

acts set up in defendant company a cause to restrain the other as asserted in an action by cross-complaint. *Co. v. Central Am. Ry. Rep.* 536.

A landowner whose property was taken years ago for a roadway by a railroad company, and who has lately obtained judgment for damages according to the charter, has, so far as appears, an ample legal remedy either by levy and sale or by ejectment against another company which has succeeded to all the rights and has interposed a claim to all the property of the former road. *Remshart v. Savannah & C. R. Co.*, 54 *Ga.* 579.

Where a municipality by ordinance grants to a railroad company the right to construct a switch upon a street owned by the municipality in fee, and further grants to the company the right to operate cars thereon either by horse power or steam, a bill in equity will not lie by the owner of property abutting on said street to restrain the company from operating its cars by steam. Chancery has no jurisdiction in such case. The remedy, if any, for the injuries complained of is by action at law. *Mills v. Parlin*, 14 *Am. & Eng. R. Cas.* 147, 106 *Ill.* 60.

The temporary interruption of the business of a city horse railway company, for only three or four days, by moving a large house along the street lengthwise with the company's track, even granting that the company has the exclusive right of way in the street for its cars, is not a case of irreparable damage, or such an injury but that an adequate remedy exists at law. And the further fact that the defendant proposes to move other houses over the same and other streets, when employed to do so, in view of the fact that such removals are of rare occurrence, and not likely to occur on the same street again for many years, and because it would be but a temporary interruption of the company's franchise, was held not to furnish sufficient equitable ground for decreeing a perpetual injunction. *Fl. Clark Horse R. Co. v. Anderson*, 108 *Ill.* 64.

A court of equity will not interfere, by injunction, to restrain prosecution against a railroad for failing to erect gates at crossings, under ordinances of cities and villages, even though the ordinances may be void, for the reason that the party sued has an adequate remedy at law. If the ordinance is void, that will defeat a prosecution under it. *Chicago, B. & Q. R. Co. v. Ottawa*, 148 *Ill.* 397, 36 *N. E. Rep.* 85.

A court of equity will not lend its aid to an assignee of a lease of land through which a railroad company seeks to condemn a

right of way, and enjoin it from so doing, when it is shown that the assignee is the president of a rival road, and denies the power of the first company to condemn the land under its charter, but will leave him to his remedy at law. *Piedmont & C. R. Co. v. Speelman*, 30 *Am. & Eng. R. Cas.* 316, 67 *Md.* 260, 9 *Cent. Rep.* 71, 10 *Atl. Rep.* 77, 293.

So far, at least, as incorporeal property or rights or easements are concerned, an injunction should not be issued to prevent the land on which these rights exist from being taken and the rights themselves destroyed, without compensation first made. The party aggrieved must first resort to his legal remedy. *Stevens v. Paterson & N. R. Co.*, 20 *N. J. Eq.* 126.—REV. ED IN *Muir v. Howell*, 37 *N. J. Eq.* 39.

An injunction will not be granted where an action of ejectment will restore the complainant to all his rights. *Morris C. & B. Co. v. Fagin*, 22 *N. J. Eq.* 430.—APPROVING *Morris & E. R. Co. v. Prudden*, 20 *N. J. Eq.* 530; *Carlisle v. Cooper*, 21 *N. J. Eq.* 576. FOLLOWING *Stevens v. Erie R. Co.*, 21 *N. J. Eq.* 259.

A judgment creditor of a foreign railroad corporation, who has also an attachment, cannot procure an injunction to restrain the company from mortgaging property in other states which he cannot reach by his attachment. *Rogers v. Michigan S. & N. I. R. Co.*, 28 *Barb. (N. Y.)* 539.

Such judgment creditor has no preference over other creditors of the company, by virtue of his judgment and attachment, or because the company is insolvent, until his execution and attachment are made liens on the property which the company proposes to mortgage. *Rogers v. Michigan S. & N. I. R. Co.*, 28 *Barb. (N. Y.)* 539.

A court will refuse an injunction to prevent a railroad company transporting beyond the state certain bonds, stocks, and securities, where it appears that plaintiff has a judgment, and that an attachment will stop their transfer as effectually as an injunction. In such case he will be deemed as having a complete remedy at law. *Rogers v. Michigan S. & N. I. R. Co.*, 28 *Barb. (N. Y.)* 539.

An injunction will not be granted to restrain a city from changing the grade of a street, upon the complaint of a passenger railway company that had purchased the right of way over the street, formerly a turnpike, where ample remedy is given the com-

pany for the recovery of whatever damages may result to them, by statutory proceedings. *Kiége Ave. Pass. R. Co. v. Philadelphia*, 10 Phila. (Pa.) 37.—DISTINGUISHING *Market St. R. Co. v. Building Com'rs* (MS.).

The federal courts, sitting as courts of equity, have jurisdiction to compel railroad companies to discharge the duty imposed upon them of granting equal facilities to all shippers alike. So an injured shipper may procure an injunction to compel the company to do its duty, instead of resorting to actions at law for damages, or to a mandamus. So *held*, where plaintiff filed a bill to compel a company to receive from, and deliver live stock to, his stock-yards on equal terms with those allowed rival stock-yards. *McCoy v. Cincinnati, I., St. L. & C. R. Co.*, 13 Fed. Rep. 3.

(2) *Illustrations*.—Plaintiff and defendant entered into a contract by which the former leased the road of the latter for forty years at a stated sum per mile per year. This action was brought to vacate the contract on the ground of fraud in defendant in procuring it, and to restrain defendant from bringing any actions to recover instalments of rent due under it. *Held*, that the case did not justify the interference of equity, because the fraud complained of could be finally adjudicated in one action at law for rent, and that a temporary injunction was warranted neither by section 3388 of the Iowa Code, nor by the usages of courts of equity in such cases. *Dubuque & S. C. R. Co. v. Cedar Falls & M. R. Co.*, 76 Iowa 702, 39 N. W. Rep. 691.

Plaintiff company, claiming the ownership of city property on both sides of the highway and the fee in the latter, asked for an injunction to restrain the defendant railway company from operating its road across the highway through a cut below the surface, on the ground that the city ordinance authorizing the construction of the railroad required that the highway crossing should be made on grade. *Held*, that the plaintiff had a complete and adequate remedy at law, and that a demurrer to the petition was properly sustained. *Planet P. & F. Co. v. St. Louis, O. H. & C. R. Co.*, 115 Mo. 613, 22 S. W. Rep. 616.

One of several mortgage bondholders filed a bill to enjoin mortgage trustees from conveying such part of an interstate railroad as was situate in the state of New York, but it appeared that the property consisted of the

franchise, lands, buildings, road, and road-bed; but there was no charge of any intention to remove or injure the property. *Held*, that as the property consisted of such things as could not be carried out of the state, a temporary injunction was not necessary to have the property remain in the state to abide the final event of the suit. *McHugh v. Boston, H. & E. R. Co.*, 66 Barb. (N. Y.) 612.

In such case it appeared that the trustees had been appointed by the supreme court of another state through which the road ran, and that they were not charged with any fraud themselves, but that certain acts were charged as fraudulent prior to their appointment, for which they were not responsible. *Held*, that such allegations of fraud were not proper grounds for an injunction and a receiver, where it appears that plaintiffs have an ample remedy in an action for damages against the former trustees. *McHugh v. Boston, H. & E. R. Co.*, 66 Barb. (N. Y.) 612.

Where, in equity, A. alleged a contract with a railroad company, under which he was to convey to the company a right of way over his grounds, and a tract of land for the erection of a depot, and charged that in violation of this contract the company had purchased other grounds, and intended to erect their depot thereon, and abandon the ground contracted for (which abandonment was denied by the respondent), and praying for an injunction, etc.—*held*, that the complainant was not entitled to the relief prayed for in equity, but must resort to his remedy at common law, or under the act of assembly relating to railroad companies. *Gallagher v. Fayette County R. Co.*, 38 Pa. St. 102.

A judgment creditor of a railroad company levied on the cars, horses, etc., of the company. The trustees of a mortgage given by the company claimed that this property was theirs under the mortgage, and brought their bill for a special injunction to restrain the plaintiff and the sheriff from proceeding with the sale. *Held*, that it was a proper case for the interpleader law, and the injunction was refused. *Eckfelt v. Starr*, 5 Phila. (Pa.) 497.

No legal obligation of the Milwaukee & Northern R. Co. to refrain from building and operating said road being shown, the complaint alleges that the organization of said company was fraudulent and collusively

road, and road-
age of any inten-
property. *Held*,
sisted of such
ried out of the
n was not nec-
y remain in the
ent of the suit.
E. R. Co., 66

that the trustees
supreme court
which the road
ot charged with
at certain acts
prior to their
y were not re-
a allegations of
unds for an in-
here it appears
le remedy in an
the former trus-
E. & E. R. Co.,

ged a contract
nder which he
pany a right of
a tract of land
, and charged
tract the com-
ounds, and in-
t thereon, and
ted for (which
y the respons-
unction, etc.—
as not entitled
quity, but must
mmon law, or
ting to railroad
Cyette County R.

a railroad com-
ses, etc., of the
f a mortgage
med that this
the mortgage,
special injunc-
and the sheriff
le. *Held*, that
e interpleader
refused. *Eck-*
7.

Milwaukee &
from building
ng shown, the
rganization of
and collusively

made for the purpose of enabling its co-
defendant, the Milwaukee & Northern R.
Co., to avoid its covenant, etc., and asks for
an injunction against both roads. The an-
swer fully meets and denies all the aver-
ments of fraud and collusion. *Held*, that
on the complaint and answer the injunction
should have been refused, and plaintiffs left
to their legal remedy. *Menasha v. Mil-*
waukee & N. R. Co., 5 *Am. & Eng. R. Cas.*
300, 52 *Wis.* 414, 9 *N. W. Rep.* 396.

8. Complainant guilty of laches.—If
a company enter upon land without consent
of the owner or without condemning a right
of way, such entry may be enjoined if sea-
sonable application be made; but if he con-
sents to the entry, or, with full knowledge,
stands by long after the road is completed,
an injunction should be denied, leaving him
to his remedy at law. *Midland R. Co. v.*
Smith, 113 *Ind.* 233, 15 *N. E. Rep.* 256, 12
West. Rep. 699.—DISTINGUISHING *Cox v.*
Louisville, N. A. & C. R. Co., 48 *Ind.* 178.
—DISTINGUISHED IN *Green v. Tacoma*, 51
Fed. Rep. 622. QUOTED IN *Organ v. Mem-*
phis & L. R. R. Co., 51 *Ark.* 235.

Where a landowner has full knowledge
that a company has entered upon his land,
and he stands by for nine months without
making any objection other than that the
amount of damages offered by the company
is not satisfactory, he cannot enjoin the op-
eration of the road, but must sue at law
to recover damages. *Pensacola & A. R. Co.*
v. Jackson, 21 *Fla.* 146.

In such case there is no ground for award-
ing an injunction to prevent a multiplicity
of suits, since the injury resulting from the
construction and operation of the road may
all be recovered in one suit, which would be
a bar to any further litigation. *Pensacola*
& A. R. Co. v. Jackson, 21 *Fla.* 146.

A delay of six years, and sometimes less,
in asserting a right will stay the interven-
tion of equity. So where the servient
owner of land allowed water to be diverted
from a stream for seven years, and used for
railroad purposes, and where large sums of
money had been expended in doing so, and
it appeared that his injury could be com-
pensated in money, his right to an injunc-
tion was lost. *Pennsylvania R. Co.'s Ap-*
peal, 125 *Pa. St.* 189, 17 *Atl. Rep.* 478.

Where a company is only authorized to
lay a track on a city street with the assent
of the city government, and such assent is
given subject to certain conditions, and

such conditions are violated by the company,
the city may enjoin the further construction
of the road, though it has been guilty of
some laches in applying for the injunction,
as in such case the ordinary rule of equita-
ble estoppel governing individuals does not
apply. *Northern C. R. Co. v. Mayor, etc.,*
of Baltimore, 21 *Md.* 93.—APPLYING *Phila-*
delphia, W. & B. R. Co. v. State, 20 *Md.* 157.

A turnpike company, a part of whose
roadbed has been condemned for the use
of a railroad company, and the damages
awarded by a jury of inquisition, upon the
condition that the railroad company shall
erect and maintain upon the land so con-
demned a close board fence, so long as the
turnpike shall be used by the railroad com-
pany, cannot, after receiving the damages
and permitting the railroad company to
build its road over the land condemned,
and to use the same for years without mak-
ing any objection, and without requiring it
to build the fence, and when the railroad
has passed into the hands of receivers, ob-
tain an injunction to restrain the receivers
from using the condemned land for the pur-
poses of the railroad because of failure to
erect the fence. *Spencer v. Falls Turnpike*
Road, 70 *Md.* 136, 16 *Atl. Rep.* 451.

Where the construction of an expensive
railroad bridge over a navigable river has
been permitted to proceed almost to com-
pletion, in full view of all parties that could
be affected thereby, and large expenditures
and liabilities have been incurred, and no
action is taken to prevent the progress of
the work for more than fourteen months,
the court will not interfere by preliminary
injunction. *Attorney-General ex rel. v. New*
York & L. B. R. Co., 24 *N. J. Eq.* 49.—
DISTINGUISHING *Thompson v. Paterson &*
H. R. R. Co., 9 *N. J. Eq.* 527.—APPLIED IN
Central R. Co. v. Standard Oil Co., 2 *Am.*
& Eng. R. Cas. 286, 33 *N. J. Eq.* 372.

9. Where hardship will result.—
An injunction will not be granted where it
would cause great injury to the defendants,
and might be of serious detriment to the
public without corresponding advantage to
the complainant. *Torrey v. Camden & A.*
R. Co., 18 *N. J. Eq.* 293.—DISTINGUISHED
IN *Evans v. Missouri, I. & N. R. Co.*, 64 *Mo.*
453.—*Higbee v. Camden & A. R. & T. Co.*, 20
N. J. Eq. 435. *Mocanagua Coal Co. v. North-*
ern C. R. Co., 4 *Brews. (Pa.)* 158, 9 *Phila.*
250. *Lehigh & W. B. Coal Co. v. Delaware*
& H. Canal Co., 1 *Pa. Dist.* 737.

Unless the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrong-doer of the benefit of any consideration as to its injurious consequences. *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530. *Hackensack Imp. Com. v. New Jersey Midland R. Co.*, 22 N. J. Eq. 94.

Where there is on the one side an anticipated injury which may occur, but which is not certain to occur if the defendant is not enjoined, and on the other hand an injury which will certainly occur if the injunction is granted, the injunction will be refused. *Lehigh & W. B. Coal Co. v. Delaware & H. Canal Co.*, 1 Pa. Dist. 737.

The operation of a railroad will not be enjoined where the damage sustained by plaintiff is trivial—forty or fifty dollars—and the granting of the injunction will work great damage to the company. *Whittlesey v. Hartford, P. & F. R. Co.*, 23 Conn. 421. *Western R. Co. v. Alabama G. T. R. Co.*, 96 Ala. 272, 11 So. Rep. 483.—APPLYING *Highland Ave. & B. R. Co. v. Birmingham Union R. Co.*, 93 Ala. 505; *Schurmeier v. St. Paul & P. R. Co.*, 8 Minn. 113; *Zabriskie v. Jersey City & B. R. Co.*, 13 N. J. Eq. 314; *Garnett v. Jacksonville, St. A. & H. R. R. Co.*, 20 Fla. 889.—*New York & A. R. Co. v. New York, W. S. & B. R. Co.*, 11 Abb. N. Cas. (N. Y.) 386.

Where a railroad company have irregularly taken lands, but have the capacity to acquire title, this court will not, where the advantage to the complainants would be small, and the injury to the company incalculably great, interpose and stop the running of the cars on such road until the statutory method of acquiring title can be executed. *Erie R. Co. v. Delaware, L. & W. R. Co.*, 21 N. J. Eq. 283.

An injunction will not be granted when it will operate inequitably or contrary to the real justice of the case; equity interferes in this manner to prevent irreparable mischief or to suppress a multiplicity of suits and vexatious litigations. *Troy & B. R. Co. v. Boston, H. T. & W. R. Co.*, 7 Am. & Eng. R. Cas. 49, 86 N. Y. 107.—DISTINGUISHING *New York P. & D. Estab. v. Fitch*, 1 Paige 97; *Niagara Falls Int. Bridge Co. v. Great Western R. Co.*, 39 Barb. 212; *Carpenter v. Oswego & S. R. Co.*, 24 N. Y. 655; *Wager v. Troy Union R. Co.*, 25 N. Y. 526; *Williams v. New York C. R. Co.*, 16 N. Y. 97; *Henderson v. New York C. R. Co.*, 78 N. Y. 423.

—QUOTED IN *Metropolitan El. R. Co. v. Manhattan El. R. Co.*, 15 Am. & Eng. R. Cas. 1, 11 Daly (N. Y.) 373, 14 Abb. N. Cas. 103; *Purdy v. Manhattan El. R. Co.*, 36 N. Y. S. R. 43, 13 N. Y. Supp. 295.

An equity court is not bound to issue an injunction when it will produce great public or private mischief, merely for the purpose of protecting a technical or unsubstantial right. *Gray v. Manhattan R. Co.*, 128 N. Y. 499, 28 N. E. Rep. 498, 40 N. Y. S. R. 478; *affirming* 35 N. Y. S. R. 32, 12 N. Y. Supp. 542.

A street railway company instituted an action to obtain an injunction against three railroad companies to restrain them from preventing the laying of track across such railways. One of the railway companies answered, in substance, that it had occupied the ground for more than twenty years; that it was a part of its yard; that the company had rights in the street; that the street railway company was not a valid corporation and had no right to lay its tracks through said yard, and that other and safer points of crossing were near at hand; that the construction of the street railway would cause great loss and injury to the railway company and be attended with danger to its employes, etc. Held, that an order for a temporary injunction, which in effect divested the railway company of the possession of the property and gave it to the street railway company, was void. *Calvert v. State*, 34 Neb. 616, 52 N. W. Rep. 687.

10. Mandatory injunctions.*—(1) *When granted.*—Where one connecting road is about to refuse another equal facilities for the exchange of traffic, in violation of the Interstate Commerce Act, § 3, by reason of a boycott declared by a labor organization, a court of equity may compel such interchange by mandatory injunction. *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.*, 53 Am. & Eng. R. Cas. 293, 54 Fed. Rep. 746.—FOLLOWING *Coe v. Louisville & N. R. Co.*, 3 Fed. Rep. 775. QUOTING *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. Rep. 243.

And such injunction when awarded will be binding upon all officers and employes of the defendant company who have notice thereof, without making them actual parties to the suit. *Toledo, A. A. & N. M. R. Co.*

* As to when a mandatory injunction will issue against company to compel performance of some duty, see note, 20 L. R. A. 166.

El. R. Co. v. m. & Eng. R. 4 Abb. N. Cas. R. Co., 36 N. 95. and to issue an ce great pub- ly for the pur- cal or unsub- hattan R. Co., 498, 40 N. Y. Y. S. R. 32, 12

instituted an against three in them from ck across such ay companies it had occu- twenty years; that the com- that the street valid corpora- lay its tracks ther and safer at hand; that railway would to the railway h danger to its n order for a in effect di- of the posses- t to the street l. Calvert v. Rep. 687.

ctions.*—(1) ne connecting er equal facili- in violation of § 3, by reason labor organiza- mpel such in- ction. Toledo, nsylvania Co., 54 Fed. Rep. uisville & N. OTING Joy v. Ct. Rep. 243. awarded will d employés of have notice actual parties N. M. R. Co.

injunction will performance of 166.

v. *Pennsylvania Co.*, 53 *Am. & Eng. R. Cas.* 293, 54 *Fed. Rep.* 746.

A mandatory injunction may lie to enforce a continuing obligation in cases where the courts would not decree specific performance of the obligation. *Chouteau v. Union R. & T. Co.*, 22 *Mo. App.* 286.

An injunction to restrain a defendant from raising the water from his mill pond above a certain height is not mandatory; but if it were strictly mandatory, that would not constitute a valid objection to it. There is no general rule against granting relief by mandatory injunction, interlocutorily, where the damage has been completed before the filing of the bill; and there is no difference between the case of injury to easements and the injury to other rights. *Longwood Valley R. Co. v. Baker*, 27 *N. J. Eq.* 166.

The remedy of an owner of land crossed by a railroad, for a failure to discharge its statutory obligation to such owner, is not confined to an action for damages, but may be enforced in equity and the performance of the duty compelled by a mandatory injunction. *Kerr v. West Shore R. Co.*, 18 *N. Y. S. R.* 63, 2 *N. Y. Supp.* 686.

A mandatory injunction, as a general rule, can only be properly granted on final hearing, as its effect before that time is like awarding an execution before trial and judgment. *Mocanagua Coal Co. v. Northern C. R. Co.*, 9 *Phila. (Pa.)* 250.

The true difference between a prohibitory injunction and a mandatory injunction is this: the former, when issued and executed, leaves the status of things just as it is at the time of execution. The latter, although prohibitory in form, when issued and executed, works a change in the existing condition of things by prohibiting the defendant from doing the reverse of what he is desired to do; and in this way he is compelled to do some act which restores the former condition of things. *Hall v. Chesapeake, O. & S. W. R. Co.*, (Tenn.) 12 *Am. & Eng. R. Cas.* 41.

Where a railway company has erected a cattle-shed and goods station at a station where by its act it is provided that there shall be "no goods or cattle station," the question of public convenience does not apply and the company will be compelled by a mandatory injunction to pull them down. *Price v. Bala & F. R. Co.*, 50 *L. T.* 787.

A railway company, on selling a portion of their surplus lands to plaintiff, entered into an implied obligation not to do or permit anything on the land retained by them which would interfere with the plaintiff's reasonable enjoyment of the land he purchased, except what was required for the construction of their railway; a hoarding not being for that purpose, a mandatory injunction ought to be granted. *Myers v. Catterson, L. R.* 43 *Ch. D.* 470.

(2) *When refused*.—Equity will not interfere by mandatory injunction to enforce a continuing obligation, which is so uncertain and indefinite in its terms as to make it necessary to resort to conflicting evidence *aliunde*, to determine the intent of the parties. *Chouteau v. Union R. & T. Co.*, 22 *Mo. App.* 286.

A mandatory injunction will not be ordered on a preliminary or interlocutory motion, but only upon final hearing, and then only to execute the decree of the court. It is only in cases of obstruction to easements or rights of like nature, that maintaining a structure erected and kept as the means of preventing their enjoyment will be restrained and the structure ordered to be removed, as part of the means of restraining defendant from interrupting the enjoyment of the right. *Rogers L. & M. Works v. Erie R. Co.*, 20 *N. J. Eq.* 379.—QUOTING Attorney-General v. New Jersey R. & T. Co., 3 *N. J. Eq.* 141.—*Hall v. Chesapeake, O. & S. W. R. Co.*, (Tenn.) 12 *Am. & Eng. R. Cas.* 41.

A mandatory injunction to compel a railroad company to remove an embankment should be refused, where it appears that the company is solvent, giving the plaintiff an adequate remedy at law, and where the embankment has been built at great cost and is a public benefit. *Herbert v. Pennsylvania R. Co.*, 43 *N. J. Eq.* 21, 10 *Atl. Rep.* 872, 9 *Cent. Rep.* 322.

Mandatory injunctions have been granted in Pennsylvania by the subordinate courts; but the better doctrine is that a mandatory order upon a preliminary motion cannot be made, though a final injunction may command acts to be done or undone. *Loughlin v. Atlantic & O. R. Co.*, 15 *Phila. (Pa.)* 241.—REVIEWING *Audenried v. Philadelphia & R. R. Co.*, 68 *Pa. St.* 378.

An injunction to a company to work traffic will only be issued where there is a well-founded ground of complaint in re-

spect of past working, and the question of proper facilities for the receipt, etc., of traffic at a junction does not arise until the junction exists. *Dublin Whiskey Distillery Co. v. Midland G. W. R. Co.*, 4 Ky. & C. T. Cas. 32.

The complainants, a stock-yard company, sought an injunction to compel a railroad company to receive at their yards from complainants live stock, carried over the road and consigned for delivery at the defendants' yards. The injunction was denied, first, because the question whether defendants are subject to any duty to the complainants to receive such freight is an unsettled question of law; second, because the injunction asked for is mandatory, and such writs are not ordinarily granted until final hearing. *Delaware, L. & W. R. Co. v. Central S. Y. & T. Co.*, 31 Am. & Eng. R. Cas. 82, 43 N. J. Eq. 71, 9 Cent. Rep. 111, 10 Atl. Rep. 490; affirmed in 43 N. J. Eq. 605, 12 Atl. Rep. 374, 13 Atl. Rep. 615.—REFERRED TO IN *Delaware, L. & W. R. Co. v. Central S. Y. & T. Co.*, 37 Am. & Eng. R. Cas. 607, 45 N. J. Eq. 50, 17 Atl. Rep. 146.

Plaintiff brought an action for specific performance of a contract, and on application for a mandatory injunction *pendente lite* it appeared that the contract in question was exceedingly comprehensive and most minute in its working details; that those details provided for special and varying contingencies, and the elements of discretion and judgment with regard thereto; that the due execution thereof would involve the ascertainment of what is right and proper the parties thereto should do from day to day with regard to ever-varying circumstances. Held, that the action could not be maintained and the injunction should be denied. *Fargo v. New York & N. E. R. Co.*, 3 Misc. 205, 52 N. Y. S. R. 205.—QUOTING *Powell Duffryn Steam Coal Co. v. Taff Vale R. Co.*, L. R. 9 Ch. 331; *Blanchard v. Detroit, L. & L. M. R. Co.*, 31 Mich. 43; *Atlanta & W. P. R. Co. v. Speer*, 32 Ga. 550.

11. Perpetual injunctions.—The federal court, in determining the question of granting a temporary restraining order or a perpetual injunction, is governed solely by the laws of congress, the rules of the supreme court regulating equity practice, and the general rules of procedure in equity cases applicable to the equity practice in the courts of the United States. *Payne v.*

Kansas & A. V. R. Co., 47 Am. & Eng. R. Cas. 228, 46 Fed. Rep. 546.

Upon the payment of the amount found against a railroad company on account of its title, under a bill filed to settle its rights to certain property in litigation, it was entitled to a perpetual injunction to prevent further disturbance thereof, and to have the title confirmed. *Taylor v. Central R. Co.*, 67 Ga. 122.

2. Procedure.

12. Jurisdiction.*—(1) Federal courts.

—A federal court may enjoin the officers of a state, though the state itself is the real party in interest. So the governor of a state may be enjoined from proceeding to foreclose a mortgage for the benefit of the state. *Murdock v. Woodson*, 2 Dill. (U. S.) 188.—APPROVING *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 783.

An injunction issued by a state court is wholly inoperative to impede or impair the power of the circuit courts to issue such a writ in states where the writ is the proper remedy of the judgment creditor. *United States ex rel. v. Lee County*, 6 Wall. (U. S.) 210.

Injunction issued by a state court is inoperative to affect, or in any manner to control or impede, the process of a circuit court. *United States ex rel. v. Keokuk City Council*, 6 Wall. (U. S.) 514.—FOLLOWING *United States v. Johnson County*, 6 Wall. (U. S.) 166.

(2) *Michigan*.—The amendment of chancery rule 112, made April 7, 1886, was designed to prevent the hasty granting of injunctions by commissioners, and to harmonize the practice with what was originally intended when the system of injunction masters was borrowed from New York. *Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.*, 61 Mich. 9, 27 N. W. Rep. 715.

(3) *New York*.—A supreme court in one judicial district has no jurisdiction to enjoin pending legal proceedings in another district; and if such injunction is awarded it is void and may be disregarded. *Schell v. Erie R. Co.*, 51 Barb. (N. Y.) 368, 35 How. Pr. 438, 4 Abb. Pr. N. S. 287. But see *Erie R. Co. v. Ramsey*, 45 N. Y. 637; affirming 57 Barb. 449.

An order restraining a railroad corpora-

* Equity jurisdiction in general over corporations, see note, 9 L. R. A. 651.

tion from leasing or selling any of its property is within the meaning of the code, § 224, and ch. 151 of 1870, § 1, providing that an injunction "to suspend the general and ordinary business of the corporation, can be granted only by the court"; and therefore such injunction cannot be granted by a county judge. *Middletown v. Rondout & O. R. Co.*, 12 Abb. Pr. N. S. (N. Y.) 276.

And it seems that an order restraining the company from entering into a contract for the building and equipping of its road is of the same nature, and could only be issued by the court. *Middletown v. Rondout & O. R. Co.*, 12 Abb. Pr. N. S. (N. Y.) 276.

The act of 1870, ch. 151, provides that an injunction "to suspend the general and ordinary business of the corporation" shall only be granted upon eight days' notice; therefore such injunction granted *ex parte* is void. *Wilkie v. Rochester & S. L. R. Co.*, 12 Hun (N. Y.) 242.—DISTINGUISHED IN *Howlett v. New York, W. S. & B. R. Co.*, 14 Abb. N. Cas. 328, 28 Hun 55.

And in such case, a defendant does not waive the irregularity in procuring the injunction by appearing and moving to vacate the injunction ordered. *Wilkie v. Rochester & S. L. R. Co.*, 12 Hun (N. Y.) 242.

A domestic corporation filed a bill showing some contract relation between itself and two other corporations, one domestic and the other foreign, but doing business in the state, in which an accounting was prayed for between plaintiff and the foreign corporation, and also an injunction to restrain the latter from interfering with certain alleged rights of the plaintiff, and interfering with its property out of the state, and alleging a combination between the two defendants to affect plaintiff's rights in the state. Held, that the court had no jurisdiction to enjoin threatened acts in another state, nor to compel undoing what is already performed; but it might compel an accounting, and restrain such acts as were threatened in the state. *Atlantic & P. Tel. Co. v. Baltimore & O. R. Co.*, 14 J. & S. (N. Y.) 377.—APPLYING *Northern Ind. R. Co. v. Michigan C. R. Co.*, 15 How. (U. S.) 233; *Baltimore & O. R. Co. v. Harris*, 12 Wall. (U. S.) 65. FOLLOWING *People v. Central R. Co.*, 42 N. Y. 283. REVIEWING *Chase v. Vanderbilt*, 5 J. & S. 334.

(4) *Ohio*.—The supreme court may allow a temporary injunction, where it appears

that defendant is doing or threatens to do acts respecting the subject-matter of a pending action, tending to render the judgment ineffectual. And where an injunction is sought in the court below, and refused, and the judgment is reversed on appeal, the supreme court may proceed to render the judgment which the court below should have rendered. *Wagner v. New York, C. & St. L. R. Co.*, 10 Am. & Eng. R. Cas. 380, 38 Ohio St. 32.—DISTINGUISHED IN *St. Louis & S. F. R. Co. v. Evans & H. Fire Brick Co.*, 85 Mo. 307.

(5) *Pennsylvania*.—The constitution of 1874, art. 5, § 3, giving the supreme court "original jurisdiction in cases of injunction where a corporation is a party defendant" does not give jurisdiction where trustees of a corporation mortgage file a bill to sell the mortgaged property, and ask at the same time for an injunction to restrain defendants from selling or interfering with the property. *Fargo v. Oil Creek & A. R. R. Co.*, 81* Pa. St. 266.

The power of the court of common pleas to interfere by injunction rests mainly, if not solely, upon the clause of the act giving that court equity jurisdiction, which empowers it to enjoin for the prevention or restraint of the commission or continuance of acts contrary to law and prejudicial to the interests of the community, or the rights of individuals. *Moore v. Green & C. St. Pass. R. Co.*, 3 Phila. (Pa.) 210.—FOLLOWED IN *Cooper v. Second & T. St. Pass. R. Co.*, 3 Phila. (Pa.) 262.

Courts of equity in Philadelphia, by act of April 8, 1846, cannot grant an injunction to restrain the city from repairing the Girard avenue bridge, erected under act of March 27, 1852. *Philadelphia & R. R. Co. v. Philadelphia*, 8 Phila. (Pa.) 284.—FOLLOWING *Flanagan v. Philadelphia*, 51 Pa. St. 491. REVIEWING *Wolbert v. Philadelphia*, 48 Pa. St. 439.

(6) *Virginia*.—An injunction cannot be maintained in a county other than that in which the act or proceeding is to be done, or is doing, or apprehended. *Norfolk & W. R. Co. v. Postal Tel. Cable Co.*, 88 Va. 932, 14 S. E. Rep. 689.—FOLLOWED IN *Norfolk & W. R. Co. v. Postal Tel. Cable Co.*, 88 Va. 936.

The chancery court of the city of Richmond cannot enjoin an act to be done in the county of Prince George. *Norfolk & W. R. Co. v. Postal Tel. Cable Co.*, 88 Va. 936.

14 S. E. Rep. 690.—FOLLOWING Norfolk & W. R. Co. v. Postal Tel. Cable Co., 88 Va. 932.

(7) *West Virginia*.—Where the law does not give a court of equity jurisdiction of the subject-matter—e.g., to enjoin the building of a railroad pursuant to a valid ordinance—consent of parties cannot invest the court with power to award damages or ascertain and decree compensation. *Ohio River R. Co. v. Gibbens*, 35 W. Va. 57, 12 S. E. Rep. 1093.

Where, in order to sustain a bill of injunction, a jurisdictional fact is necessary to be established, such fact must be not only alleged in the bill, but it should be sustained by sufficient evidence to at least make a *prima facie* case before the court proceeds to refer the cause to a commissioner, or to order an issue out of chancery. *Ward v. Ohio River R. Co.*, 35 W. Va. 481, 14 S. E. Rep. 142.

13. Discretion of the court.—The power to issue an injunction rests in the sound discretion of the court, and will not be exercised when all parties in interest are not before the court. *Fayolle v. Texas & P. R. Co.*, (D. C.) 3 Am. & Eng. R. Cas. 532.

Under the act of congress of March 2, 1793, the federal courts can only award injunctions upon "reasonable previous notice to the adverse party or his attorney, of the time and place of moving for the same." *Mowrey v. Indianapolis & C. R. Co.*, 4 Biss. (U. S.) 78.

The court on appeal will never interfere with the discretion of a chancellor in refusing an injunction, where there is evidence enough to sustain his ruling. *So held*, where only three lot owners in a cemetery sought to enjoin the construction of a railroad through it after being authorized by a city, where the evidence showed that the existence of the railroad was not at all inconsistent with the prior grant for cemetery purposes, as the railroad only ran along a river on such ground as was not capable of being used for burial purposes, and would not detract from the beauty of the cemetery. *Wood v. Macon & B. R. Co.*, 68 Ga. 539.—DISTINGUISHED IN *Davis v. East Tenn., V. & G. R. Co.*, 87 Ga. 605.

On the hearing of an application for injunction to prevent the erection, by railroad companies, of a bridge on a street in a city across their tracks, the affidavits being conflicting, especially upon the question wheth-

er or not damage would accrue to complainant by such erection, the chancellor did right to refuse the injunction, and there was no abuse of discretion in so refusing. *Doolittle v. East Tenn., V. & G. R. Co.*, 80 Ga. 658, 6 S. E. Rep. 918.

There is no abuse of the discretion of a court of equity in refusing a temporary injunction on the complaint of a railroad company that at a point where the company owned 150 feet of ground where it was necessary for them to put in side tracks, defendants were constructing a saw mill which would interfere with the side tracks; that the sawdust and other material about the mill would be likely to catch fire from the railroad engines, and extend to its roadbed, and thereby destroy it; that the erection of the mill would be a continuing nuisance, damages of which could not be estimated. *East Tenn., V. & G. R. Co. v. Sellers*, 85 Ga. 853, 11 S. E. Rep. 543.

Where a street-car company is only authorized by its charter to use horses as a motive power, but it agrees with the city to maintain its track only in the middle of the street if it will consent to the use of electricity as a motive power, and it is afterward sued for failing to remove its track to the middle of the street, the discretion of the court in awarding a temporary injunction restraining the construction of the road on the side of the street will not be disturbed upon appeal. *Gloversville v. Johnstown, G. & K. Horse R. Co.*, 49 N. Y. S. R. 315, 66 Hun 627, 21 N. Y. Supp. 146.

14. Who may demand—Parties complainant.—(1) *In general*.—A party may have such an incorporeal interest in a street as to enable him to enjoin a diversion of it to objects and uses inconsistent with the purpose for which it was granted to the city, as by laying a railroad track on it. *Ingram v. Chicago, D. & M. R. Co.*, 38 Iowa 669.—DISTINGUISHED IN *Kucheman v. Chicago, C. & D. R. Co.*, 46 Iowa 366.

The fact that one railroad company, being lessees of the road and franchises of another, fails to have the lease acknowledged or proved, and recorded with the secretary of state within thirty days after its execution, as required by law, will not prevent the two companies from obtaining an injunction to prevent third persons from infringing the franchise and rights. The lessors and lessees having together the whole legal ownership of the rights to be protected,

may properly join as complainants. And as the property to be protected belongs to the stockholders whom the complainants represent, the defendants, being wrongdoers, cannot set up the alleged uncertainty of legal relations between the complainants, to justify their own wrongful acts or to prevent the appropriate relief. *Pennsylvania R. Co. v. National R. Co.*, 23 N. J. Eq. 441.

Where railroad property is sold under a first mortgage, the lien of a second mortgage is thereby extinguished, and the holders of such second mortgage cannot enjoin proceedings to collect the purchase price from the purchasers of the road. *Searles v. Jacksonville, P. & M. R. Co.*, 2 Woods (U. S.) 621.

The state cannot properly be made a party plaintiff, at the relation of a private citizen, to a bill of injunction to restrain the county court of a county from issuing its bonds or levying a tax to pay for a subscription to the stock of a railroad company. The state has no interest, legal or equitable, in the subject-matter. *State v. Parkville & G. R. Co.*, 32 Mo. 496.

New York Act of 1873, ch. 301, § 1, granting plaintiff company the right to construct and operate a passenger railway "through, upon, and along" certain streets in New York city, did not confer upon the company any exclusive franchise or right, nor give it power to interfere with the construction of another road, either in behalf of the city or of the public. If the defendant company, that was also chartered by the legislature, had no right to lay its track to the same point that plaintiff claimed, it could be restrained only by the public, unless it actually interfered with plaintiff's track. *Christopher & T. St. R. Co. v. Central Cross-Town R. Co.*, 4 Hun (N. Y.) 630, mem., 67 Barb. 315.

The power given county attorneys "to represent the state in all cases in the district and inferior courts in their respective counties," does not authorize a county attorney to institute suit in the name of the state on the relation of private parties against a corporation, to enjoin it from exceeding its powers and thereby creating a public nuisance, except the suit be brought with the sanction and in the name of the attorney-general. *State ex rel. v. Paris R. Co.*, 55 Tex. 76.

(2) *Owners and occupiers.*—A bill in

chancery against a municipal corporation, to prevent a threatened usurpation of power by the corporate authorities, or the violation of a duty imposed by law, whereby the burden of taxation will be increased, may be filed by property holders or taxpayers, without the intervention of the attorney-general or other officers representing the state. *New Orleans, M. & C. R. Co. v. Dunn*, 51 Ala. 128.

It is no legal bar to an injunction that the plaintiff may have acquired his title from collateral motives, and very recently before the work complained of began or was to begin. *Savannah & W. R. Co. v. Woodruff*, 86 Ga. 94, 13 S. E. Rep. 156.

The owner of a lot bordering upon a street, but not including any part of it, cannot enjoin the construction of a railroad in the street, unless he will suffer an injury different in character, and not merely greater in degree, than the public generally. *Crowley v. Davis*, 63 Cal. 460.

Maine Rev. St. ch. 51, § 9, giving a landowner the right to an injunction against the use and occupation of land, does not authorize the assignee of a judgment awarding damages for land taken, to maintain a bill for an injunction. *Illsley v. Portland & R. R. Co.*, 56 Me. 531.

Where a tenant enjoins the construction of a railroad over his lands because his damages have not been paid, the injunction will be dissolved if it be made to appear on appeal that plaintiff has parted with his interest in the land. *Piedmont & C. R. Co. v. Speelman*, 30 Am. & Eng. R. Cas. 316, 67 Md. 260, 9 Cent. Rep. 71, 10 Atl. Rep. 77, 293.

And where it appears that plaintiff has parted with his interest to a third person for the sole purpose of enabling him to obstruct the construction of the road, in the interest of a rival road, equity should not lend its aid to assist such person by an injunction. *Piedmont & C. R. Co. v. Speelman*, 30 Am. & Eng. R. Cas. 316, 67 Md. 260, 9 Cent. Rep. 71, 10 Atl. Rep. 77, 293.

Persons who lay out lands into a public square or park and convey them to the city for public use, and who still own lands facing the square, only have rights differing in degree, and not in kind, from those of other citizens owning land not adjoining the square, and which may not have been assessed with plaintiff's for the improvement of the square; and such persons

cannot enjoin the construction of a railroad over such grounds, unless it would do them some special injury not in common with the rest of the public. *Anderson v. Rochester, L. & N. F. R. Co.*, 9 *How. Pr. (N. Y.)* 553.—QUOTING *Drake v. Hudson River R. Co.*, 7 *Barb. (N. Y.)* 508.

Where a railroad is authorized by law a court of equity will not restrain its construction on the ground that plaintiff will sustain indirect or consequential damages, where his property is not taken or appropriated: *Barnes v. South Side R. Co.*, 2 *Abb. Pr. N. S. (N. Y.)* 415.—APPLYING *Gould v. Hudson River R. Co.*, 6 *N. Y.* 522; *Bellinger v. New York C. R. Co.*, 23 *N. Y.* 42; *Corey v. Buffalo, C. & N. Y. R. Co.*, 23 *Barb.* 482.

(3) *Citizens and taxpayers.*—An action to restrain the continuance of a public nuisance, such as a railroad, cannot be maintained by an individual without proof that he has suffered or will suffer peculiar or special damage not sustained by the community at large, and the injury must be substantial; but the nature or extent of damage is immaterial. *Forty-second St. & G. S. F. R. Co. v. Thirty-fourth St. R. Co.*, 20 *J. & S. (N. Y.)* 252; *appeal dismissed in 102 N. Y.* 691, *mem.*—DISTINGUISHING *McHenry v. Jewett*, 90 *N. Y.* 62; *Houston St., etc., R. Co. v. Forty-second St., etc., R. Co.*, *Daily Reg.* Sept. 9, 1884.

A court of equity will not entertain a bill in the name of one or more private citizens to restrain the obstruction of a public street by a railroad, where no private injury or threatened injury is alleged to such citizens or their property. Nor is it sufficient that one of the parties is a lot owner on such street, unless a specific injury to such property be alleged. *Coast Line R. Co. v. Cohen*, 50 *Ga.* 451.

The fee of streets being in the city where they are located, and the city having the power to control and regulate their use, a court of equity will not, at the suit of an individual, enjoin a railway company from operating its road laid in the street without the permission of the city, but will leave the redress to the public authorities. *Patterson v. Chicago, D. & V. R. Co.*, 75 *Ill.* 588.

Under the N. H. Act of July 5, 1867, allowing any citizen to sue out an injunction to restrain the consolidation of railroads to create a monopoly, the plaintiff need not show that he has suffered any private griev-

ance, or that he has any interest other than as a citizen. *Currier v. Concord R. Corp.*, 48 *N. H.* 321.—DISTINGUISHING *Quincy Canal v. Newcomb*, 7 *Metc. (Mass.)* 276; *Fall River Iron Works Co. v. Old Colony & F. R. R. Co.*, 5 *Allen (Mass.)* 224; *Brainard v. Connecticut River R. Co.*, 7 *Cush. (Mass.)* 506.

(4) *Boroughs, counties, towns.*—A borough or town that is charged with the duty of keeping its streets in proper condition, and that is responsible if they are otherwise, is the proper party to apply for an injunction to restrain the unauthorized laying of a railroad track in the streets. *Stamford v. Stamford Horse R. Co.*, 36 *Am. & Eng. R. Cas.* 140, 56 *Conn.* 381, 15 *Atl. Rep.* 749, 1 *L. R. A.* 375. *Chester v. Connecticut Valley R. Co.*, 41 *Conn.* 348.

A county may maintain an action to enjoin a railroad company from laying its railroad, without any lawful authority, along and in a county road in several towns. *Stearns County v. St. Cloud, M. & A. R. Co.*, 36 *Minn.* 425, 32 *N. W. Rep.* 91.

15. *Who may be enjoined—Parties defendant.*—The court will not enjoin the state or its agent from taking possession of a railroad, where the state is not a party to such proceeding. *Printup v. Cherokee R. Co.*, 45 *Ga.* 365.—APPROVED IN *Branch v. Macon & B. R. Co.*, 2 *Woods (U. S.)* 385.

In a suit to enjoin the state treasurer from paying over the proceeds of the sales of certain lands granted to several railroad companies by the Kansas Act of February 23, 1866, the railroad companies are proper parties. *State v. Anderson*, 5 *Kan.* 90.—RECONCILED IN *Dixon Tp. v. Sumner County Com'rs*, 25 *Kan.* 519.

Where the action is to restrain the construction of a railroad in a city, and to annul an ordinance granting the permission of the city to build a road, it seems that the corporation is a necessary party, where it has reserved to itself a certain per cent. of the gross earnings of the road. *People v. New York & H. R. Co.*, 45 *Barb. (N. Y.)* 73.

Where the action is by an abutting property owner to obtain equitable relief against the construction and operation of an elevated railway, it is no ground for demurrer that both the lessor and lessee of the road are joined as defendants, the injury having commenced while the former was in possession. Neither does the fact that the lease

is for a very long term make the fact of the joinder of the two companies material, where a perpetual injunction is sought. *O'Sullivan v. New York El. R. Co.*, 25 N. Y. S. R. 903, 7 N. Y. Supp. 51.

In a suit by a borough for an injunction against laying a track in the street by a horse railroad company, which was defended by the company, a holder of some of the bonds of the company, secured by a mortgage of its property and franchise, claimed the right, on the ground of his interest, to appear and be made a party defendant, under Conn. Gen. St. §§ 887 and 1288, but did not allege that the company was not in good faith making defense, or that there was any necessity for his intervention. *Held*, that he was not entitled to be admitted as a defendant. *In re Ferris*, 56 Conn. 396, 15 Atl. Rep. 751.

16. Bill—Amendment.—(1) *General rules.*—A bill to restrain a corporation from executing its powers should make such specific and distinct allegations that the court can see that there is such excess. *Leo v. Union Pac. R. Co.*, 22 Blatchf. (U. S.) 22.

A bill "praying for an injunction against the use and occupation of" the complainant's land taken for the location of a railroad, must allege a specific demand, on a day certain, more than thirty days before the filing of the bill, or it will be bad on demurrer. *Mooers v. Kennebec & P. R. Co.*, 58 Me. 279.

A company will not be enjoined in the use of its main tracks in making up its outgoing trains and in unmaking its incoming trains, in doing which loud noises are made by means of the cars, engines, and men, and smoke and steam cast off, and the dwelling of the complainant caused to tremble or vibrate, and, when the doors or windows are open, smoke and steam carried therein, so that the inmates are aroused from their sleep, and his wife afflicted with nervousness, unless it be shown that there is some abuse or negligent use of the franchise. *Beideman v. Atlantic City R. Co.*, (N. J. Eq.) 19 Atl. Rep. 731.

A plaintiff having a cause of action which entitles him to an injunction restraining the unlawful maintenance and operation of a railroad in a street in front of his premises, by reason of its continuous interference with his rights of property, may unite with a demand for such equitable relief and for damages because of such interference, a

5 D. R. D.—72.

claim for a personal injury suffered on a particular occasion from the same wrongful appropriation and use of the highway. *Lamming v. Galusha*, 135 N. Y. 239, 31 N. E. Rep. 1024, 47 N. Y. S. R. 831; *reversing* 63 Hun 32, 22 Civ. Pro. 16, 43 N. Y. S. R. 592, 17 N. Y. Supp. 328.

Although a bill asking for an injunction contains the averment that the defendant, by cutting a channel through plaintiff's land when he had granted the defendant the right to construct its railroad through his land, would divert the water of a creek from his mill, and would work to him irreparable damage, yet if there is no averment that the defendant is insolvent, or that its officers, agents, or servants are transcending their authority, or that any damage which may be done to the property cannot be adequately compensated in damages, the injunction must be refused. *Chesapeake & O. R. Co. v. Bobbett*, 5 W. Va. 138.

Where a company is about to take possession of land without determining in some way the compensation to be paid therefor, and without payment or tender of payment thereof, the landowner may enjoin the company; but the complaint is fatally defective unless it avers that the company threatens or intends to enter upon the land without making payment therefor. *Diedrichs v. Northwestern Union R. Co.*, 33 Wis. 219.

The charge that they "have entered upon the same [the land], or are about to enter upon the same," is too uncertain, when taken in connection with another charge in the bill that a company has acted without the authority of law, and in the absence of any averment or charge that it is about to act further without authority of law. *Chesapeake & O. R. Co. v. Patton*, 5 W. Va. 234.

Where a bill is filed to enjoin the construction of a railroad, and a rule has been granted to show cause why an injunction should not issue, at the hearing of the rule, it is proper to allow plaintiffs to amend by supplying an omission which had been made the ground of objection in the answer, and to grant leave to take affidavits to rebut allegations in the answer; but a motion for a temporary injunction should be denied, as enjoining the construction of a public work which is authorized by law, and should not be granted until after the hearing of the rule to show cause. *Dela-*

ware & R. Canal Co. v. Raritan & D. B. R. Co., 14 N. J. Eq. 445.

(2) *Illustrations.*—A bill by the owner of land against the New Albany & Salem R. Co., to enjoin the company from constructing their road through his land, on the ground that the company has not assessed or tendered to him his damages, etc. The bill did not aver that the plaintiff was not called upon by an agent of the company, for a release of the right of way, before the commencement of operations by the company upon the line of the road. *Held*, that it must therefore be presumed that the complainant was thus called upon, pursuant to the requirement of the charter. *New Albany & S. R. Co. v. Connelly*, 7 Ind. 32.

A bill by creditors of a railroad alleged that the corporation was insolvent; that all its property was mortgaged to trustees for the benefit of one class of creditors; that it owed large amounts to other creditors, one of whom had attached all its property; that it was about to execute a lease to the attaching creditor for a long term of years, at a rental which would not pay the interest upon its indebtedness; and that the execution of the lease would be injurious to the interest of its creditors and stockholders. The prayer of the bill was for an injunction to restrain the corporation from further prosecuting its business, and for the appointment of receivers. *Held*, that the bill did not state a case within the equity jurisdiction of the court. *Pond v. Framingham & L. R. Co.*, 9 Am. & Eng. R. Cas. 551, 130 Mass. 194.—QUOTING *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 393.

Plaintiff, who was the lessee of a hotel, alleged that a strip of land between the hotel and defendant's track was a public highway, and for that reason a fence across it, erected by defendant, was a nuisance; but other averments showed that an easement appurtenant to the hotel consisting of a right of way across the land existed, and that the company had fenced across the same, leaving no opening. *Held*, that this might have been ground for a motion to make more specific, but it did not defeat the action. *Avery v. New York C. & H. R. R. Co.*, 31 Am. & Eng. R. Cas. 583, 106 N. Y. 142, 12 N. E. Rep. 619, 8 N. Y. S. R. 612, 7 Cent. Rep. 795.

A railroad company seeking an injunction to prevent defendant from interfering with its right of way alleged that the company

owned a right of way across an original survey before defendant acquired title to a part thereof, and that the defendant's vendor received a deed of the portion claimed by him, expressly reserving the right of way; that the plaintiffs had been in the constant possession and enjoyment of the right of way for more than twenty-one years, except as obstructed by the defendant. *Held*, that these allegations set forth an absolute title to the right of way, independent of any claim by prescription or long possession; and that the allegations as to long possession must be construed as intended to negative the idea of forfeiture by abandonment or non-user. *Chance v. East Tex. R. Co.*, 22 Am. & Eng. R. Cas. 169, 63 Tex. 152.

17. Affidavits.—As a general rule, an injunction will not be allowed upon mere information and belief, and the following affidavit to a bill of injunction is insufficient under the statute: "James Montgomery on his solemn oath says that each and every allegation contained in the foregoing bill are true so far as they are known to him personally, and so far as he has heard, he believes them to be true"—Montgomery not being a plaintiff in the bill. *Chesapeake & O. R. Co. v. Huse*, 5 W. Va. 579.

Where a bondholder seeks an injunction to restrain a company from misapplication of its funds, an affidavit for the injunction, which is made in part on information and belief, is sufficient, where it appears that plaintiff has no access to the company's books and is not an officer or personally familiar with its transactions; and where it further appears that the court by a former decree had found a misapplication, and where the facts showed no net earnings where they were formerly nearly a million and a half of dollars, and where the denial is by the company's secretary, but only consists of a bald contradiction, without any facts to refute the charge of misapplication. *Barry v. Missouri, K. & T. R. Co.*, 36 Fed. Rep. 228.

Where the allegations in a duly verified petition authorize a temporary injunction, but the affidavits presented by the defendants on the hearing of the application clearly rebut the essential allegations of the petition, no injunction ought to be allowed. *Atchison & N. R. Co. v. Troy*, 10 Kan. 513.

Where a bill alleges that a railroad was laid upon a public street in a temporary manner, with the design to pretend to the

court that the road was completed, when it was not, but the weight of evidence, by affidavits, was, that the portion of the road complained of was substantially constructed before the bill was filed, the court will refuse a preliminary injunction. *Beck v. Erie Terminal R. Co.*, 1 Pa. Dist. 449.

18. Questions raised.—Whether rates by state railroad commissioners are reasonable and just or not, even if subject to judicial control, is not open to inquiry in a suit to enjoin their discretionary action. *McWhorter v. Pensacola & A. R. Co.*, 37 Am. & Eng. R. Cas. 566, 24 Fla. 417, 12 Am. St. Rep. 220, 2 L. R. A. 504, 5 So. Rep. 129.

Where a bill alleges that the defendant's act will cause irreparable injury unless restrained, a demurrer to the complaint is not such an admission of the charge of irreparable injury as to conclude that question; but the court will consider the facts alleged in determining that question. *Boston & M. R. Co. v. Portsmouth & D. R. Co.*, 57 N. H. 200.

A court of equity will not decide upon the legal title of two railroad companies to a certain route, upon an injunction bill. *Morris & E. R. Co. v. Blair*, 9 N. J. Eq. 635.—APPLIED IN *Sioux City & D. M. R. Co. v. Chicago, M. & St. P. R. Co.*, 25 Am. & Eng. R. Cas. 150, 27 Fed. Rep. 770. RECORDED IN *East Ala. R. Co. v. Tennessee & C. R. R. Co.*, 29 Am. & Eng. R. Cas. 363, 78 Ala. 274.

On a bill to restrain a person from building a canal across land previously condemned for a railroad's use, for which damages have been assessed by a jury and paid into court, defendant cannot urge that the complainant's charter has expired, since such objection should have been taken by *certiorari*. *Packard v. Bergen Neck R. Co.*, 48 N. J. Eq. 281, 22 Atl. Rep. 227.

Where a telephone company files a bill to restrain a street-car company from using electricity on a certain street, on the ground that it interferes with plaintiff's wires, and no relief is asked, except an injunction, and the defendant's answer sets up no claim for affirmative relief, no claim for an extra allowance of costs can be made, under the code, where the bill is dismissed. *Hudson River Telep. Co. v. Watervliet T. & R. Co.*, 39 N. Y. S. R. 966, 61 Hun 161, 21 Civ. Pro. 204, 15 N. Y. Supp. 763.

When railroad companies exceed their

statutory powers in dealing with other people's property, no question of damages is raised when an injunction is applied for, but simply one of an invasion of a right. *Com. v. Pittsburgh & C. R. Co.*, 24 Pa. St. 159.—FOLLOWED IN *Payne v. Kansas & A. V. R. Co.*, 47 Am. & Eng. R. Cas. 228, 46 Fed. Rep. 546. QUOTED IN *St. Louis R. Co. v. Northwestern St. L. R. Co.*, 69 Mo. 65; *Deschamps v. Second & T. St. Pass. R. Co.*, 3 Phila. (Pa.) 279; *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.—*Attorney-General v. Ryan*, 5 Man. 81.

Upon a bill for an injunction and relief, an act of the legislature ought not to be adjudged unconstitutional on a mere preliminary hearing, for the injunction, and before an examination into the general merits of the bill. Upon such a bill, calling for an immediate injunction upon a railroad corporation to stay their appropriation of, or operations upon, the complainant's land, under their charter, on the ground that the charter was unconstitutional—*held*, that the case must take the ordinary course of judicial proceedings, and until a hearing upon the merits could be had, and for the purposes of the preliminary inquiry, the constitutionality of the act would be assumed, and the injunction denied. *Deering v. York & C. R. Co.*, 31 Me. 172.

19. Appeal—Review.—Where a suit for injunction turns wholly upon the validity of a statute granting the defendant the exclusive right to the use of certain property, to aid in the construction and operation of its railway, which is claimed by the plaintiff as a public levee or landing, and the use of such property in a way not materially in conflict with any use to which it is being put is of great advantage to the defendant, an injunction restraining it from such use will be modified accordingly; and in the consideration of the matter, weight will be given to the presumption that an act of the legislature is valid and that the defendant is engaged in a public enterprise in which the public is interested. *Portland v. Oregonian R. Co.*, 7 Sawy. (U. S.) 122, 6 Fed. Rep. 321.

Where a decree of a court of equity has enjoined an action of ejectment to recover possession of land condemned for railroad

*Order refusing injunction. Obligation to continue or reinstate injunction, whether maintainable in appellate court, see note, 2 AM. & ENG. R. CAS 290.

purposes, and has quieted the title in the company, it is no defense to the suit for injunction that the company has a perfect legal defense to the action in ejectment, since such defense is not as efficient as the decree in equity; and, moreover, this is especially true when the objection was not made in the court below, but the appellant answered to the merits, and went to a hearing on the bill without objection that the suit could not be maintained because the remedy at law of the appellee was complete. *Folts v. St. Louis & S. F. R. Co.*, 57 *Am. & Eng. R. Cas.* 582, 60 *Fed. Rep.* 316.

A harmless though useless restraint by a temporary injunction is a mere ideal burden, and therefore resort to this court before the final hearing of the case to throw it off is needless. In so far as the question of cost is involved, that will bear delay until such hearing. *Georgia Southern & F. R. Co. v. Ray*, 43 *Am. & Eng. R. Cas.* 95, 84 *Ga.* 376, 11 *S. E. Rep.* 352.

Where both an individual and a railroad company are claiming a strip of land, and the individual takes possession and obtains an injunction to restrain the company from interfering with the possession, the bill will be dismissed upon its appearing that the plaintiff has parted with his interest in the land, but it should be without prejudice to the rights of the parties at law. *Taylor v. Lake Shore & M. S. R. Co.*, 33 *Ill. App.* 116.

A railroad company cannot enjoin county commissioners from laying out a highway across its track, because it is stated to be "for public and private use," on the ground that the constitution does not allow private property to be taken for private use. It is sufficient if it appears that the use is to be public as well as private. *Highway Com'rs v. Chicago & N. W. R. Co.*, 34 *Ill. App.* 32.—DISTINGUISHING *Chicago & W. I. R. Co. v. Dunbar*, 95 *Ill.* 571. FOLLOWING AND QUOTING *Chaplin v. Highway Com'rs*, 126 *Ill.* 264.

Neither can such injunction be sustained on the ground that the act under which the commissioners proceed is unconstitutional, as embracing more than one subject in its title, being that of "roads and bridges." *Highway Com'rs v. Chicago & N. W. R. Co.*, 34 *Ill. App.* 32.

The object of a special injunction is protection only, and therefore when it appears that the complainant's interests will be fully protected by a decree enjoining con-

struction of a railroad in front of his property, a general injunction previously issued, enjoining all construction of the railroad, will be modified so as to allow the construction to proceed elsewhere. *Collins v. North-eastern El. R. Co.*, 2 *Pa. Dist.* 417.

Though an injunction remains in full force pending appeal under a supersedeas bond after a final decree is entered dissolving it, yet if the order granting the injunction limits its duration to the hearing of the cause in the district court, and on the hearing the injunction is dissolved, the rule does not apply. The supreme court will not revise such an order thus limited, on appeal, and an order which cannot be revised is not affected by an appeal. *Ft. Worth St. R. Co. v. Rosedale St. R. Co.*, 68 *Tex.* 163, 7 *S. W. Rep.* 381.—QUOTING *Daw v. Eley*, L. R. 3 *Eq.* 509. REVIEWING *Williams v. Pouns*, 48 *Tex.* 141.

On an appeal from a preliminary order of injunction made by a judge of the circuit court, in vacation, the appellate court will not consider any depositions in the cause taken by the appellant subsequent to the time such order of injunction took effect. *Freshwater v. Pittsburgh, W. & K. R. Co.*, 6 *W. Va.* 503.

Temporary injunction modified so as to allow a company to complete over its own land a side track already commenced, and to use the same until a final adjudication is had in the cause, this side track not touching any property of the complainants, and its construction and use being (according to the evidence) more likely to lessen than increase their annoyance or damage for the present. *Savannah, A. & M. R. Co. v. Fort*, 84 *Ga.* 300, 10 *S. E. Rep.* 1014.

An injunction was granted restraining the city of New Orleans from destroying or removing the Pontchartrain railroad depot. The city obtained an order dissolving the injunction on bond. The railroad company asked for an appeal from such order, which the court *a quo* refused, on the ground that no irreparable injury would follow. *Held*, that the allegations in the petition being taken as true, an irreparable injury would follow, because the company would, in case it was decided in their favor, be driven to another action on the bond to obtain their rights; that an appeal would lie in all cases from an interlocutory decree where an irreparable injury would follow. *State v. Judge*, 23 *La. Ann.* 51.—QUOTING *State v.*

Judge, 12 La. Ann. 455; *White v. Cazenave*, 14 La. Ann. 57.

After the court had refused a preliminary injunction for the removal of an oil pipe and to prevent its use by defendants, and had discharged an *ad interim* order staying the defendants in the premises, and an appeal therefrom had been taken and was pending, an application to this court to continue such *ad interim* order, merely on the ground of the appeal, was denied. *Central R. Co. v. Standard Oil Co.*, 2 Am. & Eng. R. Cas. 286, 33 N. J. Eq. 372.—APPLYING *Easton v. New York & L. B. R. Co.*, 24 N. J. Eq. 49, 59.

A county erected an elevated roadway or approach to a bridge, which was longer than the former approach, and obtained a preliminary injunction to restrain a street-car company from relaying its track on the approach. On appeal the injunction was modified so as to allow the track to be laid to the former beginning of the approach, and beyond that continued until final hearing. *Perkiomen Ave. Pass. R. Co.'s Appeal*, (Pa.) 4 Atl. Rep. 458. To same effect see *Pennsylvania S. V. R. Co. v. Philadelphia & R. R. Co.*, 151 Pa. St. 402, 24 Atl. Rep. 1086.

II. USE OF THE WRIT IN PARTICULAR CASES.

1. In General.

20. Acts injurious to stockholders.

—Where a transit company has received a majority of the stock of a railroad company, and has contracted for the construction of the road, and has issued its own stock for a very large sum, and has expended a considerable sum in money, and assumed obligations for another sum of considerable amount, and new directors of the railroad company are fraudulently elected at an adjourned meeting at which the transit company is not represented, who propose to take charge of the road, the transit company may prevent the carrying out of such arrangement by an injunction. *New York & B. Rapid Transit Co. v. Parrott*, 36 Fed. Rep. 462.

21. Alienation of property.—Where defendants robbed an express company in the United States of money, bonds, and other property, which the company had in its hands as common carriers, and invested the same in property in Ontario, a chancery

court on tracing the property will enjoin its transfer until a final hearing. *Merchants Exp. Co. v. Morton*, 15 Grant's Ch. (U. C.) 274.

E. & W., attorneys, by authority of an agreement, hypothecated bonds of a railroad to a banking company as collateral to secure moneys advanced or to be advanced in the construction and equipment of the railroad; and if the advancements were not paid by a fixed date, the banking company was to have power to sell the bonds. The time having passed, E. & W. organized a syndicate to purchase the bonds, and the bank gave notice to the railroad of its intention to sell the bonds, if the amount of their claim was not paid by a given day. The railroad filed a bill, *inter alia*, praying an injunction to restrain the sale. *Held*, that the relation between the parties was that of mortgagor and mortgagee, and not that of trustee and *cestui que trust*, and therefore the bank could not be restrained from selling, nor E. & W. from buying. *Nova Scotia C. R. Co. v. Halifax Banking Co.*, 23 Nov. Sc. 172.

22. Appropriation of land.*—The principle upon which a court of equity proceeds in interfering to prevent bodies corporate having compulsory power to enter upon, and to take and appropriate for their own uses, the lands of others, differs materially from the principle upon which it intervenes to prevent the commission or continuance of waste, nuisances, or trespasses, when only private rights, or the rights of persons, natural or artificial, not having such powers, are involved; the court intervening in such cases, because of the necessity to keep such corporations within control and in subjection to the law, rather than upon the theory that they are trespassers, or that the injury which they are inflicting is irreparable. *East & W. R. Co. v. East Tenn., V. & G. R. Co.*, 22 Am. & Eng. R. Cas. 81, 75 Ala. 275.—QUOTED IN *Highland Ave. & B. R. Co. v. Birmingham Union R. Co.*, 93 Ala. 505.

If, however, in such case, the right and title of the complainant are not clear, or if the whole controversy resolves itself into a naked dispute as to the strength of the legal title, and it is not shown that an action

* Injunction to prevent illegal taking or occupation of lands or operation of roads, see notes, 22 AM. & ENG. R. CAS. 88; 10 *Id.* 393.

of trespass or of ejectment will not afford all necessary relief, the court will not intervene by injunction. *East & W. R. Co. v. East Tenn., V. & G. R. Co.*, 22 Am. & Eng. R. Cas. 81, 75 Ala. 275.

The pendency of a proceeding by a prosecuting attorney, in the nature of a *quo warranto*, against a railroad company, to procure the forfeiture of its franchises on the ground that it has been organized to do an illegal act, cannot affect or delay the decision in a prior proceeding to enjoin such company from further prosecuting the purpose for which it has been organized. *Aurora & C. R. Co. v. Lawrenceburgh*, 56 Ind. 80, 18 Am. Ry. Rep. 136.

Whether this court will prevent, by injunction, the permanent appropriation of lands by a railroad company acting *ultra vires*, in the absence of irreparable injury, *quære*. *Erie R. Co. v. Delaware, L. & W. R. Co.*, 21 N. J. Eq. 283.

23. Conspiracy to boycott.—A combination for the purpose of inducing officers and employes of a railroad company, subject to the Interstate Commerce Act, to refuse to receive and handle the freights of a connecting road, with a view of injuring the latter, is a conspiracy within the meaning of the Interstate Commerce Act, § 10, and a court of equity may enjoin all acts that might affect the exchange of interstate traffic. *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.*, 53 Am. & Eng. R. Cas. 307, 54 Fed. Rep. 730.—APPLYING *Bowen v. Hall*, 6 Q. B. D. 333; *Walker v. Cronin*, 107 Mass. 555; *Lumley v. Gye*, 2 El. & Bl. 216; *Rice v. Manley*, 66 N. Y. 82; *Benton v. Pratt*, 2 Wend. (N. Y.) 385.

If a common carrier is injured by a conspiracy on the part of an organization of engineers to prevent it from the interchange of traffic with connecting carriers, it may have a remedy for the loss against all engaged in the conspiracy. *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.*, 53 Am. & Eng. R. Cas. 307, 54 Fed. Rep. 730.—QUOTING *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598.

24. Construction of road.—Averments in a bill filed by one railroad corporation against another, to enjoin the defendant from constructing its railroad on the complainant's right of way, that the defendant has wrongfully taken possession of lands of which the complainant was possessed, and is appropriating the same to its

uses; that it had not proceeded to the condemnation of the lands in the mode prescribed by law, and had not, in obedience to the constitution, made just compensation therefor—give the court jurisdiction to prevent the further invasion of the property by the defendant, without regard to any question of irreparable injury. *East & W. R. Co. v. East Tenn., V. & G. R. Co.*, 22 Am. & Eng. R. Cas. 81, 75 Ala. 275.

If a railroad corporation, which is authorized by statute to select a route for the road, and to construct the road thereon, cannot construct its road without imminent danger to the works of a canal company, previously constructed, under a similar authority from the legislature, the railroad company will be restrained by injunction from constructing its road upon that route. *Hudson & D. Canal Co. v. New York & N. J. R. Co.*, 9 Paige (N. Y.) 323.—REFERRING TO *Mohawk Bridge Co. v. Utica & S. R. Co.*, 6 Paige 554.

The power of defendant company as to the location of its tracks and branches for station accommodations in New York city is limited by its charter, granted in 1846; and if it attempts to build beyond the designated points it may be enjoined. *People v. Hudson River R. Co.*, 2 Abb. Pr. N. S. (N. Y.) 249, 32 How. Pr. 394. *Mississippi, O. & R. R. Co. v. Gaster*, 24 Ark. 96.—FOLLOWING *Mississippi, O. & R. R. Co. v. Cross*, 20 Ark. 443.

Stockholders of a railroad company may enjoin a company and its directors from expending money to build a branch line and bridges, where it appears that the enterprise must result in a serious loss, without any immediate prospect of advantage. *Ives v. Smith*, 8 N. Y. Supp. 46; *affirming* 3 N. Y. Supp. 645.

Building another railroad on a portion of the unused right of way of a railroad company, which it has acquired by purchase, creates an additional servitude upon the easement, and the consent of the owner of the land must first be obtained, and compensation made to him for the damage, although the company to which the right of way was originally conveyed has transferred a part of it to the company building the additional road. The owner of the fee may enjoin the second company from building its road until compensation has been made. *Ft. Worth & R. G. R. Co. v. Jennings*, 46 Am. & Eng. R. Cas. 574, 76 Tex.

373. 13 S. W. Rep. 270, 8 L. R. A. 180.—DISTINGUISHING *Hatch v. Chicago & I. R. Co.*, 18 Ohio St. 118. QUOTING *Houston & T. C. R. Co. v. Odum*, 53 Tex. 353; *Texas & S. R. Co. v. Meadows*, 73 Tex. 32; *East Ala. R. Co. v. Visscher*, 114 U. S. 341.

Where it is doubtful whether a company is able financially to construct its main line, a municipal corporation that has subscribed to its stock, with the expectation of being benefited by the construction of the main line, may enjoin the company from expending its funds in constructing branch roads. *Platteville v. Galena & S. W. R. Co.*, 43 Wis. 493, 17 Am. Ry. Rep. 1.

An injunction will lie to restrain a railway company from proceeding with blasting operations whereby stone is thrown on neighboring buildings and into gardens. *Arnold v. Furness R. Co.*, 22 W. R. 613.

Where a charter authorizes a company to construct a railroad between designated points, without naming any line of route, with a provision that it may also build a lateral road to a designated place, much is left to the discretion of the company in building the road, and it will not be enjoined from building the main line so as to run through the lateral point, in the absence of proof that it has not acted in good faith or exercised a sound discretion. *Bonaparte v. Camden & A. R. Co.*, *Baldw.* (U. S.) 205.—QUOTED IN *State ex rel. v. Wilson*, 49 Mo. 146.

The construction of a track for a horse railroad over a turnpike road, under an agreement with the turnpike company, by a corporation whose charter contains a restriction making it "void so far as relates to the right to construct the said road in any town until the act has been accepted by the selectmen," will not be restrained by injunction as a nuisance in a town traversed by a turnpike road, merely because the selectmen of the town have not accepted the charter. *District Attorney v. Lynn & B. R. Co.*, 16 Gray (Mass.) 242.

Where two companies have the authority to build and operate railroads between the same termini, neither can take exception to any irregularity or unlawfulness in the exercise of such franchise by the other, unless it can show a particular injury to itself from such course. *Erie R. Co. v. Delaware, L. & W. R. Co.*, 21 N. J. Eq. 283.—DISTINGUISHED IN *Evans v. Missouri, I. & N. R.*

Co., 64 Mo. 453. QUOTED IN *Pennsylvania R. Co. v. National R. Co.*, 23 N. J. Eq. 441.

Where a corporation is authorized by statute to construct its road upon a particular route, a mere temporary injury to a canal which has been previously authorized and constructed, and which can be compensated in damages, is not sufficient to justify the granting of an injunction to stop the progress of the work. *Hudson & D. Canal Co. v. New York & E. R. Co.*, 9 Paige (N. Y.) 323.—QUOTED IN *Sargent v. Ohio & M. R. Co.*, 1 Handy (Ohio) 52.

But if the railroad corporation is constructing its railway upon such route without authority, and such construction will probably injure the works of the canal company, an injunction will be granted to restrain the construction of the railway upon the route of the canal. *Hudson & D. Canal Co. v. New York & E. R. Co.*, 9 Paige (N. Y.) 323.

It is no objection to the construction of a railroad on the route of a canal that the road cannot be traversed by steam engines after it is completed, without frightening the horses upon the towing path of the canal, so as to destroy the navigation of such canal. But if the railroad company attempts to use steam engines upon the road, instead of horses, after the road is completed, the remedy of the canal company is to apply for an injunction to restrain the use of such engines. *Hudson & D. Canal Co. v. New York & E. R. Co.*, 9 Paige (N. Y.) 323.

Where a company has made and filed a map and survey of the line of an intended road, and has given the required notice to all persons interested, and no change of route is made, it has acquired a right to construct and operate its road over said line, to the exclusion of all other railroads, and free from interference, and it may enjoin such interference. *Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co.*, 35 Am. & Eng. R. Cas. 267, 110 N. Y. 128, 13 Cent. Rep. 232, 17 N. E. Rep. 680, 16 N. Y. S. R. 838; *affirming* 44 Hun 206, 8 N. Y. S. R. 237.—DISTINGUISHED IN *Pocantico Water Works Co. v. Bird*, 130 N. Y. 249.

By virtue of an agreement made subsequent to a mortgage, with the grantees of the mortgagors, a company claimed the

right to construct approaches to their tunnel, over lands and railroad track covered by their mortgage, thereby inflicting serious damage, and proposing to allow no compensation, except the cost of the alteration at the crossing. *Held*, that such right would not be determined on a petition for an injunction to prevent the injury, filed by the receiver of the mortgagors, as auxiliary to a bill to foreclose, where the respondents were not parties to such bill. They should be made parties in order that the question may be directly litigated. *Coe v. New Jersey Midland R. Co.*, 28 N. J. Eq. 27, 14 Am. Ky. Rep. 5.

The mortgagees—*held*, under the circumstances, not estopped by acquiescence. *Coe v. New Jersey Midland R. Co.*, 28 N. J. Eq. 27, 14 Am. Ky. Rep. 5.

The injunction restraining the building of the approaches was modified so far as to allow the construction to go on, on condition that the respondents make and pay for all alterations in the petitioners' track, where rendered necessary thereby, and give bond to pay for all other damage inflicted, including the value of the land occupied, preserving to the petitioners the use and benefit of their drill-yard, etc., the grade of which would be affected by the raising of the track at the crossing. *Coe v. New Jersey Midland R. Co.*, 28 N. J. Eq. 27, 14 Am. Ky. Rep. 5.

Two railway companies were in the actual possession of a strip of ordinance land 100 feet in width, along which their tracks were laid, and a third company proceeded to lay its track on the same strip, when an injunction was obtained at the instance of one of the first-named companies restraining such third company from further proceeding. Thereupon they obtained from the government of the Dominion a license of occupation of the same strip, the order in council authorizing such license, stating that it was not to "operate to imply any covenant or agreement on the part of the crown to give possession to the licensees, but that such license shall be accepted by them subject to any legal right which" the two railways so in possession "may hereafter establish in respect of one hundred feet or any part thereof." A motion was then made to dissolve the injunction, which was refused with costs. *Grand Trunk R. Co. v. Credit Valley R. Co.*, 26 Grant's Ch. (U. C.) 572.

25. Improper use of corporate franchise.*—The court of equity may enjoin a railroad company from exceeding or abusing its corporate franchise, or from violating the public law, to the injury of the public, upon information filed by the attorney-general. *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.—QUOTED IN *Stockton v. Central R. Co.*, 50 N. J. Eq. 52.

A court of equity has jurisdiction, at the instance of stockholders of a railroad corporation, to restrain the corporation and those who have control and management thereof from acts tending to the destruction of its franchises, from violation of the charter; from misuse or misappropriation of the corporate powers or property, and from other acts prejudicial to the stockholders amounting to a breach of trust. Such jurisdiction will be entertained, notwithstanding the case may involve, as an incidental question, the inquiry which of two is the legal board of directors. *Pond v. Vermont Valley R. Co.*, 12 Blatchf. (U. S.) 280.

If the charter of the street railroad company has been misused to benefit private persons, and if, instead of being used to operate a road for the public, by a sham arrangement and contrivance it has been used to operate it for a private corporation, its operation or use ought to be perpetually enjoined. *Mayor, etc., of Macon v. Harris*, 75 Ga. 761.

26. Interference with business.—Where a railroad company has the power to carry passengers from its road across a river to a city, but contracts with the city and the lessees of a public ferry owned by the city for the transportation of all its freight and passengers, but afterwards starts a ferry of its own under a claim that the public ferry is inadequate and not properly run, which is denied, an injunction will not issue to restrain the city authorities from arresting the railroad employes while running the ferry. *Texas & P. R. Co. v. Baton Rouge*, 36 Fed. Rep. 845.

Where a landowner grants land to a company "to be used for railroad purposes only, and none other," and the company knows that he is in the business of buying and shipping cotton seed at the point, and that his object is to prevent competition, permitting third parties to erect a build-

* Restraining exercise of corporate franchise. Action by one in behalf of others, see note, 9 L. R. A. 273.

corporate
uity may en-
exceeding or
or from vio-
injury of the
by the attor-
v. *Chicago*
QUOTED IN
N. J. Eq. 52.
iction, at the
railroad cor-
poration and
management
destruction
of the char-
lization of the
y, and from
stockholders
Such juris-
withstanding
idental ques-
is the legal
rmont Valley

ailroad com-
nefit private
ing used to
, by a sham
it has been
corporation,
e perpetually
n v. *Harris*,

business,—
as the power
ad across a
with the city
ry owned by
n of all its
wards starts
aim that the
not properly
tion will not
orities from
s while run-
Co. v. *Baton*

nd to a com-
md purposes
e company
ss of buying
e point, and
competition,
ect a build-

ate franchise.
see note, 9

ing on the ground, where cotton seed is bought and shipped, is a violation of the terms of the conveyance, and the landowner may enjoin the company. *Wilczinski v. Louisville, N. O. & T. R. Co.*, 66 Miss. 595, 6 So. Rep. 709.

A court of equity may grant an injunction to restrain the police board of a city from interfering with the business of an express company, which passes through the state; but such board has the right to control the manner of delivery of goods in the city. *Adams Exp. Co. v. Board of Police*, 65 How. Pr. (N. Y.) 72.

A railroad company cannot maintain an injunction against fifteen or twenty different men along the line of its road for indiscriminately selling whiskey to its employes, whereby they are made drunk and rendered unfit for duty. The company has a right to require its men to keep sober, and if they do not, it may discharge them; and this is all the remedy which the law gives. *Northern Pac. R. Co. v. Whalen*, 3 Wash. T. 452, 17 Pac. Rep. 890.

Neither can the company enjoin the county commissioners from granting a license to sell intoxicating liquors along the line of its road. If the commissioners act erroneously, the remedy is by appeal or *certiorari*, and not by injunction. *Northern Pac. R. Co. v. Whalen*, 3 Wash. T. 452, 17 Pac. Rep. 890.

27. Interference with track.—The open and acknowledged possession by a company of its right of way is sufficient to sustain an injunction to prevent interference therewith, forcibly or without its consent; being in possession and occupation of the premises the company cannot be disturbed in such possession, except through proper legal proceedings. *Northern Pac. R. Co. v. St. Paul, M. & M. R. Co.*, 1 Am. & Eng. R. Cas. 12, 1 *McCrary* (U. S.) 302, 3 Fed. Rep. 702.—FOLLOWED IN *Payne v. Kansas & A. V. R. Co.*, 47 Am. & Eng. R. Cas. 228, 46 Fed. Rep. 546.

An unauthorized interference with complainant's lines of road in actual operation, and one which complainant was engaged in building for the purpose of constructing its steam railway, is a special injury to the complainant, which equity will enjoin. *Denver & S. R. Co. v. Denver City R. Co.*, 2 Colo. 673, 20 Am. Ry. Rep. 339.

Where a railroad is constructed in a deep cut on a street, and the company supports

the sides of the cut by walls, on which its station building rests, the town authorities will be enjoined from constructing a drain so as to carry water from the street and discharge it in the cut to the injury of the wall and the railroad, where it appears that a drain can be constructed elsewhere so as not to injure the company, at a somewhat greater cost; and this is so though the construction of the railroad somewhat intercepted the drainage of the locality. *Lanbury & N. R. Co. v. Norwalk*, 37 Conn. 109.

An injunction will be granted to restrain the owner of land, who has granted a right of way to a railroad, from erecting a mill within the limits prescribed by the deed, and where it will interfere with the repair and construction of the company's track. *Cunningham v. Rome R. Co.*, 27 Ga. 499.

The courts have the power to restrain the moving of a house across a street electric railroad when such moving will result in the stopping of the cars an unnecessary length of time, and the cutting or destruction of the wires, even though the common council of the city have failed or refused to take any steps to prevent such injury or destruction. *Williams v. Citizens' R. Co.*, 130 Ind. 71, 29 N. E. Rep. 408.—DISTINGUISHING *Kistner v. Indianapolis*, 100 Ind. 210; *Wood v. Mears*, 12 Ind. 515.

Proof that the defendant asserted that a company did not own a certain right of way, that he was going to have the right of way adjusted and recover damages therefor, is not sufficient evidence of a threat or danger of violent interference to sustain an action of injunction against the defendant. *St. Joseph & D. C. R. Co. v. Dryden*, 17 Kan. 278.

Where one railroad company has built its roadbed, and obtained its right of way and grounds for the station buildings, machine shops, side tracks, etc., through a defile or canyon, an injunction will be granted in its favor, restraining another railroad, authorized to build to the same point, from interfering with its track until there has been an adjustment of their respective rights under the general railroad law of the territory. *Montana C. R. Co. v. Helena & R. M. R. Co.*, 6 Mont. 416, 12 Pac. Rep. 916.

A statute authorized the extension of a railroad, and provided that it should not cross any existing railroads at grade, and that all necessary structures for crossing under grade should be subject to the ap-

proval of the railroad commissioners. A plan for the proposed structure by which a railroad was to be crossed was prepared and submitted to the railroad commissioners, and, a hearing being had, was approved by them. After the hearing, and before being notified of the approval, the company whose location was to be crossed extended a siding so as to make a second track at the point of crossing. The other company tore up this siding and removed the embankment supporting the same. The track of the railroad as it existed at the time of the hearing was not disturbed, and the extension of the railroad was constructed under the same, in accordance with the plan proposed to, and approved of by, the commissioners. *Held*, that the company whose location was thus interfered with could not maintain a bill in equity against the other company to restrain it from tearing up the siding and removing the embankment, and to recover damages for such acts. *Fitchburg R. Co. v. New Haven & N. Co.*, 14 *Am. & Eng. R. Cas.* 95, 134 *Mass.* 547.

28. Issuing stock or bonds.—Where directors are charged with issuing illegal stock in excess of the authorized capital, in the absence of some special necessity therefor, an injunction should not extend beyond the excess, so as to affect the genuine stock. *Fisk v. Chicago, R. I. & P. R. Co.*, 4 *Abb. Pr. N. S. (N. Y.)* 378, 53 *Barb.* 513, 36 *How. Pr.* 20.

Under the Pa. Constitution, art. 16, § 7, providing that "no corporation shall issue stocks or bonds except for money, labor done, or property actually received," an injunction will not lie, at the suit of the state, to restrain a railroad from borrowing money, and issuing its bonds therefor, where it is not shown that the company would not receive full value for the bonds, if issued. *Com. v. Lehigh Ave. R. Co.*, 129 *Pa. St.* 405, 18 *Atl. Rep.* 414, 498.

29. Laying pipes.—The Standard Oil company, a foreign corporation, laid a pipe line on the bottom of a navigable river on lands belonging to the state, without authority, and underneath a railroad drawbridge; but the channel was of such a depth and width that the pipe line would not interfere with the bridge. *Held*, that a preliminary injunction to prevent the laying of the pipe should be denied, where it appeared, among other things, that the pipe had been laid before the application was

made, and because the railroad franchise of carrying oil is not exclusive, and especially where the oil company only intends to transport its own oil. *United N. J. R. & C. Co. v. Standard Oil Co.*, 1 *Am. & Eng. R. Cas.* 33, 33 *N. J. Eq.* 123.

A street was condemned across railroad lands, which necessitated the building of a bridge sixteen feet above the tracks, which was built at the expense of the city. Subsequently an oil company, under authority from the city, laid a pipe for the transportation of oil under the surface of the street and crossing the railroad tracks on a level therewith and alongside of the bridge. *Held*, that an injunction to restrain the laying of the pipe line was properly refused. *Central R. Co. v. Standard Oil Co.*, 1 *Am. & Eng. R. Cas.* 36, 33 *N. J. Eq.* 127.

30. Laying and taking up of tracks.

—Where one company owns lands and contracts to allow another company to lay tracks thereon, an injunction will issue to restrain an interference with the laying of such track, where it appears that if the laying of the track is prevented, the damage to the company will be of a kind that cannot be fixed by evidence, being wholly uncertain, and where no question arises as to whether the use of the tracks will be inconsistent with the easement granted. *Chicago & W. I. R. Co. v. Lake Shore & M. S. R. Co.*, 30 *Ill. App.* 129.

The operations of a company in the construction of a great work of public convenience should not be suddenly arrested without notice, unless in a case of urgent and pressing necessity; yet where the complainants cannot be otherwise secured in their rights, an *ex parte* order for an injunction will be granted. *Ross v. Elizabeth-Town & S. R. Co.*, 2 *N. J. Eq.* 422.

Where a company proposes to discontinue a section of its road and tear up the track, it may be enjoined from doing so, where it appears that the abandonment of the section would be attended with some public inconvenience by requiring persons to travel a more circuitous route, and require transshipment of freight, and where an injunction will not apparently prejudice the rights of the company. *People v. Albany & V. R. Co.*, 37 *Barb. (N. Y.)* 216; *affirming* 11 *Abb. Pr.* 136, 19 *How. Pr.* 523.

Under the Pa. Act of 1846 an injunction cannot issue to restrain commissioners for the erection of a public building from tak-

ad franchise of
and especially
tends to trans-
J. R. & C. Co.
Eng. R. Cas.

cross railroad
building of a
tracks, which
the city. Sub-
under authority
the transporta-
of the street
acks on a level
the bridge,
strain the lay-
properly refused.
4 Co., 1 Am. &
127.

up of tracks.
lands and con-
pany to lay
will issue to
the laying of
that if the lay-
the damage to
d that cannot
wholly uncer-
arises as to
will be incon-
granted. *Chi-*
Shore & M.

ny in the con-
public conven-
arrested with-
of urgent and
ere the com-
se secured in
der for an in-
Ross v. Eliza-
Eq. 422.

o discontinue
up the track,
g so, where it
t of the sec-
some public
sons to travel
require trans-
re an injunc-
ce the rights
bany & V. R.
ming 11 Abb.

an injunction
missioners for
ng from tak-

ing up the rails of a passenger railway com-
pany occupying the proposed site of the
building. *West Phila. Pass. R. Co. v. Per-*
kins, 4 Brews. (Pa.) 173.

An injunction will not be issued to re-
strain a railroad from laying its tracks
across a canal that has been practically
abandoned for over twelve years. *Schuyl-*
kill Nav. Co. v. Pottsville & M. R. Co., 17
Phila. (Pa.) 648.—FOLLOWING Pittsburgh
& L. E. R. Co. v. Bruce, 12 W. N. C. 554.

Plaintiff company, seventeen years be-
fore, purchased a road of a rival company,
which ran in the same direction as plaintiff's
road, but at certain places some two or
three miles apart; took up the track, and,
in most cases, the right of way had become
inclosed with the adjoining lands. Def-
endant company purchased the interest of
the adjoining owners and commenced to
lay a track thereon. *Held*, that a tempo-
rary injunction should not issue. *Troy &*
B. R. Co. v. Boston, H. T. & W. R. Co., 13
Hun (N. Y.) 60, 57 How. Pr. 181; not same
case as 86 N. Y. 107.

The city of Philadelphia owned a track
which the plaintiff company had used for
the purposes of a connection. They then
contracted with two other roads to jointly
build a "junction railroad," which would
serve the purpose of a city track. *Held*,
that after such arrangement plaintiff could
not enjoin the city from tearing up its track
on the ground that it had expended large
sums of money in repairing the same. *Phil-*
adelphia v. Philadelphia & R. R. Co., 58 Pa.
St. 253.

A preliminary injunction was granted on
a bill filed by a railroad company against a
borough and its officers to restrain defend-
ants from interfering with the laying of a
second track upon land acquired by the
plaintiff company's lessor from the com-
monwealth, but which had been permis-
sively used as a passageway by the public
for more than twenty-one years. *Pennsyl-*
vania R. Co. v. Freeport, 138 Pa. St. 91, 20
Atl. Rep. 940.—REVIEWING Pennsylvania
R. Co. v. Gray, 2 Railroad World 399.

31. Municipal legislation.—An in-
junction to restrain a municipal corpora-
tion from passing an ordinance giving a
railroad company permission to run steam
engines on certain streets, should not be
granted unless it appears that the mere vot-
ing on and formal passage of the ordinance
would instantly, without any action or at-

tempt to enforce any right or privilege
under it, work an irremediable private in-
jury. *Whitney v. Mayor, etc., of N. Y., 28*
Barb. (N. Y.) 233.

The right of a street railway company to
extend its track is derived from its charter
and not from a city ordinance merely grant-
ing permission to do so; and the city can-
not be enjoined from passing such ordi-
nance, as it would confer no rights and
would be harmless until some steps were
taken to extend the track under the ordi-
nance. *Chicago v. Evans, 24 Ill. 52.*

A court of equity has no jurisdiction to
enjoin a suit for the violation of a village
ordinance. *Yates v. Batavia, 79 Ill. 500.*—
FOLLOWED IN Chicago, B. & Q. R. Co. v.
Ottawa, 47 Ill. App. 73.

If a city ordinance is invalid, a person
affected by its enforcement has a right to
ask preventive equitable relief in order to
prevent a multiplicity of prosecutions, and
such consequences as would necessarily re-
sult from its enforcement. *South Covington*
& C. St. R. Co. v. Berry, 50 Am. & Eng. R.
Cas. 434, 93 Ky. 43, 18 S. W. Rep. 1026.

An injunction *pendente lite* should be
granted on the application of a taxpayer, to
restrain municipal authorities from selling a
franchise for a street railway, only where
the plaintiff clearly shows that the action
complained of is in violation of N. Y. Act
of 1890, ch. 565, as amended in 1892, ch.
676, regulating the sale of such franchises.
Abraham v. Meyers, 29 Abb. N. Cas. (N. Y.)
384.

An abutting lot owner cannot restrain the
municipal authorities from selling a fran-
chise for a street railway merely on the
ground that the sale is illegal, as he has no
rights that may be enforced before the ac-
tual construction of the road is threatened
or commenced. *Abraham v. Meyers, 29*
Abb. N. Cas. (N. Y.) 384.

**32. Occupation of streets and
highways.**—In the absence of any im-
putation of fraud on the part of the company
in procuring the passage of a city ordinance
under legislative authority granting to the
company a right of way for its track through
certain designated streets, an injunction
will not lie at the suit of an abutting owner
to restrain the company from changing its
tracks from a narrow to a standard gauge.
Denver & S. F. R. Co. v. Donke, 36 Am. &
Eng. R. Cas. 155, 11 Colo. 247, 17 Pac. Rep.
777.

Where a company refuses to comply with Mass. Gen. St. ch. 63, §§ 57-60, requiring such companies to construct a proper proportion of highways laid out at grade across their tracks, the city which controls such highway will not be enjoined from constructing the entire way across the track. *Old Colony R. Co. v. Foll River*, 147 Mass. 455, 18 N. E. Rep. 425.

Where a projector^d highway of a city coincides with the intersection of a proposed canal and a railroad in a marsh inaccessible to horses and vehicles, and a landowner has procured the adoption of a resolution of the city council granting to him a contract for the erection of a drawbridge at that point, a preliminary injunction prayed by him against the construction of the railroad by a solid filling will not be granted, unless he will stipulate to release the judgment for damages already awarded and submit to a new award, and obtain the consent of the city council to allow the railroad to cross the street in question at grade, and not insist upon a drawbridge. *Packard v. Bergen Neck R. Co.*, 48 N. J. Eq. 281, 22 Atl. Rep. 227.—FOLLOWED IN *State v. Bayonne*, 54 N. J. L. 474.

Such preliminary injunction will not be granted when the evidence fails to show the accrued cost of the canal, or an estimate thereof, or how much more it would cost complainant to erect a drawbridge than to cross by a solid filling, or that such cost would not be more than the whole value of the canal, or that the work already expended would be a total loss. *Packard v. Bergen Neck R. Co.*, 48 N. J. Eq. 281, 22 Atl. Rep. 227.

Where a taxpayer files a complaint containing undenied allegations that the city authorities have granted the right to construct and operate a railway on certain streets, which is of great value, but which was obtained without any consideration, and that a public sale of the franchise, or the construction and operation of the road by the city itself, would have brought large returns to the municipal corporation, an injunction should issue to prevent the construction of the road. *Stuyvesant v. Pearsall*, 15 Barb. (N. Y.) 244.

The exclusive privilege of laying a railway track, and running cars, and receiving pecuniary emolument therefrom, like the franchise of a bridge or ferry, or other incorporeal hereditament, is as much a sub-

ject of property as the park or the city hall, or the moneyed contents of the city treasury. To grant such a privilege to a few favored individuals, without any public equivalent, is a gross breach of trust, and subject, as such, to the jurisdiction of the supreme court, sitting as a court of equity; and the court, on the complaint of a taxpayer, may restrain the making of such a grant by injunction, or if the grant is already made, may declare it null and void. *Stuyvesant v. Pearsall*, 15 Barb. (N. Y.) 244.

Neither the people nor individual property owners abutting on a street can restrain a railroad company which is authorized by law to construct a railroad on the street, nor the city from giving its assent to such construction. *People v. Kerr*, 37 Barb. (N. Y.) 357; modifying 20 How. Pr. 144; affirmed in 27 N. Y. 188.

An injunction will not lie to restrain a railroad company from making a cut and excavation in a highway merely on the supposition or anticipation that the company will not restore the highway to its former usefulness. After the work is completed, affirmative proceedings may be instituted if the usefulness of the highway is not restored. *Baucus v. Albany Northern R. Co.*, 8 How. Pr. (N. Y.) 70.

An injunction will not be granted to restrain a railroad company from destroying a bridge, part of a public street which a municipality, by a contract with said company under an act of assembly, had agreed to vacate because the street had not been vacated by a formal ordinance of the council of said municipality; for equity considers that as done which ought to have been done. *McGee's Appeal*, 114 Pa. St. 470, 8 Atl. Rep. 237.

A preliminary injunction restraining a borough from interfering with the construction of a street railway will not be continued, where the resolutions and ordinances of the borough council granting the consent of the borough to the construction of the railway are conditional in character, and it is doubtful whether the plaintiff company has accepted them, and it is also alleged by defendant that the resolutions and ordinances were never signed by the burgess or posted as required by law. *Athens, S. & W. Elec. St. R. Co. v. Sayre*, 156 Pa. St. 23, 26 Atl. Rep. 780.—QUOTING *Kepner v. Com.*, 40 Pa. St. 124.

The condition of a railway charter that the consent of the city should be obtained

before constructing the road will be enforced in equity by injunction. *Philadelphia v. Lombard & S. St. Pass. R. Co.*, 5 *Phila. (Pa.)* 248.

Under an act of assembly and an ordinance of a city council the footway or pavement of a street was surrendered to a railroad company for a specific use, with a proviso for reversion to the city when the use ceased; and the company conveyed a lot, described as bounded by the line of the street. *Held*: (1) that the line of the street had not been changed by the ordinance and the act of assembly; (2) that the house line, and not the curb line separating the cartway from the footway, was the boundary or line of the street; (3) that the erection of a building twelve feet from the curb line could be restrained by injunction. *Pennsylvania R. Co. v. Pittsburgh Grain Elevator Co.*, 50 *Pa. St.* 499.

33. Operation of railway.—The provision of Iowa Code, § 3391, to the effect that an injunction to stop "the operations of a railway" can only issue upon reasonable notice, only applies to completed roads, and not to those which are in process of construction. *Johnston v. Chicago, M. & St. P. R. Co.*, 58 *Iowa* 537, 12 *N. W. Rep.* 576.

Where a railway company carries a large portion of traffic which, according to an agreement with another company, ought to have passed over its line, by other lines belonging to such first-mentioned company, the case is one in which the court may interfere by injunction. *Wolverhampton & W. R. Co. v. London & N. W. R. Co.*, *L. R.* 16 *Eq.* 433, 43 *L. J. Ch.* 131.—CONSIDERED IN *Donnell v. Bennett*, *L. R.* 22 *Ch. D.* 835, 52 *L. J. Ch.* 414, 48 *L. T.* 68, 31 *W. R.* 316, 47 *J. P.* 342.

The bringing or user of engines upon a railway will be restrained under section 115 of 8 & 9 *Vict. c. 20*, unless they have been approved by the railway company as there-in mentioned. *Midland R. Co. v. Ambergate, N. & B. R. Co.*, 10 *Hare* 359, 1 *Ry. & C. T. Cas.* 19.

If a junction could not be reasonably worked when constructed, a company could not be enjoined to construct it as a reasonable facility. *Dublin Whiskey Distillery Co. v. Midland G. W. R. Co.*, 4 *Ry. & C. T. Cas.* 32.

In order to induce this court to interfere under the *Ry. & C. T. Act* of 1854, for the purpose of enjoining a railway company to

run through trains on a continuous line of railways, it is not necessary to show a case of individual grievance, but it is necessary to show a case of public inconvenience. The court, in judging what is reasonable accommodation, will consider the general traffic of the railway, and the accommodation which such traffic requires. *In re Barret*, 1 *C. B. N. S.* 423, 26 *L. J. C. P.* 83, 1 *Ry. & C. T. Cas.* 38.

Seem, if there were two competing companies having lines from A. to B., and one of them had a continuation from B. to C., and the company having such continuation arranged the departures from B. so as to interfere seriously with the other line and put the public to inconvenience thereby and force the traffic to B. over a greater extent of line, at a sacrifice of time or cost, this court would interfere. *In re Barret*, 1 *C. B. N. S.* 423, 26 *L. J. C. P.* 83, 1 *Ry. & C. T. Cas.* 38.

Complainants leased a railroad to another company, which took possession. Afterwards complainants filed a bill to cancel the lease and obtain possession of the road. *Held*, that a preliminary injunction would not lie to restrain the operation of the road before final decree, in the absence of anything to show waste or damage to the property. *Farmers' R. Co. v. Reno, O. C. & P. R. Co.*, 53 *Pa. St.* 224.

The plaintiffs, a colliery company, having sidings which connected their collieries with a railway, gave notice to the railway company of their desire to run engines and carriages over the railway, pursuant to the provisions of the ninety-second section of the *Railways Companies Clauses Act 1845*. The railway company declined to give effect to the notice, and obstructed the passage of the plaintiffs' trains over their line. The plaintiffs filed a bill to restrain the railway company from interfering with the use of the railway. *Held*, that although the plaintiffs were entitled, under the above section, to the use of the railway, the court could not compel the railway company to employ their servants in working the points and signals on the line, or to intrust the working of them to the plaintiffs' servants; and since it was impossible for the plaintiffs to exercise their rights without the use of the points and signals, their bill must be dismissed. *Powell Duffryn Steam Coal Co. v. Taff Vale R. Co.*, 43 *L. J. Ch.* 575, 2 *Ry. & C. T. Cas.* 22.

34. Taxation.*—A court should not interfere by injunction to obstruct the working of the general tax laws of the state relating to railroads, unless an injury will be inflicted for which the company has no other adequate remedy. *Parmley v. St. Louis, I. M. & S. R. Co.*, 3 Dill. (U. S.) 13.

Where the method of taxing railroads is through a state board of equalization, a court should not interfere to restrain the tax upon grounds which are merely formal or technical, or for acts which do no substantial injury, or where the wrong could have been avoided or prevented by steps open to the complaining party at the time. Mistakes of judgment on the part of such board in honestly overvaluing the property cannot ordinarily be corrected in equity. But where it sufficiently appears that such board was actuated by passion and prejudice, and, with a design to discriminate against railroads, and without evidence, have assessed their property not only higher than it was valued by the companies on oath, but higher than it was valued by a committee of such board who heard the evidence, and where it is alleged that the valuation is at least one third more than other property of equal value, an injunction ought to issue, not to annul the whole assessment, but to correct the inequality. *Parmley v. St. Louis, I. M. & S. R. Co.*, 3 Dill. (U. S.) 13.

So if such board of equalization should clearly exceed its lawful jurisdiction, there may be a remedy by injunction in a proper case. *Parmley v. St. Louis, I. M. & S. R. Co.*, 3 Dill. (U. S.) 13.

An express company filed a bill to enjoin a license tax imposed by the laws of Tennessee, on the ground that the same was unconstitutional, as an attempt to regulate interstate commerce. Held, that an injunction would not lie where no ground for equity jurisdiction was shown except the unconstitutionality of the law. *Shelton v. Platt*, 139 U. S. 591, 11 Sup. Ct. Rep. 646.—FOLLOWED IN *Allen v. Pullman Palace Car Co.*, 139 U. S. 658.

*Irregularity in assessment of tax as ground for injunction, see note, 17 AM. & ENG. R. CAS. 490.

Injunction to restrain levy of tax as casting cloud on title, see note, 17 AM. & ENG. R. CAS. 398.

Power of a court of equity to enjoin the collection of a tax, see note, 53 AM. REP. 110.

35. Trespasses.—Jurisdiction of equity to enjoin trespasses is now established, but will not be exercised unless complainant's legal title is clear and he has no adequate legal remedy. *Boulo v. New Orleans, M. & T. R. Co.*, 55 Ala. 480.

If the remedy at law is not as plain, adequate, and complete as one obtainable in equity in case of a continued trespass, the party may prevent the injury by injunction, rather than wait until it is done, and then look for his damages in a court of law. *Payne v. Kansas & A. V. R. Co.*, 47 Am. & Eng. R. Cas. 228, 46 Fed. Rep. 546.

An injunction will not issue to restrain a mere trespass, where the threatened injury will not be irreparable and destructive to the plaintiff's estate, but is susceptible of a perfect pecuniary compensation. *Schurmeier v. St. Paul & P. R. Co.*, 8 Minn. 113 (Gil. 88).

To justify an injunction to restrain a trespass upon real property, it is not necessary that the threatened injury should be irreparable; but under the Indiana statute it is sufficient if it be shown that the remedy at law is not as practical and efficient as the remedy in equity; and when, owing to the character of the property, the injury cannot be fully compensated in damages, an injunction will be granted. *Clark v. Jeffersonville, M. & I. R. Co.*, 44 Ind. 248.

Equity will enjoin encroachments upon land by making excavations, erecting permanent buildings, and the like. *Chicago, B. & Q. R. Co. v. Porter*, 36 Am. & Eng. R. Cas. 405, 72 Iowa 426, 34 N. W. Rep. 286.

36. Ultra vires acts.*—If a corporation goes beyond the powers with which the legislature has invested it, and in a mistaken exercise of those powers interferes with the rights or property of others, equity is bound to interfere by injunction if the exigency of the case require it. Whether those rights are invaded by a mistaken or a fraudulent exercise of power is immaterial. *Delaware & R. Canal Co. v. Camden & A. R. Co.*, 16 N. J. Eq. 321.

A doubt as to the authority of a corporation to do an act is fatal to an application for an injunction to restrain such act on the ground of want of authority. *Attorney-General v. Delaware & B. B. R. Co.*, 27 N. J. Eq. 1; affirmed in 27 N. J. Eq. 631.

* Injunction to restrain ultra vires acts, see note, 16 AM. & ENG. R. CAS. 460.

Where a corporate excess of power tends to the public injury or to defeat public policy, it may be restrained in equity at the suit of the attorney-general. *Stockton v. Central R. Co.*, 51 *Am. & Eng. R. Cas.* 1, 50 *N. J. Eq.* 52, 24 *Atl. Rep.* 964.—QUOTING Attorney-General *v. Delaware & B. B. R. Co.*, 27 *N. J. Eq.* 631; Attorney-General *v. Chicago & N. W. R. Co.*, 35 *Wis.* 524. REVIEWING *Thomas v. West Jersey R. Co.*, 101 *U. S.* 71.

Where a statute only authorizes a municipal corporation to issue bonds for a public improvement to be paid in ten years, a vote authorizing bonds to run for twenty years is illegal, and a court may enjoin the issuing of the bonds. *Union Pac. R. Co. v. Lincoln County*, 3 *Dill. (U. S.)* 300.

37. Use of bridges.—An injunction will not issue to restrain the building of a bridge across a navigable river, unless it appears that it would amount to such an obstruction as to create a nuisance. *Northern Pac. R. Co. v. Barnesville & M. R. Co.*, 2 *McCrary (U. S.)* 224, 4 *Fed. Rep.* 172.

An injunction at the suit of a railroad to restrain the taking of a tow of more than two barges through the draw of its bridge over a navigable river should be refused, where the evidence shows, that, to save expense, the bridge was not properly constructed and guarded, and where no danger seems to be apparent. *Texas & P. R. Co. v. Interstate Transp. Co.*, 42 *Fed. Rep.* 261.

The corporate limits of the city of Rome extended to the further banks of a river, and the authorities of Floyd county built a bridge across the river, connecting a street of the city with its continuation beyond the river, and placed the bridge under the control and management of the municipal authorities, who took charge of it and engaged to keep it in repair, but stipulated that, in case of its destruction by flood or from any other cause, they should not be bound to rebuild it. Under the power contained in its charter, and with the consent of the corporate authorities both of the county of Floyd and the city of Rome, a street railroad company constructed its tracks across the bridge and ran its cars backward and forward over it until the bridge was washed away by a flood. The county replaced the old bridge by a new structure upon the same site. The company set about laying its tracks over this new bridge, but the county authorities objected, unless the

company would agree to pay for the privilege of using the bridge, and upon refusal to do so, filed a bill to enjoin the use of it until the county should be compensated therefor. *Held*, that the injunction was properly refused. *Floyd County v. Rome St. R. Co.*, 77 *Ga.* 614, 3 *S. E. Rep.* 3.

The office of an interlocutory injunction is simply to retain matters *in statu quo*; where, therefore, the railway track of the Niagara Falls suspension bridge has been declared to be a public highway, an agreement that the same should be used by one railway exclusively was *ultra vires* the charter of the bridge company. The Erie & Niagara Falls R. Co. moved to restrain the Great Western R. Co., with whom such illegal agreement had been made, from preventing the Erie & Niagara R. Co. from crossing the lands of the Great Western R. Co. in order to obtain access to the bridge; and it was shown that the latter company were not actively interfering to prevent the approach being obtained, but were simply passive; the court, on interlocutory motion, refused the injunction, although of opinion that at the hearing the relief should be granted. *Erie & N. R. Co. v. Great Western R. Co.*, 21 *Grant's Ch. (U. C.)* 171.

38. Voting stock.—For the reason that a court of equity will not anticipate an illegal act, an injunction to restrain a foreign corporation from allowing votes by proxy in a corporate election, will be refused in the absence of a state statute authorizing it. *Woodruff v. Dubuque & S. C. R. Co.*, 19 *Abb. N. Cas. (N. Y.)* 437, 30 *Fed. Rep.* 91.

An injunction to restrain the holder of railroad stock from voting upon such stock at an election of directors does not come within the meaning of the *Wis. Code*, § 132, providing that an injunction to suspend the general and ordinary business of a corporation can only be granted by the circuit court or a judge thereof. *Reed v. Jones*, 6 *Wis.* 680.

Plaintiff's complaint alleged in substance that he was the owner of certain shares of corporate stock which had been pledged to secure a loan and had been transferred on the books of the corporation to defendant as trustee for the pledgee; that the defendant, by reason of his control of the shares, had been enabled to a great extent to control the management of the corpora-

tion, and had managed the same without regard to its best interests, and so as to subvert the interests of another corporation; that defendant has heretofore voted on said shares at elections held by the stockholders, and claims the right so to do at future elections; that it is greatly against plaintiff's interest to permit defendant so to vote, and that plaintiff will suffer great and irreparable injury if defendant is permitted to do so. An injunction was asked, restraining defendant from voting on the shares. On appeal from an order granting a temporary injunction restraining defendant from voting *pendente lite*—held, that the complaint did not set forth a cause of action; and that the granting of the order was error. *McHenry v. Jewett*, 90 N. Y. 58; reversing 26 Hun 453.—DISTINGUISHED IN Forty-second St. & G. S. F. R. Co. v. Thirty-fourth St. R. Co., 20 J. & S. (N. Y.) 252.

2. To Stay Proceedings.

39. When granted, generally.—

Where a bill is filed to restrain the sale of a mortgaged railroad, on the ground that the bonds secured by the mortgage are void, the possibility that a favorable chance to sell the road might be lost or delayed is not a legal ground for refusing the injunction, which might entirely destroy any rights that the plaintiff might have. *North Carolina R. Co. v. Drew*, 3 Woods (U. S.) 674.

When the fundamental contract between two railroad companies provides that all disputes between the two shall be settled by arbitration, and one road has made an illegal misapplication of funds or profits belonging to both, with the assent of a majority of the other road, if stockholders in the latter road, not thus assenting, bring their bill to recover their share of such profits, the court will enjoin both roads, if necessary, from settling or attempting to settle the claims made by such stockholders by arbitration. *March v. Eastern R. Co.*, 43 N. H. 515.

It is undoubtedly within the power of the court (and it is its duty), where an abuse of the general railroad law is attempted by the unlawful application of its provisions to a private use, to restrain the unauthorized proceedings. *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; reversed on another point in 32 N. J. Eq. 755.

Where the court of appeals has formerly

decided that certain stock certificates had been fraudulently issued, suits on such certificates will be enjoined, where it is alleged that the certificates are of the same class and description as the ones declared fraudulent, and where such allegations are not denied nor impeached. *New York & N. H. R. Co. v. Schuyler*, 17 How. Pr. (N. Y.) 464.

Where an owner of land entered into a written contract with a railway company to grant and finally to convey to the company a right of way across the land, upon condition that the company should construct and maintain upon the land a passenger depot, with proper side tracks and stock-yards sufficient to do the business there offered, and permitted the company to take the immediate possession of such right of way under such contract, and to construct thereon its railway, and a side track, and a passenger depot, and stock-yards, but the owner of the land and the company honestly differed in opinion as to whether the company had fulfilled all the conditions of the contract, and the owner then instituted condemnation proceedings, under the statutes, for damages, and the company then commenced an action to perpetually enjoin the owner from prosecuting his condemnation proceedings, it was not error for the court to grant a temporary injunction to restrain such owner from so prosecuting his said proceedings until the injunction case should be finally heard and determined upon its merits. *Harvey v. Kansas, N. & D. R. Co.*, 45 Kan. 228, 25 Pac. Rep. 578.

An action to recover for personal injuries was commenced against an insolvent railroad company after it had been placed in the hands of a receiver; and on demurrer the supreme court allowed the plaintiff to amend by inserting the receiver's name instead of that of the corporation, and ordered the chancellor to consent to the amendment and to the continuance of the suit. Held, that the chancery court could restrain the receiver from pleading in the action at law the statute of limitations which had become a bar between the bringing of the action and the time of final petition for an injunction. *Lehigh C. & N. Co. v. Central R. Co.*, 35 Am. & Eng. R. Cas. 2, 42 N. J. Eq. 591, 8 Atl. Rep. 648.

40. When refused, generally.—If a city lays out a way forty feet wide across a railroad at grade, under an order of county

certificates had
ts on such cer-
ere it is alleged
the same class
eclared fraudu-
ations are not
ew York & N.
ow. Pr. (N. Y.)

entered into a
way company to
to the company
d, upon condi-
d construct and
passenger depot,
nd stock-yards
s there offered,
to take the im-
h right of way
construct there-
ack, and a pas-
s, but the own-
pany honestly
ether the com-
nditions of the
hen instituted
under the stat-
company then
etually enjoin
his condemna-
t error for the
injunction to
prosecuting his
injunction case
ad determined
Kansas, N. &
ac. Rep. 578.

personal injuries
insolvent rail-
been placed in
d on demurrer
the plaintiff to
ver's name in-
n, and ordered
ne amendment
ne suit. *Held*,
d restrain the
e action at law
h had become
of the action
for an injunc-
Central R. Co.,
N. J. Eq. 591,

erally.—If a
wide across a
ter of county

commissioners authorizing it to be laid out
fifty feet wide, the only remedy of the rail-
road company is by a petition for a writ of
certiorari. *Old Colony R. Co. v. Fall River*,
147 Mass. 455, 18 N. E. Rep. 425.

Injunction will not lie to restrain the
tearing down of fences in obedience to the
lawful orders of a court. *Chicago & A. R.*
Co. v. Maddox, 92 Mo. 469, 10 West. Rep.
42, 4 S. W. Rep. 417.

Where bondholders have instituted a pro-
ceeding to remove mortgage trustees, such
trustees cannot enjoin the proceeding on
the alleged ground that the bondholders
are improperly resisting a scheme touching
the management of the property, to which
a majority of the bondholders have assented.
Farmers' L. & T. Co. v. McHenry, 9 Abb.
N. Cas. (N. Y.) 235.

A railroad company sold a part interest
in certain cars to a car company, and then
entered into an agreement by which the
car company was to operate them and
divide the profits with the railroad com-
pany, but the latter retained the right to
terminate the contract upon paying the car
company for its interest in the cars; but it
terminated the contract without paying for
such interest. *Held*, that the railroad com-
pany could not enjoin an action at law
against it by the car company to recover
the value of its interest in the cars, on the
ground that the car company had not fairly
divided the profits. *Pullman Palace Car*
Co. v. Chicago, M. & St. P. R. Co., 56 Fed.
Rep. 756; reversing 49 Fed. Rep. 409.

**41. Enjoining the enforcement of
judgments.**—Courts of equity will not
restrain a judgment at law except when the
injured party has had a verdict or judgment
rendered against him in consequence of ac-
cident or mistake or fraud of the other
party without any fault of his own, and has
no remedy, or has without fault lost his
remedy at law. *Railroad Co. v. Neal*, 1
Woods (U. S.) 353.

And where a motion has been made to
set aside a judgment at law and grant a new
trial, and the motion has been overruled, a
court of equity will not interpose by injunc-
tion on the ground that the judgment is un-
just, and that there is a good defense, and
that the defendant in the action at law had
been surprised at the trial, and did not have
a full and fair hearing on the motion for a
new trial. *Railroad Co. v. Neal*, 1 Woods
(U. S.) 353.

5 D. R. D.—73.

A judgment may be enjoined for the pur-
pose of allowing a set-off. *Chicago, D. &*
V. R. Co. v. Field, 86 Ill. 270.—EXPLAINED
IN *Galena & S. W. R. Co. v. Ennor*, 116 Ill.
55.

Where a conductor, who has been injured
by the negligence of other servants of the
company, has recovered a judgment for
damages, and an action has been brought
by a person whom the conductor allowed to
travel on the train against the company's
orders, and for whose injuries the conduc-
tor is bound to indemnify the company
against liability, a court of equity will, on
the ground of equitable set-off, enjoin the
collection of the judgment in favor of the
conductor until the decision of the suit at
the instance of the injured passenger.
Memphis & C. R. Co. v. Greer, 38 Am. &
Eng. R. Cas. 248, 87 Tenn. 698, 11 S. W.
Rep. 931.

Where a party has brought a suit at law
and obtained a verdict, a court of equity
will not enjoin his proceeding to judgment
upon the verdict, unless it appear that it
would be contrary to equity and good con-
science to permit him to proceed, and
that this could not have been interposed as
a defense to the action. But equity will
not interpose merely on the ground that
the verdict is erroneous. *New York & N.*
R. Co. v. Hawes, 56 N. Y. 175, 6 Am. Ry.
Rep. 173; reversing 3 J. & S. 372.

An injunction will not issue at the re-
quest of an execution creditor, who seeks to
restrain the levying of executions in the
hands of the sheriff placed there before his,
when he might by proper diligence have
had his execution included and shared *pro*
rata. *Walker v. Whelen*, 4 Phila. (Pa.)
389.

Where a railroad has paid dividends be-
longing to a ward to a person other than
the guardian, but such money has been ap-
propriated to pay necessary expenses of the
minor, and where in a suit by the guardian
to recover such dividends the railroad was
not allowed to set up the above facts in de-
fense, and final judgment was given against
the company, an injunction will be granted
to restrain an execution upon such judg-
ment until an account is taken to determine
the amount due from the ward's estate to
the person who has so applied the dividends,
and to apply such amount to the satisfaction
of the judgment. *Southwestern R. Co. v.*
Chapman, 46 Ga. 557.

In 1866 B. recovered judgment against a railroad company. In 1868, by virtue of other judgments against the company, its franchises, track, etc., were sold under execution, but certain town lots of the company remained unsold. In 1872 execution from B.'s judgment was levied on these town lots; and the present is a suit to enjoin the sale, brought by the trustees (formerly directors) of the company, whose petition acknowledges the judgment debt to B., but fails to show that there is any other creditor of the company, and fails to account for the delay of petitioners in applying the property to B.'s demand. *Held*, that the injunction was erroneously granted. Under such a state of facts, B. should not have been restrained from enforcing his judgment by a sale of the property. *Good v. Sherman*, 37 Tex. 660.

A railroad contractor, who by the terms of his contract was entitled to possession of the road built until paid for, was forcibly ejected by the company, and obtained a judgment in a suit against the company for unlawful entry and detainer. *Held*, that the company could enjoin the execution of this judgment by paying into court the amount due the contractor. *Johnson v. St. Louis, I. M. & S. R. Co.*, 141 U. S. 602, 12 Sup. Ct. Rep. 124.—DISTINGUISHING *Balance v. Forsyth*, 24 How. (U. S.) 183; *Balance v. Forsyth*, 13 How. 18.

Creditors of the Monroe Railroad and Banking Co. levied on certain lots in the city of Griffin. The mayor and council of the city filed a bill against these creditors to prevent the levies from being executed, alleging that the lots had been dedicated by the railroad to certain uses for the benefit of the citizens of Griffin. *Held*, that such a bill lay at the instance of the mayor and council of the city. *Cox v. Mayor, etc., of Griffin*, 18 Ga. 728.

A railway company obtained a judgment at law on a subscription to its first mortgage bonds and shares of stock, after it had parted with the same, and after it had become insolvent, making it impossible for it to deliver the bonds or certificates of stock. The judgment debtor sought to enjoin the judgment until the bonds and stock should be deposited. *Held*, that he was entitled to have the actual value of the proportionate share of the bonds credited upon the judgment, but was not entitled to an absolute injunction until the bonds and stock were

filed, as that was impossible; but the company was only chargeable with the value of the bonds at the time it disposed them, and not the face value or the purchase price. (Mulkey, J., dissenting.) *Galena & S. W. R. Co. v. Ennor*, 116 Ill. 55, 4 N. E. Rep. 762; reversing 14 Ill. App. 327.

42. — of justices' judgments.—Injunction was sought by a railway company to restrain a number of judgments rendered against it in a justice's court. *Held*, that while the judgments were voidable because rendered upon a defective service, still resort should have been had to the statutory mode of correcting the errors in the several judgments—viz., appeal or *certiorari*. Where such remedies were neglected, relief by injunction will be denied. *Galveston, H. & S. A. R. Co. v. Ware*, 74 Tex. 47, 11 S. W. Rep. 918.—FOLLOWED IN *Jones v. Rose-dale St. R. Co.*, 75 Tex. 382.—*Central Iowa R. Co. v. Piersol*, 65 Iowa 498, 22 N. W. Rep. 648.

Inasmuch as some of the judgments sought to be enjoined were for less than twenty dollars, it was error to dissolve the injunction as to them, the right to appeal not existing. *Galveston, H. & S. A. R. Co. v. Ware*, 74 Tex. 47, 11 S. W. Rep. 918.

Judgment against a railway company for negligently killing a calf worth fifteen dollars. The road, in application for injunction, alleged that it had a defense—viz., that the calf was not injured by the cars, but "got into a mud hole and died from effects of injuries received while there." *Held*, the defense was good. *Gulf, C. & S. F. R. Co. v. Rawlins*, 80 Tex. 579, 16 S. W. Rep. 430.

An injunction was sought restraining an execution upon a judgment in a justice's court for damages for obstructing the road to and from the plaintiff's woodland. The petition alleged that the railway company owned the right of way alleged as an obstruction, and that the plaintiff in the judgment did not own land adjacent to the railway, and that the road obstructed was not public. *Held*, the defense was meritorious. *Gulf, C. & S. F. R. Co. v. King*, 80 Tex. 681, 16 S. W. Rep. 641.

43. Staying proceedings in attachment.—A citizen of Missouri has no right to purchase claims against resident employes of a domestic railroad company, and sue thereon and garnishee the company in another state, where the company has not the same exemption that it has at home;

and an injunction may be obtained to restrain such proceedings. *Wabash Western R. Co. v. Siefert*, 41 Mo. App. 35.

A proceeding was instituted before a justice, and attachment issued, and a railroad company summoned as garnishee. Judgment was taken against the principal debtor, and then a garnishee summons issued against the company to appear and answer whether it had funds of the debtor, at which time the statutory fee and mileage, amounting to \$1.10, were paid. *Held*, that the company could not enjoin the proceedings on the ground that such fee and mileage were not paid or tendered upon service of the original attachment. *Eberhardt v. Pennsylvania Co.*, 15 Ill. App. 511.

44. — ejectment.—Where possession of land is taken for railroad purposes with the knowledge of the owner, and such possession is continued for twenty years, during which time negotiations for the payment to be made for the land are carried on, and the land is indispensable to the company, the company may proceed to condemn the land, if it has the power to do so; and if not, to pay such compensation as the chancery court may fix; and the landowner will be enjoined from proceeding in ejectment pending such proceedings. *Paterson, N. & N. Y. R. Co. v. Kamlah*, 28 Am. & Eng. R. Cas. 250, 42 N. J. Eq. 93, 6 Atl. Rep. 444. —EXPLAINING *New York & G. L. R. Co. v. Stanley*, 35 N. J. Eq. 283. —DISTINGUISHED IN *Jacksonville, T. & K. W. R. Co. v. Adams*, 28 Fla. 631.

A company contracted for certain lands, and under the conditions of the contract proceeded to lay its track across them, receiving at length a deed from the only owner of whose rights it had notice. Meanwhile the same land had been set off, by deed of partition, to a party who held some unrecorded claim to an undivided interest in the premises, and this party afterwards quitclaimed the land by a deed referring to the company's occupancy. *Held*, that an injunction would lie to restrain proceedings in ejectment brought against the company by the holder of the quitclaim. *Detroit & M. R. Co. v. Brown*, 37 Mich. 533.

A company was permitted to enter upon land and construct its road under an agreement that it would build a depot on the premises. It built its road, but failed to build the depot, and afterwards became insolvent, and its property was sold under

foreclosure proceedings; after it had been again sold and a new company organized, the landowner commenced ejectment to recover possession of the land, when the company obtained a restraining order. *Held*, that the present company only had a right to the same protection as the original company, and could only obtain relief upon paying the value of the land, and damages, as of the time of the original entry, with interest. *New York & G. L. R. Co. v. Stanley*, 10 Am. & Eng. R. Cas. 345, 35 N. J. Eq. 233; affirming 34 N. J. Eq. 55. —DISTINGUISHED IN *Jacksonville, T. & K. W. R. Co. v. Adams*, 28 Fla. 631. EXPLAINED IN *Paterson, N. & N. Y. R. Co. v. Kamlah*, 28 Am. & Eng. R. Cas. 250, 42 N. J. Eq. 93.

45. — foreclosure.—A railroad company executed a mortgage on its property, but afterwards executed another mortgage for a larger amount, which it described as a first mortgage, it being the intention of the company to take up the first mortgage; but it failed to procure a surrender of some of the bonds, and the scheme to take up the first mortgage failed. Subsequently the property was sold under execution and a new company was organized, whereupon the trustee in the second mortgage commenced foreclosure proceedings. *Held*, that an injunction at the suit of the holder of bonds secured by the second mortgage, to restrain proceedings until he could procure a surrender of all the bonds secured by the first mortgage, was improperly allowed. *Wait v. Weller*, 4 Hun (N. Y.) 626.

46. — trespass.—A company filed a bill averring its right to cut certain trees by virtue of a deed conveying to it a right of way, "and the right to fell any timber beyond the right of way which is sufficiently near the track of said road to fall on or obstruct the same," and sought, among other things, to enjoin an action against it for "trespass in going outside of the right of way and felling timber or trees in section 20," etc. The evidence did not definitely locate the trees within the section. *Held*, that a decree enjoining the trespass suit was erroneous, and must be reserved, since complainant failed either to aver or show that the trees, for the cutting of which the trespass suit was brought, were such as the deed gave it a right to fell. *Day v. Louisville, N. O. & T. R. Co.*, 69 Miss. 589, 11 So. Rep. 25.

47. — proceedings to enforce penalties.—The supreme court of the District of Columbia has no jurisdiction to restrain by injunction the prosecution of a criminal information to recover a penalty. *Washington & G. R. Co. v. District of Columbia*, 6 Mackey (D. C.) 570.

III. CONTINUING; DISSOLVING.

48. When a preliminary injunction or staying order will be continued until final hearing.—The courts will not dissolve injunctions till the hearing, where it is apparent from the pleadings and proofs that there is serious dispute about the facts, and doubts as to the relief sought. *Durham v. Richmond & D. R. Co.*, 104 N. Car. 261, 10 S. E. Rep. 208.—FOLLOWED IN *Raleigh & W. R. Co. v. Glendon & G. M. & M. Co.*, 112 N. Car. 661.

When relief is sought by an injunction against fraud, which is the gravamen of the bill, the court will continue the injunction, though the defendant has fully answered the equity set up. *Johnston v. Chicago, M. & St. P. R. Co.*, 58 Iowa 537, 12 N. W. Rep. 576.

Where the right to an injunction, issued upon filing the bill, to restrain a horse railroad company from laying, under grant by municipal authorities, a track alongside of complainants' track, in the street of a city, which had been in complainants' possession, to which they claimed title by grant, and on which they had maintained their track for more than twenty years, depends upon whether the grant from the owners of the land, under which complainants claim title, was prior to a dedication of the street by such owners to public use, and the agreement for dedication itself gives color to complainants' claim, the injunction will not be dissolved upon the hearing upon the bill and answer. *Camden & A. R. Co. v. Atlantic & P. R. Co.*, 26 N. J. Eq. 69.

When individuals file a bill to restrain an express company from consolidating with another company, it is no objection to continuing an injunction that the latter company, or its stockholders, were not made parties. *Blatchford v. Ross*, 5 Abb. Pr. N. S. (N. Y.) 434.

A railroad company enjoined city authorities from opening a street through an embankment of its road. The city answered and moved to dissolve the injunction. It appeared that the embankment had

existed for more than twenty years under such conditions as to make the right of the city to interfere therewith doubtful. *Held*, that the injunction was properly continued until the final trial on the merits; and the city could not insist that it was such a nuisance that it could not wait for the trial. *Atlanta v. Georgia R. & B. Co.*, 40 Ga. 471.

Where the record shows that the plaintiff was a railroad company owning and operating a line of railway, and that it was constructing a telegraph line along its road, which was a necessary adjunct to the road to aid in the safe operating of the same, and that the defendant cut down three telegraph poles, and threatened to prevent by violence the construction of the telegraph line, and having been temporarily enjoined from interfering with the building of the telegraph — *held*, that it was error to dissolve the injunction upon a showing that was evenly balanced whether or not the plaintiff had the right of way. The restraining order should have been continued until the rights of the parties could be finally determined. *St. Joseph & D. C. R. Co. v. Dryden*, 11 Kan. 186.

A preliminary injunction having been granted against the laying of a railroad track on Delaware avenue, Philadelphia, and the case involving the following questions — (1) the right of a railroad to be located longitudinally upon a public street, or (2) so as to cross or obstruct access to a public wharf, (3) without the owner being entitled to compensation or security before the wharf is taken or injured; (4) if such taking or injury may be authorized under the laws of Pennsylvania, it is not forbidden by the laws of the United States as an interference with commerce; (5) the effect of the provisions of the will of Stephen Girard, together with the action taken by the state and city under them — *held*, that the court would not consider these questions until final hearing, leaving the preliminary injunction undisturbed until then. *Pennsylvania R. Co. v. Philadelphia Belt Line R. Co.*, 149 Pa. St. 218, 24 Atl. Rep. 210; affirming 1 Pa. Dist. 1.

Defendants contracted to build plaintiff's railroad, the president agreeing to a deposit of bonds to secure payment of cost of construction, to be delivered to the contractors and sold by them on thirty days' notice. The company filed a bill alleging that the

years under
the right of
with doubtful
properly con-
the merits;
st that it was
d not wait for
R. & B. Co.,

at the plaintiff
g and operat-
at it was con-
ong its road,
ct to the road
the same, and
three telegraph
nt by violence
raph line, and
oined from in-
the telegraph
dissolve the in-
at was evenly
plaintiff had
raining order
ntil the rights
y determined.
ryden, 11 Kan.

having been
of a railroad
Philadelphia,
ollowing ques-
railroad to be
public street,
act access to a
e owner being
ecurity before
d; (4) if such
horized under
not forbidden
states as an in-
the effect of
Stephen Girard,
n by the state
that the court
estions until
eliminary in-
en. *Pennsyl-
Belt Line R.
Rep. 210; af-*

child plaintiff's
g to a deposit
f cost of con-
e contractors
days' notice,
ging that the

defendants had obtained possession of the bonds by falsely representing that the road was completed, and obtained an injunction to restrain a transfer of the bonds. *Held*, on a motion to continue the injunction until the hearing, that, having in view the great importance of maintaining the property in *statu quo*, the injunction would be continued, though obtained on a misstatement of a fact material to one ground of recovery as stated in the bill. *Winnipeg & H. Bay Co. v. Mann*, 6 Man. 409.

49. — and when not.—Where condemnation proceedings have been instituted in a state court of undoubted jurisdiction, and final judgment entered, a federal court exercising equity jurisdiction will not continue a restraining order on the application of another company, a non-resident, where it appears that it owned a majority of the stock in the company instituting the condemnation proceedings, and controlled its operations, and might easily have made itself a party to the proceedings. *Union Pac. R. Co. v. Denver & R. G. R. Co.*, 37 *Fed. Rep.* 179.

Where one creditor cannot be injured by the dissolution of an injunction granted on the filing of a bill by creditors against a corporation, and its continuance would defeat the plans for the reorganization of the corporation entered into by the creditors, and would be inconsistent with previous orders in the case, there is no equity that would justify the court in maintaining the injunction at the sole instance of one creditor as against all the other creditors, as well as the corporation. *Washington City & P. L. R. Co. v. Southern Md. R. Co.*, 55 *Md.* 153.

Where a stockholder obtains an injunction to restrain a lease of the road, and a guaranty by the lessee of the bonds of the lessor, it is no ground for continuing the injunction until final trial that the plaintiff demands that the directors shall account for the proceeds of certain bonds, where there is nothing to show that such directors are not responsible, and fully able to respond to any damages that might be awarded plaintiff. *Gere v. New York C. & H. R. R. Co.*, 19 *Abb. N. Cas. (N. Y.)* 193.

Where railroad bondholders obtain a preliminary injunction to restrain the carrying out of a contract which it is claimed will affect their interest, the injunction should not be continued where its effect

will be to give the plaintiffs substantially all the relief they could obtain by a final judgment, and where it appears that the injury to plaintiffs, by refusing it, will be slight and easily compensated. *Steele v. Pittsburgh, S. & L. E. R. Co.*, 36 *N. Y. S. R.* 198, 58 *Hun* 611, 12 *N. Y. Supp.* 576.

50. Grounds for dissolution, generally.—Though a court has declared the erection of a bridge over a navigable river a nuisance, as obstructing navigation, and has enjoined its erection, upon congress subsequently passing an act authorizing the bridge, the injunction should be dissolved. *Baird v. Shore Line R. Co.*, 6 *Blatchf. (U. S.)* 461.

The court will, in a proper case, dissolve an injunction restraining a railroad from completing its track, upon condition that the company shall first deposit with the court a sufficient sum of money to secure a full indemnity for all damage that may ensue to the property of complainant. *Columbus & W. R. Co. v. Witherow*, 82 *Ala.* 190, 3 *So. Rep.* 23.

As a rule a court of equity will not take jurisdiction, on the application of a stockholder in a railroad company, merely for the purpose of inquiring into the legality or regularity of an election of officers or removing an officer in actual possession; but when that question arises collaterally, an independent and special ground of equity being also shown, the court will entertain and decide the question. *Moses v. Tompkins*, 84 *Ala.* 613, 4 *So. Rep.* 763.

If the directors or other officers of a company, alleged to have been illegally elected, are proceeding to sell stock for the non-payment of assessments thereon, made without authority, and it is sought to restrain them from doing so, and from extending the road, this is an independent ground of equity, which gives the court jurisdiction; and the jurisdiction having attached, the court will inquire into the legality of their election. *Moses v. Tompkins*, 84 *Ala.* 613, 4 *So. Rep.* 763.

Selectmen of a town may discontinue a suit in equity to restrain a railroad corporation from unlawfully and dangerously running cars on its road, although a temporary injunction has been issued, and although some of the inhabitants of the town move to come in and prosecute the suit. *Mears v. Boston & N. Y. C. R. Co.*, 5 *Gray (Mass.)* 371.

When an injunction is granted by a judicial officer who has no authority to grant it, the error or irregularity is only available upon motion for a discharge of the injunction, which must precede any act on the part of the defendant in recognition or affirmation of its regularity. In such case, a motion to dissolve is not the appropriate remedy, but is a waiver of the error or irregularity. *East & W. R. Co. v. East Tenn., V. & G. R. Co.*, 22 *Am. & Eng. R. Cas.* 81, 75 *Ala.* 275.

One street-car company was authorized by its charter to use any part of the track of another company. Such other company obtained an injunction to prevent its use of a part of its track, whereupon the first company instituted condemnation proceedings to acquire the right to use such track. *Held*, that the injunction should be dissolved until final hearing and the compensation should be fixed; and if not then paid, the injunction might be renewed. *Sixth Ave. R. Co. v. Kerr*, 28 *How. Pr. (N. Y.)* 382; *affirming* 45 *Barb.* 138.

51. Want of equity in bill.—A motion to dissolve an injunction for want of equity in the bill cannot perform the office of a demurrer to the bill; but on the hearing of such motion, all amendable defects should be regarded, *pro hac vice*, as cured by amendment, and the inquiry be made whether, if the facts were well pleaded, the case would be of equitable jurisdiction, and an injunction the appropriate remedy. *East & W. R. Co. v. East Tenn., V. & G. R. Co.*, 22 *Am. & Eng. R. Cas.* 81, 75 *Ala.* 275.

52. Dissolving on coming in of answer.—Whether an injunction shall be dissolved or not on the coming in of the answer is a question for the discretion of the court. *Cox v. Mayor, etc., of Griffin*, 18 *Ga.* 728.

Where a city is about to tear up a street railway track, and the company files a bill for an injunction, alleging that the track is properly laid, and this is denied by the answer of the city, if the case is heard on the pleadings, the allegations of the answer must be taken as true and the injunction dissolved. *Spokane St. R. Co. v. Spokane Falls*, 46 *Fed. Rep.* 322.

Where a party files a bill and obtains an injunction against a company on an allegation that he is a stockholder, the injunction should be dissolved on the coming in of the answer denying that he is a stock-

holder. *Blatchford v. New York & N. H. R. Co.*, 5 *Abb. Pr. (N. Y.)* 276.

An injunction having been granted till the further order of the court, upon a complaint, supported by affidavits, to perpetually enjoin the defendant, a railroad company, from constructing a switch or side track in an alleged street in front of certain town lots belonging to the plaintiff, a motion to dissolve, upon answer setting forth facts denying every material averment of the complaint and supported by affidavits, was properly sustained. *Rayle v. Indianapolis, P. & C. R. Co.*, 32 *Ind.* 259.

Where, by the averments of the bill, the complainant's title to the lands in controversy is based wholly on the fact of continuous uninterrupted possession by it and those under whom it claims, and the defendant, in its answer, verified by affidavit, directly and unequivocally denies the fact of possession by the complainant at the time of the entry upon and taking of the land, and also the prior possession by the complainant, or by those under whom it claims, and avers that the title and possession resided with other parties, from whom the defendant had a license or conveyance under which it entered and commenced the appropriation of the land, the temporary injunction, issued on the filing of the bill, should, on motion, be dissolved; it being clear that less injury would result to the complainant from its dissolution than would result to the defendant from its continuance to the final hearing. *East & W. R. Co. v. East Tenn., V. & G. R. Co.*, 22 *Am. & Eng. R. Cas.* 81, 75 *Ala.* 275.

Where the bill seeks to enjoin the consummation of an attempted consolidation with another corporation, as shown by resolutions adopted by a majority at a stockholders' meeting, which declared that the consolidation "do now take place, and be fully carried into effect," followed by an election of officers for the consolidated company, the abandonment of the attempt by the defendants, on discovering the illegality of their proceedings, not shown by an official declaration or by the rescission of the resolutions, does not destroy the equity of the bill; and such new matter in avoidance, not being responsive, cannot be considered on motion to dissolve the injunction. *Nathan v. Tompkins*, 82 *Ala.* 437.

53. Proceedings to obtain dissolution.—A defendant in injunction, on

York & N. H.
6.
en granted till
t, upon a com-
ts, to perpetu-
railroad com-
switch or side
front of certain
plaintiff, a mo-
setting forth
avermment of
by affidavits,
e v. Indianap-
59.
of the bill, the
nds in contro-
e fact of con-
sion by it and
, and the de-
d by affidavit,
enies the fact
ainant at the
taking of the
ession by the
nder whom it
e and posses-
s, from whom
r conveyance
mmenced the
he temporary
g of the bill,
ved; it being
result to the
olution than
from its con-
East & W.
G. R. Co., 22
z. 275.
join the con-
consolidation
down by reso-
y at a stock-
red that the
place, and be
lowed by an
consolidated
the attempt
ing the ille-
shown by an
rescission of
the equity
ter in avoid-
not be con-
the injunc-
Ala. 437.
ain disso-
junction, on

complying with the law, may have the injunction set aside in every case where its dissolution will not work irreparable injury to the plaintiff. *Jefferson & L. P. R. Co. v. New Orleans*, 30 *La. Ann.* 970.

Under the N. Y. Code Civ. Pro. § 629, as amended in 1883, a court cannot dissolve an injunction unless it is specified that "the alleged wrong or injury is not irreparable, and is capable of being adequately compensated for in money"; and this must be shown to the court by facts from which he can determine for himself, and not by mere affidavits which are but the expression of opinions. *Metropolitan El. R. Co. v. Manhattan R. Co.*, 65 *How. Pr.* (N. Y.) 277.

And the above statute is construed to mean that an application to vacate an injunction should be made to the court or judge who heard a previous application to vacate or modify the injunction order. *Metropolitan El. R. Co. v. Manhattan R. Co.*, 65 *How. Pr.* (N. Y.) 277.

A motion to vacate an injunction to restrain one railroad company from purchasing the property, assets, and franchises of another company at a sale under a foreclosure of a mortgage, cannot be made at a general term of the New York supreme court without notice, under section 626, Code Civ. Pro. *Gere v. New York C. & H. R. Co.*, 38 *Hun* (N. Y.) 231.

An abutting lot owner restrained a railroad company from laying its track in the street, the fee of which was in the lot owner. The company answered, but did not deny that it was wrongfully laying a track, but set up an undertaking by which it agreed to pay the lot owner all damages which he might sustain. *Held*, as no justification was pleaded, it could only procure a dissolution of the injunction by strictly complying with the N. Y. Code Civ. Pro. § 629, as amended by chapter 404, of 1883, relating to dissolving injunctions in certain cases upon giving security by the defendant. *Chamberlin v. Buffalo, N. Y. & P. R. Co.*, 31 *Hun* (N. Y.) 339.

54. Damages on dissolution.—Upon the dissolution of an injunction restraining the sale, under a deed of trust, of the property, effects, franchises, etc., of a railroad company, it is erroneous for the court, without proof, to assess the damages at six per cent. upon the amount released by the dissolution; the damages assessed in such a case should be commensurate with the

actual injury sustained, and may, if the circumstances warrant it, exceed ten per cent. upon the amount enjoined. *St. Louis v. Alexander*, 23 *Mo.* 483.

It is proper to render judgment for ten per cent. damages on the dissolution of an injunction restraining the collection of a tax. *Rio Grande R. Co. v. Scanlan*, 44 *Tex.* 649.

Where an injunction is properly granted, the fact that it is subsequently discontinued is no ground for awarding damages to the defendant. *New York, W. S. & B. R. Co. v. Omerod*, 29 *Hun* (N. Y.) 274. *Montreal St. R. Co. v. Ritchie*, 16 *Can. Sup. Ct.* 622.

A horse railway company was enjoined from extending its track to a certain point, and the injunction was dissolved; the company claimed damages for a loss of profits that might have been realized from increase of business after the extension. It appeared that the company had another line, parallel with the extension and near the same, and that no accounts were kept of the profits as to the extension, the fare being five cents for any distance. *Held*, that no damages could be assessed for such profits, they being speculative, and too remote and uncertain. *Chicago City R. Co. v. Howison*, 86 *Ill.* 215.

The trustees for the mortgage bondholders of a railroad leased the road, whereupon certain bondholders filed a bill to enjoin the operation of the road by the lessees, and to set aside the lease, and gave bond to secure such damages as the defendants might suffer. *Held*, on a dissolution of the injunction, that it was within the power of the chancellor to ascertain the damages caused by the injunction, and decree payment, independent of any action on the bond which might be necessary to enforce payment. *Sturgis v. Knapp*, 33 *Vt.* 486; *former appeal* 31 *Vt.* 1.

IV. VIOLATION OF THE WRIT *

55. What amounts to a violation, generally.—It is a violation of an injunction restraining a defendant from disposing of property, to deliver the property, though sold previously to the service of the injunction. *Jewett v. Bowman*, 27 *N. J. Eq.* 171.

Defendant having been enjoined from laying a railroad track in front of plaintiff's property, the laying of a track by a company other than the defendant must be

* See also CONTEMPT.

regarded as the act of defendant, as the defendant's president, when the persons laying the track were threatened with prosecutions by the city, informed the city attorney in writing that the track was being constructed in pursuance of an ordinance of the city council granting the right to defendant. Besides, as the track complained of would be useless without a connection with defendant's track, and defendant must be regarded as having consented to and caused such connection, it is guilty of a violation of the injunction. *Kentucky & I. Bridge Co. v. Krieger*, 91 Ky. 625, 16 S. W. Rep. 824.

A bill was filed by a railroad company and a motion for an injunction to restrain another company from building a road; the motion was denied, and an answer was put in under a rule. *Held*, that defendants had actual notice that their title was disputed, and that they went on with the road at their peril before the final hearing. *Warren & F. R. Co. v. Clarion L. & I. Co.*, 54 Pa. St. 28.

Where defendants, a railway company, were enjoined against removing from their premises certain iron rails to which plaintiff claimed to be entitled, and they allowed another claimant to take them away without objection or obstruction on their part, and to remove them to the United States—*held*, that they had committed a breach of the injunction. *Bickford v. Welland R. Co.*, 17 Grant's Ch. (U. C.) 484.

56. What does not.—Where a state railroad commission is temporarily enjoined from enforcing a schedule of freight rates on the ground that they are too low, it is not a violation of the injunction to make another schedule of rates on a separate complaint, though made for the purpose of enabling the commission to avoid the injunction. *Chicago, B. & Q. R. Co. v. Dey*, 38 Fed. Rep. 656.

Where an injunction issues against the corporation itself, its officers, who neither do anything in violation of it nor conceal the fact that it has been issued, cannot be held liable for a breach of the injunction. *Trimmer v. Pennsylvania, S. & N. E. R. Co.*, 36 N. J. Eq. 411.

An injunction never acts retroactively, so as to make an act unlawful which is done before the injunction was granted. So where a railroad company is enjoined from taking up or removing its track, or selling or otherwise disposing of the iron forming

the track, a mere failure to prevent third parties from removing the iron, which had been sold to them prior to the injunction, is not a contempt. *People v. Albany & V. R. Co.*, 12 Abb. Pr. (N. Y.) 17; 20 How Pr. 358.

On a complaint which showed merely that the defendants, a city and its employés, were interfering by physical force with the construction of a railroad bridge by plaintiff, a court commissioner ordered them to show cause before the circuit judge on a day named, why they should not be restrained from interfering with said bridge according to the prayer of the complaint; and he also made a temporary order that defendants, their agents, etc., "desist and refrain from in any way or manner interfering with the construction of [said] bridge by plaintiff, and from cutting the piles being there driven, or doing any act of any kind to hinder, delay, impede, impair, or prevent the contractor and his employés from performing said work, and from doing any act to hinder, delay, or prevent the building of the proposed line of railway," etc. On the next day the same court commissioner, on application of the city by its attorney, and upon the answer of the defendants setting up a counterclaim for an injunction restraining plaintiff from building said bridge, etc., ordered plaintiff to show cause before the circuit judge on the day previously named why it should not be so enjoined, and also made a temporary order restraining plaintiff in the mean time from building the bridge. *Held*, that construing strictly the first injunctive order above recited, in view of the matters alleged in the complaint upon which it was founded (and also in view of the second order made by the same commissioner), it must be understood as restraining defendants only from forcible interference with the construction of the bridge; and the city's attorney was not guilty of any contempt in obtaining the second injunctive order. *Wisconsin C. R. Co. v. Smith*, 10 Am. & Eng. R. Cas. 364, 52 Wis. 140, 8 N. W. Rep. 613.

57. Breach by employees.—Where a mandatory injunction issues against one company to compel an interchange of the freights with another road, and to prevent a boycott threatened by the employés, such employés are bound by the injunction so long as they remain employés; but they may avoid it, without being guilty of con-

tempt, by ceasing to be employ  s. *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.*, 53 *Am. & Eng. R. Cas.* 397, 54 *Fed. Rep.* 730.

Where the servant of a corporation does acts in obedience to its orders which are in violation of an injunction restraining such acts, or which amount to a trespass, and such servant has no notice of the injunction or the invalidity or wrongfulness of such acts, or of any liability or danger of arrest likely to be incurred in the performance thereof, and such liability and threatened danger are known to his principal, but concealed from him, the principal is bound to indemnify him for the damages suffered by him as the natural result of his acts done in obedience to the orders of his superiors. And the liability of the principal does not, in such case, depend upon the ultimate determination of the question as to whether an alleged trespass by or upon the servant is or is not legally justifiable, or as to the legality or propriety of the issuance of the injunction. The master may not wilfully expose his servant to danger of loss or injury in the course of his employment, the risk of which is known to him, but notice of which is wrongfully withheld from the servant. *Guirney v. St. Paul, M. & M. R. Co.*, 44 *Am. & Eng. R. Cas.* 654, 43 *Minn.* 496, 46 *N. W. Rep.* 78.

58. Jurisdiction of proceedings for violation.—An injunction may be granted by the judge of the district court at chambers; and a charge for the violation of such injunction may be heard and determined by such judge at chambers. *State v. Cutler*, 13 *Kan.* 131.

Where an injunction is issued against a railway company, its assigns, agents, employ  s, and any one acting by its authority or in its behalf, but not against the present defendant by name, and the present defendant is the president of the railway company, and owns a majority of its stock, and has by contract with the railway company full control of all the property, franchises, and privileges of the railway company, and where the present defendant afterward, with notice of said injunction, does what the company is prohibited from doing—held, that he may be prosecuted for a violation of said injunction. *State v. Cutler*, 13 *Kan.* 131.

The proceeding for the violation of an injunction is a summary proceeding, and the charge may be tried upon the original affidavit filed in such proceeding, and not

upon any formal pleadings. *State v. Cutler*, 13 *Kan.* 131.

59. Conflict between state and federal courts.—Where an injunction is granted by a state court, and served on a company, restraining it and its servants from obstructing a public avenue in a city with its trains, etc., the same will be binding upon a receiver of the company subsequently appointed by the United States court; and such receiver will be punishable for contempt for disobeying the mandate of the writ. *Safford v. People*, 85 *Ill.* 558.

60. Excuses for violation, generally.—A common carrier cannot excuse its violation of an injunction upon the ground that its imperative duty to the public demanded such violation. *Kentucky & I. Bridge Co. v. Krieger*, 91 *Ky.* 625, 16 *S. W. Rep.* 824.

If the receivers of a corporation disobey an injunction against the corporation made before their appointment, the fact that they have been removed at the time they are tried for contempt affords no defense. *Safford v. People*, 85 *Ill.* 558.

In such a case one of the receivers cannot be exonerated because he took no active part in the matters complained of. It is his duty to see that the injunction is obeyed. *Safford v. People*, 85 *Ill.* 558.

61. Advice of counsel as a defense.—Where a party is enjoined from doing any acts as business manager of a corporation, and from trespassing on its premises, but subsequently enters an office, takes possession, opens a safe and removes papers to another place, this is a violation of the injunction, though he acted under advice of counsel in doing so. *Ciancimino's T. & T. Co. v. Ciancimino*, 43 *N. Y. S. R.* 49, 17 *N. Y. Supp.* 125.

Where, one is enjoined from intermeddling with the business of a corporation, the fact that he acted under the advice of counsel, though it is contrary to law and should not have been given, yet is a circumstance to be taken into consideration by way of mitigating the punishment which would otherwise be imposed. *Ciancimino's T. & T. Co. v. Ciancimino*, 43 *N. Y. S. R.* 49, 17 *N. Y. Supp.* 125.

62. When a commitment will be refused.—When a corporation has disobeyed an injunction prohibiting the moving of engines at a certain place, to the injury of another party, resulting in dam-

ages unliquidated in their nature, and not ascertainable by the machinery of the court, it will not, in the absence of special circumstances, commit the offender until he compensate the injured party, but leave the latter to his remedy at law. *Thompson v. Pennsylvania R. Co.*, 48 N. J. Eq. 105, 21 Atl. Rep. 182.

Where a company is enjoined from operating its road over certain premises, but gives an undertaking under the statute which fully secures the landowner against loss, and there is nothing to show that the public interest will suffer, the court will refuse to exercise its right to punish the company for contempt by continuing to operate the road pending an appeal. *Troy & B. R. Co. v. Boston, H. T. & W. R. Co.*, 57 How. Pr. (N. Y.) 181.—FOLLOWING UNWILLINGLY Sixth Ave. R. Co. v. Gilbert El. R. Co., 71 N. Y. 430.

V. INJUNCTION BONDS.

63. When required, and effect, generally.—On the issuing of a preliminary injunction, restraining a railway from interfering with the construction of a crossing beneath its track, under Pa. Act of May 6, 1884, a bond with sureties to the satisfaction of the court should be given to indemnify for damages sustained. *Appeal of Wheeling, P. & B. R. Co.*, (Pa.) 3 Atl. Rep. 12.

Upon the modification of an injunction, the court may require, as a condition of such modification, that the defendant give a bond to secure the plaintiff against any injury which may result to it from the same, or to perform the final decree concerning the same. *Portland v. Oregonian R. Co.*, 7 Savvy. (U. S.) 122, 6 Fed. Rep. 321.

Under the present charter of the city of New Orleans, the city may obtain the dissolution of an injunction against it, without furnishing the bond and security required of other litigants by article 307 of the Code of Practice. *Jefferson & L. P. R. Co. v. New Orleans*, 30 La. Ann. 970.

Where the right to an injunction is clear as where a street-car company lays its track in a street, the fee of which is in abutting lot owners, without the consent or payment of damages to such owners, the court will refuse to dissolve the injunction, notwithstanding the provision of the statute providing for the vacating of injunctions upon the defendant executing a proper undertaking "where the injury is not irreparable."

Thayer v. Rochester City & B. R. Co., 15 Abb. N. Cas. (N. Y.) 52.

64. Right to proceed upon the bond.—An injunction bond conditioned to pay the damages, if it shall be decided eventually that complainants were not equitably entitled to a restraining order, is forfeited by a decision of the chancellor dissolving the order and dismissing the bill; provided it is not shown that such decision was based on some fact arising subsequently to the granting of such order. *New York & L. B. R. Co. v. Dennis*, 40 N. J. L. 340.

The terms of an undertaking given to obtain a preliminary injunction, provided that the sureties should be liable "if this court shall finally decide that the plaintiff was not entitled to the injunction." The special term decided that the plaintiff was not entitled to an injunction, which was affirmed by the general term, and appeal taken to the court of appeals. *Heidt*, that the decision by the court of appeals, when the remittitur is sent down and is made and entered as the judgment of the court below, is deemed the final judgment, within the meaning of the condition of the undertaking. *Ninth Ave. R. Co. v. New York El. R. Co.*, 3 Abb. N. Cas. (N. Y.) 22.

Judgments which were formerly authorized against sureties of an injunction bond, where injunction issued to stay collection of a judgment, were on a construction of article 3936, Pasch. Tex. Dig., and were statutory judgments. They were not rendered by the district court under its general equity powers. Under the revised statutes no judgment can be rendered against the principal and sureties on an injunction bond, or against the principal alone, on dissolution of the injunction. *Texas & N. O. R. Co. v. White*, 57 Tex. 129.—REVIEWING *Cook v. De la Garza*, 13 Tex. 447.

On the dissolution of the injunction the holder of the judgment pursues his ordinary remedy to collect the same, and the bond which restrained its collection gives him an additional security for his debt. *Texas & N. O. R. Co. v. White*, 57 Tex. 129.

65. Evidence.—In an action on an injunction bond, which was given on the filing of a bill to enjoin statutory proceedings by a railroad company to condemn a right of way through the complainant's lands, the bill being finally dismissed, damages cannot be recovered on account of the obstruction and delay of the railroad company's work

B. R. Co., 15

d upon the
conditioned to
decided event-
not equitably
der, is forfeited
ellor dissolving
bill; provided
ision was based
quently to the
New York & L.
L. 340.

aking given to
ction, provided
liable "if this
at the plaintiff
unction." The
e plaintiff was
on, which was
m, and appeal
Held, that the
eals, when the
d is made and
he court below,
ent, within the
of the undertak-
New York El.
) 22.

formerly author-
junction bond,
stay collection
construction of
, and were statu-
e not rendered
general equity
d statutes no
against the prin-
junction bond, or
on dissolution
N. O. R. Co. v.
WING Cook v.

injunction the
es his ordinary
and the bond
n gives him an
t. *Texas &*
r. 129.

tion on an in-
en on the filing
proceedings by
mn a right of
nt's lands, the
damages cannot
ae obstruction
mpany's work

by the injunction, when the only evidence is that the company had a force of hands engaged on the work when the injunction was sued out, and that it "was largely damaged by being enjoined from the use of said right of way," which was abandoned pending an appeal in the injunction suit. *Cooper v. Hames*, 93 Ala. 280, 9 So. Rep. 341.

Where a mortgaged road is leased, and its operation by the lessees enjoined by certain bondholders, in ascertaining the damages to the lessees, after its dissolution, caused by suing out the injunction, the road having been operated by a receiver while the injunction was in force, it is proper to admit proof of the income of the road for a stated period next before and after the time the injunction was in force. And the opinions of witnesses, acquainted with the business of the road and the expense of operating it, are admissible as tending to show its value to the lessees. *Sturgis v. Knapp*, 33 Vt. 486.

66. Damages.—Where the interests involved are large, and are liable to suffer by delay, the cost of hiring a special train to reach a judge to obtain a dissolution of an injunction may be allowed as damages. *Crounse v. Syracuse, C. & N. Y. R. Co.*, 32 Hun (N. Y.) 497; affirmed (?) 97 N. Y. 631, mem.

So a liability incurred by the defendant in dissolving the injunction, then due but not paid, may be legally allowed as damages. *Crounse v. Syracuse, C. & N. Y. R. Co.*, 32 Hun (N. Y.) 497; affirmed (?) 97 N. Y. 631, mem.

Where certain mortgage bondholders filed a bill to set aside a lease of the road by the trustees, and to enjoin the operation of the road by the lessees, and, under an order of the chancellor, gave bond for damages, on a dissolution of the injunction it was error to decree greater damages than the amount of the penalty of the bond. *Sturgis v. Knapp*, 33 Vt. 486.

Upon a dissolution of the injunction, the trustees are entitled to a decree against the complainants for the rent reserved for the time the lessees were kept out of possession, as damages awarded under the injunction bond. *Sturgis v. Knapp*, 33 Vt. 486.

The damages recoverable on the injunction bond, on dissolution of the injunction, could not include attorney's fees expended in resisting it. Neither could expenses incurred in defending the suit on its merits be recovered as damages. *Sturgis v. Knapp*,

33 Vt. 486. *Davis v. Rosedale St. R. Co.*, 75 Tex. 381, 12 S. W. Rep. 999.

The fact that a receiver was appointed to operate the road pending the litigation will not prevent a recovery of damages by the defendants against the complainants, upon a dissolution of the injunction, caused by suing out the injunction; but the net income of the receiver should be applied in reduction of the damages, but it is not absolutely necessary that the net income be ascertained first. *Sturgis v. Knapp*, 33 Vt. 486.

Where the lessees of a railroad have been kept out of possession for a time by an injunction sued out by certain mortgage bondholders, in ascertaining their damages caused thereby, it is proper to consider the fact that it is much less expensive to operate the road in summer than in winter, and that the lessees were put out of possession at a season when its operation was becoming more profitable. *Sturgis v. Knapp*, 33 Vt. 486.

The receiver of a railroad obtained an injunction to restrain certain parties from removing, selling, or interfering with a lot of railroad iron. The usual injunction bond was given to secure "such damages as the defendants might sustain by reason of the writ." A final decree provided "that neither the plaintiff nor defendant is entitled to costs or damages herein." *Held*, under the chancery practice governing the U. S. courts, that the court had a right to settle the question of damages, and refuse damages altogether. *Russell v. Farley*, 7 Am. & Eng. R. Cas. 453, 105 U. S. 433.

67. Distribution.—K. and B., as trustees of the bondholders of a railroad, after foreclosure made a lease thereof to another railroad company. The orators who owned one quarter and represented a majority of the bonds brought a bill for themselves and all other bondholders who should choose to come in and prosecute, against K. and B. and the lessees, to set aside the lease; and an injunction was granted against the use and occupation of the road by the lessees, the court, however, first requiring a bond in the penal sum of \$30,000 to be filed by the orators to pay to the defendants such damages as they would sustain from the injunction, if it should be decided to have been improperly granted. The bill was dismissed and the mandate to the court of chancery ordered the damages to K. and B. to be assessed at \$63,097.86, and to the lessees at

\$17,383.52, and that the funds in the hands of the receiver, who had been appointed to take charge of the road pending the suit, should be applied in payment of these damages so far as they went, and that the orators should pay the remainder, not exceeding the \$30,000; and the mandate provided that the apportionment of this sum between the defendants should be considered in the final decree. It turned out that there were no funds in the hands of the receiver. *Held*, that the trustees in defending the suit must be regarded as acting for and in behalf of all the bondholders who did not assent to or aid the orators in its prosecution, and no others. The act of the orators in causing the damages was not the act of all the bondholders. The purpose for which the bond was ordered and given must control in its appropriation and apportionment, rather than any supposed superior equity set up by the lessees. There should therefore be a *pro rata* distribution among those entitled to damages according to the amount of damages each has sustained. *Sturges v. Knapp*, 36 *Vt.* 439.

And as the damages assessed to the trustees were solely for rent they would have received as representatives of all the bondholders, but for the injunction, the true rule of apportionment is a *pro rata* distribution upon the sum assessed to the lessees on the one hand, and the share of the rent assessed to the trustees on the other hand, which would have belonged to and been received by the innocent bondholders who did not participate in the prosecution of the suit on the part of the orators, had no injunction been granted. *Sturges v. Knapp*, 36 *Vt.* 439.

The trustees of a railroad, who had acquired an absolute title under decree of foreclosure, made a lease of the road for a term of years. A majority of the bondholders under the mortgage, being desirous of having the lease set aside, instituted proceedings through a committee against the trustees and the lessees to invalidate the lease and obtain an injunction against any further occupation under it. This was granted by the court of chancery, but the orators were required to give a bond in the sum of \$30,000 as an indemnity to the defendants against damages sustained by the injunction, if it should ultimately be held to have been improperly granted. Such was the final decision of the supreme

court, and the orators' bill was dismissed with costs. Injunction damages to the amount of the bond having been subsequently recovered by the defendants, it was held by the supreme court that only those bondholders could share in the distribution thereof, who did not assent to so participate in the prosecution of the suit. Previous to said lease three of the bondholders executed a power of attorney to S. and R. to act in their behalf in all things in relation to the leasing or future operating of said railroad. In pursuance thereof S. and R. opposed the leasing of the said railroad, and subsequently, without the knowledge of the three bondholders, S. signed a paper for himself and others not named, authorizing the commencement and prosecution of said suit, and took an active part as one of the committee in the prosecution, and claimed to represent the bondholders who signed said power of attorney. S. told them that he had done nothing to bind them, but they knew the suit was being prosecuted and interposed no dissent. *Held*, that they thereby participated in its prosecution. *Knapp v. Sturges*, 36 *Vt.* 721.

Previous to the commencement of said suit, P., who assented to its prosecution, owned bonds to the value of \$4500 and passed them to the L. bank as collateral security for a loan of \$5000. When P. had paid up said loan to within a few hundred dollars, after said suit had been instituted, the S. bank entered into an arrangement with the L. bank to pay up the balance of said loan and take said bonds as collateral security for a debt of \$7000 that the S. bank had against P. and also for what they paid to the L. bank. *Held*, that the S. bank, as it did not purchase said bonds, but took them as collateral security for their debt against P., took its title from P. and must stand in his place as to this injunction fund, although neither bank knew of P.'s participation in or assent to the prosecution of said suit. *Knapp v. Sturges*, 36 *Vt.* 721.

One M. executed and sent to the said committee of the bondholders a power of attorney, perfect in all respects to authorize them to act for him in the prosecution of said injunction suit, except that the names of the committee were not inserted, a space for their names being left blank. *Held*, that M. thereby participated in the prosecution of said suit. *Knapp v. Sturges*, 36 *Vt.* 721.

Where a holder of these bonds partici-

was dismissed damages to the ing been subse- defendants, it was that only those the distribution to so participate it. Previous to bondholders exe- S. and R. to act gs in relation to ing of said rail- of S. and R. op- aid railroad, and knowledge of the ed a paper for med, authorizing osecution of said art as one of the ion, and claimed ders who signed S. told them that d them, but they osecuted and in- , that they there- cution. *Knapp*

ncement of said its prosecution, ne of \$4500 and ank as collateral o. When P. had n a few hundred l been instituted, an arrangement p the balance of nds as collateral o that the S. bank r what they paid t the S. bank, as bonds, but took y for their debt om P. and must s injunction fund, w of P.'s partic- osecution of said VI. 721.

sent to the said ders a power of ects to authorize e prosecution of that the names inserted, a space blank. *Held*, that the prosecution *Sturges*, 36 *Vt.* 721. e bonds partici-

pated in the prosecution of the injunction suit, and after the decision of that suit and the rights of the parties to the fund in question became fixed, transferred them, the assignee can stand in no better position than the former owner in respect to this fund, although he had no notice of the participation of the assignor in said prosecution. *Knapp v. Sturges*, 36 *Vt.* 721.

Where one was subrogated to the rights of a holder of these bonds after the damages accrued which form the fund in question, the holder having participated in the prosecution of said suit, the other party under the order of subrogation takes no greater rights than the holder had. *Knapp v. Sturges*, 36 *Vt.* 721.

C. was not in favor of prosecuting said suit and so expressed himself to the trustees of said railroad; but being absent he appointed an attorney to attend to his bonds, and the attorney participated in its prosecution in behalf of C.; and when this fact afterwards came to the knowledge of C. he did not apprise the committee of his disapproval, and they did not know of it. *Held*, that he has no right to a distributive share of the fund by virtue of his bonds. *Knapp v. Sturges*, 36 *Vt.* 721.

INJURIES.

Caused by defects in cattle-guards, see CATTLE-GUARDS, 21-34.

— insufficiency of culverts, see CULVERTS, 18-25.

— negligence at station, see STATIONS AND DEPOTS, 58-145.

— in making flying switch, see FLYING SWITCH, 1-4.

— — operating steam railway in street or highway, see STREETS AND HIGHWAYS, 360-402.

— — liability for, see ELECTRIC RAILWAYS, 19-38; STREET RAILWAYS, 313-531; TRAILWAYS, 6.

Competency of evidence as to extent of, see EVIDENCE, 28.

Defendant's negligence as the proximate cause of, see NEGLIGENCE, 43-50.

Excessive damages in actions for, see CARRIAGE OF PASSENGERS, 643-651.

Expenses resulting from, as an element of damages, see CARRIAGE OF PASSENGERS, 626.

On Sunday, see SUNDAY, 6-8.

Presumption of negligence from mere proof of, see CARRIAGE OF PASSENGERS, 582-

588; EMPLOYES, INJURIES TO, 620; EVIDENCE, 125.

Prospective damages for permanent, see DAMAGES, 41-49.

To abutting owner, by embankments, see EMBANKMENTS, 2-4.

— business, evidence of, on assessment of land damages, see EMINENT DOMAIN, 609.

— cattle, from failure to build and maintain fences, see FENCES, 93, 94.

— children, see CHILDREN, INJURIES TO.

— crops, pasturage, etc., from failure to build and maintain fences, see FENCES, 103-110.

— drovers riding on cattle trains, see CARRIAGE OF LIVE STOCK, 125-132.

— employees, by collision, see COLLISIONS, 29-37.

— — derailment, see DERAILMENT, 8.

— — duty of company subsequent to, see EMPLOYES, INJURIES TO, 5.

— — of elevated railways, see ELEVATED RAILWAYS, 221, 222.

— — express company, liability of railway company for, see EXPRESS COMPANIES, 13.

— — one company by negligence of another, see EMPLOYES, INJURIES TO, 478-498.

— — street railway company, see STREET RAILWAYS, 517, 518.

— estate, power of personal representatives to sue for, see EXECUTORS AND ADMINISTRATORS, 12.

— freights, in loading, liability for, see CARRIAGE OF MERCHANDISE, 101.

— goods carried, caused by delay, see CARRIAGE OF MERCHANDISE, 125-148.

— — liability of carrier for, see CARRIAGE OF MERCHANDISE, 72-203; EXPRESS COMPANIES, 29-38.

— — measure of damages for, see CARRIAGE OF MERCHANDISE, 757-809.

— homesteads, see HOMESTEAD, 2.

— infant employee, see EMPLOYES, INJURIES TO, 457-477.

— land not taken, see EMINENT DOMAIN, 172-177.

— live stock, see ANIMALS, INJURIES TO; EVIDENCE, 137; STOCK-YARDS, 4.

— mail clerks, inspectors, etc., liability of company for, see CARRIAGE OF MAILS, 18.

— master's property, liability of servant for, see EMPLOYES, 22.

— mill property, in condemnation proceedings, see EMINENT DOMAIN, 176.

— passengers, by collision, see COLLISIONS, 3-28.

— — derailment, see DERAILMENT, 1-7.

— — strikers, liability for, see STRIKES, 4.

To passengers from failure to build and maintain fences, see FENCES, 102.

— on cable cars, see CABLE RAILWAYS, 8-13.

— persons and property, by blasting, see BLASTING, 2-4.

— in the street, see ELEVATED RAILWAYS, 199-222; STREET RAILWAYS, 448-516.

— teams at crossings, see CROSSINGS, INJURIES, ETC., AT.

— traveling on embankments, see EMBANKMENTS, 7.

— property, caused by bridges, see BRIDGES, ETC., 46-49.

— in construction of roads, liability for, see CONSTRUCTION OF RAILWAYS, 10-12.

— liability of railway contractor for, see CONSTRUCTION OF RAILWAYS, 46.

— slaves, liability of carrier for, see CARRIAGE OF SLAVES, 5.

— or by drains, see DRAINS, 5, 6.

See also PERSONAL INJURIES.

INJURIES TO CARS BY CATTLE.

1. Owner, when liable to company.—If the owner of cattle knowingly permits them to run at large in the vicinity of a railway crossing, upon a public highway, and they wander upon the track and are run over by a train of cars, without any fault or neglect on the part of the servants of the company, and the train is damaged thereby, he is liable to the company for the injury done. *Sinram v. Pittsburgh, Ft. W. & C. R. Co.*, 28 Ind. 244.—DISTINGUISHING *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172. REVIEWING *Knight v. Toledo & W. R. Co.*, 24 Ind. 402; *Barnes v. Chapin*, 4 Allen (Mass.) 444.

The fact that the board of county commissioners have, under the statute, passed an order permitting cattle and swine to run at large upon the uninclosed lands or public commons within the bounds of the township where the accident happened, will not avoid the liability of the defendant. *Sinram v. Pittsburgh, Ft. W. & C. R. Co.*, 28 Ind. 244.

A railroad company is entitled to the unobstructed use of its road, and where its cars and engines are thrown off the track and damaged in consequence of a collision with an ox which was upon the track tthrough the negligence of its owner, the

injury is the direct result of the owner's negligence, and he is liable therefor. *Annapolis & E. R. Co. v. Baldwin*, 11 Am. & Eng. R. Cas. 486, 60 Md. 88, 45 Am. Rep. 711.—REVIEWING *Child v. Hearn*, L. R. 9 Ex. 176; *Lee v. Riley*, 18 C. B. N. S. 722; *Powell v. Salisbury*, 2 Y. & J. 391; *Lawrence v. Jenkins*, L. R. 8 Q. B. 274.

Plaintiff was riding on a railroad velocipede, and approaching a street crossing, when he saw a mule hitched to a cart standing in the street near the track. He reduced his speed to two miles an hour, but when he reached the street he was injured by being run over by the mule, which was unattended by the defendant, its owner, or his servant who had been driving. *Held*, that the owner of the mule was liable in damages. *Bowen v. Flanagan*, 84 Va. 313, 4 S. E. Rep. 724.

Where, by the charter of a railroad company, they are not bound to erect barriers at those points where the line crosses the public road, they are not answerable for injury done to cattle straying on the line from the public road; but parties allowing their cattle so to stray are answerable to the railway company for damage done to the cars thrown off the track by collision with such cattle. *Rocheleau v. St. Lawrence & A. R. Co.*, 2 Low. Can. 337.

2. — and when not liable.—Cattle, horses, and other live stock running at large are not trespassers when they go upon the track, nor are their owners liable for damage resulting to the company from their going upon the track and an engine or train of cars running upon them. *Savannah, F. & W. R. Co. v. Geiger*, 29 Am. & Eng. R. Cas. 274, 21 Fla. 669, 58 Am. Rep. 697.

Where stock strays upon a railroad track, even from the uninclosed lands of the owner, the company, under the statute, has no remedy for the trespass unless its road is within a lawful inclosure. But even if the common law applied, the company could not recover damages sustained by its negligence in running its cars over the stock. *Louisville & N. R. Co. v. Simmons*, 85 Ky. 151, 3 S. W. Rep. 10. *Jenkins v. New Orleans, O. & G. W. R. Co.*, 15 La. Ann. 118.

INNKEEPERS.

Liability of, distinguished from that of sleep-

* Injuries to trains from trespassing cattle, see note, 19 AM. & ENG. R. CAS. 477.

ing car company, see SLEEPING CAR COMPANIES, 25.
 Regulations as to use of stations by, see STATIONS AND DEPOTS, 56.
 Taxation of, see TAXATION, 171.

INQUEST.

Admissibility of depositions taken at, see EVIDENCE, 261.
 Where coroner may hold, see CORONERS, 1.

INQUIRY.

By carrier, as to value of baggage, see BAGGAGE, 89.
 Duty of pledgee of stock to make, see STOCK, 46.
 Transferee of commercial paper, when put upon, see BILLS, ETC., 16.
 What will put a purchaser upon, see BONDS, 48, 49; MUNICIPAL AND LOCAL AID, 355-358, 384.

See also BONA FIDE PURCHASERS.

INSANE PERSONS.

Care required from carrier towards, see CARRIAGE OF PASSENGERS, 146.
 Duty of company to restrain insane passenger, see CARRIAGE OF PASSENGERS, 319; SLEEPING CAR COMPANIES, 21.
 Expulsion of insane passenger, see EJECTION OF PASSENGERS, 45.
 Obligation to carry, see CARRIAGE OF PASSENGERS, 114.

INSOLVENCY.

As ground for receiver, see RECEIVERS, 16.
 Of company aided, effect of, upon validity of subscription, see MUNICIPAL AND LOCAL AID, 174, 361.
 — as a defense to action on subscription, see SUBSCRIPTIONS TO STOCK, 158.
 — construction company, right to continue work after, see CONSTRUCTION OF RAILWAYS, 125.
 Right of stoppage in transitu must be based on, see CARRIAGE OF MERCHANDISE, 491, 492.

1. Jurisdiction. — Railroad corporations are liable to compulsory proceedings in insolvency, under Connecticut Insolvent Act of 1853, to the same extent as natural persons. *Platt v. New York & B. R. Co.*, 26 Conn. 544. — QUOTED IN *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372; *Hill v. La Crosse & M. R. Co.*, 11 Wis. 214.

Where a company has been chartered in the state, but afterward consolidates with a

corporation of another state, insolvency proceedings instituted against the original state corporation by name, in which it is described as a corporation of the state, and located in the state, will be deemed as proceedings against the original corporation, notwithstanding the consolidation. *Platt v. New York & B. R. Co.*, 26 Conn. 544.

Where it appears that such original company had an office in the state, and there is nothing to show that such office has ever been removed, it will be presumed that the company still has an office in the state, so as to give the probate judge, within whose jurisdiction the office is located, jurisdiction over its insolvent estate; although it may appear that the original corporation ceased to do business after consolidation. *Platt v. New York & B. R. Co.*, 26 Conn. 544.

Prior to the enactment of Mass. St. of 1866, ch. 113, which expressly provides that the general statutes relative to insolvent corporations shall apply to and include horse and street railroad corporations, such corporations could not be subjected to proceedings in insolvency. *Central Nat. Bank v. Worcester Horse R. Co.*, 13 Allen (Mass.) 105.

Where the court of chancery appoints receivers for two insolvent railroad companies, the court may, on the application of one of the receivers, modify a contract between the companies made before insolvency, relating to the compensation that one shall make to the other for certain terminal facilities. *In re New Jersey & N. Y. R. Co.*, 29 N. J. Eq. 67. — REFERRING TO *Elmira I. & S. Rolling Mill Co. v. Erie R. Co.*, 26 N. J. Eq. 284, 28 N. J. Eq. 400.

2. Liability of trustees. — Mortgage trustees who are in possession of an insolvent railroad, and operating it as common carriers, are liable for a loss of freights as such. *Faulkner v. Hart*, 12 J. & S. (N. Y.) 471. — FOLLOWING *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray (Mass.) 263; *Rice v. Hart*, 118 Mass. 201.

3. Rights of stockholders. — The assets of an insolvent railroad company, including moneys due from a shareholder on his subscription to its capital stock, constitute a fund for the payment of its creditors, and he cannot, to their prejudice, be released from his liability by any arrangement between it and him which is not fair and honest and for a valuable consideration. The doctrine is applicable where the debt

created by the subscription of a county is evidenced by its bonds, and they were surrendered to it in fraud of the rights of creditors, although the surrender was made pursuant to a consent decree in a suit to which they were not parties. *Morgan County v. Allen*, 3 Am. & Eng. R. Cas. 92, 103 U. S. 498.—REAFFIRMING *Sawyer v. Hoag*, 17 Wall. 621; *Sanger v. Upton*, 91 U. S. 60.

Where fully paid stock has been issued to a person in consideration only of his influence, and such person thereby obtains the control of the company and procures the election of his nominees as directors, the claim of such person for advances to an amount very little larger than one half of the amount of the stock issued to him as paid-up stock, and for which bonds have been given to him as collateral, will not be given priority over the claim of any *bona fide* creditor, whether secured or unsecured, in the distribution of the company's assets upon its insolvency. *Richardson v. Green*, 43 Am. & Eng. R. Cas. 380, 133 U. S. 30, 10 Sup. Ct. Rep. 280.

A stockholder in an insolvent company is not entitled to offset a judgment that he holds against the company against unpaid subscriptions to capital stock, where there are various liens on the property; at least, until it is ascertained that there are no liens superior to his judgment. *Gilchrist v. Helena, H. S. & S. R. Co.*, 49 Fed. Rep. 519.

But a stockholder is only liable on unpaid subscriptions to an amount necessary to satisfy the claims of creditors, and cannot be compelled to offset the whole of unpaid subscriptions against a judgment which he holds against the corporation. *Gilchrist v. Helena, H. S. & S. R. Co.*, 49 Fed. Rep. 519.

4. Rights of creditors.*—The unpaid bonds of a county, issued for stock in a railroad, are a trust fund for the payment of the debts of the company upon its insolvency, which may be enforced by the creditors of the company. *Morgan County v. Allen*, 3 Am. & Eng. R. Cas. 92, 103 U. S. 498.

An assumption to pay the debts of a

* Power of courts to compel payment of subscriptions and assessments at instance of creditors of insolvent corporations, see note, 100 AM. DEC. 532.

Preference of claims against insolvent corporations, see note, 18 L. R. A. 306.

company admitted to be hopelessly insolvent, ratably according to the value of its assets, is not substantially an agreement to pay its debts in full, "whether bonded or floating, ascertained or to be ascertained." *Lyons v. Orange, A. & M. R. Co.*, 32 Md. 18.

Creditors who are called in to present and prove claims in the settlement of the affairs of an insolvent corporation have the same right of exception, appeal, and objection to the report, orders, and decrees made in the case as creditors who were made formal parties; but if a creditor thus brought in stands by and silently acquiesces in the proceedings, he will not afterward be allowed to come in as a party and file an answer to contest such proceedings. *State v. Spartanburg & U. R. Co.*, 8 So. Car. 129.

A railway company having become insolvent, an act was passed estimating the claims of creditors for land taken by the company at \$30,000, and the value of the whole railway property at \$100,000, and directing that \$30,000 should be applied on debts for land and the balance of the \$100,000 divided *pro rata* among the other creditors; the \$30,000 proved more than sufficient to pay the land debts in full, and the company claimed to be entitled to the balance. *Held*, that the other creditors were entitled to it. *In re Cobourg & P. R. Co.*, 16 Grant's Ch. (U. C.) 571.

5. Marshaling assets.—In marshaling the assets of an insolvent railroad corporation the holders of certificates for bonds secured by a mortgage will not be given precedence over the claims of persons who have furnished labor and materials in constructing the road, especially where it appears that such certificates were issued without authority. *Thompson v. Memphis, S. & B. R. Co.*, 24 Fed. Rep. 333.

Where a creditor's bill has been filed to marshal the assets of an insolvent railroad, the claims of all parties passed upon by a jury, or by consent by the judge, and a decree was taken by consent of all parties, and the proceeds resulting from a sale of the road were brought into court to be distributed according to the liens fixed by the decree, a final decree, holding back so much of the fund as was necessary to pay parties before the court whose claims were not yet decided, and ordering the remainder to be paid out, according to the consent decree, and barring all others, is right and proper.

hopelessly insolvent the value of its agreement to either bonded or be ascertained." *R. Co.*, 32 *Md.*

in to present and ment of the affairs n have the same l, and objection l, and decrees made in ere made formal thus brought in equiesces in the afterward be al- y and file an an- edings. *State v.* 8 *So. Car.* 129. ng become insol- estimating the nd taken by the the value of the \$100,000, and di- ld be applied on nce of the \$100, g the other credi- more than suffi- s in full, and the tited to the bal- er creditors were *rg & P. R. Co.*,

—In marshaling railroad corpora- cates for bonds ll not be given of persons who materials in con- ly where it ap- vere issued with- v. *Memphis, S.* 3. as been filed to olvent railroad, ssed upon by a dge, and a de- all parties, and sale of the road be distributed by the decree, o much of the parties before e not yet de- mainder to be onsent decree, ht and proper,

Clews v. First Mortgage Bondholders, 51 *Ga.* 131.

6. Secured and unsecured creditors.—Lien creditors have no greater equity to payment out of the effects of an insolvent corporation than general creditors. Both classes of creditors have contributed to the extent of their respective debts to the assets of the insolvent, and in strict justice they should share *pro rata* in the assets. *Farmers' L. & T. Co. v. Missouri, I. & N. R. Co.*, 17 *Am. & Eng. R. Cas.* 314, 21 *Fed. Rep.* 264.—APPLYING *Chicago, R. I. & P. R. Co. v. Howard*, 7 *Wall. (U. S.)* 409.

It is not unfrequently the case that the unsecured creditor has in equity claims superior to the lien creditor upon the estate of the insolvent. The secured creditor is ordinarily entitled to priority of payment, because with equal equity he has a legal lien which equity will recognize and enforce. But there are cases in which a court of equity postpones a lien creditor to an unsecured creditor having some peculiar and superior equity. In these cases the court establishes the floating debt as an equitable lien upon the property paramount to the secured debt. *Farmers' L. & T. Co. v. Missouri, I. & N. R. Co.*, 17 *Am. & Eng. R. Cas.* 314, 21 *Fed. Rep.* 264.

The claims of unsecured creditors are in equity always superior to those of the stockholders in the distribution of the trust fund. Nor will the secured creditors, after bringing the trust property within the jurisdiction of the court, be permitted, by any private arrangement with the common debtor or otherwise, so to dispose of the property as to seriously and unnecessarily prejudice the claims of the unsecured creditors. They will not be allowed for their own benefit, or for the common interest of themselves and the debtor, to place the surplus which may exist after the satisfaction of their own claims, beyond the reach of the unsecured creditors; nor will they be permitted, beyond what is needful for their own complete security and indemnity, to hinder or delay the general or unsecured creditors. *Farmers' L. & T. Co. v. Missouri, I. & N. R. Co.*, 17 *Am. & Eng. R. Cas.* 314, 21 *Fed. Rep.* 264.

It is not necessary to the right of intervention, to participate in a trust fund *in custodia legis*, that the intervenor should first obtain judgment at law, or that he should have any lien upon the fund. *Farm-*

ers' L. & T. Co. v. Missouri, I. & N. R. Co., 17 *Am. & Eng. R. Cas.* 314, 21 *Fed. Rep.* 264.

One who contracts to furnish five thousand ties to a railroad is not a contractor and preferred creditor under the Pa. Joint Resolution of 1843. *Hart's Appeal*, 96 *Pa. St.* 355.

In an action under Minn. Gen. St. 1878, ch. 76, to wind up the affairs of an insolvent railroad, and distribute its assets among its creditors, a creditor claiming a lien by judgment upon real estate of the corporation appeared and filed his claim for allowance, and submitted to the jurisdiction of the court in that action. Such proceedings thereafter were had upon due notice to all the creditors, that the court adjudged and decreed a sale of all the corporate property, real and personal, free and clear of all liens and encumbrances, the proceeds to be held subject to the direction of the court, and reserving the question of the priority of the claims of lien creditors. *Held*, that the creditors so appearing were bound by the decree in that action, and could not attack it collaterally. *Nelson v. Jenks*, 51 *Minn.* 108, 52 *N. W. Rep.* 1081.

A railway company that was heavily in debt to debenture holders, and unable to meet its engagements, filed a scheme of arrangement, which, among other things, provided for a funding of past due interest on debentures and for an extension of payment of principal for ten years; that the income of the company should be applied in payment of interest on debentures, debenture stock, and funded interest, and subject thereto in payment of interest on deferred debenture stock, with power to the company to liquidate debts of unsecured creditors by the issue of deferred debenture stock at par. An unsecured creditor opposed the scheme on the ground that it appropriated all the free assets available to an unsecured creditor, and that it gave the company power to make preferred creditors. *Held*, that the scheme seemed to be fairly drawn; that an unsecured creditor who had no lien on the assets could not complain of their appropriation, and that it would be presumed that the company would act fairly as between unsecured creditors and not give preferences. *In re East & W. I. Dock Co.*, *L. R.* 44 *Ch. D.* 38.—QUOTING *In re East & W. J. R. Co.*, *L. R.* 8 *Eq.* 93. REVIEWING *In re Cambrian R. Co.'s*

Scheme, L. R. 3 Ch. 278; In re Bristol & N. S. R. Co., L. R. 6 Eq. 448.

7. Priority of laborers' claims.*—

A person who contracts with a railroad company to receive all of its freights at the end of its road proper, and convey them by ferry across a river to a city, and to take up goods in the city and convey them to the railroad, and make deliveries to the consignees and collect freight charges, employing for the purpose his own teams and men, is a contractor, and not an employé of the company, within the meaning of the New Jersey statute making claims for wages of railroad laborers prior liens in case of the insolvency of the company. *Lehigh C. & N. Co. v. Central R. Co.*, 29 N. J. Eq. 252, 18 Am. Ry. Rep. 207.—QUOTING *Balch v. New York & O. M. R. Co.*, 46 N. Y. 521. REVIEWING *Gurney v. Atlantic & G. W. R. Co.*, 58 N. Y. 358.

The above statute is confined to personal labor, or that which the claimant performs in person, as distinguished from that employed by persons under him. *Lehigh C. & N. Co. v. Central R. Co.*, 29 N. J. Eq. 252, 18 Am. Ry. Rep. 207.

INSPECTION.

Of cars, by employes, rule requiring, see EMPLOYEES, INJURIES TO, 454.

— C. O. D. goods before paying bill, see CARRIAGE OF MERCHANDISE, 272.

— corporate books, right of, see STOCKHOLDERS, 6-8.

— coupling apparatus, disobedience of rule requiring, see EMPLOYEES, INJURIES TO, 416.

— documents, books, etc., see DISCOVERY, ETC., 2-7.

— improvements, by mortgage trustees, see MORTGAGES, 146.

— interstate carriers or traffic, under state laws, see INTERSTATE COMMERCE, 227-229.

— rate books, under railway and canal traffic acts, see CHARGES, 112.

— receivers' books, see RECEIVERS, 145.

— rolling stock, see CARRIAGE OF PASSENGERS, 104.

— things sold, see SALES, 7.

— track, see CARRIAGE OF PASSENGERS, 166, 167; EMPLOYEES, INJURIES TO, 143-154, 743-745.

*When debts incurred for construction of road before insolvency entitled to priority of payment out of net earnings, see 45 AM. & ENG. R. CAS. 94, *abstr.*

Of transfer book and list of stockholders, see STOCK, 81.

INSPECTORS.

At stations, liability of company for false imprisonment by, see FALSE IMPRISONMENT, 8.

Of elections, see DIRECTORS, ETC., 9.

INSTRUCTIONS.

As to comparative negligence, see COMPARATIVE NEGLIGENCE, 12-19.

— compensatory damages, see DAMAGES, 25.

— credibility of employes as witnesses, see WITNESSES, 30.

— exemplary damages, see DAMAGES, 38.

Assuming facts not in evidence, see CONTRIBUTORY NEGLIGENCE, 115.

By court, to mortgage trustees, see MORTGAGES, 149.

Curing error in admission of evidence by, see APPEAL AND ERROR, 64; EMINENT DOMAIN, 905.

Deviation from, by agent, effect of, see AGENCY, 46.

Discretion of court as to time to prepare, see APPEAL AND ERROR, 25.

Duty to give, to infant employes, see EMPLOYEES, INJURIES TO, 461-463.

— — — unskilled employes, see EMPLOYEES, INJURIES TO, 27-37.

Erroneous, when ground for reversal, see APPEAL, ETC., 40-53; EMINENT DOMAIN, 899; NEW TRIAL, 5-7.

Failure of vice-principal to give, liability of company, see FELLOW-SERVANTS, 88.

In actions against carriers, see CARRIAGE OF LIVE STOCK, 151-153; CARRIAGE OF MERCHANDISE, 698; CARRIAGE OF PASSENGERS, 595-608.

— — — city or town, for injuries received in street or highway, see STREETS AND HIGHWAYS, 368.

— — — receivers, see RECEIVERS, 140.

— by abutter, for damages sustained by railway in street, see STREETS AND HIGHWAYS, 244.

— — — and against express companies, see EXPRESS COMPANIES, 88.

— — — husband, for personal injuries to wife, see HUSBAND AND WIFE, 22.

— for causing death, see DEATH BY WRONGFUL ACT, 289-357.

— — — conversion, see TROVER, 17.

— — — damages caused by fire, see FIRES, 291-306.

— — — — for nuisance, see NUISANCE, 36.

stockholders, see

RE.

company for false
FALSE IMPRISON-

ETC., 9.

ONS.

nce, see COMPARA-
19.

es, see DAMAGES,

es as witnesses,

see DAMAGES, 38.

ence, see CONTRIB-
15.

ustees, see MORT-

of evidence by, see
4; EMINENT DO-

nt, effect of, see

me to prepare, see

employees, see EM-
61-463.

yes, see EMPLOYES,

r reversal, see AP-
EMINENT DOMAIN,

7.

to give, liability of
SERVANTS, 88.

, see CARRIAGE OF

3; CARRIAGE OF
CARRIAGE OF PAS-

injuries received in
STREETS AND HIGH-

IVERS, 140.

ges sustained by
STREETS AND HIGH-

as companies, see

personal injuries to
WIFE, 22.

DEATH BY WRONG-

VER, 17.

fire, see FIRES,

NUISANCE, 36.

In actions for damages for wrongful inter-
ference with property, see EMINENT
DOMAIN, 1007.

— ejection of passengers, see EJECTION
OF PASSENGERS, 97-99.

— failure to build or repair cattle-
guards and fences, see CATTLE-GUARDS,
30; FENCES, 98.

— false imprisonment, see FALSE IM-
PRISONMENT, 17.

— flowing land, see FLOODING LANDS,
77-83.

— injuries at crossings, see CROSSINGS,
INJURIES, ETC., AT, 351-360.

— stations, see STATIONS AND DE-
POTS, 136-138.

— caused by collisions, see COLLI-
SIONS, 17, 18, 28.

— negligence of fellow-servants,
see FELLOW-SERVANTS, 495-505.

— obstructions and encroach-
ments in highways, see STREETS AND
HIGHWAYS, 417.

— railway in street or highway,
see STREETS AND HIGHWAYS, 393-395.

— to children, see CHILDREN, INJU-
RIES TO, 171-180.

— employees, see COLLISIONS, 37;
EMPLOYEES, INJURIES TO, 631-655.

— passengers by derailment, see
DERAILMENT, 6.

— trespassers, see TRESPASSERS,
INJURIES TO, 121-127.

— libel or slander, see LIBEL, ETC., 11.

— malicious prosecution, see MALICIOUS
PROSECUTIONS, 15.

— negligence, see NEGLIGENCE, 104-
114.

— personal injury at or near bridge, see
BRIDGES, ETC., 58.

— on contracts, see CONTRACTS, 99.

— construction contracts, see CON-
STRUCTION OF RAILWAYS, 116.

— subscriptions to stock, see SUBSCRIP-
TIONS TO STOCK, 178.

— under civil rights act, see COLORED PER-
SONS, 12.

In stock-killing cases, see ANIMALS, INJURIES
TO, 560-578.

Invading the province of the jury, see CON-
TRIBUTORY NEGLIGENCE, 118.

Non-reversible errors in, see APPEAL AND ER-
ROR, 70-86.

Objections to, how to be taken, see APPEAL
AND ERROR, 98-100.

Of shipper, liability of initial carrier as to, see
CARRIAGE OF MERCHANDISE, 557, 559.

On assessment of damages by jury, see DAM-
AGES, 103-105; EMINENT DOMAIN,
576-594.

On question of contributory negligence, see
CONTRIBUTORY NEGLIGENCE, 108-125;

CROSSINGS, INJURIES, ETC., AT, 221.

— trial, generally, see TRIAL, 95-185.

— de novo of appeal from justice of the
peace, see ANIMALS, INJURIES TO, 640.

— of action for loss of baggage, see BAG-
GAGE, 122.

— ejection suits, see EJECTION, 30.

Outside of the issue, see CARRIAGE OF MER-
CHANDISE, 738.

Prayers for, in actions for causing death, see
DEATH BY WRONGFUL ACT, 348-362.

Presumptions of regularity respecting, see AP-
PEAL AND ERROR, 33.

Questions for jury subject to, see NEGLIGENCE,
75-78.

Reference in, to view by jury, see TRIAL, 48.

Reversal for erroneous, see APPEAL AND
ERROR, 40-54.

To agents, see AGENCY, 23.

— carrier, to forward forthwith, see CARRIAGE
OF MERCHANDISE, 38.

— commissioners appointed to assess dam-
ages, see EMINENT DOMAIN, 512.

— employees, contributory negligence in dis-
obedience of, see EMPLOYEES, INJURIES TO,
422.

Verdict contrary to, when ground for new
trial, see NEW TRIAL, 17.

See also PRAYER.

INSULTS.

By third persons to passengers, see CARRIAGE
OF PASSENGERS, 327.

Duty to protect passengers from, see CAR-
RIAGE OF PASSENGERS, 309, 310; STREET
RAILWAYS, 328.

Excessive damages for, see CARRIAGE OF PAS-
SENGERS, 650; EJECTION OF PASSENGERS,
130.

Exemplary damages in cases of, see CARRIAGE
OF PASSENGERS, 638; EJECTION OF PAS-
SENGERS, 116.

INSURANCE.

Company not an insurer against fires, see
FIRES, 39.

— of employee's safety, see EMPLOYEES,
INJURIES TO, 11, 96.

Deduction of insurance money from damages,
see CARRIAGE OF PASSENGERS, 632;

DEATH BY WRONGFUL ACT, 168, 379;
FIRES, 361, 362.

Duty of warehousemen to insure, see WARE
HOUSEMEN, 5.

Evidence of increased cost of, on assessment
of land damages, see EMINENT DOMAIN,
614.

Express company, how far an insurer, see
EXPRESS COMPANIES, 24.
Increased cost of, as an element of land dam-
ages, see EMINENT DOMAIN, 704.
Of goods shipped, effect of, on right to sue
carrier, see CARRIAGE OF MERCHANDISE,
718.
— **property burned, as a defense, see** FIRES,
195.
On deceased's life, proof of, in mitigation of
damages, see DEATH BY WRONGFUL ACT,
288.
Right of intermediate carrier to benefit of,
see CARRIAGE OF MERCHANDISE, 640.
Stipulation for benefit of, see BILLS OF LADING,
90; CARRIAGE OF MERCHANDISE, 411;
LIMITATION OF LIABILITY, 21.
Subrogation of company after claims of loss,
see SUBROGATION, 4.
When company becomes insurer by agree-
ment, see LIMITATION OF LIABILITY, 24.
See also FIRE INSURANCE.

INSURER.

How far carrier is, see BAGGAGE, 2; CAR-
RIAGE OF LIVE STOCK, 22; CARRIAGE OF
MERCHANDISE, 11-30, 104.
When initial carrier is, until delivery to next
carrier, see CARRIAGE OF MERCHANDISE,
374.

INTENT.

Effect of, on question of dedication, see
DEDICATION, 4.
Of legislature, ascertaining, see STATUTES,
37-41.
— **parties to contract, ascertaining, see** CON-
TRACTS, 22.
Presumption of, from conduct, see EVIDENCE,
121.
Question of, in awarding exemplary dam-
ages, see DAMAGES, 29.
Weight given to, on question of abandon-
ment, see ABANDONMENT, 1.

INTEREST.

Effect of payment of, to validate irregular
bonds, see MUNICIPAL AND LOCAL AID,
342.
In actions against carriers, see CARRIAGE OF
MERCHANDISE, 773, 774, 792.
— **for flowing lands, see** FLOODING LANDS,
99.
— **— goods lost by delay, see** CARRIAGE OF
MERCHANDISE, 148.
— **— injuries caused by fire, see** FIRES,
348, 349.

In actions for taxes, see TAXATION, 322.
— **land, what may be condemned, see** EMINENT
DOMAIN, 91-132.
— **the event, effect of, on competency of**
witness, see WITNESSES, 11-18.
Insurable, see FIRE INSURANCE, 1-3.
Interpretation of statute taxing, see TAX-
ATION, 57.
Jurors, when disqualified by reason of, see
EMINENT DOMAIN, 538, 539.
Of abutting owner in the street, see STREETS
AND HIGHWAYS, 133.
— **landowner in right of way, see** RIGHT OF
WAY, 12.
— **receiver, removal for, see** RECEIVERS, 168.
— **stockholders, in corporate property, see**
STOCKHOLDERS, 3.
On bonds, guaranty of payment of, see
GUARANTY, 12, 13.
— **tax on, see** REVENUE, 5.
— **corporate bonds, see** BONDS, 24; UNION
PACIFIC R. CO., 11.
— **damages, see** CARRIAGE OF LIVE STOCK,
161; CHARGES, 47; DAMAGES, 107-
111; DEATH BY WRONGFUL ACT, 437-
440; ELEVATED RAILWAYS, 134; TRES-
PASS, 17.
— **debentures, see** DEBENTURES, 10.
— **land damages, see** EMINENT DOMAIN, 759-
767, 1200, 1249.
— **overdue coupons, see** COUPONS, 12.
— **taxes, see** TAXATION, 301.
— **railway aid bonds, see** MUNICIPAL AND
LOCAL AID, 312, 347.
— **receivers' certificates, see** RECEIVERS,
109.
— **subscriptions, agreement by company to**
pay, see SUBSCRIPTIONS TO STOCK, 42-44.
— **value of goods lost by fire, see** CARRIAGE OF
MERCHANDISE, 158.
Payments of, when subject to taxation, see
TAXATION, 110.
Receiver, when chargeable with, see RE-
CEIVERS, 152.
Remaining in landowner after deed of right
of way, see EMINENT DOMAIN, 206.
Right to, as between buyer and seller of
stock, see STOCK, 57.
Rights of bondholders in respect to, see
BONDS, 41.
What acquired by condemnation of land, see
EMINENT DOMAIN, 128-132; STREET
RAILWAYS, 1, 58; STREETS AND HIGH-
WAYS, 122.
— **passes by deed of right of way, see**
EMINENT DOMAIN, 203.
When allowed as damages, see ANIMALS, IN-
JURIES TO, 591.
— **lessor entitled to, see** LEASES, ETC., 106.

I. THE RIGHT TO INTEREST..... 1173
II. COMPUTATION AND RATE..... 1175

I. THE RIGHT TO INTEREST.

1. In general.*—Interest may not be allowed in any case unless by virtue of some contract expressed or implied, or of some statute, or on account of default of the party, when it is allowed as damages for the default. *In re New York & B. Bridge*, 137 *N. Y.* 95, 32 *N. E. Rep.* 1054, 50 *N. Y. S. R.* 182.

A proceeding by a subcontractor to enforce a lien against a railroad company is "a proceeding to enforce a liability for money due," within the meaning of the Illinois statute regulating the allowance of interest; and interest is properly allowed thereon. *St. Louis & P. R. Co. v. Kerr*, 48 *Ill. App.* 496.

In assumpsit against a carrier for not delivering goods intrusted to him to carry, interest on the value of the property is not allowable as matter of law; but the jury in their discretion may allow or withhold interest. *Richmond v. Bronson*, 5 *Den. (N. Y.)* 55.—FOLLOWING *Watkinson v. Laughton*, 8 *Johns. (N. Y.)* 213; *Dox v. Dey*, 3 *Wend. (N. Y.)* 356.

Where a defendant is only enjoined from disposing of money which plaintiff claims, to other parties, it does not prevent the payment of it to plaintiff; and defendant is rightly charged with interest thereon for the time that it is held. *New York, L. E. & W. R. Co. v. Carhart*, 1 *N. Y. S. R.* 426, 40 *Hun* 639.

A railroad was authorized to make a road between points named and to pay interest on instalments on stock until the road should be completed. Interest is not payable beyond the time the road had been completed between these points. *Pittsburg & C. R. Co. v. Allegheny County*, 63 *Pa. St.* 126.

The company were, after their act of incorporation, authorized to extend the road to other points. *Held*, that this did not authorize the payment of interest until the road should be completed to those points. *Pittsburg & C. R. Co. v. Allegheny County*, 63 *Pa. St.* 126.

Where the plaintiff, after notice of action

* Allowance of interest in actions against carriers, see note, 30 *AM. & ENG. R. CAS.* 40.
 When interest not allowable on damages, see 24 *AM. & ENG. R. CAS.* 479, *abstr.*

for extortion by a railway company, serves the company with a demand of interest under 3 & 4 *Wm. IV., c. 42, § 28*, the arbitrator, under a submission of "all matters in difference," may award him interest, although the notice of action did not contain a demand of interest. *Edwards v. Great Western R. Co.*, 11 *C. B.* 588, 21 *L. J. C. P.* 72.

An insurance company claiming title to a lot of ground under a sale on a deed of trust, the validity of the sale being denied by the mortgagor, sold the same to a railway company which had instituted a proceeding to condemn the same lot, making a quitclaim deed, and giving its agreement dated March 24, 1880, that if the trustee's deed should be set aside and a redemption allowed from such sale, the insurance company should pay out of the redemption money the sum of \$4680, the purchase money, with interest thereon from the date of the agreement. The compensation allowed in the condemnation proceeding was \$6615, which the railway company deposited in the county treasury on December 27, 1880, where it remained until January 17, 1889, when it was distributed by agreement. On cross-bill of the railway company the court decreed that the insurance company should pay six per cent. interest for \$4680 from December 27, 1880, to January 17, 1889. *Held*, that the decree allowing the railway company interest was erroneous, and that after the condemnation the mortgage or deed of trust became a lien on the fund or compensation money. *Union Mut. L. Ins. Co. v. Chicago & W. I. R. Co.*, 146 *Ill.* 320, 34 *N. E. Rep.* 948.

2. Assessments or calls on stock.

—Interest is recoverable in an action by a company for calls under a count for calls without a count for interest. *London & B. R. Co. v. Fairclough*, 3 *Scott N. R.* 68, 2 *M. & G.* 674. *S. P.*, *Southampton Dock Co. v. Richards*, 1 *Scott N. R.* 219, 1 *M. & G.* 448.

Defendant subscribed to the stock to be paid "in such instalments and at such times as the board of directors might lawfully direct." Calls were made at different times, aggregating the full amount of the subscription, which were paid, but without some delay, the exact amount of the calls being paid without anything being said about interest. *Held*, that an action would not afterward lie to recover interest on the calls from the time they were made until

the time of payment. *Southern C. R. Co. v. Moravia*, 61 Barb. (N. Y.) 180.

3. Coupons.*—Coupons for interest on bonds issued in aid of a railroad draw interest after due. *Aurora v. West*, 7 Wall. (U. S.) 82.—FOLLOWED IN *Walnut v. Wade*, 103 U. S. 683; *Welsh v. First Div. St. P. & P. R. Co.*, 25 Minn. 314. REVIEWED IN *Corcoran v. Chesapeake & O. Canal Co.*, 1 MacArth. (D. C.) 358.

Interest is recoverable upon overdue coupons, payable to bearer at a particular time and place, from and after their maturity. *Welsh v. First Div. St. P. & P. R. Co.*, 25 Minn. 314.—FOLLOWING *Aurora v. West*, 7 Wall. (U. S.) 82; *Genoa v. Woodruff*, 92 U. S. 502; *Burroughs v. Richmond Co.*, 65 N. Car. 234.—FOLLOWED IN *Patterson v. First Div. St. P. & P. R. Co.*, 25 Minn. 324, n.

Although no such interest is promised in the same. *Humphreys v. Morton*, 100 Ill. 592.—FOLLOWED IN *Cairo v. Zane*, 149 U. S. 122.

Bonds with semi-annual coupons were issued to the company by a county in payment of stock, the company agreeing to pay the interest on the bonds. The county paid the interest. Held, that the company was liable for interest on the coupons. *Pittsburg & C. R. Co. v. Allegheny County*, 63 Pa. St. 126.

4. Judgments on contracts.—Interest is collected in New Jersey, upon a judgment, by means of an indorsement on the execution, and when a rule to show cause is discharged, the interest may be indorsed to commence at the time the rule for judgment nisi was entered. *Erie R. Co. v. Ackerson*, 33 N. J. L. 33.

A railroad recovered a judgment in the court of claims against the United States. On appeal the U. S. supreme court ordered that "the judgment is hereby reversed, and it is ordered that this cause be remanded, with directions to enter judgment for the full amount claimed." Held, that the railroad was not entitled to interest on the judgment, under Rev. St. §§ 1089, 1090, allowing interest where the judgment "is affirmed by the supreme court." *Pacific R. Co. v. United States*, 26 Ct. of Cl. 564.—DISTINGUISHING *Hobbs v. United States*, 19 Ct. of Cl. 229.

5. Judgments in tort.—In the Dis-

trict of Columbia a judgment for a tort does not bear interest. *Washington & G. R. Co. v. Harmon*, 58 Am. & Eng. R. Cas. 380, 147 U. S. 571, 13 Sup. Ct. Rep. 557. Contra, see *Hellen v. Metropolitan R. Co.*, 4 Mackey (D. C.) 519.

No interest can be charged on a judgment for personal injuries, entered before the passage of the Ky. Act of March 1, 1888, amending Gen. St. ch. 60, § 6, providing that a judgment, except for injury to a person, shall bear legal interest from its date. *Louisville & N. R. Co. v. Sharp*, 91 Ky. 411, 16 S. W. Rep. 86. *McMurtry v. Kentucky C. R. Co.*, 84 Ky. 462, 1 S. W. Rep. 815.

Interest cannot be recovered on a judgment for personal injuries, prior to the passage of the act of March 1, 1888, where a case is appealed and the supersedeas bond provides that the appellant shall pay "all rents, hire, or damage to property of which the appellee is kept out of possession by the appeal." *Louisville & N. R. Co. v. Sharp*, 91 Ky. 411, 16 S. W. Rep. 86.

Where a judgment obtained against a railroad company for damages for personal injury is silent as regards the collection of interest, the execution issued thereon cannot call for the payment of interest, as the execution must follow the judgment. *Solen v. Virginia & T. R. Co.*, 14 Nev. 405.—FOLLOWED IN *Solen v. Virginia & T. R. Co.*, 15 Nev. 313.—*Solen v. Virginia & T. R. Co.*, 15 Nev. 313.

So where a party recovers a verdict against a railroad for personal injuries, and the form of the judgment is prepared by the plaintiff's attorney without any provision for interest, the judgment may be satisfied by payment of the amount of the verdict; or where that amount is tendered and refused, an action to recover the interest cannot be maintained. *Solen v. Virginia & T. R. Co.*, 15 Nev. 313.—FOLLOWING *Solen v. Virginia & T. R. Co.*, 14 Nev. 405; *Hastings v. Johnson*, 1 Nev. 617.

6. Mortgages — Sinking fund.—Where a mortgage of a railroad provided for a sinking fund, to be raised by annual payments by the company, to buy its bonds, if they could be bought at a certain rate, and that the bonds so bought should remain in force, and interest be paid thereon by the company and added to the sinking fund, payments to the sinking fund to cease while the bonds should be above the rate prescribed—held, that notwithstanding

* Recovery of interest on overdue coupons, see note, 64 AM. DEC. 441.

judgment for a tort
*Washington & G.
 Am. & Eng. R. Cas.
 3 Sup. Ct. Rep. 557.
 Metropolitan R. Co., 4*

charged on a judg-
 ments, entered before
 Act of March 1, 1888,
 ch. 60, § 6, providing
 for injury to a per-
 son from its date.
*v. Sharp, 91 Ky. 411,
 10 Murtry v. Kentucky
 S. W. Rep. 815.*

recovered on a judg-
 ments, prior to the pas-
 sage of March 1, 1888, where a
 supersedeas bond
 shall pay "all
 to property of which
 out of possession by
*Alle & N. R. Co. v.
 S. W. Rep. 86.*

obtained against a rail-
 road for personal in-
 juries, the collection of in-
 terest thereon cannot
 be made, as the ex-
 ceed judgment. *Solen v.
 Nev. 405.*—FOL-
 LOWING *Virginia & T. R. Co., 15
 Virginia & T. R. Co.,*

recovers a verdict
 for personal injuries, and
 judgment is prepared by
 without any provi-
 sion, judgment may be satis-
 fied by the amount of the ver-
 dict, and the interest
 recovered. *Solen v. Virginia
 Nev. 405.*—FOLLOWING
*R. Co., 14 Nev. 405;
 Nev. 617.*

Sinking fund.—
 If a railroad provided
 to be raised by annual
 payments, to buy its bonds,
 at a certain rate,
 bonds bought should re-
 ceive interest thereon
 added to the sink-
 ing fund to the sink-
 ing fund should be above the
 sinking fund notwithstanding

such rise in the bonds, the interest pay-
 ments to the sinking fund must continue
 until the maturity of the mortgage. (Ra-
 pallo, J., dissenting.) *Wilds v. St. Louis,
 A. & T. H. R. Co., 26 Am. & Eng. R. Cas.
 106, 102 N. Y. 410, 7 N. E. Rep. 290, 2 N.
 Y. S. R. 41; affirming 33 Hun 668.*

7. Scrip orders.—A resolution adopted
 by a railroad corporation that it would pay
 interest on scrip issued by it entitles the
 holder to interest on drafts drawn by the
 company upon its treasurer after the adop-
 tion of the resolution, without a demand of
 payment. *Marion & M. R. Co. v. Hodge, 9
 Ind. 163.*

8. Subscriptions to stock.—An al-
 lowance of interest on a subscription from
 the date of the completion of the road,
 where the promise was to pay one year
 after its completion, and nothing is ex-
 pressed about interest, is error. *Stevens v.
 Corbitt, 33 Mich. 458.*

9. Taxes.—Where a company owes the
 state tax on part of its property not covered
 by the limitations in its charter, it would
 seem equitable that it should pay interest
 at least from the time the tax was claimed
 by the officers of the state. *Wright v.
 Southwestern R. Co., 64 Ga. 783.*

Interest upon the amount of a tax which
 it is claimed should have been paid cannot
 be allowed where the amount claimed has
 never been levied, and is not therefore in
 default. *Lake Shore & M. S. R. Co. v.
 People, 46 Mich. 193, 9 N. W. Rep. 249.*

10. Unliquidated demands.—In-
 terest, as a general rule, is not recoverable
 on unliquidated demands, and it cannot be
 said that the recent modifications of the
 rule have unsettled the rule heretofore ap-
 plicable in Texas. *Texas & P. R. Co. v.
 Ferguson, 9 Am. & Eng. R. Cas. 395, 1 Tex.
 App. (Civ. Cas.) 724.*

Where a company lets a contract for
 work, agreeing to cause its engineer to
 make a final measurement and estimate of
 the work upon the request of the con-
 tractors, but fails to do so, interest is allow-
 able upon any balance due the contractor
 from the time of default, though such bal-
 ance is not liquidated, nor capable of being
 made certain merely by calculation. *Mc-
 Mahon v. New York & E. R. Co., 20 N. Y.
 463.*—DISTINGUISHED IN *Mansfield v. New
 York C. & H. R. R. Co., 114 N. Y. 331, 21
 N. E. Rep. 735, 1037, 23 N. Y. S. R. 739, 24
 N. Y. S. R. 534, 40 Alb. L. J. 89, 4 L. R. A.*

566; *Sweet v. Morrison, 116 N. Y. 19, 22 N.
 E. Rep. 276, 26 N. Y. S. R. 445.*

II. COMPUTATION AND RATE.

11. Computation—From time of demand.—A claim against a corporation
 for legal services draws interest from the
 time it is presented and referred by the
 directors to a committee, though not made
 out as a formal account. *Jackson v. New
 York C. R. Co., 2 T. & C. (N. Y.) 653;
 affirmed in 58 N. Y. 623, mem.*

Where a railroad company authorizes an
 undertaker to bury a child which it has
 killed on the track, interest is properly
 allowable on the amount of his bill from
 the time it is presented and not paid. If
 the company disputes the amount of the
 bill, it may avoid interest by tendering the
 amount actually due. *Mackovsky v. Man-
 hattan R. Co., 11 N. Y. S. R. 649.*

**12. — from time principal be-
 comes due.**—If a contract is silent on the
 subject of interest, and does not by impli-
 cation exclude it, on money due and pay-
 able under the contract, the law implies
 that interest is to be paid from the time
 the debt becomes payable. *Vermont & C.
 R. Co. v. Vermont C. R. Co., 34 Vt. 1.*

The holder of a railway debenture is en-
 titled to recover interest from the date fixed
 for the payment of the principal, if the com-
 pany does not pay the principal at that
 time. *Price v. Great Western R. Co., 4
 Railw. Cas. 707, 16 M. & W. 244, 16 L. J.
 Ex. 87. S. P., Morgan v. Jones, 8 Ex. 620,
 22 L. J. Ex. 232.*

13. — from time of wrongful act.
 —Where property is destroyed by the neg-
 ligence of another, the owner will be en-
 titled to interest on the value of such prop-
 erty from the time of its destruction. *Fremont, E. & M. V. R. Co. v. Marley, 25
 Neb. 138, 40 N. W. Rep. 948.*

**14. — from commencement of ac-
 tion.**—Where a company is sued for negli-
 gently destroying lumber by fire, it is proper
 to instruct the jury to award plaintiff in-
 terest from the time of the commencement
 of the action. In such case the damage is
 the value of the property destroyed, and
 the allowance of such interest cannot be
 objected to on the ground that the value
 could not be readily ascertained. *Chapman
 v. Chicago & N. W. R. Co., 26 Wis. 295, 3
 Am. Ry. Rep. 551.*—FOLLOWED IN *Dean v.
 Chicago & N. W. R. Co., 43 Wis. 305.*

QUOTED IN Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co., 27 Fla. 1.

15. Rate, generally.—Plaintiff recovered in the circuit court of the District of Columbia a judgment in an action of tort. On appeal to the supreme court of the United States the judgment was affirmed with costs and interest, until paid, "at the same rate per annum that similar judgments bear in the courts of the District of Columbia." *Held*, that these words are not to be taken as directing an inquiry into the character of the action in which the judgment below was rendered, but merely as indicating that the rate *per centum*, at which the interest must be computed, shall be no higher or lower than the legal rate in the jurisdiction where the judgment was originally recovered. *Fifth Baptist Church v. Baltimore & P. R. Co.*, 2 Mackey (D. C.) 458.—QUOTING *Zink v. Langton*, 2 Dougl. 749.

16. Conventional, or legal, rate.—Where a company is authorized to issue its bonds at seven per cent., payable semi-annually, which are sued on some time after they become due, interest, by way of damages, should be computed at seven per cent. from the time they are due down to the time of judgment, and not at six per cent., the usual rate of interest. *Beckwith v. Hartford, P. & F. R. Co.*, 29 Conn. 268.

Where a corporate bond is issued with interest payable semi-annually, and the bond is sued on some time after it is due, in computing interest down to the time of the judgment, the interest is allowable under the general law as damages, and is not governed by the contract, and therefore should be computed without the semi-annual rests. *Ashuelot R. Co. v. Elliot*, 57 N. H. 397, 13 Am. Ry. Rep. 491.

In a suit to recover interest payable at a specified time by the terms of the contract, judgment will be entered, not only for the interest due and unpaid, but also for interest thereupon from the time of default. *Moody v. Philadelphia & R. R. Co.*, 16 Phila. (Pa.) 74.

According to the law of Vermont, the principal of bonds will carry interest, after due, at the rate in the bond, and the coupons, after due, at the usual rate allowed in Vermont. *Jackson & S. Co. v. Burlington & L. R. Co.*, 24 Blatchf. (U. S.) 194.

So also in Missouri. *Fauntleroy v. Hannibal*, 5 Dill. (U. S.) 219.

Where a debenture holder brings an action against the company and recovers judgment for the principal debt and interest, the original debt is merged in the judgment, and when the company is wound up, he can recover interest on his claim only at the rate of four per cent., although the debenture bore six per cent. interest. *In re European C. R. Co.*, L. R. 4 Ch. D. 33, 46 L. J. Ch. 57, 35 L. T. 583, 25 W. R. 92.—DISTINGUISHED IN *Popple v. Sylvester*, L. R. 22 Ch. D. 98, 52 L. J. Ch. 54, 47 L. T. 329, 31 W. R. 116.

17. Reduction of rate by statute.—Plaintiff obtained a judgment against a railroad, which, by the laws of the state, drew interest from its date at the rate of seven per cent. Afterward, and before the judgment was paid, the law was amended reducing the rate to six per cent. The judgment was based on a contract. *Held*, that the judgment was not a contract within the meaning of the federal constitution prohibiting laws that impair the obligation of contracts, neither did the law deprive the party of his property without due process of law; and that the judgment only drew six per cent. interest after the change in the law. *Morley v. Lake Shore & M. S. R. Co.*, 146 U. S. 162, 13 Sup. Ct. Rep. 54.—FOLLOWING *O'Brien v. Young*, 95 N. Y. 428.—Contra, see *Prouty v. Lake Shore & M. S. R. Co.*, 26 Hun (N. Y.) 546.

A railroad recovered a judgment for internal revenue illegally collected. On appeal the U. S. supreme court affirmed the judgment with interest at the same rate "that similar judgments bear in the courts of the state." Between the date of the judgment and its affirmance the rate of interest in the state was reduced from seven per cent. to six per cent. Final judgment was entered for interest at seven per cent. *Held*, that the error in allowing seven per cent. interest cannot be inquired into collaterally. *New York C. & H. R. R. Co. v. United States*, 24 Ct. of Cl. 22.

18. Law of place, as to rate.—Bonds and coupons by their terms payable in England bear interest after maturity according to the law of England. And where the holder accepted payment at the English rate without objection, he will not be allowed the higher rate fixed by the laws of the state where the bonds were issued, though no evidence was offered of the rate allowed by the laws of England. *Coghlan*

older brings an
y and recovers
ebt and interest,
ed in the judg-
ny is wound up,
his claim only at
although the de-
interest. *In re*
Ch. D. 33, 46 L.
V. R. 92.—Dis-
Sylvester, L. R.
54, 47 L. T. 329,

te by statute.
gment against a
ws of the state,
e at the rate of
d, and before the
aw was amended
per cent. The
contract. *Held*,
a contract with-
eral constitution
ir the obligation
the law deprive
without due proc-
judgment only
after the change
re Shore & M. S.
Sup. Ct. Rep. 54.
Young, 95 N. Y.
r. Lake Shore &
(V.) 546.

judgment for in-
ollected. On ap-
point affirmed the
t the same rate
hear in the courts
date of the judg-
e rate of interest
from seven per
mal judgment was
n per cent. *Held*,
seven per cent.
into collaterally.
R. Co. v. United

to rate.—Bonds
s payable in Eng-
aturity according
And where the
e at the English
e will not be al-
ed by the laws of
nds were issued,
ffered of the rate
ngland. *Coghlan*

v. South Carolina R. Co., 51 *Am. & Eng. R. Cas.* 79, 142 *U. S.* 101, 12 *Sup. Ct. Rep.* 150.

A provision in a judgment of another state or territory, allowing interest on the amount thereof at a rate specified, does not control where suit is brought upon the judgment in New York; as the increase is allowed, not as interest but as damages, its measure must be that of the state where the action for its recovery is brought. *Wells v. Davis*, 105 *N. Y.* 670, 1 *Silv. App.* 457, 12 *N. E. Rep.* 42, 8 *N. Y. S. R.* 10; *modifying Pac. R. Co.*, 3 *Mo. App.* 574.

INTERFERENCE.

With corporate franchise, remedies for, see FRANCHISES, 9.

— easements, remedies for, see EASEMENTS, 14, 15.

— possession of receivers, see RECEIVERS, 45, 46; STRIKES, 5.

— private ways, remedies for, see PRIVATE WAYS, 9-17.

INTERMEDIATE CARRIER.

Delivery of baggage to, see BAGGAGE, 20.

Judgment against, in favor of initial carrier, see EXPRESS COMPANIES, 78.

Liability of, for baggage, see BAGGAGE, 22.

— — — delay, see CARRIAGE OF PASSENGERS, 516.

Notice and delivery to, see CARRIAGE OF LIVE STOCK, 102, 103.

Right of, to limit liability, see CARRIAGE OF MERCHANDISE, 669, 674.

Rights, duties, and liabilities of, see CARRIAGE OF LIVE STOCK, 105-108; CARRIAGE OF MERCHANDISE, 624-643; CARRIAGE OF PASSENGERS, 512-516; CHARGES, 79-82.

INTERNAL REVENUE.

Generally, see REVENUE, 4-12.

Evidence of payment of tax on lost goods, see EVIDENCE, 6.

Stamps, see REVENUE, 11.

INTERPLEADER.

In actions against carriers, see CARRIAGE OF MERCHANDISE, 739.

— attachment, see ATTACHMENT, ETC., 66.

1. When the application will lie.—The defendant railroad company had commenced the construction of its road over the lands of the defendant B., and had de-

posited the amount of the land damages awarded B. by the commissioners, in the plaintiff's bank, as provided by statute, for which the bank had issued a certificate of deposit to B. While said work was in progress, and before much of B.'s land had been taken, said company was enjoined at the instance of other parties from the further prosecution of work upon its road; whereupon it forbade the orator to pay B. the sum so deposited, because it had taken but a small portion of the lands of B. for which said damages were awarded, and had damaged said lands to a much less extent than the amount of the damages awarded. B. claimed such deposit, and demanded the same of the orator, and upon its refusal to pay the same to him, brought suit at law therefor. The orator claimed no interest in said fund other than as a stockholder. *Held*, that the orator could sustain a bill of interpleader against the defendants in respect to said fund. *First Nat. Bank v. West River R. Co.*, 46 *Vt.* 633.

2. — and when not.—The amount due from a plaintiff cannot be the subject of controversy in an action of interpleader; the action can only be maintained when plaintiff admits liability for the full amount claimed to one or the other of the claimants. Plaintiff in such an action must also show that there is a question as between the claimants to be tried, and that he will incur hazard in paying to either. *Baltimore & O. R. Co. v. Arthur*, 12 *Am. & Eng. R. Cas.* 25, 90 *N. Y.* 234; *reversing 25 Hun* 454, *mem.*

Where an action is brought against a railway company to recover dividends due upon certain stock, and against a person claiming to be the registered owner of such stock, the company is not entitled to relief by interpleader. *Dalton v. Midland R. Co.*, 12 *C. B.* 458.

Goods were sent by express, C. O. D., to plaintiff, who refused to pay the amount of the bill, and brought suit against the company to recover the goods. After the case was tried before a justice and appealed to court, and the case near trial, the company moved that the person sending the goods, who lived in another state, be required to appear and interplead. *Held*: (1) that such interpleader was not necessary to a defense; (2) but conceding that the company had a right to demand an interpleader, the application was not seasonably made. *Pacific*

Exp. Co. v. Williams, 2 *Tex. App. (Civ. Cas.)* 714.

Where an administrator, who was also an heir to the estate, brought a bill in chancery, setting forth, among other things, that the commissioners allowed a claim against the estate in favor of the Rutland & B. R. Co. for \$1000, being for ten shares of corporation stock, and that orator at the time did not deem it his duty to appeal, and the time of appeal expired, and since that said railroad company has commenced a suit upon the administrator's bond to recover this allowance, and that the heirs insisted the \$1000 should be distributed, and that the allowance was made by fraud, and that legal proceedings would be obtained for that purpose, etc., and that the plaintiff is ready to pay it to whomsoever is entitled, and praying that the parties may interplead and orator may be allowed to deposit the \$1000 in court, to be disposed of as the judgment of the court may direct, and also praying for an injunction; upon general demurrer—*held*, that the facts did not lay the ground of an independent jurisdiction in equity for a bill of interpleader. *Lincoln v. Rutland & B. R. Co.*, 24 *Vt.* 639.

INTERPRETATION.

Of agreements between connecting carriers, see CARRIAGE OF PASSENGERS, 517-519; CONNECTING LINES, 4.

- to convey land, see VENDOR AND PURCHASER, 1.
- issue free passes, see PASSES, 1.
- assignments, see ASSIGNMENT, 14-16.
- bills of lading, see BILLS OF LADING, 34-55.
- particulars, see BILLS OF PARTICULARS, 3.
- by-laws, see BY-LAWS, 3.
- car leases, see SLEEPING CAR COMPANIES, 2.
- charter provisions, see CHARTERS, 51-76; ELEVATED RAILWAYS, 4; STREET RAILWAYS, 67-80.
- charters granted by two or more states, see CHARTERS, 14, 15.
- Connecticut and Massachusetts statutes relative to grade crossings, see CROSSING OF STREETS AND HIGHWAYS, 99.
- constitutional provisions as to compensation for land condemned, see EMINENT DOMAIN, 373.
- respecting aid to railways, see MUNICIPAL AND LOCAL AID, 1-4.

Of contracts, generally, see CONTRACTS, 21-26.

- evidence of conduct of parties to show, see EVIDENCE, 9.
- for carrying the mail, see CARRIAGE OF MAILS, 3.
- joint user of right of way, see RIGHT OF WAY, 25.
- railway construction, see CONSTRUCTION OF RAILWAYS, 19-26.
- limiting liability, see CARRIAGE OF PASSENGERS, 338; EXPRESS COMPANIES, 74.
- to establish stations, see STATIONS AND DEPOTS, 35.
- corporate franchises, see FRANCHISES, 5.
- customs and usages, see CUSTOMS, 1.
- deeds, see DEEDS, 10-48.
- English statutes relative to passenger fares, see TICKETS AND FARES, 136.
- exemptions from taxation, see TAXATION, 144-151.
- fence laws, see FENCES, 7-11.
- fire policies, see FIRE INSURANCE, 4-6.
- instructions, see ANIMALS, INJURIES TO, 560; COMPARATIVE NEGLIGENCE, 13; CONTRIBUTORY NEGLIGENCE, 11; EMPLOYEES, INJURIES TO, 632; FIRES, 292; TRIAL, 135.
- insurance policies, see ACCIDENT INSURANCE, 1.
- Interstate Commerce Act, see INTERSTATE COMMERCE, 11.
- judgments, see JUDGMENT, ETC., 9-36.
- land grants, see LAND GRANTS, 3, 4.
- leases, see LEASES, ETC., 1-11, 54.
- mining leases, see MINES, ETC., 10.
- mortgages, see MORTGAGES, 74-86.
- particular words on passenger ticket, see TICKETS AND FARES, 7.
- pleadings, see CARRIAGE OF PASSENGERS, 537; EMPLOYEES, INJURIES TO, 503; FELLOW-SERVANTS, 450; FIRES, 164; PLEADING, 1.
- power of attorney to transfer stock, see STOCK, 33.
- rapid transit acts, see RAPID TRANSIT ACTS, 1.
- round-trip tickets, see TICKETS AND FARES, 71, 72.
- rules for the conduct of the company's business, see EMPLOYEES, INJURIES TO, 23.
- shipping contracts, see CARRIAGE OF MERCHANDISE, 400-418.
- special contracts limiting liability, see CARRIAGE OF LIVE STOCK, 96.
- verdicts, see TRIAL, 214.
- statutes, see STATUTES, 37-64.
- affording remedy for causing death, see DEATH BY WRONGFUL ACT, 11-39.

CONTRACTS, 21-
 of parties to show,
 il, see CARRIAGE OF
 of way, see RIGHT
 tion, see CONSTRUC-
 26.
 CARRIAGE OF PAS-
 PRESS COMPANIES,
 see STATIONS AND
 FRANCHISES, 5.
 CUSTOMS, 1.
 48.
 tive to passenger
 FARES, 136.
 tion, see TAXATION,
 7-11.
 INSURANCE, 4-6.
 MALS, INJURIES TO,
 NEGLIGENCE, 13;
 GENCE, 11; EM-
 332; FIRES, 292;
 ACCIDENT INSUR-
 Act, see INTERSTATE
 NT, ETC., 9-36.
 GRANTS, 3, 4.
 , 1-11, 54.
 ES, ETC., 10.
 AGES, 74-86.
 ssenger ticket, see
 GE OF PASSENGERS,
 JURIES TO, 503;
 50; FIRES, 164;
 transfer stock, see
 ee RAPID TRANSIT
 TICKETS AND FARES,
 of the company's
 , INJURIES TO, 23.
 CARRIAGE OF MER-
 ing liability, see
 . 96.
 14.
 37-64.
 causing death, see
 CT, 11-39.

Of statutes and contracts for sale of railroad,
 see SALES OF RAILROADS, 6, 7.
 — — — authorizing mortgages of corporate
 property, see MORTGAGES, 6-11.
 — — — giving laborers' liens, see LIENS, 43.
 — — — imposing restrictions on foreign corpo-
 rations, see FOREIGN CORPORATIONS, 5.
 — — — regulating charges, see CHARGES, 7.
 — — — liability for injuries caused by fire,
 see FIRES, 1-18.
 — — — proceedings to dissolve corporation,
 see DISSOLUTION, ETC., 12.
 — — — relative to cattle-guards, see CATTLE-
 GUARDS, 2.
 — — — compensation of receivers, see
 RECEIVERS, 157.
 — — — condemnation of land, see EMINENT
 DOMAIN, 46-57.
 — — — consolidation, see CONSOLIDATION,
 1-8.
 — — — construction of bridges, see
 BRIDGES, ETC., 2-9.
 — — — crossing of railroads, see CROSSING
 OF RAILROADS, 8-15.
 — — — duty to construct culverts, see
 CULVERTS, 1.
 — — — toward employees, see EMPLOYES,
 INJURIES TO, 1.
 — — — foreclosure of railway mortgages,
 see MORTGAGES, 159.
 — — — issuing of railway aid bonds, see
 MUNICIPAL AND LOCAL AID, 283.
 — — — — stock, see STOCK, 6.
 — — — killing stock, see ANIMALS, INJU-
 RIES TO, 12-28.
 — — — liability of company for injuries
 to servants by negligence of fellow-ser-
 vants see FELLOW-SERVANTS, 166-195.
 — — — municipal aid to railways, see MU-
 NICIPAL AND LOCAL AID, 54-71.

Of statutes relative to obstructions and en-
 croachments in streets and highways,
 see STREETS AND HIGHWAYS, 404.
 — — — right of appeal, see EMINENT DO-
 MAIN, 870.
 — — — trustees under railway mortgages,
 see MORTGAGES, 130.
 — — — statutory grants of right of way, see PUB-
 LIC LANDS, 38, 39.
 — — — subscriptions to stock, see SUBSCRIPTIONS
 TO STOCK, 24-35.
 — — — tax laws, see TAXATION, 53-61.
 — — — tickets over connecting lines, see TICKETS
 AND FARES, 102, 103.
 — — — verdicts, see DEATH BY WRONGFUL ACT,
 362; EMINENT DOMAIN, 825; TRIAL,
 193.
 — — — writings, a question of law, see TRIAL, 97.

INTERROGATORIES.

Admissibility and effect of, as evidence, see
 EVIDENCE, 257, 258.
 Filing of, in foreclosure, see MORTGAGES,
 205.
 Right to submit, to the jury, see TRIAL, 202-
 205.
 To garnishees, see ATTACHMENT, ETC., 60.

INTERRUPTION.

Of possession, when defeats title by pre-
 scription, see ADVERSE POSSESSION, 10.

INTERSECTION.

Of railroads, location of, see PUBLIC LANDS,
 44.
 See CROSSING OF RAILWAYS.